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ELVIN D. KROHN AND PHYLLIS J. KROHN, APPELLANTS AND CROSS-APPELLEES, V. RANDY R. GARDNER, APPELLEE, AND FARM BUREAU INSURANCE COMPANY OF NEBRASKA, GARNISHEE-APPELLEE AND CROSS-APPELLANT.

471 N.W.2d 391

Filed June 28, 1991. No. 89-119.

1. **Summary Judgment.** Summary judgment is properly granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such facts and that the moving party is entitled to judgment as a matter of law.
2. **Declaratory Judgments: Parties.** In a request for declaratory relief, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.
3. **Actions: Parties: Judgments.** Indispensable parties to a suit are those who have such an interest in the controversy that the court cannot render a final decree without affecting their interests.
4. **Insurance: Parties: Liability.** Judgment creditors or persons injured by the insured are interested parties and must be included in any proceeding held to determine or construe the validity of an insurer's liability under a policy.
5. **Actions: Res Judicata: Estoppel: Parties.** An individual is not estopped or barred by res judicata if he was not a party to the prior adjudication and does not stand in privity to one who was a party.
6. _____: _____: _____: _____. Privity implies a relationship by succession or representation between the parties involved in the two actions in respect to the right adjudicated in the first action. No privity exists where litigants in different cases are interested in the same question or desire to prove or disprove the same fact or set of facts.
7. **Insurance: Motor Vehicles: Liability: Judgments: Res Judicata: Parties.** A judgment favorable to the insurer in an action to determine coverage between an automobile liability insurer and the insured does not, as a matter of res judicata, preclude the injured person from litigating the question of coverage in a subsequent action or proceeding instituted by him against the insurer, since the injured person is not in privity with any of the parties in the former proceeding.
8. **Motor Vehicles: Highways: Public Health and Welfare: Statutes.** The purpose of the Motor Vehicle Safety Responsibility Act is to protect the public on the highways against the operation of motor vehicles by financially irresponsible persons. The state may make and enforce regulations reasonably calculated to promote care on the highways.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded for a new trial.

Dennis C. Magnuson, of Gast & Peters, for appellants.

John W. Iliff, of Gross & Welch, P.C., for garnishee-appellee.

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

PER CURIAM.

Elvin D. and Phyllis J. Krohn appeal from an order of the district court for Douglas County which sustained a motion for summary judgment by Farm Bureau Insurance Company of Nebraska. The Krohns' garnishment proceedings in aid of execution against Farm Bureau were dismissed on the ground that the issue was res judicata.

The garnishment proceedings arose following an automobile accident on October 13, 1983, between the Krohns and Randy R. Gardner, who was driving a 1971 Mercury which belonged to his father. In the Madison County District Court, the Krohns obtained judgments against Gardner for $25,000 each.

Farm Bureau had issued an automobile liability insurance policy to Gardner's father, which policy was due to expire on October 24, 1983. On October 12, he applied to Farm Bureau to add the 1971 Mercury to the policy. Farm Bureau's underwriting manual provided that if an additional automobile was to be added to a policy within 30 days of its expiration, payment for the next premium period must accompany the application. A 10-day grace period after the expiration date was also provided, and during that period an insured could remit the payment for the renewal coverage.

Gardner's father included a check for the renewal of his policy with the application to add the Mercury on October 12. His check was twice returned for insufficient funds. Gardner's father then mailed a money order to Farm Bureau on November 3, and it was received on November 4.

Farm Bureau denied coverage on the 1971 Mercury following the accident, and Gardner brought a declaratory judgment action against the insurance company. The Pierce County District Court dismissed the action, which was tried on stipulated facts, finding that no coverage existed for the 1971 Mercury under the policy.

After the Krohns obtained judgments against Gardner in the

Madison County District Court, the judgments were transcribed to the Douglas County District Court, where the Krohns then filed garnishment proceedings against Farm Bureau. Farm Bureau's motion for summary judgment was sustained by the Douglas County District Court, which found that the issue of whether Farm Bureau provided coverage for the Mercury had been litigated and fully determined in the Pierce County District Court, so that the matter was res judicata. The Douglas County District Court also found that because Farm Bureau was not indebted to Gardner, it could not be indebted to the Krohns.

The Krohns assign as error the trial court's finding that (1) their legal rights in Gardner's liability insurance policy could be determined in a declaratory judgment action to which they were not parties and (2) the previous declaratory judgment between Farm Bureau and Gardner was res judicata in the Krohns' garnishment proceedings against Farm Bureau.

Farm Bureau has cross-appealed, asserting that the Douglas County District Court did not have subject matter jurisdiction over the garnishment actions because the judgments of the Madison County District Court cases were not transcribed to Douglas County. The record reflects the judgments against Gardner were transcribed in conjunction with the filing of the garnishment actions. The cross-appeal is dismissed.

Summary judgment is properly granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such facts and that the moving party is entitled to judgment as a matter of law. *Millard v. Hyplains Dressed Beef*, 237 Neb. 907, 468 N.W.2d 124 (1991).

We note first that under Nebraska law, "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." Neb. Rev. Stat. § 25-21,159 (Reissue 1989). In this case, the only parties to the declaratory judgment action were Gardner and Farm Bureau. The Krohns were not included in the action, and their rights have been prejudiced by

the failure to be a party to that case.

Our case law makes it clear that "the statute authorizing a declaratory judgment is applicable only where all interested persons are made parties to the proceedings." *Shepoka v. Knopik*, 197 Neb. 651, 654, 250 N.W.2d 619, 621 (1977). Accord *Omaha Pub. Power Dist. v. Nuclear Elec. Ins. Ltd.*, 229 Neb. 740, 428 N.W.2d 895 (1988). In *Shepoka*, we reiterated that "indispensable parties to a suit are those who have such an interest in the controversy that the court cannot render a final decree without affecting their interests." *Shepoka, supra* at 655, 250 N.W.2d at 621, citing *Ohmart v. Dennis*, 188 Neb. 260, 196 N.W.2d 181 (1972). As judgment creditors, the Krohns "or any person injured by the assured obviously is an interested party in any and all proceedings which are held to determine or construe the validity of the insurer's liability under the policy." *Constant v. Pacific Nat'l Ins. Co.*, 84 N.J. Super. 211, 216-17, 201 A.2d 405, 408 (1964). The Krohns have an interest in the controversy between Gardner and his insurance company such that the final decree affected their interests. They were indispensable parties to the action between Gardner and Farm Bureau.

We disagree with the district court's finding that the Krohns are now barred by res judicata based on the lower court's holding in the *Gardner v. Farm Bureau* action. " 'The doctrine of issue preclusion recognizes that limits on litigation are desirable, but a person should not be denied a day in court unfairly.' " *Hickman v. Southwest Dairy Suppliers, Inc.*, 194 Neb. 17, 22, 230 N.W.2d 99, 103 (1975).

> "The basis of the doctrine is that the party to be affected, or someone with whom he is in privity, has litigated or has had an opportunity to litigate the same matter in a former action. . . . The law is clear that one is not estopped or barred by a prior adjudication if he was not a party to such action and does not stand in the relation of privy to one who was a party. . . ."

Hickman, supra at 27, 230 N.W.2d at 106.

> Due process requires that the rule of collateral estoppel operate only against persons who have had their day in court either as a party to a prior suit or as a privy; and,

> where not so, that at least the presently asserted interest was adequately represented in the prior trial.

Id. at 28-29, 230 N.W.2d at 106. We do not find that the Krohns have had their day in court as far as determining their ability to collect on the judgments entered against Gardner. Gardner was able to file suit against the insurance company, and the Krohns were able to file suit against Gardner, but the Krohns have not been provided the opportunity to be heard in determining their rights as against Farm Bureau. We cannot allow an innocent injured third party to be foreclosed in this manner.

The Krohns are not in privity with Gardner because " ' "[p]rivity implies a relationship by succession or representation between the party to the second action and the party to the prior action in respect to the right adjudicated in the first action." . . .' " *Hickman, supra* at 24, 230 N.W.2d at 104. As we have noted, "for the purpose of issue preclusion, the mere fact that litigants in different cases are interested in the same question or desire to prove or disprove the same fact or set of facts is not a basis for privity between the litigants." *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 839, 458 N.W.2d 443, 458 (1990).

An Indiana appeals court has stated:

> "A judgment determining, as between an automobile liability insurer and the insured or a person claiming to be insured, a question of coverage in favor of the insurer does not, as a matter of res judicata, preclude the injured person from litigating the question of coverage in a subsequent action or proceeding instituted by him against the insurer, since the injured person is not in privity with any of the parties in the former proceeding."

United Farm Bureau Mut. Ins. Co. v. Wampler, 406 N.E.2d 1195, 1197 (Ind. App. 1980).

If the action of the district court is allowed to stand, the Krohns will leave emptyhanded, even though another court found that they were entitled to $25,000 each as damages for the injuries sustained in the auto accident. To say it simply, that is not fair. We agree with the Illinois Appeals Court, which held that "[a]n accident victim must be given a chance to litigate the question of the validity of a liability insurance policy before his

interest in the insurance can be terminated." *M.F.A. Mutual Insurance Co. v. Cheek*, 34 Ill. App. 3d 209, 212, 340 N.E.2d 331, 334 (1975), *aff'd* 66 Ill. 2d 492, 363 N.E.2d 809 (1977). The court wrote, "an accident victim has a valid interest in the proceeds of liability insurance, and . . . liability insurance is not merely a private matter between an insured and an insurer." *M.F.A. Mutual Insurance Co., supra* at 217, 340 N.E.2d at 337.

A federal district court also has held that " 'upon the happening of an accident the injured third party acquired an interest in the policy that cannot be foreclosed by litigation or agreement between insurer and insured alone.' " *Atlantic City v. American Casualty Insurance Company*, 254 F. Supp. 396, 398 (D.N.J. 1966).

In Nebraska, motorists are required to carry liability insurance on automobiles under the Motor Vehicle Safety Responsibility Act, Neb. Rev. Stat. §§ 60-501 et seq. (Reissue 1988). It is a Class II misdemeanor for an individual to drive a vehicle without proof of financial responsibility. Neb. Rev. Stat. § 60-570 (Reissue 1988). As this court noted as long ago as 1952:

> The purpose of the Motor Vehicle Safety Responsibility Act is to protect the public on the highways against the operation of motor vehicles by financially irresponsible persons and thus is referable to the police power of the state. This power is inherent in every sovereignty and permits the enactment of laws, within constitutional limits, to promote the general welfare of its citizens. Therefore, in the interests of the public the state may make and enforce regulations reasonably calculated to promote care on the part of all who use its highways.

Montgomery v. Blazek, 161 Neb. 349, 354, 73 N.W.2d 402, 406 (1955).

One of the "regulations reasonably calculated to promote care" on the highways was passed by the Nebraska Legislature in 1985. It requires that proof of financial responsibility be provided before a car may be licensed. As Sen. Gerald Conway, the introducer, noted in the statement of intent for the bill:

> It is, however, only under extraordinary circumstances that such financial responsibility [as was previously

> required] is examined for validity. As a result, large numbers of Nebraska drivers are operating their vehicles without any means of covering the cost of injuries and damage they may inflict in an accident. To obtain indemnification the injured parties must often resort to formal court action. This is often futile when the motorist at fault is without financial support.

Statement of Intent, L.B. 404, Committee on Public Works, 89th Leg., 1st Sess. (Feb. 21, 1985).

In floor debate, Senator Conway noted that the "very presence [of uninsured motorists] in our system and our roadways is creating an unbelievable financial and in many cases emotional hardship on many of those people who are conscientious to meet the current law . . . ." Floor Debate, L.B. 404, 89th Leg., 1st Sess. 2922 (Apr. 4, 1985). Sen. Peter Hoagland also supported the bill, stating that the requirement would mean a higher percentage of people are insured, which in turn meant that more people would have protection. "And that is the goal of the Legislature surely, the goal of society, the goal of an insurance system to have a greater number of people protected. That is what this bill is going to do." Floor Debate, L.B. 404, 89th Leg., 1st Sess. 4083 (Apr. 25, 1985).

We have noted that "[p]ublic policy of protecting the third party against loss caused by negligence of the financially irresponsible motorist is, however, especially strong. A policy defense good against the insured may be unavailing against the third party." *Smith v. Canal Ins. Co.*, 184 Neb. 866, 868, 173 N.W.2d 36, 37 (1969).

The Wisconsin Supreme Court noted that it has "consistently viewed automobile liability insurance policies as more than indemnity contracts between insurer and insured; there is a strong public policy favoring compensation of injured third parties." *Simonds v. Bouton*, 87 Wis. 2d 302, 307, 274 N.W.2d 666, 669 (1979).

We have held that the law regarding an uninsured motorist "was enacted for the benefit of the innocent victim of a financially irresponsible motorist, and is to be liberally construed to fully accomplish that purpose." *Herrera v. American Standard Ins. Co.*, 203 Neb. 477, 481, 279 N.W.2d

140, 143 (1979).

We cannot allow the Krohns to be deprived of an attempt to collect on the judgments which were entered to compensate them for their injuries. They must be given an opportunity for their day in court against the insurance company. We find that the trial court erred in granting summary judgment for the defendants, in finding that the Krohns' legal rights in Gardner's liability insurance policy could be determined in a declaratory judgment action to which they were not parties, and in finding that the declaratory judgment was res judicata to their claims against Farm Bureau. We reverse and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., dissenting.

There are several reasons why I believe the majority has reached an incorrect result in this case.

The issues in garnishment proceedings are framed by the application and answer. See Neb. Rev. Stat. § 25-1030 (Reissue 1989). In *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 300-01, 363 N.W.2d 362, 366 (1985), this court stated:

> By the application the garnisher frames the issue: Does the garnishee owe a debt to the judgment debtor or hold property, funds, or credits of a judgment debtor? The answers of the garnishee and the controverted answers or factual allegations in the garnisher's application constitute the pleading for disposition of the liability issue under § 25-1030.

Farm Bureau Insurance Company of Nebraska, the garnishee, in its answers to the interrogatories, denied that the 1971 Mercury automobile involved in the accident was covered by the insurance policy to Randy Gardner's father because a judgment in the Pierce County District Court in a declaratory judgment action filed by Gardner had determined there was no coverage, and alleged that the issue was res judicata. In their applications for determination of garnishee liability, the Krohns alleged merely that Farm Bureau did provide coverage for the automobile involved in the accident on October 13, 1983. No factual allegations attacking the Pierce County District Court declaratory judgment were made by the Krohns.

The trial court in the garnishment proceedings found that the

issue of whether Farm Bureau provided insurance coverage for the 1971 Mercury had been litigated and fully determined in the Pierce County District Court; that that court had determined the policy did not provide coverage for the automobile in question; and that, accordingly, the matter was res judicata. The trial court further found that because Farm Bureau was not indebted to Gardner, it could not be indebted to the Krohns.

Even though Krohns' pleadings in the garnishment proceedings raised no issue in the trial court as to whether the judgment in the declaratory judgment action was binding on them, all of Krohns' rights regarding the subject matter of the previous litigation, the insurance policy, were derived through Gardner. The same evidence would determine both causes of action. Accordingly, in the garnishment proceedings in this court, the issue raised by the Krohns ought to be res judicata as to them.

There is a further reason why the judgment of the trial court should be affirmed. The trial court determined the action on the garnishee's motion for summary judgment.

A summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and that the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1989); *Millard v. Hyplains Dressed Beef*, 237 Neb. 907, 468 N.W.2d 124 (1991). Since the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must produce enough evidence to demonstrate his entitlement to a judgment if the evidence were to remain uncontroverted at a trial, after which the burden of producing contrary evidence shifts to the party opposing the motion. *Deutsche Credit Corp. v. Hi-Bo Farms, Inc.*, 224 Neb. 463, 398 N.W.2d 693 (1987).

The only issue before the trial court was whether the Farm Bureau policy provided coverage for the 1971 Mercury involved in the October 13, 1983, accident.

The depositions of Merlyn Kuhl and George Morrison show that the Gardner insurance policy with Farm Bureau was due to

expire on October 24, 1983. On October 12, 1983, Gardner's father made an application to add the 1971 Mercury to the policy.

Farm Bureau's underwriting procedures provided that if coverage for another vehicle was to be added to a policy within 30 days of the policy's expiration date, payment for the next premium period must be made with the application. The policy also provided a 10-day grace period after the expiration date, during which an insured could make the payment for the renewal coverage.

Gardner's father sent his check for the renewal of the policy with the application on October 12, 1983. However, his check was twice returned for insufficient funds. On November 4, 1983, 1 day after the 10-day grace period had expired, Farm Bureau received a money order from Gardner's father in the mail. Because the premium was not paid in time, there was no coverage under the policy for the 1971 Mercury on the date of the accident.

No evidence was presented at the hearing on the motion for summary judgment to controvert the fact that there was no coverage under the Farm Bureau insurance policy for the accident with the 1971 Mercury. Accordingly, Gardner had no coverage for the 1971 Mercury under the policy, and the Krohns had no rights against Farm Bureau.

The order sustaining Farm Bureau's motion for summary judgment was proper, and the judgment should have been affirmed.

HASTINGS, C.J., concurring in part, and in part dissenting.

I concur in that portion of the majority opinion dealing with the issue of res judicata. However, I join in the dissent of Judge Boslaugh to the extent that it suggests the record supports the conclusion that garnishee-appellee Farm Bureau met its burden of demonstrating that the uncontroverted facts showed that it was entitled to judgment as a matter of law and appellants failed in their burden of presenting evidence showing an issue of material fact which prevented a judgment for the garnishee-appellee as a matter of law. See *Mason State Bank v. Sekutera*, 236 Neb. 361, 461 N.W.2d 517 (1990). The injured

persons were parties to this litigation and had an opportunity to controvert Farm Bureau's prima facie case and failed to do so. It would seem that the trial court reached the right result for perhaps the wrong reason.

I am authorized to state that Judge Caporale joins in this concurrence and dissent.

NEBRASKA EQUAL OPPORTUNITY COMMISSION, APPELLANT, V. STATE EMPLOYEES RETIREMENT SYSTEM, APPELLEE.

471 N.W.2d 398

Filed June 28, 1991. No. 89-140.

1. **Statutes: Legislature: Intent.** Repeals by implication are not favored, and a construction which, in effect, repeals another statute will not be adopted unless such construction is made necessary by the evident intent of the Legislature.
2. **Statutes.** A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is unavoidable.
3. **Statutes: Time.** Where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication.
4. **Pleadings.** Neb. Rev. Stat. § 25-852 (Reissue 1989), permitting the amendment of pleadings, is to be liberally construed so as to prevent a failure of justice.
5. _____. The decision to grant or deny an amendment to a pleading under the provisions of Neb. Rev. Stat. § 25-852 (Reissue 1989) rests in the discretion of the trial court.
6. _____. While it is an abuse of discretion to refuse to permit an amendment proposed at an opportune time in furtherance of justice, a trial court is not to permit an amendment of a pleading to conform to the proof if the proposed amendment would substantially change the nature of the claim or defense.

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

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

Steven G. Seglin, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

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

CAPORALE, J.

On behalf of Charles Thiessen, the Nebraska Equal Opportunity Commission, the appellant, sued the State Employees Retirement System, the appellee, alleging that certain actions taken by the Retirement System in accordance with the requirements of the State Employees Retirement Act, Neb. Rev. Stat. §§ 84-1301 through 84-1331 (Cum. Supp. 1986), violated the Act Prohibiting Unjust Discrimination in Employment Because of Age, Neb. Rev. Stat. §§ 48-1001 through 48-1009 (Reissue 1988), to Thiessen's detriment. Following a bench trial, the district court dismissed the commission's petition. The commission asserts, in summary, that the district court erred in (1) failing to follow the traditional age discrimination analysis and (2) overruling the commission's motion to amend its pleadings after judgment. We affirm.

Thiessen was born November 16, 1924, began working for the State in August 1961, and almost 25 years later, at 61 years of age, voluntarily terminated his employment on June 6, 1986.

Under the statutes then in effect, employees who were members of the Retirement System could choose among three benefit schemes: (1) a monthly annuity based upon the combined contributions made to the retirement fund by both the employee and the State, (2) a lump-sum payment of up to 25 percent of the employee's contributions to the fund and an annuity based upon the combined remaining employee and State contributions, or (3) a lump-sum payment of 100 percent of the employee's contributions, coupled with a forfeiture of the State's contributions. § 84-1319. However, employees below age 55 could, upon terminating their employment, receive a lump-sum payment of 100 percent of their personal contributions, along with an annuity based upon the State's contributions. § 84-1321. In other words, those employees over the age of 55 who wished to receive a lump-sum payment of their personal contributions to the fund were forced to forfeit any benefit from the State's contributions, while younger employees would receive a lump-sum payment and an annuity.

Thiessen opted to receive the lump-sum payment. Since he was over 55, he forfeited any benefit from the employer's contributions, which amounted to $12,337.72.

The Legislature has since amended § 84-1319 to give terminating employees the same benefit options regardless of age. See 1987 Neb. Laws, L.B. 60.

The essence of the commission's position in its first summarized assignment of error is that former §§ 84-1319 and 84-1321 violated the age discrimination statutes. The question therefore boils down to whether compliance with one series of state statutes can constitute a violation of another series of statutes of the same state. There are two rules of statutory construction which are applicable to situations where statutes enacted by the same sovereign appear to conflict. The first is the doctrine of repeal by implication, and the second is the principle that statutes of general application yield to those of specific application.

Repeals by implication are not favored, and a construction which, in effect, repeals another statute will not be adopted unless such construction is made necessary by the evident intent of the Legislature. A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is unavoidable. *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991); *Sarpy Co. Pub. Emp. Assn. v. County of Sarpy*, 220 Neb. 431, 370 N.W.2d 495 (1985); *City of Grand Island v. County of Hall*, 196 Neb. 282, 242 N.W.2d 858 (1976). The age discrimination statutes were enacted in 1963 and most recently amended in 1983. The forfeiture of employer contributions was mandated by a 1986 amendment to § 84-1319. See 1986 Neb. Laws, L.B. 311. Logic dictates that a prior enactment cannot repeal a subsequent one. Since the forfeiture provision was enacted after the age discrimination statutes, the age discrimination statutes could not have worked a repeal of the benefit statutes.

We have stated that " '[w]here general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication. . . .' " *Glockel v. State*

Farm Mut. Auto. Ins. Co., 219 Neb. 222, 231, 361 N.W.2d 559, 565 (1985), quoting *Kibbon v. School Dist. of Omaha*, 196 Neb. 293, 242 N.W.2d 634 (1976). The age discrimination act is general in nature, prohibiting age discrimination in a variety of employment situations. The statute mandating the asserted discriminatory treatment is narrower and more specific; it is limited to retirement and termination benefits of employees who are part of the Retirement System. Since the general law yields to the specific, the benefit scheme is to be treated as an exception to the general prohibition against age discrimination.

The commission directs our attention to a plethora of federal court decisions which hold that compliance with a state statute is not a defense in an action for age discrimination under the federal age discrimination act, 29 U.S.C. §§ 621 et seq. (1988). The commission suggests that our own age discrimination statutes are based upon the federal act, and, thus, the same rule regarding compliance with a state statute should apply under our act. This argument is without merit. Of course, compliance with a state statute will not defeat an action under a federal act; the supremacy clause of the federal Constitution gives federal enactments precedence over state law. See U.S. Const. art. VI, cl. 2.

In an attempt to overcome this obvious impediment, the commission asserts that the federal cases it cites

> did not rely on the supremacy clause. Rather, those courts looked at the reasonableness of reliance on a discriminatory state statute. The courts found that the defendants did not rely on a reasonable factor other than age. In those cases, liability was found even though the defendants had no notice that reliance on a state statute was invalid.

Reply brief for appellant at 10.

However, the fact that some of the cases cited by the commission may not express their reliance on the supremacy clause is immaterial. Such reliance is implicit in the result reached, and the cases are therefore of no help when confronting a conflict between two statutes enacted by the same sovereign.

In its second summarized assignment of error, the

commission complains that the district court erred in denying its motion to amend its pleadings after judgment was entered against it.

Neb. Rev. Stat. § 25-852 (Reissue 1989) provides:

> The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding . . . by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. . . .

This statute is to be liberally construed so as to prevent a failure of justice. *Building Systems, Inc. v. Medical Center, Ltd.*, 213 Neb. 49, 327 N.W.2d 95 (1982). Since the decision to grant or deny an amendment rests in the discretion of the trial court, *West Town Homeowners Assn. v. Schneider*, 215 Neb. 905, 341 N.W.2d 588 (1983), the question becomes whether the district court abused its discretion when it denied the commission's motion.

While it is an abuse of discretion to refuse to permit an amendment proposed at an opportune time in furtherance of justice, *Jacobs v. Goetowski*, 221 Neb. 281, 376 N.W.2d 773 (1985), and *Kleinknecht v. McNulty*, 169 Neb. 470, 100 N.W.2d 77 (1959), we have held that a trial court is not to permit an amendment of a pleading to conform to the proof if the proposed amendment would substantially change the nature of the claim or defense, *Malerbi v. Central Reserve Life*, 225 Neb. 543, 407 N.W.2d 157 (1987).

The commission's motion requests leave to amend its pleadings "so as to state a cause of action based on constitutional claims and under federal law" without specifying the constitutional claims which were to form the basis of its new cause. Even if we assume that the commission is empowered to assert such claims (authority seemingly not conferred by the provisions of § 48-1007, which invests the commission with power to bring suits for violations of the age discrimination statutes), the fact remains that pleading federal law and constitutional questions would substantially change the nature of the cause the commission had litigated. Accordingly, the

district court did not abuse its discretion by denying the commission leave to amend its petition.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PATRICK J. GREEN, APPELLANT.

471 N.W.2d 402

Filed June 28, 1991. No. 90-456.

1. **Right to Counsel.** A trial court should warn a defendant who has the right to court-appointed counsel of the dangers and disadvantages of self-representation, but the warning is not required.
2. _____. A defendant may not utilize his or her right to counsel to manipulate or obstruct the orderly procedure in the court or to interfere with the fair administration of justice.
3. _____. An indigent defendant's right to counsel does not include the right to be represented by counsel of his choice or to be represented by an attorney he likes or with whom he has rapport.
4. _____. It is not up to the trial court to conduct the defense of a pro se defendant. A defendant's right of self-representation must be honored, even if in doing so, a court allows a defendant to do harm to himself or herself.
5. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those 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.
6. **Verdicts: Appeal and Error.** On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
7. **Assault: Police Officers and Sheriffs: Intent.** A person commits the offense of assault on an officer in the third degree if he or she intentionally, knowingly, or recklessly causes bodily injury to a peace officer while such officer is engaged in the performance of his or her official duties.
8. **Assault: Police Officers and Sheriffs: Words and Phrases.** "Bodily injury" to a peace officer is defined as physical pain, illness, or any impairment of physical condition. A police officer is a peace officer.

9. **Criminal Attempt: Intent.** A person is guilty of an attempt to commit a crime if he or she intentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime.
10. **Criminal Attempt: Trial.** Whether a defendant's conduct constitutes a substantial step toward commission of a particular crime is, generally, a question for the trier of fact.
11. **Criminal Attempt: Convictions.** One can be convicted of attempt even if the actual commission of the offense could not have occurred.
12. **Criminal Law: Motor Vehicles.** Any person who drives any motor vehicle in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property shall be deemed to be guilty of reckless driving.
13. _____: _____. Reckless driving lies somewhere between careless driving and willful reckless driving.
14. **Words and Phrases.** The terms "wanton" and "reckless" have in practice been treated synonymously.
15. _____. Recklessness is the disregard for or indifference to the safety of another or for the consequences of one's act.
16. **Implied Consent: Blood, Breath, and Urine Tests.** Any law enforcement officer may require any person who operates a motor vehicle upon a public highway in this state to submit to a preliminary test of his or her breath for alcohol content if the officer has reasonable grounds to believe that such person has alcohol in his or her body, has committed a moving traffic violation, or has been involved in a traffic accident. Any person who refuses to submit to such preliminary breath test shall be placed under arrest.
17. _____: _____. Refusal to submit to a preliminary breath test is a separate offense from refusal to submit to a chemical test.
18. **Sentences: Probation and Parole: Appeal and Error.** The denial of probation and the imposition of a sentence within statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion.
19. **Sentences: Probation and Parole.** In considering probation in lieu of a sentence, the court should not withhold imprisonment when a lesser sentence would depreciate the seriousness of the offender's crime or promote disrespect for the law.
20. **Sentences.** In 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.

Appeal from the District Court for Platte County, JOHN C. WHITEHEAD, Judge, on appeal thereto from the County Court for Platte County, LYLE WINKLE, Judge. Judgment of District Court affirmed in part, and in part reversed and cause remanded with directions.

James C. Stecker for appellant.

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

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

FAHRNBRUCH, J.

Patrick J. Green appeals his Platte County Court convictions and sentences for (1) attempted third degree assault on a peace officer, (2) reckless driving, (3) refusal to submit to a chemical test to determine alcohol content, and (4) refusal to submit to a preliminary breath test to determine alcohol content.

This is the second case in a trio of cases arising from separate events occurring in Platte County over the course of several days involving this same defendant. See, *State v. Green, ante* p. 328, 470 N.W.2d 736 (1991); *State v. Green, post* p. 492, 471 N.W.2d 413 (1991).

We affirm in part and in part reverse and remand with directions.

In this appeal, Green alleges six assignments of error: (1) The trial court erred in finding that Green's waiver of counsel was made voluntarily, knowingly, and intelligently; (2) the trial court erred in failing to appoint standby counsel; (3) the trial court erred in permitting Green to introduce evidence of his prior misconduct; (4) the evidence was insufficient to support the convictions; (5) the trial court erred in finding two prior offenses valid for enhancement purposes; and (6) the sentences were excessive.

By amended complaint, Green was charged in the county court for Platte County with the offenses of which he was convicted and with driving while under the influence of alcoholic liquor. The original complaint alleged the same counts, except that Green had been charged with third degree assault on a peace officer instead of attempted third degree assault on a peace officer.

Green represented himself at all stages of the proceedings. He requested a jury trial, which was held on June 15, 1989.

Green was acquitted on the charge of driving while under the influence of alcoholic liquor, and he was found guilty of all other counts on which he was ultimately tried. On July 10, 1989, an enhancement hearing was held on the conviction of refusal to submit to a chemical test. The court found that the current conviction of refusal to submit to a chemical test was Green's third such conviction in 10 years, which finding subjected the defendant to an enhanced penalty for that offense. Upon the conclusion of a sentencing hearing conducted on July 25, 1989, Green was sentenced as set forth in part VI of this opinion.

Green timely appealed his convictions to the district court for Platte County, which affirmed the county court's judgments. Timely appeal to this court followed. In both of the appeals Green has been represented by counsel.

I. WAIVER OF COUNSEL

On April 18, 1989, Green was arraigned in the county court on the charge of third degree assault on a peace officer. The court explained the nature of the charge and the possible penalty. After the count was amended by the State to attempted third degree assault on a peace officer, the court advised Green of the nature of the amended charge and the possible penalty. When the court asked Green if he desired an attorney to represent him, Green stated that he did, but that he did not want an attorney from Platte County. The court told Green that he could retain his own attorney. Green was further informed by the court that if he could demonstrate to the court that he could not afford an attorney, the court would appoint counsel, but that Green could not make the choice as to whom the court would appoint. Green then indicated that he would complete a poverty affidavit and application for court-appointed counsel. If a felony defendant desiring court-appointed counsel asserts indigency, a court must require him or her to complete an affidavit of indigency. Neb. Rev. Stat. § 29-1804.07 (Reissue 1989). See, also, Neb. Rev. Stat. § 29-1804.13 (Reissue 1989) (a court may require such an affidavit from an indigent misdemeanant who may be punished by imprisonment and who seeks court-appointed counsel). When the court again inquired

as to whether Green wanted an attorney, Green stated, "I certainly do, but I don't know if I'll be happy with yours." After the court asked if he was claiming that he was financially unable to hire an attorney, Green stated that he would not know until he checked the affidavit.

At a later arraignment that same day on the remaining charges, Green was advised of certain constitutional and statutory rights, including the right to court-appointed counsel, the pleas that could be entered, and the consequences of those pleas. The court informed Green of the nature of the remaining charges and the possible penalties associated with those charges. After Green was advised of the nature of the charges and the possible penalties, the court asked Green if he wanted an attorney to represent him. Green responded that he definitely wanted an attorney and that he did not believe he had the funds to hire an attorney on his own. After Green expressed his concerns with attorneys in Platte County, the court told him that he did not have the right to choose the attorney whom the court would appoint. When Green asked the court how he would know that he was not being appointed a biased attorney, the court advised him that it would appoint counsel who it was satisfied was not biased or prejudiced. Upon Green's protests that he did not have any input in the matter, the court stated, "Sometimes beggars can't be choosey, Mr. Green." Green thereupon remarked: "Is that what you're saying?—I would like to have that on the record. Thank you. That's what I was after." When the court attempted to explain that a rotation system for court-appointed attorneys was used, Green interrupted the court, complaining that he had no choice in the matter.

On April 25, 1989, Green next appeared to enter his pleas. The court asked Green whether he wanted court-appointed counsel, whether he would retain his own attorney, or whether he would proceed on his own. Green responded:

> I found that I cannot afford to hire my own attorney, but I've also found out by interviewing some local attorney's [sic] that in order them — for them to represent me, they would apparently be biased because they were afraid that they might be jeopardizing the legal plunder in which

> they're receiving from the county. So I have no alternative but to defend myself.

When the court asked Green whether he wanted court-appointed counsel, he reiterated that he did not think he could find an unbiased attorney in Platte County. He further affirmed that although he could not afford to retain counsel, he did not want the court to appoint counsel. Green confirmed by proceeding pro se that he understood he was waiving the right to an attorney.

Green argues that because the trial court failed to advise him of the pitfalls of self-representation or the decided advantage of legal representation, his waiver of counsel was not knowingly and intelligently made. It is then claimed that due to this failure, the judgment must be reversed and the cause remanded for rearraignment and a new trial.

In *State v. Green, ante* p. 328, 470 N.W.2d 736 (1991), we held that a trial court should warn a defendant who has the right to court-appointed counsel of the dangers and disadvantages of self-representation, but that the warning is not required. In the absence of an on-the-record warning, a voluntary, knowing, and intelligent waiver of counsel may be found if the record as a whole so reflects. *Id.*

As the court reasoned in *Green, ante* p. 328, 470 N.W.2d 736 (1991), this defendant has long been involved in the judicial system. He has often elected to waive counsel and proceed pro se. In two of his cases which were appealed to this court, Green represented himself at trial. See, *State v. Green*, 236 Neb. 33, 458 N.W.2d 472 (1990); *State v. Green*, 229 Neb. 493, 427 N.W.2d 304 (1988). Green even represented himself pro se in his 1988 appeal to this court. In an appeal to this court, we held that Green's waiver of counsel was voluntarily, understandingly, and intelligently made. See *State v. Green*, 236 Neb. 33, 458 N.W.2d 472 (1990).

It is abundantly clear from the record that Green was aware that he had the right to court-appointed counsel and that he could not choose whom the court appointed to represent him. He repeatedly blocked the court's efforts to appoint counsel, insisting, without any evidence to support him, that all the attorneys in Platte County were biased. Green stated that he did

not have the funds to hire his own counsel, that he did not desire a lawyer from Platte County, and that he had no choice but to proceed on his own. He acknowledged that he understood that by proceeding pro se, he was waiving his right to counsel. The evidence reflects that Green was "playing games" with the system in order to obtain a reversal from this court. After the trial court informed Green that "beggars could not be choosey," Green declared that he wanted that comment on the record and that was what he was after. A defendant may not utilize his or her right to counsel to manipulate or obstruct the orderly procedure in the court or to interfere with the fair administration of justice. *State v. Denbeck*, 219 Neb. 672, 365 N.W.2d 469 (1985). Although the trial court might have stated the legal proposition more artfully, its statement substantially is correct. See *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989) (an indigent defendant's right to counsel does not include the right to be represented by counsel of his choice or to be represented by an attorney he likes or with whom he has rapport). Green's recalcitrant attitude left the trial court with no option other than to permit him to represent himself. If the court had forced an attorney from Platte County upon Green, this appeal might well have been brought on the basis that Green's right to self-representation had been violated. See *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984).

The trial court was not clearly wrong in finding that Green's waiver of counsel was made voluntarily, knowingly, and intelligently. See *State v. Green, ante* p. 328, 470 N.W.2d 736 (1991). This assignment of error is without merit.

II. STANDBY COUNSEL

Green next asserts that due to the inherent problems associated with pro se representation, the county court should have appointed standby or advisory counsel to assist him in his self-representation, assuming a voluntary, knowing, and intelligent waiver of the right to counsel. In addressing this identical argument in *State v. Green, ante* p. 328, 470 N.W.2d 736 (1991), we held that in view of Green's antagonism toward and unsubstantiated mistrust of the local bar and his

manipulative tactics, the trial court did not abuse its discretion in failing sua sponte to appoint standby counsel to assist Green. That statement applies with equal force to this case. In point of fact, the record in this case more strongly reflects Green's unexplained hostility toward attorneys from Platte County. This assignment of error is meritless.

III. HEARING ON ADMISSIBILITY OF EVIDENCE

During cross-examination, Green elicited testimony from a police officer regarding a number of Green's prior arrests. Green in his case in chief testified about a number of occasions on which he was arrested by members of the Columbus Police Department. Green's apparent trial strategy was to show that the Columbus police officers were biased toward him.

In his third assignment of error, Green claims that reversible error was committed when the trial court failed to conduct a hearing on the admissibility of evidence after Green blindly and unknowingly began to present prejudicial and inadmissible evidence.

This issue was raised in *State v. Green, ante* p. 328, 470 N.W.2d 736 (1991), wherein Green also represented himself at trial. As this court declared in that case:

> Green must accept the consequences of his election to proceed pro se. It is not up to the trial court to conduct the defense of a pro se defendant. A defendant's [right of self-representation as] guaranteed under *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), must be honored, even if in doing so, a court allows a defendant to do harm to himself or herself.

Ante p. 339, 470 N.W.2d at 746.

This assignment of error is without merit.

IV. SUFFICIENCY OF THE EVIDENCE

The substance of Green's fourth assignment of error is that the evidence was insufficient to sustain any of his convictions.

In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the

evidence. *State v. Lohman*, 237 Neb. 503, 466 N.W.2d 534 (1991). Those 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. *Id.*

> " ' "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." ' [Citation omitted.]"

State v. Cogswell, 237 Neb. 769, 771, 467 N.W.2d 680, 681-82 (1991).

Viewed in the light most favorable to the State, the record reflects the following: Officer James A. Fairchild is a police officer employed by the Columbus, Nebraska, Police Department. He was on duty during the early morning hours of March 25, 1989. At that time, Officer Fairchild was in uniform and was driving a marked police car on patrol.

At approximately 1 o'clock on that morning, he observed Green's Thunderbird automobile, which was facing west, in the north lane of 11th Street between 24th and 25th Avenues. Fairchild's attention was drawn to the vehicle because it was being power braked. By "power braking," Fairchild meant that the vehicle was standing still with its right rear tire spinning on the pavement, causing a huge cloud of smoke to rise up from that tire. Fairchild followed the vehicle.

The Thunderbird was driven to 24th Avenue, where it turned south. The record is silent as to the rate of speed at which the car was driven to 24th Avenue. Fairchild testified that as the car was turning, it was moving at a "pretty good rate of speed." As the car was part way around the corner, it appeared to the officer that "the vehicle's tires locked up." The car slid to within a couple of inches of an automobile parked on the corner. Fairchild testified that as he continued to follow the vehicle, he was traveling in excess of 40 m.p.h. and was barely keeping up with the other car. From the record, it is not known what the posted rate of speed is for that area. When the Thunderbird slid to a stop at 23rd Avenue, Fairchild activated his overhead red

lights.

When the driver of the Thunderbird exited that car, Fairchild recognized him to be the defendant. Green immediately began yelling and directing profanity toward the officer. Fairchild smelled a strong odor of intoxicating liquor on Green's breath and observed Green's unsteady gait. Green's speech was slurred. Fairchild had received training in detecting persons driving motor vehicles while under the influence of alcoholic liquor, had made over 50 arrests for that offense, and had observed a number of persons drinking alcoholic liquor and the consequent effects. On four occasions, Green refused Fairchild's request to perform field sobriety tests.

During the above-described events a police sergeant, Ray Jahn, arrived to render assistance. When Fairchild asked Jahn to retrieve an apparatus so that a preliminary breath test could be administered, Green stated: "[F]uck you. I refuse to take the test." As Jahn attempted to read a preliminary breath test form to Green, Green repeated the vulgarity and again refused to submit to a preliminary breath test. Jahn corroborated Fairchild's testimony regarding Green's drunken appearance, his refusals to perform field sobriety tests, and his refusals to submit to a preliminary breath test.

Green was arrested, handcuffed, and placed in the rear seat of Fairchild's patrol car. He was driven approximately eight blocks to the police station, where he was placed in a holding room with his left hand handcuffed to a bench. While in the holding room, Green repeatedly kicked a door to that room with such force that Fairchild thought the door was going to come off its hinges. To prevent damage to the door, Fairchild handcuffed Green's left ankle to the bench in the holding room. After Green resumed kicking the door, Fairchild decided to further handcuff Green and, after he entered the holding room, asked Green to extend his right arm so that it could be handcuffed. As Fairchild reached for Green's right arm, the defendant drew back and punched the officer in the stomach, driving Fairchild backward, according to the officer. Fairchild testified that he was in pain and that his stomach was sore for 2 or 3 hours. Fairchild handcuffed Green's right hand to the bench. The officer cuffed Green's right ankle to the bench. As

Fairchild was backing up, even though Green's ankle was restrained, he attempted to kick Fairchild in the groin. His foot came within 1 foot of that area.

At 1:45 a.m., Fairchild read to Green an implied consent form. As the officer recited the material contained on the form, Green chanted in a loud voice that he did not understand. When Fairchild asked Green what he did not understand, Green stated that the State broke its contract and that he did not have to provide a blood or urine sample. He then began repeating that he did not understand. After the form was read to Green, he was asked if he wanted to provide a blood or a urine sample. See Neb. Rev. Stat. § 39-669.09 (Reissue 1988) (a law enforcement officer who requires a chemical test may direct whether the test will be of the blood, breath, or urine, and if a blood or urine test is directed by the officer, the arrestee may choose between the two). Green continued stating that he did not understand. Green repeated this same behavior when Fairchild advised him of the consequences of a refusal to submit to a chemical test.

1. Attempted Assault on a Peace Officer

"A person commits the offense of assault on an officer in the third degree if he or she intentionally, knowingly, or recklessly causes bodily injury to a peace officer . . . while such officer . . . is engaged in the performance of his or her official duties." Neb. Rev. Stat. § 28-931 (Reissue 1989). "Bodily injury" to a peace officer is defined as "physical pain, illness, or any impairment of physical condition." Neb. Rev. Stat. § 28-109(4) (Reissue 1989). As the term is used in § 28-931, a police officer is a "peace officer." See *State v. Fly*, 236 Neb. 408, 461 N.W.2d 421 (1990).

A person is guilty of an attempt to commit a crime if he or she intentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime. Neb. Rev. Stat. § 28-201(1)(b) (Reissue 1989). The statute defining criminal attempt requires that an actor's dangerous disposition be manifested by some intentional act which would constitute a

substantial step toward the completion of the crime if the circumstances were as the actor believed them to be. *State v. Sodders*, 208 Neb. 504, 304 N.W.2d 62 (1981). Whether a defendant's conduct constitutes a substantial step toward commission of a particular crime is, generally, a question for the trier of fact. *State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987); *Sodders, supra.*

Fairchild testified that Green punched him in the stomach. Green argues that he only rubbed the officer's stomach, insulting the officer's weight. Even if Fairchild's testimony regarding the blow to his stomach is ignored for purposes of argument, there remains the officer's testimony that Green attempted to kick him in the groin. There is no doubt that if Green had actually kicked the officer in the groin, Fairchild would have experienced pain. Green's overt act in kicking in the direction of Fairchild and coming within 1 foot of the officer's groin constituted a substantial step toward the commission of the assault. Although the handcuffs may have prevented Green from in fact kicking the officer, that is legally of no consequence. One can be convicted of attempt even if the actual commission of the offense could not have occurred. See *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985) (one can be convicted of attempted murder even if the gun used to attempt to commit the murder was unloaded; the statute only requires that a defendant believes the gun to be loaded). That Green came within 1 foot of completing his assault bears out that he believed that he could kick the officer in the groin. It is uncontroverted that Fairchild was engaged in the performance of his duties and in uniform at the time of the attempted assault. Accordingly, the evidence was sufficient for the jury to find beyond a reasonable doubt that Green attempted a third degree assault on the officer.

2. Reckless Driving

"Any person who drives any motor vehicle in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property shall be deemed to be guilty of reckless driving." Neb. Rev. Stat. § 39-669.01 (Reissue 1988). Reckless driving lies somewhere between careless driving, see Neb. Rev.

Stat. § 39-669 (Reissue 1988), and willful reckless driving, see Neb. Rev. Stat. § 39-669.03 (Reissue 1988). The terms "wanton" and "reckless" have in practice been treated synonymously. *Dotzler v. Tuttle*, 234 Neb. 176, 449 N.W.2d 774 (1990). See, also, NJI2d 8.81 (an act is wanton if it is done intentionally and with reckless disregard for the consequences). "Recklessness is the disregard for or indifference to the safety of another or for the consequences of one's act." *Dotzler, supra* at 188, 449 N.W.2d at 782.

Fairchild's testimony reflects that Green, shortly after power braking his Thunderbird, turned a corner at too high a rate of speed, slid toward a parked car, and came within inches of striking that car. Fairchild further testified that Green's vehicle also slid to a stop at a stop sign. From these described events, the jury could find beyond a reasonable doubt that Green operated his Thunderbird in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property.

3. Preliminary Breath Test

> Any law enforcement officer . . . may require any person who operates . . . a motor vehicle upon a public highway in this state to submit to a preliminary test of his or her breath for alcohol content if the officer has reasonable grounds to believe that such person has alcohol in his or her body, has committed a moving traffic violation, or has been involved in a traffic accident. Any person who refuses to submit to such preliminary breath test . . . shall be placed under arrest.

Neb. Rev. Stat. § 39-669.08(3) (Reissue 1988). Refusal to submit to a preliminary breath test is a separate offense from refusal to submit to a chemical test, which is prescribed in subsection (2) of § 39-669.08.

There is no doubt that Fairchild, at all relevant times, was a law enforcement officer who was duly authorized to make arrests for violation of traffic laws. It is likewise uncontroverted that Green was operating a motor vehicle upon a public highway in this state. See Neb. Rev. Stat. § 39-602(32) (Reissue 1988) (highway includes a street which is publicly

maintained when any part thereof is open to the use of the public for purposes of vehicular travel). Fairchild's testimony reflects that not only did the officer have reasonable grounds to believe that Green had driven recklessly in violation of § 39-669.01, but he further had reasonable grounds to believe that Green had alcohol in his body. Jahn's and Green's testimony shows that Green understood he was being asked to submit to a breath test and that the defendant's refusals to submit to the test on two occasions could not have been more emphatic or clear. There was sufficient evidence for the jury to find beyond a reasonable doubt that Green refused to submit to a preliminary breath test.

4. Refusal to Submit to a Chemical Test

Green argues that the evidence shows that he did not understand the nature of the request to submit to a chemical test. He claims that one cannot refuse to take the test when understanding is lacking.

The identical contention was advanced by Green in *State v. Green, ante* p. 328, 470 N.W.2d 736 (1991). In that case, Green employed the same tactics as he did in this case when he was requested to submit to a chemical test. In *Green*, we held that Green could not evade the effect of the law by repeatedly screaming that he did not understand and that such actions evinced a clumsy attempt by Green to evade the purview of the law. The same is true in this case. From the evidence presented, the jury could find beyond a reasonable doubt that Green refused to submit to a chemical test.

V. ENHANCEMENT

Green contends that because his prior convictions regarding refusing to submit to a chemical test were uncounseled, they cannot be used to enhance his current convictions of that offense.

This identical issue was raised in *State v. Green, ante* p. 328, 470 N.W.2d 736 (1991). As recalled from that case, the State attempted to use three prior cases from 1980, 1984, and 1987 to enhance Green's current convictions of driving while under the influence of alcoholic liquor and refusal to submit to a chemical test. We held there that only the 1984 convictions of driving

while under the influence and refusal to submit to a chemical test could be used to enhance Green's current convictions of those offenses.

The State used those same convictions to enhance Green's penalty in this case. As in the holding in *State v. Green, ante* p. 328, 470 N.W.2d 736 (1991), only Green's 1984 conviction of refusal to submit to a chemical test may be used to enhance his penalty for his conviction in this case. Thus, the cause must be remanded with respect to Green's sentence for refusal to submit to a chemical test.

VI. EXCESSIVENESS OF SENTENCES

For his reckless driving conviction, Green was sentenced to a term of imprisonment of 15 days, and his driving privileges were revoked for a period of 1 year from the date of his release from jail. On the conviction of attempted assault on a peace officer, Green was sentenced to a term of imprisonment of 1 year. The court imposed a fine in the sum of $100 for Green's refusal to submit to a preliminary breath test. Green's sentences of imprisonment were ordered to be served concurrently to any other sentences of incarceration. Since the cause must be remanded for resentencing concerning the conviction of refusal to submit to a chemical test, there is no need to further consider that sentence.

In his final assignment of error, Green contends that the trial court abused its discretion in failing to place him on probation.

"[T]he denial of probation and the imposition of a sentence within statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion. [Citations omitted.]" *State v. Dean*, 237 Neb. 65, 77, 464 N.W.2d 782, 791 (1991). "In considering probation in lieu of a sentence, the court should not withhold imprisonment when a lesser sentence would depreciate the seriousness of the offender's crime or promote disrespect for the law." *Id.* (citing Neb. Rev. Stat. § 29-2260 (Reissue 1989)).

> " '[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. . . .' " [Citations omitted.]

State v. Rodgers, 237 Neb. 506, 511, 466 N.W.2d 537, 540 (1991).

"Every person convicted of reckless driving shall be punished by imprisonment . . . for a period of not less than five days nor more than thirty days, or by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by both such a fine and imprisonment." Neb. Rev. Stat. § 39-669.02 (Reissue 1988). Also applicable here is Neb. Rev. Stat. § 60-427 (Reissue 1988) (now codified at Neb. Rev. Stat. § 60-496 (Cum. Supp. 1990)), which provides that a court may, in its discretion, suspend for not less than 10 days nor more than 1 year the driver's license of a defendant convicted of certain motor vehicle violations.

Attempted third degree assault on a peace officer is a Class I misdemeanor, Neb. Rev. Stat. §§ 28-201(4)(d) and 28-931(2) (Reissue 1989), punishable by a sentence up to imprisonment of 1 year, a fine of $1,000, or both. Neb. Rev. Stat. § 28-106 (Reissue 1989).

Refusal to submit to a preliminary breath test is a Class V misdemeanor. § 39-669.08(3). Section 28-106(1) provides that a Class V misdemeanor is punishable by a fine of up to $100. The sentences imposed for all of the foregoing convictions are within the statutorily prescribed limits. Accordingly, we review the sentences to determine whether the court abused its discretion.

From and including 1976, Green has been convicted of numerous offenses, including possession of a controlled substance, resisting an officer, driving while under the influence of alcoholic liquor, refusal to submit to a chemical test, third degree assault, operating a motor vehicle while his driver's license was suspended, refusal to submit to a preliminary breath test, malicious injury to property, and possession of more than 1 ounce of marijuana. Despite his obvious alcohol abuse, Green denied that he has ever had problems with alcohol. From his statement contained in the presentence report (PSR), it is clear that Green does not take responsibility for his actions, but

attributes his problems primarily to police harassment. The probation officer recommended that Green not be placed on probation. A report from an alcohol and drug abuse counselor asserts: "[A]busive drinking is part of Mr. Green's preferred lifestyle . . . . Mr. Green perceives himself to be in direct conflict with those who advocate more traditional values, and clearly he rather enjoys his status as something of a radical." The counselor further reported that Green perceived no reason to change his behavior except to comply with the requirements of a court order.

Green has displayed a longstanding disrespect for the law and has formerly been convicted of refusing to submit to a preliminary breath test, offenses involving violence, and several driving offenses. His conduct at trial and documentation contained in the PSR more than show his unrepentant attitude. The record provides no support for the conclusion that Green will magically and instantaneously become a law-abiding citizen. Placement of Green on probation would depreciate the seriousness of the crimes of which he was found guilty and promote disrespect for the law. The county court did not abuse its discretion in failing to place Green on probation nor in imposing the sentences that it did for reckless driving, the attempted assault on Officer Fairchild, and Green's refusal to submit to a preliminary breath test.

The district court's affirmance is affirmed in part and reversed in part. The cause is remanded to the district court with the directions that it vacate and set aside the county court's sentence for refusal to submit to a chemical test and remand the matter to that court for further proceedings pursuant to law.

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

STATE OF NEBRASKA, APPELLEE, V. PATRICK J. GREEN, APPELLANT.

471 N.W.2d 413

Filed June 28, 1991. No. 90-455.

1. **Right to Counsel.** If an indigent defendant is to be imprisoned upon conviction, he or she has a right to court-appointed counsel at trial, regardless of whether the offense for which he or she may be imprisoned is classified as petty, misdemeanor, or felony.
2. **Right to Counsel: Waiver.** A criminal defendant may proceed pro se and forgo his or her right to counsel, but the waiver of that right must be made voluntarily, knowingly, and intelligently.
3. **Right to Counsel.** A trial court should warn a defendant who has the right to counsel of the dangers and disadvantages of self-representation, but the warning is not required.
4. **Right to Counsel: Waiver.** A voluntary, knowing, and intelligent waiver of counsel can be found in the absence of a warning if the record viewed as a whole shows such a waiver.
5. **Right to Counsel.** Once a defendant is informed of the right to retained or appointed counsel, there is no requirement that the court advise the defendant on each subsequent court appearance of that same right.
6. **Right to Counsel: Waiver.** By conduct, a defendant can voluntarily, knowingly, and intelligently waive his or her right to counsel.
7. _____: _____. A defendant's familiarity with the criminal justice system strongly weighs in favor of a finding that a waiver of counsel was voluntarily, knowingly, and intelligently made.
8. **Right to Counsel.** A trial court may, but is not required to, appoint standby counsel for a defendant proceeding pro se.
9. _____. The appointment of standby counsel is left to the discretion of the trial court.
10. _____. A request for standby counsel is an important factor in deciding whether a court should have appointed standby counsel.
11. **Supreme Court: Judicial Notice: Appeal and Error.** When certain aspects of the controversy have been previously considered and determined, the Supreme Court can take judicial notice of facts recited in one of its earlier opinions concerning the same defendant but involving a different conviction and sentence.
12. **Criminal Law: Trial: Evidence: Appeal and Error.** An error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt.
13. **Trial: Juries: Appeal and Error: Words and Phrases.** When there is some incorrect conduct by a trial court which, on review of the record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant, the error is harmless.
14. **Trial: Evidence: Appeal and Error.** If evidence properly admitted at trial overwhelmingly establishes a defendant's guilt, any error in excluding admissible evidence is harmless error beyond a reasonable doubt.

15. _____: _____: _____. Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the finding by the trier of fact.
16. **Trial: Evidence: Controlled Substances.** A roach clip offered in evidence in prosecution for possession of marijuana is relevant.
17. **Rules of 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.
18. **Trial: Evidence.** An exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which the testimony was given. It must also be shown to the satisfaction of the trial court that no substantial change has taken place in the exhibit so as to render it misleading.
19. _____: _____. Whether sufficient foundation has been laid for the admission of physical evidence must necessarily be determined on a case-by-case basis.
20. **Trial: Evidence: Appeal and Error.** A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion.
21. **Trial: Evidence: Proof.** Proof that an exhibit remained in the custody of law enforcement and court officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence.
22. **Juries: Verdicts: Jury Instructions.** Although a jury may acquit an accused even if its verdict is contrary to the law and the evidence, the defendant is not entitled to have the jury instructed concerning the power of jury nullification.
23. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those 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.
24. **Verdicts: Appeal and Error.** On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
25. **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.
26. **Controlled Substances: Intent: Evidence: Proof.** A defendant possesses a controlled substance when the defendant knows of the nature or character of the substance and its presence and has dominion or control over the substance. A defendant's control or dominion over premises where a controlled substance is located may establish the defendant's constructive possession of the controlled substance.

27. **Controlled Substances: Circumstantial Evidence: Proof.** The existence of narcotics may be proved by circumstantial evidence. There need be no sample placed before the jury, nor need there be testimony by qualified chemists, as long as the evidence is sufficient to support an inference that the material in question was narcotics.
28. **Sentences: Probation and Parole: Appeal and Error.** The denial of probation and the imposition of a sentence within statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion.

Appeal from the District Court for Platte County, JOHN C. WHITEHEAD, Judge, on appeal thereto from the County Court for Platte County, LYLE WINKLE, Judge. Judgment of District Court affirmed.

James C. Stecker for appellant.

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

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

FAHRNBRUCH, J.

Patrick J. Green appeals his Platte County Court conviction for possession of marijuana and sentence imposed therefor. We affirm.

As explained in *State v. Green, ante* p. 475, 471 N.W.2d 402 (1991) (*Green II*), this same defendant was involved in a trio of appeals arising from separate events occurring in Platte County over the course of several days. See, also, *State v. Green, ante* p. 328, 470 N.W.2d 736 (1991) (*Green I*). The same county judge presided over each of Green's jury trials.

In this marijuana conviction appeal, Green claims that the trial court erred in (1) finding that he voluntarily, knowingly, and intelligently waived his right to counsel; (2) failing to appoint standby counsel; (3) striking a witness' testimony; (4) receiving certain exhibits in evidence; (5) refusing to give his proposed instruction on jury nullification; (6) finding that the evidence was sufficient to convict him; and (7) imposing an excessive sentence.

On the evening of March 12, 1989, police officers Todd D. Thalken and Charles D. Case, Jr., were dispatched to a

Columbus, Nebraska, residence to investigate a domestic disturbance. The house had two apartments with separate doorways located on the front porch. The apartment on the main floor was rented to Penny Grape. Glen Grape leased the upstairs apartment. Rosemary and Warren Hellbusch resided with Glen Grape. Rosemary Hellbusch and Glen Grape informed Thalken that Green had been in their apartment and had refused to leave when requested. Grape appeared frightened and expressed his fear that Green might attack him.

Thalken went downstairs to speak with Green to "get his side of the story." At that point, Green was standing on the porch between the two doors. Green stated that he lived in the house. He was very argumentative and aggressive and ordered the policemen to leave. Thalken returned upstairs to speak with Glen Grape and Rosemary Hellbusch and to obtain a written statement of the events. Officer Alan C. Wilkins was also dispatched to the scene on the evening in question and, upon arrival, went to the upstairs apartment. While Thalken was obtaining statements from Grape and Hellbusch, Thalken observed Green standing part way inside the door of Glen Grape's apartment, and Wilkins heard Green yell that the disturbance was downstairs and that he was the culprit. Grape again communicated to the officers his fear of Green.

Case and Wilkins returned downstairs followed by Thalken, who informed Green that he was under arrest for trespassing. Green ran into the downstairs apartment and, along with Penny Grape, held a storm door shut in an attempt to prevent the police from entering. The police were able to resist Grape's and Green's efforts and entered the apartment in order to apprehend Green for trespassing in the upstairs apartment. Case, Wilkins, and Thalken chased Green through a living room and into a kitchen, where he was finally subdued and arrested. Case observed a marijuana pipe and a roach clip on a kitchen counter and informed Thalken and Wilkins of his observation. There was partially smoked marijuana inside the pipe. Green was escorted by Thalken to his police cruiser and taken to the police station.

In the early morning hours of the following day, a search warrant for the Grape-Green apartment was obtained.

Investigator Timothy D. Kayl of the Columbus Police Department was assigned to assist in a search of the premises. He was accompanied to the apartment by Thalken, Wilkins, and Officer Badura. Five members of the police department were present during the search: Thalken, Case, Wilkins, Kayl, and Badura. With the exception of Badura, all the officers testified at trial.

During execution of the warrant, Kayl found a bag of marijuana in a dresser drawer in a bedroom. Motor vehicle titles bearing Green's name and/or signature, as well as female undergarments, were discovered in that drawer. The remaining dresser drawers contained both men's and women's clothing. Mostly adult male and female clothes were found in the bedroom in which the marijuana was discovered. Another dresser in the bedroom contained books, papers, and articles of clothing. The record is silent as to whether male or female clothing was in the second dresser. Also in the bedroom was a twin-sized bed.

Green returned to the apartment and was present during at least part of the search. While the premises were being searched, Green told Wilkins that police officers had found "my ounce and a half" and that they would attempt to prosecute the defendant for delivering the substance. Case and Kayl corroborated Wilkins' testimony on that point. Thalken corroborated Wilkins' testimony and also testified that Green identified his "ounce and a half" as his "stash of pot."

In a cupboard in a living room, Thalken and Kayl discovered a tray with seeds and organic material that appeared to be marijuana, a metal scale, several brass fittings, and a wood pipe with burnt material that smelled like marijuana.

In the bedroom where marijuana was found, Case recovered an application and order to postpone the payment of a fine and costs from the Platte County Court addressed to Green at 2010 11th Street, the address of the downstairs apartment. The application and order was found in a cardboard box at the foot of the dresser in which marijuana was discovered. Case testified that on an earlier occasion when he had responded to a dispute at 2010 11th Street, Green informed him that he lived at that address.

On March 24, 1989, a one-count criminal complaint was filed in the county court for Platte County charging Green, in essence, with possessing more than 1 ounce but not more than 1 pound of marijuana. Green was arraigned on March 28, 1989. At a hearing on April 4, 1989, the court entered a plea of not guilty in Green's behalf. Green requested a jury trial, during which he represented himself. The jury found the defendant guilty of the crime charged. The defendant was sentenced to a term of imprisonment of 7 days in jail, to be served concurrently with any other sentence imposed.

The sentencing order was entered on July 27, 1989, and Green timely appealed to the district court. On May 1, 1990, the district court affirmed the county court's judgment. A timely notice of appeal to this court was filed in the district court on May 4, 1990. An attorney represented Green in both his appeal to the district court and to this court.

I. WAIVER OF RIGHT TO COUNSEL

At his March 28, 1989, arraignment, Green was advised of certain constitutional and statutory rights. This advisement included Green's right to have an attorney at all critical stages of the proceedings and the right to court-appointed counsel at public expense. The court explained to Green the nature of the charge and the possibility of a jail sentence upon conviction of that charge. When the court asked the defendant if he wanted an attorney to represent him, Green stated that he would not know until after he had read the police report. The court continued the matter for 1 week, until April 4, so that Green could review the police report and make his decision regarding counsel. Green was further informed that if he desired counsel, he should retain one if he was financially able, or if he was financially unable to retain counsel, he should promptly make application to the court for appointment of counsel. The court made it abundantly clear that Green's decision concerning counsel was to be made before his next court appearance, on April 4. Green stated that he understood.

Green appeared without counsel on April 4, 1989, and a plea of not guilty was entered by the court in Green's behalf. It was at that time the defendant requested a jury trial.

The defendant next appeared pro se at a pretrial conference held on May 10, 1989, and moved to have the complaint dismissed on the ground that the search was illegally conducted and that there was no probable cause for the issuance of the search warrant. Green never requested a hearing on the matter. He expressly stated that he was not moving to suppress any evidence. The defendant claimed that in this case four warrants were issued and that two of them were forged by police. Green said he wanted to present that evidence to the jury. Thereafter, when Green did not respond when the court asked if there were any motions, the court set a jury trial for June 1, 1989. The court denied Green's motion for a continuance, which the defendant sought on the basis that the Nebraska Civil Liberties Union was investigating his case. Green appeared pro se at his trial which was held on June 1.

As he did in *Green I* and *Green II*, the defendant claims that his waiver of counsel was not voluntarily, knowingly, and intelligently made because the trial court failed to advise him of the dangers of self-representation. Since we disagree with that contention, we need not reach Green's claim that the trial court's failure to so warn constitutes reversible error.

As a threshold matter, assuming that he was indigent, it is clear that Green had a right to court-appointed counsel. If an indigent defendant is to be imprisoned upon conviction, he or she has a right to court-appointed counsel at trial, regardless of whether the offense for which he or she may be imprisoned is classified as petty, misdemeanor, or felony. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972). See, also, Neb. Rev. Stat. § 29-3902 (Cum. Supp. 1990) (statutory right to counsel for felony defendants and misdemeanants who may be punished by imprisonment). It is equally true that a criminal defendant may proceed pro se and forgo his or her right to counsel, but the waiver of that right must be made voluntarily, knowingly, and intelligently. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

This court has rejected Green's argument that a defendant must be explicitly warned of the dangers and disadvantages of self-representation before a voluntary, knowing, and intelligent

waiver of counsel can be found. In *Green I*, we held that a trial court should warn a defendant who has the right to counsel of the dangers and disadvantages of self-representation, but that the warning is not required. Instead, a voluntary, knowing, and intelligent waiver of counsel can be found in the absence of a warning if the record viewed as a whole shows such a waiver. *Id.*

At his arraignment, Green was advised of his right to court-appointed counsel. He was again informed at the conclusion of the arraignment that he could retain his own counsel if he could afford one, but that if he did not have sufficient funds to engage private counsel, he should make application to the court for appointed counsel. Once a defendant is informed of the right to retained or appointed counsel, there is no requirement that the court advise the defendant on each subsequent court appearance of that same right. *Green I.* Green was aware that his decision had to be made before he was to enter his plea 1 week later. He thereafter appeared pro se at all his court appearances. It was reasonable for the court to infer that Green read the police reports and concluded that he could adequately defend himself. By conduct, a defendant can voluntarily, knowingly, and intelligently waive his or her right to counsel. *Id.*

Not only did Green appear pro se after being advised to reach a decision concerning his right to counsel and after examining the police reports to determine the strength of the State's case, but, as the presentence report and Green's past appeals to this court demonstrate, he also had a long history of involvement in the judicial system. In *Green I*, we determined that a defendant's familiarity with the criminal justice system strongly weighs in favor of a finding that a waiver of counsel was voluntarily, knowingly, and intelligently made. As noted in *Green II*, the defendant has often elected to waive counsel and proceed pro se. In two of his cases which were appealed to this court, Green represented himself at trial. See, *State v. Green*, 236 Neb. 33, 458 N.W.2d 472 (1990); *State v. Green*, 229 Neb. 493, 427 N.W.2d 304 (1988). Green even represented himself pro se in his 1988 appeal to this court. This court held in Green's 1990 appeal that his waiver of counsel was made voluntarily, understandingly, and intelligently.

In view of the record, we cannot say that the trial court was clearly wrong in finding Green's waiver of counsel to be valid. See *Green I* ("clearly erroneous" standard of review for a determination of whether waiver of counsel was voluntary, knowing, and intelligent).

II. STANDBY COUNSEL

The defendant argues that the trial court committed reversible error by failing sua sponte to appoint standby counsel to assist him in his defense. The same contention was made in *Green I* and *Green II*.

A trial court may, but is not required to, appoint standby counsel for a defendant proceeding pro se. *Green I*. Since the appointment of standby counsel may interfere with the orderly progression of a case and runs the risk of infringing on a defendant's right to self-representation, we held in *Green I* that the appointment of standby counsel is left to the discretion of the trial court.

In this case, Green never requested standby counsel. See *State v. Green*, 236 Neb. 33, 458 N.W.2d 472 (1990) (a request for standby counsel is an important factor in deciding whether a court should have appointed standby counsel). This court may take judicial notice of Green's hostility toward and mistrust of attorneys in Platte County, as reported in *Green I* and *Green II*, which the defendant had communicated to this same trial judge before the trial was conducted in this case. See *State v. Losieau*, 180 Neb. 671, 144 N.W.2d 406 (1966) (when certain aspects of the controversy have been previously considered and determined, the Supreme Court can take judicial notice of facts recited in one of its earlier opinions concerning the same defendant but involving a different conviction and sentence).

Although Green may have made misjudgments during the course of the trial, appointment of standby counsel in the absence of Green's request to do so, particularly when viewed in light of his obvious antagonism toward members of the local bar, might well have resulted in an infringement on Green's right to self-representation. See *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984) (appeal based on infringement of right to self-representation because of

interference of standby counsel with whom defendant was antagonistic). In light of these considerations, the trial court did not abuse its discretion in not appointing standby counsel for Green.

III. STRIKING GRAPE'S TESTIMONY

The following testimony was elicited from Penny Grape during the State's case in chief. Penny Grape testified that on the night in question, her children and Green were residing with her. Grape further testified that Green shared a bedroom with her and kept his personal effects in that room. Her testimony reflects that Green had full access to the house, including the bedroom in which the marijuana that he was charged with possessing was discovered.

Green also called Penny Grape to testify in his case in chief. At that time, on direct examination, Grape stated that the dresser in which marijuana was found was hers and that Green's dresser was to the left of hers. Penny Grape also testified that it was a strong possibility that one of her and Green's many visitors might have left paraphernalia on the premises.

During the State's cross-examination, Penny Grape testified in substance that the dresser in question was hers and that the only objects which Green kept in her dresser were the car titles which she placed there. When asked if she knew that marijuana was found in the dresser, she invoked her fifth amendment privilege against self-incrimination. She then stated that Green had access to the dresser. Grape denied that any friends or any children whom she babysat went into the bedroom where the marijuana was found. She testified that she did not see a bag of marijuana on the night in question. When the State again asked her if she observed Wilkins remove any marijuana or "green leafy stuff," Penny Grape invoked her fifth amendment privilege. She invoked the privilege for a third time after the State questioned her concerning paraphernalia in the residence. The court advised the jury to "disregard any testimony of this witness since she has invoked her privilege against self-incrimination."

Green argues that Penny Grape should not have been permitted to assert her fifth amendment privilege because any

answer she may have given would not have incriminated her or had already been given and that she waived the privilege by earlier providing incriminating testimony. The defendant contends that the court's action in striking the testimony prejudicially deprived him of the right to present his defense.

"[A]n error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt. [Citations omitted.]" *State v. Bradley*, 236 Neb. 371, 396, 461 N.W.2d 524, 542 (1990). "When there is some incorrect conduct by a trial court which, on review of the record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant, the error is harmless. [Citation omitted.]" *State v. Plant*, 236 Neb. 317, 338, 461 N.W.2d 253, 269 (1990).

As Green correctly recognizes, the only testimony of Penny Grape's that could have benefited him was her statements that a visitor may have left the paraphernalia in the apartment, that the dresser in question was hers, that Green had a separate dresser, and that she placed his car titles in her dresser. The trial court's statement that the jury must disregard any testimony of Penny Grape was ambiguous. It is not clear whether the trial court was referring to Penny Grape's trial testimony in its entirety or solely her testimony elicited during Green's case in chief. Out of an abundance of caution, we construe the court's statement to mean the former. Thus, in determining whether the county court committed prejudicial error, all of Penny Grape's testimony is ignored. Our assumption that the trial court struck Grape's entire testimony is in no way a reflection on the propriety of that action, nor is it intended as guidance to trial courts when faced with a similar situation. Since Penny Grape's testimony during the State's case in chief could only be interpreted as damaging to Green, this interpretation is advantageous to him.

Even if the jury believed that the dresser was Penny Grape's and that she placed Green's car titles in the drawer in which the marijuana was found, this does not show that Green did not place the marijuana in that drawer. It was uncontroverted at trial that Green resided with Penny Grape in the downstairs

apartment. From the uncontradicted testimony that adult male clothing was present in the dresser and bedroom where the police discovered the marijuana, it is clear that Green shared the bedroom with Penny Grape and would obviously have access to all areas of the room, including dresser drawers. Most importantly, Penny Grape's statements were overwhelmingly outweighed by Wilkins' testimony that Green admitted that the police had found his "ounce and a half," the testimony of three other officers corroborating that admission, and Thalken's testimony of Green's admission that the ounce and a half the defendant was referring to was "pot," i.e., marijuana. See *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989) (if evidence properly admitted at trial overwhelmingly establishes a defendant's guilt, any error in excluding admissible evidence is harmless error beyond a reasonable doubt). Accord, *State v. Jones*, 246 Kan. 214, 787 P.2d 726 (1990); *Young v. State*, 562 So. 2d 370 (Fla. App. 1990). On review of the entire record, we conclude that the striking of Penny Grape's testimony did not materially influence the jury in a verdict adverse to a substantial right of the defendant. Any error in striking any of Grape's testimony was harmless beyond a reasonable doubt.

IV. RECEIPT OF EXHIBITS IN EVIDENCE

Several exhibits were received in evidence over Green's objections. These exhibits were a picture of the dresser in which the bag of marijuana was found, a picture of the seized marijuana, the pipe and roach clip, the bag of marijuana seized on the night in question, and the application and order sent to Green by the Platte County Court, bearing the Grape-Green apartment address. Green's principal claim is that because an insufficient chain of custody was shown for those exhibits, they were inadmissible.

" 'Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the finding by the trier of fact.' [Citations omitted.]" *State v. Plant, supra* at 338, 461 N.W.2d at 269. In view of the testimony that the marijuana was found in the dresser and the fact that the bag of marijuana was

introduced in evidence, the photographs depicting the dresser and the marijuana were merely cumulative evidence. In the context of the entire record, either photograph had little probative value. Assuming, arguendo, the inadmissibility of those photographs, any error in admitting them was harmless beyond a reasonable doubt. Therefore, our analysis is restricted to the admissibility of the pipe and roach clip, the marijuana, and the application and order.

In addition to attacking the chain of custody of the exhibits at issue, Green also contends that the pipe, roach clip, and application and order were irrelevant. This court has held that a roach clip offered in evidence in prosecution for possession of marijuana is relevant. *State v. Rathburn*, 195 Neb. 485, 239 N.W.2d 253 (1976). The fact that a pipe and roach clip were found in the apartment where Green resided and where the marijuana was found makes it more probable that Green knowingly or intentionally possessed the marijuana than would be the case if the pipe or roach clip were not in evidence. See 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). That the pipe and roach clip are relevant to the issue of intent or knowledge forecloses any claim that the evidence was inadmissible as evidence of other crimes. See Neb. Rev. Stat. § 27-404 (Reissue 1989). Turning to the relevance of the application and order addressed to Green bearing the address of the premises where the marijuana was found, the application and order tended to make it more probable that Green resided with Grape and that he constructively possessed the marijuana, as will be more fully discussed in part VI of this opinion. Finally, there is no reason to believe that the probative value of the pipe, roach clip, and application and order was 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. See Neb. Rev. Stat. § 27-403 (Reissue 1989).

On the question of whether proper foundation was laid for

admissibility of the exhibits, we are governed by the principle set forth in *State v. Weible*, 211 Neb. 174, 182, 317 N.W.2d 920, 924-25 (1982):

> [A]n exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which the testimony was given. It must also be shown to the satisfaction of the trial court that no substantial change has taken place in the exhibit so as to render it misleading. As long as the article can be identified, it is immaterial in how many or in whose hands it has been.

" 'Important in such situations are the nature of the exhibit, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object.' " *State v. Apker*, 204 Neb. 577, 578, 284 N.W.2d 14, 16 (1979). "If substantial identity of one condition with the other condition is reasonably probable, the trial court may receive the exhibit in evidence." *State v. Langer*, 192 Neb. 525, 527, 222 N.W.2d 820, 822 (1974). "Whether sufficient foundation has been laid for the admission of physical evidence must necessarily be determined on a case-by-case basis. [Citation omitted.]" *State v. Kerns*, 201 Neb. 617, 621, 271 N.W.2d 48, 50-51 (1978). "[A] trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for [an] abuse of discretion. [Citations omitted.]" *Weible, supra* at 183, 317 N.W.2d at 925.

Wilkins testified that once the pipe and roach clip were seized by Case, that officer maintained possession of them on the night in question and marked them as evidence and that Wilkins obtained the exhibit from a secured evidence locker on the morning of the trial. At trial, Case identified the pipe and roach clip as those that he found in the kitchen after Green had been arrested. Case testified that the pipe and roach clip were in substantially the same condition as they were the night in question, that he kept the items in his possession until he surrendered them to Captain Scriven, and that Wilkins retrieved them from Scriven.

Kayl testified that he seized the marijuana from the dresser in the Grape-Green apartment. Wilkins testified that while he was still in the apartment, Kayl gave him the marijuana on the

evening in question, that he marked it as evidence, that he placed the marijuana in a police narcotics evidence locker, that no one other than police personnel had access to that locker, and that he brought the marijuana with him to court on the day of trial. Kayl testified that based on his signature on the evidence bag, the exhibit was the same bag of marijuana which he recovered from the apartment.

Case testified that he found the application and order addressed to Green at the searched premises and that he gave it to Wilkins. Wilkins placed the application and order in an evidence bag with the rest of the evidence and marked it, and the application and order was kept in the custody and control of the Columbus Police Department until it was brought to court on the day of Green's trial. It was Case's testimony that the application and order offered in evidence was the application and order which he seized during the search. Wilkins testified that the application and order was in substantially the same condition as it was when it was placed in the evidence bag.

The foundational evidence demonstrates that the pipe and roach clip, the marijuana, and the application and order were the same objects about which testimony was given and that no substantial change had taken place in the exhibits so as to render them misleading. Green's concern that intermeddlers tampered with the exhibits is unfounded. "[P]roof that an exhibit remained in the custody of law enforcement and court officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence. [Citations omitted.]" *State v. Langer, supra* at 527, 222 N.W.2d at 822. As the foregoing shows, the exhibits in this case were in the custody of the Columbus Police Department after they were placed there until introduced at trial. The trial court did not abuse its discretion in admitting the pipe and roach clip, the marijuana, and the application and order.

V. INSTRUCTION ON JURY NULLIFICATION

Green proposed an instruction which reads in relevant part that "the jury has an 'unreviewable and unreversible power . . . to acquit in disregard of the instructions on the law given by the trial judge . . . .' " Green assigns as error the trial court's refusal

to give that instruction on jury nullification.

Green raised this same argument in *State v. Green*, 236 Neb. 33, 458 N.W.2d 472 (1990). In that case, we held that although a jury may acquit an accused even if its verdict is contrary to the law and the evidence, the defendant is not entitled to have the jury instructed concerning the power of jury nullification. Accord, *United States v. Drefke*, 707 F.2d 978 (8th Cir. 1983), *cert. denied* 464 U.S. 942, 104 S. Ct. 359, 78 L. Ed. 2d 321; *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969) (exhaustive discussion of doctrine of jury nullification), *cert. denied* 397 U.S. 910, 90 S. Ct. 908, 25 L. Ed. 2d 91 (1970). This assignment of error is meritless.

VI. SUFFICIENCY OF THE EVIDENCE

"Any person knowingly or intentionally possessing marijuana weighing more than one ounce but not more than one pound shall be guilty of a Class IIIA misdemeanor." Neb. Rev. Stat. § 28-416(4) (Cum. Supp. 1988). Green's sixth assignment of error claims that the evidence was insufficient to support his conviction under § 28-416(4).

In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. *State v. Allison, ante* p. 142, 469 N.W.2d 360 (1991). Those 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. *Id.*

> " ' "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." ' [Citation omitted.]"

State v. Cogswell, 237 Neb. 769, 771, 467 N.W.2d 680, 681-82 (1991).

" ' "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." ' [Citations omitted.]" *State v. Lonnecker*, 237 Neb. 207, 213, 465 N.W.2d 737, 742 (1991).

> A defendant possesses a controlled substance when the defendant knows of the nature or character of the substance and its presence and has dominion or control over the substance. [Citations omitted.]
>
> A defendant's control or dominion over premises where a controlled substance is located may establish the defendant's constructive possession of the controlled substance. [Citations omitted.]

Id.

Although chemical analysis was not used to identify as marijuana the substance seized from the dresser, the evidence was sufficient for the jury to find beyond a reasonable doubt that the substance was marijuana. As this court explained in *State v. Nash*, 233 Neb. 318, 444 N.W.2d 914 (1989): "The existence of . . . narcotics may be proved by circumstantial evidence. There need be no sample placed before the jury, nor need there be testimony by qualified chemists as long as the evidence is sufficient to support an inference that the material in question was narcotics." (Syllabus of the court.) Investigator Kayl was the witness through whom the marijuana was offered in evidence. Kayl had received Drug Enforcement Agency training in drug investigation, identification, and detection. Kayl testified that he had seen and smelled burnt and unburnt marijuana. He reported that unsmoked marijuana has a distinctive smell. Kayl further testified that in every one of the 30 to 35 cases in which he had identified a substance to be marijuana, chemical analysis confirmed his identification. To Kayl's testimony must be added Green's admission that the substance was marijuana. The evidence was sufficient for the jury to determine beyond a reasonable doubt that the substance seized from the dresser in the Grape-Green apartment was marijuana.

There was evidence from which the jury could infer that Green resided in the apartment in question and that Green

shared the bedroom in which the marijuana was found. Furthermore, there was testimony that Green admitted that the 1 1/2 ounces of marijuana were his. The evidence was sufficient for the jury to find beyond a reasonable doubt that Green knew of the nature or character of the marijuana and its presence and that he had dominion or control over it.

The principal thrust of the instant assignment of error is that the evidence was insufficient to show that the marijuana weighed over 1 ounce but not in excess of 1 pound. Kayl testified that he weighed the seized marijuana on the police department's triple-beam scale. He performed testing on the scale to ensure its accuracy. The "zip-lock" plastic bag in which the marijuana was contained, together with the marijuana, weighed approximately 50 1/2 grams, which is approximately 1 1/2 ounces. Kayl testified that the bag of marijuana found in the dresser contained a normal amount of stems and seeds for a cleaned bag of marijuana. He further testified that based on his training and experience and the reading obtained when he weighed the marijuana in question, the confiscated substance exceeded an ounce in weight.

Green contends that the evidence was insufficient to show that the marijuana weighed over an ounce. In support, he points to the fact that Kayl never removed the marijuana from its baggie container. Relying on Neb. Rev. Stat. § 28-401(14) (Reissue 1989), which excludes from the definition of marijuana mature stalks and sterilized seeds incapable of germination, Green further asserts that Kayl's testimony shows that seeds and stems were in the marijuana. The significance of Green's argument lies in the legislative decision to impose a lesser penalty for possession of marijuana weighing an ounce or less. See § 28-416(6).

The definition of marijuana set forth in § 28-401(14) includes all parts of the plant, including the seeds, but excludes mature stalks and sterilized seeds. There is nothing in Kayl's testimony to indicate that the baggie of marijuana contained mature stalks or sterilized seeds. Kayl testified that the marijuana contained a normal amount of stems and seeds for a *cleaned* bag of marijuana. He further testified that based on his training and experience and the reading he obtained from the

scale when he weighed the marijuana, the marijuana seized from the Grape-Green apartment was in excess of an ounce in weight. Kayl's testimony is corroborated by Green's admission that the police had found his "ounce and a half stash of pot." The evidence was sufficient for the jury to conclude beyond a reasonable doubt that Green knowingly or intentionally possessed marijuana weighing more than 1 ounce but not more than 1 pound. This assignment of error is without merit.

VII. EXCESSIVENESS OF THE SENTENCE

Possession of marijuana of over 1 ounce but not more than 1 pound is a Class IIIA misdemeanor. § 28-416(4). Having been convicted under that statute, Green was subject to a term of 7 days in jail, a $500 fine, or both. See Neb. Rev. Stat. § 28-106 (Reissue 1989). The defendant was sentenced to 7 days in jail. In his final assignment of error, Green contends that the county court abused its discretion in not giving him an opportunity to rehabilitate himself on probation.

"[T]he denial of probation and the imposition of a sentence within statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion. [Citations omitted.]" *State v. Dean*, 237 Neb. 65, 77, 464 N.W.2d 782, 791 (1991). "In considering probation in lieu of a sentence the court should not withhold imprisonment when a lesser sentence would depreciate the seriousness of the offender's crime or promote disrespect for the law." *Id.* (citing Neb. Rev. Stat. § 29-2260 (Reissue 1989)).

> " 'In 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 observations of the sentencing judge as to the demeanor, attitude, and all facts and circumstances surrounding the life of the defendant. . . .' " [Citations omitted.]

State v. Rodgers, 237 Neb. 506, 511, 466 N.W.2d 537, 540 (1991).

Green has a lengthy history of prior offenses, including a previous conviction of possession of a controlled substance. He admitted to his probation officer that he was a regular user of

marijuana and had last consumed marijuana on the evening prior to his interview with that officer. In view of his past record and continued use of marijuana, it is obvious that Green has no desire to conform his conduct to the law. Sentencing Green to probation would have depreciated the seriousness of his crime and promoted disrespect for the law. The trial court did not abuse its discretion in imposing Green's sentence.

The judgment of the district court affirming the county court's judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES A. JACOBSEN, APPELLANT.

471 N.W.2d 427

Filed June 28, 1991. No. 90-502.

1. **Courts: Appeal and Error.** The district court and the Supreme Court generally shall review appeals from the county court for error appearing on the record.
2. **Judgments: Appeal and Error.** In an action tried without a jury, the findings and conclusions of the trial judge have the effect of a jury verdict and will not be set aside unless clearly wrong.
3. **Appeal and Error.** On questions of law, the Supreme Court has an obligation to reach a conclusion independent of that reached by the trial court.

Appeal from the District Court for Cedar County, ROBERT E. OTTE, Judge, on appeal thereto from the County Court for Cedar County, PAUL R. ROBINSON, Judge. Judgment of District Court reversed, and cause remanded with directions.

Douglas J. Stratton, of Gerrard, Stratton & Mapes, P.C., for appellant.

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

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

WHITE, J.

James A. Jacobsen, defendant, appeals from the district court's order affirming the county court's revocation of his probation based on his alleged failure to satisfactorily fulfill the conditions of his probation.

On December 15, 1987, Jacobsen appeared in the county court for Cedar County and pled guilty to driving while under the influence of alcoholic liquor, third offense, in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1987). The court accepted Jacobsen's plea after finding that it was knowingly, intelligently, and voluntarily entered into and that there was a factual basis for the plea. He was sentenced to 2 years' probation with conditions, fined $250 plus costs, and ordered to serve 7 days in jail on weekends, and his license was suspended for 1 year.

The condition of probation which led to the motion for revocation at issue here required that Jacobsen undergo an evaluation for alcohol addiction and, if found to be addicted, to complete an alcohol treatment program.

A motion alleging a probation violation was filed in the county court on August 15, 1989, in which Randy Boden, probation officer, asserted that after Jacobsen was evaluated on June 13, 1988, at the Tri County Guidance Center of South Sioux City, Nebraska, Mary Howell, an alcohol and drug abuse counselor, recommended inpatient treatment. Boden agreed to let Jacobsen defer the treatment until January 1989, in order for Jacobsen to "complete the care and sale of some livestock which he currently had on his farm."

In January 1989, Jacobsen requested and received a second evaluation at Systems Associates of Norfolk, Nebraska. Alfredo Ramirez, a clinical social worker there, found that Jacobsen "is a cronic [sic] alcoholic who has no motivation to change his lifestyle." Ramirez recommended a 45-day inpatient treatment program at Valley Hope. At the time the motion alleging the probation violation was filed in August 1989, Jacobsen had not yet entered any treatment program.

A second motion for revocation of probation was then filed by the Cedar County Attorney on August 21, 1989. After a hearing on September 12, the county court, pursuant to an

agreement between the State and the defendant, approved a continuance of any further disposition "to allow completion of the standard 21 day inpatient treatment for alcoholism provided by the Veterans Administration Hospital . . . ." The court stated,

> It is further agreed to between the State and Defendant that the Defendant upon promptly entering such inpatient treatment, and upon successful completion of such inpatient treatment, that the State will recommend no further sanction or penalties to be imposed arising out of this particular probation proceeding.

The record includes an October 25, 1989, letter to Jacobsen from the Veterans' Administration which authorized him to report on November 1 for the alcohol dependency treatment program. After Jacobsen visited Dr. Edward Pease, a psychiatrist, on November 11, the doctor determined that Jacobsen would qualify for a diagnosis of alcohol abuse, but since Jacobsen reported that he had not had a drink in 23 months, he should be allowed to continue treatment with the local Alcoholics Anonymous center. Dr. Pease stated that Jacobsen did not need inpatient alcohol treatment at that time.

Jacobsen testified that he returned home and received his driver's license, "[a]nd I thought everything was done," until he learned that he was to appear in court on February 13, 1990, for a hearing on the continuance of the motion for revocation of probation. The court then continued the matter until February 23 and ordered Jacobsen to "produce documented proof of his contention that he should not attend inpatient treatment for alcoholism."

Jacobsen obtained a letter from Dr. Pease, dated February 14, 1990, which included the recommendation against inpatient treatment based on Jacobsen's contention that he had stopped drinking on his own on December 14, 1987, and that he was attending AA meetings regularly. The letter was presented at the hearing on February 23, after which the court found Jacobsen in violation of probation. The court stated:

> The Defendant was given leave, at his request, following the hearing on September 12, 1989, to secure a treatment program at the Veterans Administration Hospital. The

> Defendant did not complete the inpatient treatment program. The Defendant reports, and verifies with a letter, that he was not accepted into such program. The Defendant did not ever report such non-acceptance to the Court, or attempt to obtain alternative treatment, prior to the hearings on February 13, 1990 and February 23, 1990.

Jacobsen was sentenced to 3 months in jail and fined $500, with credit for time served and fines paid, and his license was suspended for 15 years. The State did not contest the truth of the statements made by Jacobsen to the VA psychiatrist.

Jacobsen appealed to the district court, which affirmed the lower court's finding, and then appealed to this court, assigning as error that the sentence is excessive, that the findings of fact were clearly wrong, and that the court failed to honor a plea agreement.

"Under the provisions of Neb. Rev. Stat. §§ 25-2733 and 25-1911 (Reissue 1989), the district court and the Nebraska Supreme Court generally shall review appeals from the county court for error appearing on the record." *State v. Erlewine*, 234 Neb. 855, 857, 452 N.W.2d 764, 766 (1990). In an action tried without a jury, "the findings and conclusions of the trial judge have the effect of a jury verdict and will not be set aside unless clearly wrong." *Osmond State Bank v. Uecker Grain*, 227 Neb. 636, 637, 419 N.W.2d 518, 519 (1988). "[O]n questions of law the Supreme Court has an obligation to reach a conclusion independent of that reached by the trial court." *State v. Wren*, 234 Neb. 291, 292, 450 N.W.2d 684, 686 (1990). After our review of the record, we find that the trial court was clearly wrong in finding that Jacobsen had not satisfactorily complied with the terms of probation or with the court's order of September 12, 1989, and we reverse.

While it is true that Jacobsen did not complete an inpatient treatment program at the VA hospital as required by the court's September 12, 1989, order, it is also evident that such completion was not possible, since the VA hospital would not admit him into the program. The court's order did not require that Jacobsen inform the court or the probation officer of his acceptance or completion of the program. It merely granted a continuance of any further disposition to allow Jacobsen to

obtain treatment, and noted that the State and defendant had agreed that no further sanction or penalties would be imposed "upon promptly entering such inpatient treatment, and upon successful completion of such inpatient treatment . . . ." Jacobsen did enter the program and was denied the possibility of completing it when he was refused admission.

We do not go so far as to say that Jacobsen did all that he could do to meet the court's requirements, but we find that he met the conditions as he was able. The court specifically named the treatment program he was to attend and did not identify any alternatives should the VA program be unacceptable for any reason.

Jacobsen did serve his 2-year probation period, including 7 days in jail, a $250 fine, and a 1-year license suspension. The county court's finding that he violated the condition of probation was clearly wrong, and the district court erred in affirming it. We reverse the judgment and remand the cause with directions to release the appellant from probation.

REVERSED AND REMANDED WITH DIRECTIONS.

JACK WICKER, APPELLEE, V. RONALD WALDEMATH, DOING BUSINESS AS WALDEMATH FARMS, INC., APPELLEE, AND ARTHUR VOGEL, APPELLANT.

471 N.W.2d 731

Filed July 5, 1991. No. 88-930.

1. **Ejectment: Damages.** A plaintiff may seek rents and profits in an ejectment action.
2. **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.
3. **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.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Appeal dismissed.

Richard H. Hoch, of Hoch & Steinheider, for appellant.

Charles D. Hahn and Louie M. Ligouri for appellee Wicker.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

GRANT, J.

Defendant Arthur Vogel appeals from a judgment entered on a jury verdict finding that plaintiff-appellee, Jack Wicker, had "the right of possession" to certain land adjacent to the Missouri River. Wicker's "Petition in Ejection" prayed for "judgment for delivery of possession of the [land], for an accounting, for damages for withholding possession of such premises, for a writ of assistance to place the Plaintiff in possession . . . and for costs . . . ."

In Vogel's amended answer and counterclaim, he asserted that he owned the land pursuant to a Missouri title. He claimed that even if the land was legally located in Nebraska, he owned the land by adverse possession. Vogel also asserted in his amended answer and counterclaim that he had a lawful right to all rents and profits.

At trial, Vogel testified that he had purchased the disputed parcel from his father in the early 1960's. He testified that his father had farmed the land since the 1930's.

Wicker based his claim of ownership on a treasurer's tax deed which he acquired from the treasurer of Otoe County, Nebraska, on June 29, 1984, after paying delinquent property taxes. The owner of record in Nebraska before that time was a Timothy Crook, who had acquired his title in 1956.

The parcel of land in question apparently has two chains of title, one in Nebraska and one in Missouri. In 1867, when Nebraska gained statehood, the parcel was in Nebraska, west of the river channel. Over the next century, the course of the river changed, leaving the parcel in question submerged at times, and at times on the east side of the river. At the present time, about half of the parcel remains submerged.

On September 22, 1988, the district court set a trial date in an order also containing the following language:

> The Petition uses the words ". . . for an accounting, for

> damages for withholding possession. . ." The statute provides for damages for withholding possession of the premises. An accounting procedure is an equity procedure and unsuitable for presentation to a jury as it requires multiple hearings.
>
> If you are asking for an accounting, the Court will bifurcate the trial. If you are asking for damages for withholding possession, then that may be tried at the same trial.

The record does not contain an order determining which approach was to be followed. In fact, after the trial, the trial court made the following journal entry on October 21, 1988: "Court discusses issue of damages and whether to be handled as an accounting (equity) or damages for withholding possession (law). Counsel to contact clients and advise Court on any potential settlement."

In this connection, we note that we have held: " '[I]n order to be entitled to the equitable remedy of an accounting, it is necessary to show a fiduciary or trust relationship between the parties or a complicated series of accounts making the remedy at law inadequate.' " *Jackson v. County of Douglas*, 223 Neb. 65, 68, 388 N.W.2d 64, 66 (1986), quoting from *Lustgarten v. Jones*, 220 Neb. 585, 371 N.W.2d 668 (1985). This case presents neither of those situations.

On its own motion, the court ordered a bifurcated trial. The issue of ejectment was tried before a jury on October 3 and 4, 1988. The issue of rents and profits was retained for later resolution, as indicated by the trial orders and journal entries of September 22 and October 21, 1988. The jury returned a verdict in favor of Wicker.

On October 12, before the court entered judgment on the verdict, defendant Vogel filed a motion for judgment notwithstanding the verdict and a motion for new trial. On October 13, 1988, the court entered its judgment order directing that the sheriff place the plaintiff in possession of the premises.

The motion for judgment notwithstanding the verdict and the motion for new trial were both argued on October 21. The court denied the motions, as is reflected by the court's October 21 docket entry. Defendant Vogel filed a notice of appeal with

this court. Defendant's brief sets out five assignments of error, each of which sets out alleged error in the conduct of the trial.

We first must note that this court has recognized that a plaintiff may seek rents and profits in an ejectment action. See, *Fletcher v. Brown*, 35 Neb. 660, 53 N.W. 577 (1892); *Harrall v. Gray*, 12 Neb. 543, 11 N.W. 851 (1882). See, also, Neb. Rev. Stat. § 25-701(6) (Reissue 1989). The evidence shows that defendant Vogel leased the land in question to Ronald Waldemath, now deceased, for 2 years prior to the commencement of this action. However, no attempt was made to resolve plaintiff's claim for rents and profits.

Before addressing the merits of this purported appeal, this court must raise on its own motion the question of jurisdiction. See *Larsen v. Ralston Bank*, 236 Neb. 880, 464 N.W.2d 329 (1991).

We have said:

> 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).

Larsen, supra at 883, 464 N.W.2d at 332.

In this case, the appeal was prosecuted before any resolution of the issue of rents and profits. Consequently, the court did not dispose of the whole merits of the case, and thus there was no final order which could be appealed. See, also, *Grantham v. General Telephone Co.*, 187 Neb. 647, 193 N.W.2d 449 (1972) (appeal dismissed where trial court determined that

construction of defendants' building next to plaintiffs' building caused physical damage to plaintiffs' building, but did not dispose of issue of lost profits); *Hart v. Ronspies*, 181 Neb. 38, 146 N.W.2d 795 (1966) (appeal dismissed where court determined issue of defendant's negligence but reserved ruling on issue of damages).

There is no final order in this case. The appeal is dismissed as premature.

APPEAL DISMISSED.

DAKOTA TITLE & ESCROW CO., APPELLEE, V. WORLD-WIDE STEEL SYSTEMS, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES, EVERLASTING GOLDEN RULE CHURCH, A MISSOURI CORPORATION, APPELLANT.

471 N.W.2d 430

Filed July 5, 1991. No. 89-202.

1. **Res Judicata.** Res judicata bars relitigation not only of those matters actually litigated, but also of those which might have been litigated in an earlier proceeding.
2. **Res Judicata: Judgments: Actions.** Under res judicata, a defendant may not relitigate a defense which was available but not raised in a prior action by making it the basis of a claim in a subsequent action against the original plaintiff, which action, if successful, would nullify the initial judgment.
3. _____: _____: _____. If an original defendant previously neglected to assert a particular defense, that defendant is precluded from raising it subsequently by virtue of the existence of the judgment rendered in the former action.
4. **Supreme Court: Judicial Notice.** The Supreme Court may examine and take judicial notice of its own proceedings and judgment where certain aspects of the controversy have previously been considered and determined, in cases which are interwoven and interdependent.
5. **Judicial Notice: Records: Res Judicata.** Judicial notice of facts reflected in the court's records is subject to the doctrine of res judicata.
6. **Res Judicata: Appeal and Error.** An appellate court is not precluded from raising the issue of res judicata sua sponte.
7. **Res Judicata: Actions: Appeal and Error.** Where a cause of action could have been brought in a prior suit but was not because of unexplained dilatoriness, an appellate court can properly raise a question of res judicata sua sponte.
8. **Res Judicata: Actions.** Res judicata is grounded upon (1) public policy and

necessity to end litigation and (2) the hardship imposed upon a person by being vexed twice for the same cause of action.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded with direction to dismiss.

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

Michael McCormack, of McCormack, Cooney, Mooney, Hillman & Elder, for appellee Dakota Title.

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

FAHRNBRUCH, J.

The Everlasting Golden Rule Church, a Missouri nonprofit corporation, appeals a default judgment entered against it in favor of Dakota Title & Escrow Co. because Golden Rule's corporate president failed to appear for a deposition.

In its defense, Golden Rule argues that its president, Kelly Green, was not served with a subpoena and that, in any event, he was only a nonparty witness. Because Dakota could have raised the underlying question involved in this case in prior litigation between the same parties, see *Everlasting Golden Rule Ch. v. Dakota Title*, 230 Neb. 590, 432 N.W.2d 803 (1988) (*Everlasting I*), this action is barred by the doctrine of res judicata. Therefore, we vacate the default judgment entered by the district court for Sarpy County and remand the cause to that court with direction to dismiss the action.

The history of the dispute between the parties is found in *Everlasting I, supra*, which reads in part:

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

$16,000.00 in an escrow account to be held by the Escrow Agent [Dakota]; which sum represents an amount sufficient to protect the Buyer [SWN Investment] against a possible judgment lien against said property resulting from an action involving [Golden Rule] and the property described herein, which action is filed at Doc. 54, No. 187 of the District Court of Sarpy County, Nebraska, and is entitled 'Clifford D. Gullett, Plaintiff, vs. World-Wide Steel Systems, Inc., a Nebraska Corporation; The Everlasting Golden Rule Church, a Missouri Corporation, and Kelly Green, Defendants'.

"B. That said sum shall be held pending resolution of said lawsuit, and upon resolution shall be distributed pursuant to the court's order."

Clifford D. Gullett, the plaintiff referred to in the escrow agreement, had obtained a judgment against World-Wide in an Iowa court, which, together with interest, amounted to $13,808.12 (apparently, the judgment was for $11,530.48 and accumulated interest to reach the sum of $13,808.12) as of April 19, 1983. On that date, Gullett filed a petition in equity in the district court for Sarpy County against World-Wide, the church, and Kelly Green. That case may be found at docket 54, page 187, and is the action referred to in the escrow agreement. The petition alleged generally that World-Wide is a mere facade for the personal dealings of Green and that in an effort to hinder his creditors, Green transferred the property (the property described in the escrow agreement) from World-Wide to the church with the intent to hinder, delay, and defraud the creditors of World-Wide and Green. The petition further prayed that the court annul and set aside the transfer and that judgment be awarded [Gullett] against Green in the sum of $13,808.12, plus interest from March 1, 1983.

On April 16, 1984, Gullett filed another petition in the district court for Sarpy County seeking to register the Iowa judgment referred to above. In that action, found at docket 59, page 4, Gullett's motion for summary judgment in the amount of $11,530.48 plus interest of

$4,003.58 as of August 30, 1984, was sustained and judgment entered accordingly. Gullett's attorney, on September 18, 1984, filed a praecipe with the clerk of the district court for Sarpy County for a "writ of execution to levy upon all personal property of World-Wide Steel Systems, Inc., or specifically, any funds held by Dakota Title & Escrow Company, of World-Wide Steel Systems, Inc. under an Escrow Agreement dated August 31, 1983, to satisfy Plaintiff's judgment in the amount of $15,517.17."

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

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

Both writs were served on [Dakota] on September 21, 1984, by a deputy sheriff. The sum of $15,948.14, covering judgment, costs, service, and return, was collected on the writ in docket 59, page 4; and $51.86, covering a portion of the judgment, costs, service, and return, was collected on the writ in docket 54, page 187. These amounts were paid by the deputy sheriff into the district court for Sarpy County. The sum of $16,000 was then paid over to Gullett, and a satisfaction of judgment for the second lawsuit (not the one involved in the escrow agreement) was filed on September 26, 1984.

Gullett, now having recovered all moneys to which he was entitled, albeit in a roundabout fashion, moved to

> dismiss the first lawsuit (the one involved in the escrow agreement). An order of dismissal in docket 54, page 187, was entered by the court on January 22, 1985. At the same time, the court ordered that "any monies now on deposit with Dakota Title and Escrow Company, or received by Dakota Title and Escrow Company in the future pursuant to an escrow agreement dated August 31, 1983 . . . should be paid to Kelly Green, President of the Everlasting Golden Rule Church."
>
> Dakota Title, having already paid out the money on deposit pursuant to the writs of execution, refused to pay Green and the church. On February 8, 1985, the church filed [*Everlasting I*] in the district court for Douglas County against Dakota Title for breach of contract. The petition alleged that Dakota violated the covenants of the escrow agreement by paying out the $16,000 to a creditor of World-Wide.
>
> Generally, Dakota Title's defense was that it had paid out the money to the sheriff in accordance with the writs of execution.

Everlasting I, supra at 591-93, 432 N.W.2d at 804-05.

The district court for Douglas County granted summary judgment in favor of Golden Rule. On December 16, 1988, this court affirmed the judgment of the trial court, which held that the case referred to in the smaller writ was actually the case referred to in the escrow agreement. Payment of the $16,000 was therefore not made in accordance with a proper court order of the district court for Sarpy County for the action filed at docket 54, page 187, cited in the agreement.

Prior to this court's affirmance in *Everlasting I*, Dakota filed this declaratory judgment action in the district court for Sarpy County on January 6, 1988. Dakota sought to "pierce the corporate veil" of Golden Rule and World-Wide Steel Systems, Inc., as to the transaction leading up to the judgment in *Everlasting I*. Dakota wanted to show that Golden Rule and World-Wide were alter egos of one another, so that the Gullett action against World-Wide was the same as an action against Golden Rule. In essence, Dakota is arguing that it is subrogated to the rights of Clifford Gullett and therefore became a creditor

of World-Wide and that because World-Wide is the alter ego of Golden Rule, Dakota is also a creditor of Golden Rule.

The district court for Sarpy County first entered a default judgment against World-Wide in June 1988 for failing to file an answer. World-Wide was a Nebraska corporation which was dissolved in 1986 for failure to pay taxes.

A subpoena was issued for Green, and service was attempted at his last known address in Sarpy County. The subpoena was returned marked "not found." The record indicates Green disappeared and resided in Mexico for 1 1/2 to 2 years prior to January 1989, when Green was ordered to appear. Following the failure of Green, as president of Golden Rule, to appear for his deposition as ordered by the court, the answer of Golden Rule was stricken and default judgment was entered against Golden Rule and in favor of Dakota as a sanction, pursuant to Neb. Ct. R. of Discovery 37(b)(2) (rev. 1989).

In entering the default judgments against Golden Rule and World-Wide, the district court found that they were alter egos of each other and that the Gullett judgment against World-Wide was also a judgment against Golden Rule. In essence, the court found that the transfer of the real property from World-Wide to the church was an effort to defraud World-Wide's creditors.

Dakota then filed a petition for further relief to determine who was entitled to the proceeds of the supersedeas bond filed in *Everlasting I*, which bond was held by Rudy Tesar, clerk of the district court for Douglas County. Tesar and Golden Rule's attorneys were added as defendants to this action in an effort to resolve the interests in the bond.

This court need not reach the merits of the appeal in this case because the claim of Dakota is precluded under the doctrine of res judicata. Res judicata bars relitigation not only of those matters actually litigated, but also of those which might have been litigated in an earlier proceeding. *Blazek v. City of Omaha*, 232 Neb. 562, 441 N.W.2d 205 (1989); *Pflasterer v. Koliopoulos*, 213 Neb. 330, 328 N.W.2d 789 (1983). Under res judicata, "[a] defendant . . . may not relitigate a defense, which was available but not raised in a prior action, by making it the basis of a claim in a subsequent action against the original

plaintiff which if successful would nullify the initial judgment." *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1234 (7th Cir. 1986). See, *Blazek, supra* (original defendant could have raised questions of ordinance validity as a defense to the relief requested and obtained by the original plaintiff in the prior action); *Island v. Board*, 69 Ohio St. 2d 241, 431 N.E.2d 672 (1982) (if an original defendant previously neglected to assert a particular defense, that defendant is precluded from raising it subsequently by virtue of the existence of the judgment rendered in the former action). It is clear that Dakota could have raised the defense of Golden Rule and World-Wide being alter egos of each other in *Everlasting I*. This court takes judicial notice of the petition in *Everlasting I*, filed on February 8, 1985, and Dakota's answer, filed on August 13, 1985, both of which are contained in the transcript filed in this court in *Everlasting I*. (The Supreme Court may examine and take judicial notice of its own proceedings and judgment where certain aspects of the controversy have previously been considered and determined, in cases which are interwoven and interdependent. *State v. Meis*, 233 Neb. 355, 445 N.W.2d 610 (1989). Judicial notice of facts reflected in the court's records is subject to the doctrine of res judicata. See *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990).) In its answer, Dakota acknowledged an awareness of Kelly Green as president of both Golden Rule and World-Wide. Dakota alleged in its defense in the earlier case that the corporations were partners in the purchase of the real estate which gave rise to the escrow agreement. More importantly, the petition in the Gullett action, filed April 19, 1983, and specifically described in the escrow agreement, "alleged generally that World-Wide is a mere facade for the personal dealings of Green and that in an effort to hinder his creditors, Green transferred the property (the property described in the escrow agreement) from World-Wide to the church [Golden Rule] with the intent to hinder, delay, and defraud the creditors of World-Wide and Green." *Everlasting I, supra* at 592, 432 N.W.2d at 804.

An appellate court is not precluded from raising the issue of res judicata sua sponte, although it is infrequently done. See, *Nash v. Bowen*, 869 F.2d 675 (2d Cir. 1989) (even though a trial

court does not rule on a question of res judicata, an appellate court is not precluded from doing so); *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556 (5th Cir. 1983) (where a cause of action could have been brought in a prior suit but was not because of unexplained dilatoriness, appellate court can properly raise question of res judicata sua sponte); *Taxation With Representation of Wash. v. Regan*, 676 F.2d 715 (D.C. Cir. 1982) (MacKinnon, J., dissenting), *rev'd on other grounds* 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983) (appellate court could have raised issue of res judicata requiring remand but instead chose to address merits); *Robertson v. Interstate Securities Company*, 435 F.2d 784 (8th Cir. 1971) (appellate court may raise question of res judicata sua sponte); *Wilson v. United States*, 166 F.2d 527 (8th Cir. 1948) (record disclosed two prior orders overruling identical motions from which no appeal was taken; thus appellate court applied res judicata). See, also, *Hinkle v. Tri-State Transit, Inc.*, 21 Ill. App. 3d 134, 315 N.E.2d 289 (1974) (issue on appeal barred by collateral estoppel after settlement between the parties while case was on appeal; order to show cause why appeal should not be dismissed was issued). But cf. *Carbonell v. Louisiana Dept. of Health & Human Resources*, 772 F.2d 185 (5th Cir. 1985) (appellate court should only raise question of res judicata for the first time on appeal when affirming the trial court decision below *or* in situations in which all relevant data and legal records are before the court and comity, continuity in the law, or essential justice demand its use). Res judicata is grounded upon (1) public policy and necessity to end litigation and (2) the hardship imposed upon a person by being vexed twice for the same cause of action. *Farmers State Bank v. Germer*, 231 Neb. 572, 437 N.W.2d 463 (1989). Allowing a court to raise the issue of res judicata sua sponte is fully consistent with the policy of avoiding unnecessary judicial waste. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 100 S. Ct. 2716, 65 L. Ed. 2d 844 (1980) (Rehnquist, J., dissenting).

Since the claims raised here could have been raised in *Everlasting I, supra*, where Dakota had a full and fair opportunity to litigate the action, we vacate the default judgment entered by the district court for Sarpy County and

remand the cause to the trial court with direction to dismiss the cause.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

GRANT, J., not participating.

JULIA C. BERG, NOW KNOWN AS JULIA C. HAYWORTH, APPELLANT, V. DANNY L. BERG, APPELLEE.

471 N.W.2d 435

Filed July 5, 1991. No. 89-230.

1. **Child Support: Appeal and Error.** Our standard of review in child support cases is de novo on the record, and the decision of the district court will be affirmed in the absence of an abuse of discretion.
2. **Divorce: Modification of Decree: Child Support.** Child support payments are a vested right of the payee in a dissolution action as they accrue, and such payments may be changed only by modification of the decree in the court which entered it on the basis of a material change in circumstances.
3. **Modification of Decree: Child Support.** A court may not forgive or modify past-due child support, but may modify the amount of child support becoming due in the future.
4. **Judgments.** The district court may, on motion and satisfactory proof that a judgment has been paid or satisfied in whole or in part by the act of the parties thereto, order it discharged and canceled of record, to the extent of the payment or satisfaction.

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

Richard S. Reiser, of Gross & Welch, P.C., for appellant.

Tom Dawson, of Dawson, Fleming & Brown, P.C., and, on brief, Richard F. Welling, of Breeling & Welling, for appellee.

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

GRANT, J.

Julia C. Berg, petitioner, now known as Julia C. Hayworth, appeals from the order of the district court for Douglas County

granting respondent-appellee, Danny L. Berg, credit in the amount of $2,500 against child support arrearages.

The record shows that the parties were divorced in May 1977 and are the parents of Dana, Kylie, Derek, and Kevin Berg. In the dissolution proceeding, appellant was awarded custody of all four children, and appellee was ordered to pay child support of $100 per month per child.

The decree was modified in June 1982 and again on October 28, 1988. The 1982 modification did not pertain to child support. As a result of the 1988 modification, however, appellee was granted sole custody of Kevin, and appellant retained custody of the other three children. Appellee was ordered to pay appellant $150 per month per child for the support of Dana, Kylie, and Derek, and appellant was ordered to pay appellee $210 per month for the support of Kevin.

On January 5, 1989, appellant filed a motion to allow an offset of child support payments owed by her for the support of Kevin against a $5,397.50 arrearage owed by appellee for the support of the other children. Appellant apparently wanted to be excused from paying the $210 per month for approximately 25 months to make up for the amount of the arrearage. In response, on January 9, 1989, appellee filed a motion to determine child support delinquency, alleging that he should not be obligated to pay appellant arrearages accrued during extended periods of time Derek and Kevin were not in appellant's possession, but were living full time with appellee.

During the hearing, the parties agreed that Derek lived with appellee from January 7 through September 13, 1987, and that Kevin had lived with appellee since March 1987. Appellee testified that he paid for the complete support of Derek and Kevin during these periods and did not receive child support from appellant when the two children were in his possession. Appellant agreed she had not paid any child support, but testified that Derek spent 1 month with her in the summer of 1987 and that Kevin visited her 1 month each summer in 1987 and 1988.

Based on the foregoing, the trial court found that Derek lived with appellee for approximately 8 months, less 1 month's summer vacation, and credited appellee for the support of

Derek in the amount of $700. The court also found that Kevin lived with appellee from March 1987 until the date of the hearing, and noted that the dissolution decree had been modified on October 28, 1988. Accordingly, the court credited appellee for the support of Kevin for the 20 months elapsing between March 1987 and October 28, 1988, less 2 months' summer vacation for 1987 and 1988, in the amount of $1,800.

Our standard of review in child support cases is de novo on the record, and the decision of the district court will be affirmed in the absence of an abuse of discretion. *Hanthorn v. Hanthorn*, 236 Neb. 225, 460 N.W.2d 650 (1990).

Appellant first contends the district court did not have the authority to "modify" its judgment of October 28, 1988, on the court's own motion because the modification of a judicial decree may only be made by the district court on its own motion during the term at which the order or decree was entered. Here, the term adjourned on December 31, 1988. See *Campbell v. Campbell*, 202 Neb. 575, 276 N.W.2d 220 (1979).

The record shows that the judgment of October 28, 1988, was based on appellee's "Amended Application to Modify" filed March 5, 1987, and appellant's "Answer to Amended Application to Modify and Cross-Application." Appellee's application alleged that Derek and Kevin were residing with appellee, that appellee then paid child support of $100 per month per child for four children, and that because of a substantial change in circumstances, appellee's child support should be reduced. Appellee asked that he receive custody of Derek and Kevin and that appellant be ordered to pay child support. In her answer, appellant admitted only that Derek had been living with appellee since January 7, 1987. In her cross-application, appellant alleged that "there has been a material change of circumstances since the entry of the Decree herein and that the sum of $100.00 per month per child paid by Respondent for the support of the three minor children in the custody of the Petitioner is inadequate and should be amended by an Order of this Court." The prayer is for an increase in child support and an award of attorney fees.

The transcript shows that the matter of arrearages was not brought before the court until appellant filed her motion to

allow offset of child support payments on January 5, 1989. Both parties' motions pertaining to child support arrearages were pending before the court when the court entered judgment, and the court did not "modify" its judgment of October 28, 1988, on its own motion. The argument is without merit.

Appellant also contends she had a vested property right in the $2,500 for which appellee was given credit. We have often held that child support payments are a vested right of the payee in a dissolution action as they accrue, and such payments may be changed only by modification of the decree in the court which entered it on the basis of a material change in circumstances. *Gordon v. Gordon*, 231 Neb. 857, 438 N.W.2d 762 (1989); *Ferry v. Ferry*, 201 Neb. 595, 271 N.W.2d 450 (1978); *Smith v. Smith*, 201 Neb. 21, 265 N.W.2d 855 (1978); *Schrader v. Schrader*, 148 Neb. 162, 26 N.W.2d 617 (1947); *Wassung v. Wassung*, 136 Neb. 440, 286 N.W. 340 (1939). See, also, Neb. Rev. Stat. §§ 42-364 and 42-371 (Reissue 1988). Accordingly, a court may not forgive or modify past-due child support, but may modify the amount of child support becoming due in the future. *Contra Costa Cty. ex rel. Petersen v. Petersen*, 234 Neb. 418, 451 N.W.2d 390 (1990); *Voichoskie v. Voichoskie*, 215 Neb. 775, 340 N.W.2d 442 (1983), *appeal after remand* 219 Neb. 670, 365 N.W.2d 467 (1985).

The district court may, on motion and satisfactory proof that a judgment has been paid or satisfied in whole or in part by the act of the parties thereto, order it discharged and canceled of record, to the extent of the payment or satisfaction. See, *Scott v. Scott*, 223 Neb. 354, 389 N.W.2d 567 (1986); *Cotton v. Cotton*, 222 Neb. 306, 383 N.W.2d 739 (1986). See, also, *Contra Costa Cty. ex rel. Petersen v. Petersen, supra* (respondent was credited $7,500 for monthly payments made directly to custodial parent by respondent's parents); *Hanthorn v. Hanthorn*, 236 Neb. 225, 460 N.W.2d 650 (1990) (Social Security payments made to a parent's child on account of the parent's disability should be considered as credits toward the parent's court-ordered support obligation, in the absence of circumstances making the allowance of such a credit inequitable).

Appellant contends that appellee offered no evidence during the February 22, 1989, hearing that any payments or expenditures had been made to satisfy his obligation to pay child support. To the contrary, the record shows that appellee paid for the complete support of Derek and Kevin for definite periods of time and did not receive child support from appellant while the two children were in his possession. The facts of this case are distinguishable from those in *Scott v. Scott, supra* at 357, 389 N.W.2d at 570, where the respondent-appellant was not credited for payments "of day-to-day expenses undertaken voluntarily . . . in a living situation partly for his benefit." Under the circumstances, the district court did not abuse its discretion in crediting appellee $2,500.

The judgment of the district court is affirmed.

AFFIRMED.

ELIZABETH MAHONEY AND ROBERT J. MAHONEY, APPELLEES, V. UNION PACIFIC RAILROAD EMPLOYES' HOSPITAL ASSOCIATION, APPELLANT.

471 N.W.2d 438

Filed July 5, 1991. No. 89-351.

1. **Summary Judgment.** Summary judgment is appropriate 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. **Evidence: Stipulations: Appeal and Error.** When facts of a case are stipulated to by both parties, the Supreme Court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment.
3. **Insurance: Contracts: Intent.** An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. Where the terms of the contract are clear, they are to be accorded their plain and ordinary meaning. Where a clause can be fairly interpreted in more than one way, there is ambiguity to be resolved by the court as a matter of law.
4. _____: _____: _____. An ambiguity in an insurance policy is resolved based on what a reasonable person in the position of the insured would have understood it to mean at the time the contract was made, not based on what the

insurer intended the language to mean. In the case of ambiguity in an insurance contract, a construction favorable to the insured prevails so as to afford coverage.

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

Michael W. Pirtle and Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Eugene P. Welch and Lynn Ann Killeen, of Gross & Welch, P.C., for appellees.

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

WHITE, J.

The Union Pacific Railroad Employes' Hospital Association (Association) appeals from an order granting summary judgment to Elizabeth and Robert J. Mahoney, the plaintiffs, in this contract action seeking reimbursement of medical expenses for injuries sustained by Elizabeth Mahoney. The trial court entered a judgment of $83,736.53 for the Mahoneys and awarded them $18,000 for attorney fees. The Association's motion for new trial was overruled, and this appeal followed.

On May 23, 1986, Elizabeth and Robert Mahoney were dining at the South Omaha VFW hall. Elizabeth Mahoney fell down a flight of stairs near the ladies' restroom and was taken to the University of Nebraska Medical Center by ambulance. As part of her medical treatment, a blood sample was taken, which showed a .201 blood alcohol level. Upon admission, she was diagnosed as having sustained a closed head trauma with subarachnoid hemorrhage and probable fracture at the base of the skull, left tripod fracture, and multiple abrasions and bruises. Upon her transfer to St. Joseph Hospital on May 27, her medical record indicated that she had sustained multiple trauma with basilar skull fracture, a retrobulbar hemorrhage behind the eye, a left tripod fracture, bilateral Colles' wrist fractures, a compression fracture of the fifth thoracic vertebra, right segmental infarct of the right kidney, right pretibial lacerations, and multiple abrasions and bruises. She remained at St. Joseph until July 22, when she was moved to the Bergan

Mercy Care Center, where she stayed until August 15. Throughout the hospitalizations she incurred medical expenses of $83,736.53. The record indicates that Elizabeth Mahoney remains virtually a quadriplegic, is confined to a wheelchair, is severely confused, and has little ability to speak.

Elizabeth Mahoney is retired from the Union Pacific Railroad and is enrolled in the Association, which was formed to provide medical, surgical, and hospital services to sick or injured active or retired employees. Article VII of the Association regulations, "Benefit Exclusions," provides:

> Section 1. Benefits will not be granted in the following circumstances, except as provided in these regulations.
>
> . . . .
>
> (e) Any sickness or injury directly due to or contributed to in any way by alcoholic intoxication where intoxication is clinically proven and exceeds the legal limits of the State in which sickness or injury occurred.

Based on this exclusion, the Association denied the Mahoneys' claim. It asserted that Elizabeth Mahoney's injuries were directly due to or contributed to by alcoholic intoxication and that her .201 percent blood alcohol level exceeded the "legal limits" of Nebraska under Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986), the statute governing operation of motor vehicles by intoxicated drivers. The Mahoneys filed suit against the Association, and the Mahoneys' motion for summary judgment was granted. The Association assigns as error the trial court's grant of summary judgment and its award of $18,000 in attorney fees pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1988).

In our review of summary judgment, we note that summary judgment is appropriate 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. *Flynn v. Bausch, ante* p. 61, 469 N.W.2d 125 (1991). We also note that certain of the facts in this case were stipulated to by both parties. Therefore, " 'we review this case as if trying it originally in order to determine whether the facts warranted

the judgment.' " *Dobias v. Service Life Ins. Co., ante* p. 87, 89, 469 N.W.2d 143, 145 (1991), quoting *Dugdale of Nebraska v. First State Bank*, 227 Neb. 729, 420 N.W.2d 273 (1988).

In reviewing the coverage provided by an insurance policy, we have held that the policy

> "is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. . . . Where the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning. . . . On the other hand, where a clause in an insurance contract can be fairly interpreted in more than one way, there is ambiguity to be resolved by the court as a matter of law."

Dobias, supra at 89-90, 469 N.W.2d at 145, quoting *Malerbi v. Central Reserve Life*, 225 Neb. 543, 407 N.W.2d 157 (1987).

The question raised here concerns the policy's exclusion of injuries related to intoxication, where the intoxication is clinically proven and exceeds the legal limits of the state in which sickness or injury occurred. The Association asks us to interpret the policy to find that the "legal limit" in the policy is the same limit defined in the statute governing operation of a motor vehicle while intoxicated, or .10 percent in the case of blood alcohol. The Mahoneys argue that there is no legal limit for nondriving intoxication in Nebraska, and therefore the policy exclusion is inapplicable. We agree with the Mahoneys.

The Association admits that § 39-669.07, the driving while intoxicated law, is the only Nebraska statute which provides any guideline for intoxication and that its context is related to motor vehicles. However, the Association argues that there is nothing which prevents it from adopting the DWI standard as the legal limit for its policy. That much is true. But the policy does not clearly specify that the DWI standard has been adopted.

To support its position, the Association has offered an affidavit from the chairman of its board of trustees which states that the exclusion in question has been included in the policy since its inception in 1947 and that the board was referring to the definition of intoxication provided in each state's DWI statute. While we note the asserted intent of the board, we do not find that the policy provided the necessary specificity in the

definition, and we do find "legal limit" as used in the policy is ambiguous. As we have held:

> The resolution of an ambiguity in a policy of insurance turns not on what the insurer intended the language to mean, but what a reasonable person in the position of the insured would have understood it to mean at the time the contract was made. . . . In the case of ambiguity in an insurance contract, a construction favorable to the insured prevails so as to afford coverage.

Brown v. Farmers Mut. Ins. Co., 237 Neb. 855, 869, 468 N.W.2d 105, 115 (1991).

If the Association wanted the intoxication limits as prescribed in § 39-669.07 to apply to injuries sustained while dancing, walking, riding a bicycle, or any other activity, it should have specified these activities in the policy. Instead, the Association relied upon a statute which deals only with operating or being in actual physical control of any motor vehicle while intoxicated. Elizabeth Mahoney was not driving a car or in control of one when she was injured, and the plain meaning of the policy does not make it clear that the benefit exclusion would apply in this situation. The trial court was correct in finding that no genuine issue of material fact remained and in entering judgment of $83,736.53. We affirm the award.

We also affirm the trial court's award of $18,000 in attorney fees pursuant to § 44-359, which provides that the plaintiff in an action based on an insurance policy shall be allowed a reasonable sum as an attorney fee in addition to the amount of the recovery. We also hold that the plaintiffs should be awarded $5,000 as an attorney fee for their costs for this appeal, as provided by § 44-359.

AFFIRMED.

THOMAS D. MORRISSEY AND HARRIET L. MORRISSEY, APPELLANTS, V. ST. PAUL PROPERTY AND CASUALTY INSURANCE CO., APPELLEE.

471 N.W.2d 733

Filed July 5, 1991. No. 89-400.

Appeal from the District Court for Lancaster County, JEFFRE CHEUVRONT, Judge, upon the recommendation of the Appellate Division of the District Court, BUCKLEY, DAVIS, and ILLINGWORTH, District Judges. Reversed and remanded for further proceedings.

Rollin R. Bailey, of Bailey, Polsky, Cada, Cope & Wood, for appellants.

Shirley K. Williams, of Knudsen, Berkheimer, Richardson & Endacott, 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 a question exists as to a material fact or the inference to be drawn therefrom, and accordingly the defendant was not entitled to summary judgment. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. WILLIE LOMACK, JR., ALSO KNOWN AS WILLIE LOMAC, JR., APPELLANT.

471 N.W.2d 441

Filed July 5, 1991. No. 90-447.

Trial: Evidence: Waiver: Appeal and Error. If a party does not make a timely objection to evidence, the party waives the right to assert the court's reception of the evidence as error on appeal.

Appeal from the District Court for Keith County, JOHN P. MURPHY, Judge, on appeal thereto from the County Court for Keith County, KRISTINE R. CECAVA, Judge. Judgment of District Court affirmed.

John O. Frey, of Vestecka, Buethe & Frey, for appellant.

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

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

GRANT, J.

Defendant-appellant, Willie Lomack, Jr., was found guilty in the county court for Keith County, Nebraska, of operating his car at a speed of 74 miles per hour in a 65-mile-per-hour zone, in violation of Neb. Rev. Stat. § 39-662 (Reissue 1988). He was sentenced to pay a fine of $10 plus costs. He appealed to the district court for Keith County, where the judgment was affirmed. He then appealed to this court.

In this court, defendant assigns six errors, which may be summarized into three: (1) The trial court erred in admitting into evidence the results of a state trooper's Vascar unit as to defendant's speed, (2) the district court erred in determining that it was unable to review alleged errors in the trial court because there was no objection to the testimony of the arresting officer as to the speed of the car being driven by defendant, and (3) the trial court erred "in basing its judgment upon findings of fact which are clearly not supported by the evidence." Defendant does not contend the sentence was excessive. The objections are without merit, and we affirm.

The record shows that on November 19, 1989, at

approximately 7 p.m., Trooper Daniel Wilson of the Nebraska State Patrol observed defendant, who works as a safety specialist with the Nebraska Department of Roads, traveling eastbound in his 1989 Saab on Interstate 80 near the Roscoe interchange in Keith County. In Trooper Wilson's opinion, based on visual observation, defendant's vehicle was exceeding the speed limit. After following defendant's vehicle for approximately 4 miles and using a Vascar electronic speed measurement device to establish defendant's speed, Trooper Wilson stopped defendant and issued a citation alleging that defendant had been driving 74 miles per hour in a 65-mile-per-hour zone. The Vascar unit had indicated defendant's speed at 74.7 miles per hour. The trooper testified that the speedometer in his patrol car indicated he was traveling 75 miles per hour while he was following defendant and only one other vehicle was in the area during this time. Both the defendant and the trooper passed the other car.

As to defendant's first two summarized assignments of error, the record shows that the state trooper who arrested defendant was "trained in the visual estimation of speed of a vehicle" and passed a test on that knowledge. The trooper testified that he first became aware of a potential violation of law when he was going east on Interstate 80 and "noticed a pair of headlights approaching from the rear at a speed in excess of the posted speed limit on the interstate." As the trooper pulled off the Interstate at the Roscoe interchange exit, the car passed. The trooper observed the car for 15 to 30 seconds and testified that "the vehicle was traveling approximately 75 miles an hour at the time." This testimony was based on a simple observation by a witness trained in such observations. Defendant objected "on the grounds that he hasn't established the other item. He's referred to a period, but he did not refer to distance." Apparently, defendant thought this estimate was somehow based on a Vascar test. The objection was properly overruled.

The record then shows that the trooper further testified that he reentered the Interstate. He then testified as follows:

> I then proceeded to follow the dark colored saab for approximately 4 miles and ended the vascar following clock at the 141 overpass. During this distance I was

> behind the black saab approximately one quarter mile to a half mile distance. When the black saab entered the second stationary point which was the 141 overpass, I shut off the time switch and as I reached that stationary point at the 141 overpass I shut off the distance switch. At that point my vascar unit displayed a target speed for the black saab at 74.7 miles per hour. This was also verified with my certified speedometer on my patrol car.
>
> Q- This is how fast you were going and this is how fast your speedometer said you were going at the time you were following this vehicle?
>
> A- Yes, sir. It read approximately 75 miles an hour.

There was no objection to this testimony. The district court did not err when it determined that no objection was made to the question about the use of the Vascar unit at the time that evidence was admitted at the trial. The evidence was properly before the trial court. If a party does not make a timely objection to evidence, the party waives the right to assert the court's reception of the evidence as error on appeal. *State v. Morrow*, 237 Neb. 653, 467 N.W.2d 63 (1991). Although it does not control our decision, we note that the record shows, in the direct and rebuttal testimony of the trooper, that the Vascar unit had been checked on the day of the arrest, both before and after the arrest.

There was no effective objection to the trooper's testimony about his visual observation of defendant's speed. That evidence was properly before the trial court. See *Herman v. Lee*, 210 Neb. 563, 316 N.W.2d 56 (1982).

There was no objection to the trooper's testimony that he also timed defendant's speed with the patrol car's speedometer, which speedometer had been certified at the time of the delivery of the car to the patrol 1 month before the time of the arrest. That evidence could properly be considered by the trial court. See *State v. Snyder*, 184 Neb. 465, 168 N.W.2d 530 (1969).

Defendant's first two summarized assignments of error are without merit.

With regard to the remaining assigned error, the evidence is not only sufficient, but overwhelming, to support defendant's conviction. Defendant's evidence to the contrary was that he

had set his cruise control on his Saab, which he had purchased in July 1989, at 65 miles per hour and had not changed his speed. Defendant further testified that he had found the speed control to be accurate over the months, but was unable to get it tested before trial because the car dealer's testing machine "needed to be repaired." The trier of fact was not persuaded by defendant's evidence and believed the State's evidence.

The order of the district court for Keith County, affirming the judgment of the county court, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KEVIN S. LIXEY, APPELLANT.

471 N.W.2d 444

Filed July 5, 1991. No. 90-478.

1. **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.
2. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to support a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence presented.
3. **Criminal Law: Intent: Intoxication.** Ordinarily, voluntary intoxication does not justify or excuse a crime, unless an accused is intoxicated to an extent or degree that the accused is incapable of forming the intent required as an element of the crime charged.
4. **Theft: Intent: Circumstantial Evidence.** Whether one charged with theft intended to deprive the owner of the property permanently is to be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
5. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.

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

Dennis R. Keefe, Lancaster County Public Defender, for appellant.

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

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

HASTINGS, C.J.

Defendant, Kevin S. Lixey, appeals from his bench trial conviction of theft, pursuant to Neb. Rev. Stat. § 28-511 (Reissue 1989), and his sentence of from 20 months' to 5 years' imprisonment in an institution under the jurisdiction of the Nebraska Department of Correctional Services. Defendant assigns as error the insufficiency of the evidence to support the conviction and the excessiveness of the sentence. We affirm.

According to § 28-511, "A person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof." As used in § 28-511,

> (1) Deprive shall mean:
>
> (a) To withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or
>
> (b) To dispose of the property of another so as to create a substantial risk that the owner will not recover it in the condition it was when the actor obtained it.

Neb. Rev. Stat. § 28-509 (Reissue 1989).

This case was tried on a stipulated record taken from a companion case, *State v. Banks*, Lancaster County District Court, docket 77, page 219. In that case, Lixey testified after being appropriately warned by the court as to his right against self-incrimination, during a time when his counsel was present in court.

The testimony reflects that on December 25, 1989, Lixey was in the area of 27th and Vine Streets in Lincoln, Nebraska, at approximately 2:15 p.m. Lixey and Larry Banks had walked to this location to find a liquor store which was open and were sharing a half gallon of whiskey which they had purchased there. They consumed all but about 1 inch of the whiskey, and the two of them decided they wanted to go across town to the

"mission." They asked Allen Johnston, who came out of a nearby phone booth, to give them a ride, and Johnston declined to do so. Johnston was using his brother's Monte Carlo automobile, which was parked about 10 feet from the phone booth. The car was unlocked and its motor was running.

Johnston then entered the liquor store for 2 to 3 minutes. When Johnston left the store, he saw the defendant and Banks driving away in his brother's automobile, although he had not given them permission to use the vehicle. Johnston called the police from the liquor store, reported that the automobile had been stolen, and gave the police a description of the automobile. The defendant drove out of the parking lot onto 26th Street, drove south on 26th Street, and then turned west on Vine Street.

A few minutes later, police officer Mark T. Merwick received notice of the incident and a description of the automobile and first observed the vehicle matching the reported description heading east on Cornhusker Highway in the vicinity of 44th Street. The officer turned around to follow this vehicle and noticed that it apparently had become high-centered on a traffic island at the 48th Street intersection. However, before the officer arrived at this location, the vehicle somehow was freed from this position and proceeded south on 48th Street at a rapid rate of acceleration, with Merwick in pursuit. The officer testified that he was traveling at approximately 50 miles per hour in a 35- and then a 25-mile-per-hour speed zone. It did not appear to the officer that he was gaining on the vehicle.

By the time the officer crossed Adams Street, having pursued the vehicle in his patrol car with its siren and flashing lights activated for approximately six or seven blocks, he began to decelerate because he decided to call off the chase due to the congested nature of the neighborhood. About that time, the officer noted the vehicle he was chasing pass on the right side of a slow-moving pickup truck proceeding in the inside of the two southbound lanes of traffic. He then observed the driver of the vehicle lose control and observed the car leave the roadway, strike a vehicle parked in a used-car lot, strike several posts filled with concrete, and then swerve back out into the street and strike a slow-moving Suzuki Samurai. That collision

caused the ejection of a passenger of the Samurai, who then became airborne. The Monte Carlo automobile was a total loss. Officer Merwick approached the stolen vehicle, found the occupants to be extremely intoxicated, and placed them under arrest.

Lixey testified, contrary to the advice of his attorney. However, he, Lixey, told the court that "there wasn't no sense convicting both of us for something I did." Lixey admitted that he and Banks wanted to go across town to the mission and did not want to walk. After Johnston refused their request to drive them there, Lixey observed the Johnston automobile unlocked and running, and he and Banks got in the car and drove away. Lixey admitted that he heard the police siren. He also testified that after the accident, the police came up to the vehicle he was driving and put handcuffs on him and Banks.

Defendant argues that he was not guilty of theft because he did not intend to withhold the property of Johnston's brother permanently or for so extended a period as to appropriate a major portion of its economic value, nor did he intend to dispose of the property so as to create a substantial risk that the owner would not recover it in the condition it was in when he, Lixey, obtained the vehicle.

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. *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991).

In determining the sufficiency of the evidence to support a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence presented. *State v. Illig, supra*.

Ordinarily, voluntary intoxication does not justify or excuse a crime, unless an accused is intoxicated to an extent or degree that the accused is incapable of forming the intent required as an element of the crime charged. *State v. Saltzman*, 235 Neb. 964, 458 N.W.2d 239 (1990). Whether this situation existed was a question for determination by the trier of fact, which question it decided adversely to the defendant.

Whether the defendant intended to deprive the owner of the

property permanently or for so extended a period as to appropriate a major portion of its economic value, or to dispose of the property of another so as to create a substantial risk that the owner would not recover it in the condition it was in when the defendant obtained it, is to be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. See *State v. Peterson*, 236 Neb. 450, 462 N.W.2d 423 (1990).

The record is clear that the defendant drove the automobile in a direction exactly opposite from that of his destination. He heard the sound of the police officer's siren but nevertheless continued driving at a rate of speed which made it obvious that he was trying to escape apprehension. The evidence was sufficient to permit the trier of fact to determine that defendant intended to deprive the owner of the automobile of its possession permanently. Defendant's first assignment of error is without merit.

Theft is a Class IV felony when the value of the thing involved is $300 or more, but less than $1,000. The evidence was undisputed that the vehicle fell within this value range. The punishment for a Class IV felony is imprisonment for not more than 5 years, a fine of not more than $10,000, or both such imprisonment and fine.

Defendant waived his right to a presentence investigation report, but information brought forth prior to his sentencing disclosed that he had been before the same court a short time earlier for possession of 42 pounds of marijuana. A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *State v. Cogswell*, 237 Neb. 769, 467 N.W.2d 680 (1991). There was no abuse of discretion in this case.

The judgment of the district court is affirmed.

AFFIRMED.

LAURIE JO ZIEBARTH, APPELLEE AND CROSS-APPELLANT, V. JAMES JAY ZIEBARTH, APPELLANT AND CROSS-APPELLEE.

471 N.W.2d 450

Filed July 5, 1991. No. 90-952.

1. **Divorce: Appeal and Error.** In an appeal of an action for dissolution of marriage, the Supreme Court's review is de novo on the record; the judgment of the trial judge will be upheld in the absence of an abuse of discretion. When the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Divorce: Child Custody.** When the custody of minor children is involved in a dissolution proceeding, the custody is determined by the fitness of each parent and the best interests of the children.
3. **Child Custody.** Under Nebraska law, the inquiry into providing for the best interests of the children 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. Other factors to be considered include the moral fitness of the parents; the respective environments each offers; the emotional relationship between the children and the parents; the age, sex, and health of the children and parents; the effect on the children 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 children.
4. **Divorce: Child Custody: Public Policy.** It is sound public policy to keep children together when a marriage is dissolved, but the ultimate test remains the best interests of the children.
5. **Property Division: Appeal and Error.** A division of property is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.
6. **Divorce: Attorney Fees: Appeal and Error.** An award of an attorney fee in a marital dissolution proceeding is reviewed de novo on the record and will be affirmed on appeal in the absence of abuse of discretion by the trial court.
7. **Divorce: Attorney Fees.** Factors to be considered in awarding attorney fees in a dissolution action include the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of questions, and the customary charges for similar services; the trial court may also consider the earning capacity of the parties and the general equities of the situation.
8. **Alimony: Appeal and Error.** On appeal, an alimony award will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.
9. _____: _____. The test to determine the correctness in the amount of the alimony is the reasonableness in light of the facts of each case, considering the duration of the marriage, the history of the contributions to the marriage by

each party, the ability of the supported party to engage in gainful employment, the income and earning capacity of each party, and the general equities of the situation.

Appeal from the District Court for Franklin County: STEPHEN R. ILLINGWORTH, Judge. Reversed and remanded with directions.

Marsha E. Fangmeyer, of Knapp, Mues, Beavers, Luther & Fangmeyer, for appellant.

Steven O. Stumpff, of Stumpff Law Office, for appellee.

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

WHITE, J.

After a trial in Franklin County District Court, the marriage of Laurie Jo and James Jay Ziebarth was dissolved. The husband was awarded custody of the minor son and the wife was awarded custody of the minor daughter. The husband has appealed, alleging that the district court abused its discretion in dividing the custody of the two minor children, in ordering him to pay child support and $5,000 toward the wife's attorney fees, in incorrectly valuing the marital estate, and in awarding a money judgment to the wife. The wife cross-appeals, also asserting that the trial court abused its discretion in splitting custody of the children and asserting error in its failure to award alimony.

James and Laurie Ziebarth were married on July 31, 1982, and had two children: Tyler, born May 12, 1984, and Jillian, born June 5, 1988. The petition for dissolution was filed on January 3, 1990. A temporary order was entered which divided custody of the children between the parents. Following a hearing, the court entered its final decree on August 9, 1990. Although the guardian ad litem had recommended that the children be placed with James, the court continued the split custody arrangement—the son, Tyler, to James, and the daughter, Jillian, to Laurie. A visitation schedule was devised which provided that the children were together each weekend, alternating between the mother and the father; together with each parent for 6 weeks in the summer and on alternating

holidays; and together with the mother on Mother's Day and the father on Father's Day. The father was ordered to pay $200 per month child support. James was allowed the dependent tax exemptions and was ordered to provide medical insurance and to pay for any uncovered medical, dental, and optometric expenses. Neither party was awarded alimony. The marital property was divided, and the wife was awarded a money judgment of $13,385. James was also ordered to pay $5,000 toward Laurie's attorney fees and to pay two-thirds of the guardian ad litem's fee of $3,740.96, with Laurie to pay the remaining one-third.

The record indicates that James is a self-employed farmer and was formerly employed by the family farm corporation. Laurie is employed in the respiratory care unit of a hospital in Holdrege, Nebraska, and has worked toward a respiratory therapy degree. The parties agree about little else. This record is replete with accusations and allegations, and we provide details on the charges merely to demonstrate the vitriolic nature of the divorce and to illustrate some of the reasons for our decision to reverse the trial court and award sole custody of both children to the father, James.

FACTUAL BACKGROUND

Laurie was 19 when she married after meeting James when both were students at the University of Nebraska-Lincoln. She attended UNL for 1 year, majoring in preveterinary science. Although Laurie told James that she had earned 120 credit hours by the end of the summer following her freshman year because she had tested out of a number of classes, she transferred only 5 credit hours to Kearney State College. She attended KSC at various times between 1981 and 1989, earning 62 credit hours, but she has not received a degree.

James attended UNL for 2 years before returning to farm near Wilcox, Nebraska, where he and Laurie lived during the marriage. He stated that his first priority is his family and that he always quit working in the fields at 5 or 6 p.m. to go home to fix dinner. He said he has been the primary caretaker for the children almost since birth. Throughout the marriage, Laurie repeatedly threatened divorce and had left for 2 weeks in 1989

and told James he could not see the children during that time. Laurie accused him of having a drinking problem, but he denies any difficulty with alcohol. James said he took part in an alcohol evaluation, but no evidence of the evaluation was offered at trial.

After her marriage to James, Laurie enrolled in a radiology program at Mary Lanning Hospital in Hastings and respiratory therapy programs in Grand Island and in Omaha, but has not completed any course of training. She testified at trial that she would finish her certification for respiratory therapy by November 1990. When she attended the respiratory therapy program in Omaha at Immanuel Medical Center, Jillian was 3 months old and Tyler was 4 years old, and she took the children with her for much of the time. Laurie said James had the children 1 week out of 4, but James said he had them half of the time. She told James that her expenses were covered by student loans and grants, but he later discovered that she had charged $3,000, the limit on a credit card, to pay for her expenses. James said she spent $8,000 in 4 months and did not complete the program.

Laurie stated that James verbally encouraged her to continue her education, but then threatened to take away a vehicle so that she would not be able to attend school. She also accused him of calling her late at night before an exam to harass her.

Cindy Benjamin, a respiratory therapist in Lexington, testified that she and Laurie studied together while in Omaha and that Laurie was a loving mother. She said there were times when Laurie would be crying after a phone call from James. Benjamin said she heard one phone call in which James called Laurie a "bitch" and a "whore."

As part of the program at St. Francis Medical Center in Grand Island, Laurie agreed to work for 1 year in exchange for assistance with attaining certification in respiratory therapy. She failed to complete the program and owed the center $600. Eventually, her wages were garnished to pay the bill.

Each party accuses the other of physical abuse. Laurie said that when Jillian was 3 weeks old, James had come home intoxicated. Laurie was feeding Jillian in bed and bumped James in the back while getting out of bed. James then kicked

her until she fell out of bed with Jillian in her arms. James denies that incident, along with most of the other accusations made by Laurie. James testified that he never hit his wife, but that she hit him on three occasions. A farmhand for Ziebarth Farms, Inc., Roger Blank, stated that James came to work once with a cracked lip and puffy eyes and told him that his wife had hit him.

Another problem resulted from a difference of religion. Laurie said she had the children baptized in the Catholic Church, but that James is Lutheran. Laurie claimed to take Tyler to "C.C.D. classes" at the Catholic church and to attend church regularly, but later admitted that it was Tyler's aunt who normally took him to church and that she did not attend on a weekly basis. Tyler also attended Bible school at a Lutheran church. James said neither he nor Laurie attended church regularly while married.

A great deal of testimony was provided alleging that Laurie lies, tells stories, and embellishes the truth. When the children were enrolled at KinderCare in Omaha, Laurie indicated on the application form that she had completed college. Donette Johnson, a licensed day-care provider who took care of the Ziebarth children, stated that on the day Laurie left James, Laurie brought Jillian to Johnson's house and said she had to take Tyler to the doctor. When she returned, Johnson asked about Tyler, and Laurie told her she was leaving James and she had taken Tyler to help her move furniture out of the house.

Kirk Gardels, who has known James most of Gardels' life, stated that he and his wife quit seeing James and Laurie about 6 months after the Ziebarths were married because they found Laurie to be untrustworthy and prone to tell stories. She told them that she was a backup singer for John Denver, that she had almost completed veterinary school, that she was unable to get pregnant and they were going to adopt, that she was valedictorian of her high school class, and that she was a cheerleader.

Laurie told Rene Saldivar, another of James' friends, that she had worked at the cancer unit at a hospital, that she almost made the Olympic ski team, and that she almost finished veterinary school. Another friend, Ron Lush, said that Laurie

could outdrink anyone and that she told him that her "best" in the last 6 months had been drinking 20 shots of tequila in one evening.

James' college roommate, Terry Anderson, said that Laurie tells lies to impress others and that she stated that she had a heart condition and had been advised not to smoke and drink, but he said that she smoked and drank anyway.

Laurie's father stated that Laurie told people she could not visit her uncle because her cousin had burned in a fire and everyone blamed Laurie for it. Laurie's father said that the cousin died from shotgun wounds, that Laurie was not present when the incident occurred, and that no one blames her for it.

James testified to several examples of stories he was told by Laurie. She had told him that she was working for a professor at Kearney State College. When Laurie's mother went to take Laurie to lunch, she found that no one in the office knew Laurie. James called the office to ask for tax information and found out that Laurie did not work for the professor, but that he was her advisor. Laurie told James that she had numerous health problems, including a brain tumor and heart difficulties, but when he asked why she had not marked these on an insurance form, she admitted they were lies. She told James when he met her that she was in the process of moving to Ft. Collins, Colorado, to finish her veterinary training and that she had one semester left. She also told him early in the marriage that she had a very large savings account and inheritance from her father and that she owned land and skyscrapers in Denver. When James asked for information for tax purposes, he was told that it was in a partnership or a holding company under another name and that they did not need to report anything. Laurie also told James that she was class president and a regents scholar at UNL.

Laurie denied most of these stories and said she never told anyone that she was a backup singer for John Denver or that she was on the Olympic ski team. She denied telling anyone that she had drunk 20 tequilas in one evening.

Discipline was also a point of contention. Laurie said she believes children need structure and boundaries, but that James lets the children run free. Laurie said that she never hit Tyler on

the face with her hand, but that she did spank him. She said James tends to favor Tyler over Jillian and at times did not acknowledge Jillian. James said that during their separation he was not allowed to see Jillian when he went to pick up Tyler from visitation.

During the trial, Laurie accused her father of verbal, emotional, physical, and sexual abuse. She said that he dragged her by her hair, threw her down stairs, forced her to sleep in a doghouse, touched her on the breasts, and had sexual intercourse with her when she was 7 years old. She said she had not communicated with her father for 7 years, but he walked her down the aisle at her wedding and she sang at his wedding when he was remarried. She said she told James 2 years earlier about the sexual abuse, but never told anyone else until after she was separated from James, when she told her mother.

Laurie told James that her father had sexually abused her, her sister, and his stepdaughter, but James said that earlier she had told him her grandmother's second husband had abused her.

Laurie and her mother both contacted Governor Kay Orr, who had named Laurie's father to a state board. They passed on the sexual abuse allegations and questioned the Governor's wisdom in appointing her father to the state board.

Laurie's father denied her accusations and said that he first learned of the allegations after James and Laurie split up. Laurie also accused him of sexually abusing his stepdaughter and of causing problems in his stepdaughter's marriage, even though his stepdaughter was not married.

Laurie's sister said that there was no truth to any of the abuse accusations, which she first learned of approximately 2 months before trial when her mother called and said Laurie needed her help in fighting for custody. Laurie's sister also later received a phone call and letter from Laurie asking her to help.

Laurie's father said he offered to set up a trust fund for the Ziebarth children but Laurie refused, saying it was not necessary. Laurie said she did not trust his motive for the offer. Laurie's father gave her $2,000 as a loan, but she refused to pay it back. The canceled checks were admitted into evidence, and one for $1,000 indicates it was a "loan," and the other for

$1,000 indicates it was for "cash." Her father said that when he asked Laurie what her intentions were about paying it back, she told him that if he wanted the money he could take her to court and sue her.

Laurie said she had a bedroom for Tyler built in the basement and that she paid for it with her own money. However, a memo in evidence indicates that the cost of the remodeling was $406 and a balance of $334.40 remains.

Laurie's witnesses included Dr. Bernard Douglas, the children's pediatrician, who testified that he has worked with Laurie at the Holdrege hospital and has seen her when she brought the children in for appointments. He said he considered her one of the better respiratory therapists and had no problems with her truth or veracity.

The director of respiratory care at the Holdrege hospital, Steven Davis, testified that he tries to coordinate Laurie's schedule with that of her mother, who is a nurse at the hospital, so that they do not overlap. Davis testified that he works with Laurie for about 6 hours a week and that Laurie has a satisfactory job performance, with no drug or alcohol problems, and he has no knowledge of any trouble with her truth and veracity. He said that Laurie has taken the licensing exam for respiratory therapy, but that the results were not released because she did not finish the schooling in the correct amount of time.

Jeannie Blausey, a certified professional counselor who has had 13 sessions with Laurie, testified that she learned of Laurie's accusations against her father from James and that Laurie had not mentioned them to Blausey. She suggested Laurie needed regular therapy and should attend Al-Anon or Adult Children of Alcoholics meetings and that she anticipates a long relationship with Laurie.

A number of friends testified that James is an honest, caring person who has a positive relationship with his children. Gardels said Laurie once told James that she was tired of the children and that James should take them. After the separation, Gardels often accompanied James to pick up the children for visitation, and he said Laurie made it a condition of visitation that James not allow the children to see either

grandfather. Gardels said the children were present when Laurie accused her father of sexual abuse.

Rene Saldivar, who has known James for 17 years and has taken trips with James and Laurie and his wife, said that Tyler seems happier when he is with his father than with his mother. He said that Laurie has an up-and-down personality and that once when James was 10 minutes late getting home when the Saldivars and Laurie were preparing to leave for a camping trip, Laurie said she was not going. She later decided to go, but punished James by making him do the packing. Saldivar said that Laurie is verbally abusive toward James and that James responds by doing what he is told. Laurie is a screamer when it comes to discipline, and Tyler seems nervous and edgy around her, Saldivar said.

Grace Adam testified that at a birthday party, Tyler looked as if he was afraid of his mother. Lush stated that Laurie is harsh with Tyler and that Tyler seems fearful of her. Terry Anderson stated that Tyler was frequently afraid of his mother, who was short tempered and always scolding. Sheri Anderson stated that Laurie was hard on Tyler and that his personality was different when around his father. She said she never knew whether to believe what Laurie told her.

After the separation, James had some difficulties in visiting his children. Laurie told him she would not let him have Tyler under the conditions in James' house, but would not explain what she meant. Laurie told James that she was willing to put Tyler in hiding and that she would go to jail for him.

James testified to a confrontation with Laurie and Laurie's mother, over Laurie's father seeing the children. Laurie's mother had accused James of being guilty of sexual abuse by letting the children see Laurie's father, had called James "dumb river rat white trash," and had said, "I'll kill you." Laurie had told James to get away from her mother or she would have her "uncle send some men down in seconds flat." Laurie apparently has said her uncle had connections with the Mafia in Las Vegas.

James said that Laurie's mother also had difficulty telling the truth and that she had claimed they had always had nice kennels, while Laurie's father said they never even owned a doghouse. James said that he is concerned that Laurie is trying

to alienate the children and that during the separation she did not let him call the children on their birthdays, but instead hung up or put Jillian to bed before he could talk to her.

STANDARDS OF REVIEW

> " '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.' "

LaBenz v. LaBenz, 237 Neb. 231, 232, 465 N.W.2d 726 (1991), quoting *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990). Our de novo review of the record results in our decision that the more stable environment for both children is with the father and that it is in the children's best interests to be placed in his sole custody.

"When the custody of minor children is involved in a dissolution proceeding, the custody is determined by the fitness of each parent and the best interests of the children." *Applegate v. Applegate*, 236 Neb. 418, 419, 461 N.W.2d 419, 420 (1990). Under Nebraska law, the inquiry into providing for the best interests of the children

> 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.

McDougall v. McDougall, 236 Neb. 873, 877, 464 N.W.2d 189, 192 (1991). We agree with the finding of the trial judge that either parent could meet the needs of these children, but we find that the attitude and stability of the mother and the emotional relationship between her and the children is questionable and that the children deserve the opportunity of the more secure environment which can be provided by the father.

CHILD CUSTODY

Thomas Lieske, the guardian ad litem, completed an investigation and report which concluded that the father is the more stable of the two parents and that he could provide a more nurturing environment. The guardian ad litem expressed concern about the apparent desire of the mother to sever relationships, and the effect that might have on visitation should she be awarded custody. The mother's past work and school history evidenced a lack of ability to follow through on activities. Her tendency to fabricate or embellish could have an effect on the children and their ability to perceive reality, Lieske noted. He said that Tyler had stated that he missed his sister during the time when they were separated.

As we have previously noted, " ' " '[t]he judgment concerning the custody of children is necessarily quite subjective in nature. Many factors may be considered in light of the particular circumstances of each individual case.' " ' " *Moeller v. Moeller*, 215 Neb. 360, 362, 338 N.W.2d 749, 751 (1983).

A psychological evaluation of both parties was completed by Dr. John Meidlinger, a clinical psychologist, who recommended James as the parent more likely to provide emotional and physical stability and to be able to cooperate with visitation schedules.

Evidence was presented which indicates that James has taken a major role in child rearing and housekeeping since the children were born. While Laurie stated that she did most of the work around the house, James testified that he took part in all aspects of child care, including changing diapers, bathing, and feeding, as well as doing household chores, including doing the laundry, vacuuming, dusting, kitchen and bathroom cleaning,

and cooking. His testimony was supported by affidavits and testimony at trial which indicated that James quit his farming operation at 6 p.m. in order to help at home. The day-care operator testified that James regularly brought the children and supplies for their needs to day care and that he always responded if she called when the children were sick or had an emergency. Laurie provided no evidence other than her own testimony to dispute any of this information.

The guardian ad litem also expressed concerns about Laurie's alienation of family. James testified that she refused to attend Ziebarth family gatherings. When Laurie and James first separated, Laurie made it a condition for James' visitation that he not allow his father to see the children. The trial court issued an order during the pendency of the action stating that all grandparents were allowed visitation.

Laurie's relationships with her father and her sister also indicate difficulties in sustaining family ties. Her allegations against her father were raised only after she was separated from James, and the allegations were rebutted by her sister, who testified that she received a threatening letter from Laurie. We make no finding as to the credibility of the charges, but note that it is disturbing that the charges were made and were made in the presence of the children. There was also a great deal of evidence from friends who had severed ties with James and Laurie because of difficulties in getting along with Laurie.

We have stated that it is sound public policy to keep children together when a marriage is dissolved. See, *Boroff v. Boroff*, 197 Neb. 641, 250 N.W.2d 613 (1977); *Richey v. Richey*, 216 Neb. 565, 344 N.W.2d 642 (1984); *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990). The trial court apparently split custody based on testimony concerning the bonding of the children and accepted the statements that Tyler had a better relationship with his father. The court stated that the split custody, which was initially a temporary order, appeared to be working. However, there is evidence of difficulties with visitation during the separation. James and Gardels both testified that Laurie and her mother insisted on searching the vehicle when they arrived to pick up Tyler. We have already noted the problems created by Laurie's placing conditions on visitation concerning the

grandparents. James also had difficulty in talking to the children on their birthdays and was apparently not always allowed to say hello to Jillian when he picked up Tyler.

We find that it is in the best interests of Tyler and Jillian that they be allowed to remain together in the custody of the parent most able to provide a stable, nurturing environment. That parent is James, and we reverse the district court's holding awarding split custody. We remand for the district court to revise the visitation schedule accordingly.

CHILD SUPPORT

James also assigns as error the trial court's requirement that he pay $200 per month child support. Because we reverse the district court's order and award custody of both children to James, we also reverse the court's order regarding child support. Because the decree did not make clear how the child support determination was calculated, we remand to the district court to recalculate any possible child support based on the new custody award.

PROPERTY DIVISION

Also assigned as error is the trial court's determination that the net marital estate was valued at $76,755. James asserts that the court abused its discretion by not taking into consideration and setting aside his 11-percent interest in the family farm corporation, Ziebarth Farms, Inc. We do not find the division of property to be an abuse of discretion, and the property division portion of the decree is affirmed.

ATTORNEY FEES

The last assignment of error asserted by the appellant is the court's order that James pay $5,000 toward attorney fees for Laurie. " 'An award of an attorney fee in a marital dissolution proceeding is a matter within the trial court's discretion, is reviewed de novo on the record, and will be affirmed on appeal in the absence of abuse of discretion.' " *Huffman v. Huffman*, 236 Neb. 101, 109, 459 N.W.2d 215, 221 (1990). In awarding attorney fees in a dissolution action we consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time

required for preparation and presentation of the case, the novelty and difficulty of questions, and the customary charges for similar services. *Murrell v. Murrell*, 232 Neb. 247, 440 N.W.2d 237 (1989); *Hamm v. Hamm*, 228 Neb. 294, 422 N.W.2d 336 (1988). The trial court may also consider the earning capacity of the parties and the general equities of the situation. *Smith v. Smith*, 222 Neb. 752, 386 N.W.2d 873 (1986); *Kosnopfl v. Kosnopfl*, 206 Neb. 524, 293 N.W.2d 854 (1980).

At the time of the trial, Laurie was working only part time, earning about $1,300 per month. James' potential earning capacity from his farm is far greater, and we find that the attorney fee is reasonable in light of the time involved in preparing this case and the general equities. Although the trial court did not include in the record the basis for the award, we do not find that the court abused its discretion, and we affirm the award of an attorney fee.

CROSS-APPEAL

We have dealt with the first assignment of error in the cross-appeal concerning custody. We next address the cross-appellant's argument that the trial court erred in failing to award her alimony. Laurie asks for $500 per month alimony for 120 months. On appeal, an alimony award will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. *Murrell, supra*. The ultimate test in determining the correctness in the amount of the alimony is the reasonableness in light of the facts of each case. *Murrell, supra*. The factors determining the reasonableness of an award of alimony include the duration of the marriage, the history of the contributions to the marriage by each party, the ability of the supported party to engage in gainful employment, and the income and earning capacity of each party, as well as the general equities of the situation. *Gale v. Gale*, 224 Neb. 803, 401 N.W.2d 501 (1987).

> In determining whether alimony should be awarded . . . [t]he trial court should consider what effect, if any, the marriage has had upon the ability of the supported spouse, if any, to secure employment in the future, and the

> earning capacity of the supporting spouse. . . .
>
> Alimony is not to be used simply to equalize the income of the parties or to punish one of the parties. It may be used to assist the other party during a reasonable time to bridge that period of unavailability for employment or during that period to get proper training for employment.

Murrell, supra at 252-53, 440 N.W.2d at 241; *Kimbrough v. Kimbrough*, 228 Neb. 358, 362, 422 N.W.2d 556 (1988).

The trial court found that Laurie did not interrupt a personal career or forgo educational opportunities. We agree. Laurie did not provide evidence to establish a disparity in the income or the potential income between the parties, nor is there evidence that the marriage had any effect upon her ability to obtain training or a job. In fact, the evidence indicates that she had many opportunities to complete her education, but that she failed to take advantage of or to follow through on those opportunities. Her failure to obtain certification in her chosen field of respiratory therapy is hers alone. She did not participate in the farming operation, and at the time of trial she was earning approximately $1,300 per month working part time at Phelps Memorial Health Center in Holdrege. We are not persuaded that the general equities of the situation require that she be awarded alimony. The trial court was correct in this determination, and the cross-appeal is dismissed.

CONCLUSION

Although it is never an easy task to determine the custody of minor children in a dissolution action, we believe that the children in this instance must be given the opportunity to develop normally and to grow up in a stable, nurturing environment. We find that the father, James, is more able to provide this environment, and it is in the children's best interests to be placed with him. We reverse the finding of the district court dividing custody and remand for a determination of visitation. We also remand for a recalculation of child support. We affirm the court's property division and its award of an attorney fee, as well as the court's determination not to award alimony. The cross-appeal has no merit and it is dismissed.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLANT, V. DEANDRA A. BUTLER, APPELLEE.

471 N.W.2d 447

Filed July 5, 1991. No. 91-175.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Reversed and remanded for further proceedings.

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

L. William Kelly, of Kelly & Schroeder, for appellee.

HASTINGS, C.J.

This is an application for review before one judge of this court of an order of the district court suppressing certain evidence seized as a result of the search of defendant's vehicle by an officer of the Nebraska State Patrol. This proceeding is brought under the provisions of Neb. Rev. Stat. § 29-824 (Reissue 1989).

On October 7, 1990, an automobile being driven by Roger Collins on Interstate 80 in York County was stopped by Nebraska State Patrol Trooper James Brady, who is also a "state deputy sheriff," after being clocked at 86 miles per hour. Following the stop, the driver presented a California driver's license, portions of which had been obliterated; a California identification card; and a Social Security card which bore a different Social Security number than the identification card.

After having learned that the automobile was registered to the defendant, Deandra A. Butler, who was a passenger in the car, the trooper was provided by Butler with identification in the form of a Michigan driver's license.

Collins was advised by the trooper of the violation for speeding. An "NCIC check" revealed that Collins had a valid California driver's license, but that his driving privileges had been suspended in Michigan. The check also revealed that Butler's driving privileges had been suspended in Michigan.

Collins was then asked to step from the automobile, and he was arrested and handcuffed for having possession of an altered driver's license and for driving while his driving

privileges had been suspended in Michigan.

The trooper then asked Butler to exit the car, and he was searched and handcuffed by the trooper. Butler was advised that he was not under arrest, but was being detained for security purposes.

In the meantime, according to the trooper, Deputy Perry arrived at the scene. Brady made a cursory search of the vehicle to check for weapons or obvious contraband. Nothing was seized by the trooper.

Because both occupants of the vehicle, which was parked on or alongside the highway, were not legally capable of driving, a wrecker was ordered to tow in the vehicle. The vehicle was towed to the business place of the wrecking service, where it was inventoried by Brady and Trooper Reggie Ayers.

According to Brady, in line with patrol policy, an inventory of vehicle form, NSP 710, was used. The officers went through the vehicle specifically to pick out the valuable items to make sure that they were accounted for and that they were there when the property was to be picked up by the owners.

The passenger compartment and the trunk were inventoried. The inventory form revealed that in the passenger compartment were such items as clothing; stereo tapes; toilet articles; $400 in cash; a brown wallet with the identification of the defendant in it, which wallet contained a folded paper containing a white powdery substance suspected to be cocaine; and, on the floor in the back seat, a plastic shopping bag within which was a smaller white paper bag containing a small amount of suspected marijuana. The powdery substance was field tested and was positive for cocaine.

The inventory of the trunk disclosed bundles of cash, wrapped in rubberbands, "sitting loose in the trunk" and totaling $3,100, and a red mechanic's oil cloth containing a Smith and Wesson .38-caliber snub-nosed revolver loaded with six rounds of ammunition. An NCIC check revealed that the revolver had been stolen in 1973 from a man in Elkhart City, Indiana.

Trooper Brady testified during cross-examination that he had "looked inside" the trunk of the automobile at the scene of the stop and had seen the large amount of cash. According to

the trooper, although he might not have considered the cash to be contraband, "[i]t raised my suspicions."

It is apparent that it was those items of contraband found in the inventory search which were ordered suppressed by the order of the district court.

The defendant does not question the legality of the arrest of Collins and concedes that such arrest authorized a search of the vehicle. He admitted that during argument to the trial court. The law supports that conclusion. However, it is the second search, at the place to which the vehicle was towed, to which he objects.

This appeal may be disposed of on the basis that the contraband was revealed and seized as the result of an inventory search. In *Florida v. Wells*, ____ U.S. ____, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990), although the Court held in that instance that the search was insufficiently regulated so as to satisfy the fourth amendment, the search was invalid because the Florida police had no policy with regard to opening closed containers during inventory searches. Although there is no issue as to opening closed containers in this case, the same rationale applies in conducting the search in the first place.

Excerpts from the Nebraska State Patrol policy manual provide as follows:

> VIII. Inventory and Storing of Vehicles
>
> A. Officers have the authority to tow-in or impound a motor vehicle when:
>
> 1. It is an obstruction or a traffic hazard.
>
> . . . .
>
> 4. The person driving or in control of such vehicle is arrested and taken into custody and the vehicle is not lawfully parked at the subject's residence.
>
> 5. An arrested driver who is not under the influence of alcohol or a controlled substance or is not otherwise impaired should be allowed to provide for lawful and responsible disposition of the vehicle, provided, such disposition does not delay the officer in the performance of his/her duties.
>
> B. When any vehicle is towed in, regardless of the reason, by an officer of the Nebraska State Patrol, that officer . . . shall also inventory the contents of that vehicle

on the inventory (NSP 710).

A fair reading of the testimony in this situation would seem to fit the facts within the inventory exception to the rule prohibiting warrantless searches.

In this case, the automobile was parked on or alongside the highway, which fact in and of itself would suggest that it constituted a traffic hazard under provision VIIIA1. The person driving the automobile was arrested and the vehicle was not lawfully parked at "the subject's residence," as provided for in VIIIA4. It is possible to read VIIIA5 in such a manner that one could determine that the driver, by not having lawful driving privileges in Nebraska because of his suspension in Michigan, was "otherwise impaired" so that he need not have been "allowed to provide for lawful and responsible disposition of the vehicle . . . ." Nevertheless, there is nothing in the record that such driver, or the owner for that matter, sought to provide for such disposition and was turned down.

Therefore, on the face of it, the facts fit the formal policy of the Nebraska State Patrol. Additionally, that same policy requires that when any vehicle is towed in, the officer shall inventory the contents of that vehicle on form NSP 710.

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. Following standard police procedure, the police inventoried the contents of the automobile and found and seized certain contraband. The Supreme 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 Supreme Court cited with approval the following language from *United States v. Gravitt*, 484 F.2d 375 (5th Cir. 1973), *cert. denied* 414 U.S. 1135, 94 S. Ct. 879, 38 L. Ed. 2d 761 (1974): " '[W]hen the police take custody of any sort of container [such as] an automobile . . . it is reasonable to search the container to itemize the property to be held by the police. [This reflects] the underlying principle that the fourth amendment proscribes only *unreasonable* searches.' " (Emphasis in original.) 428 U.S. at 371.

The Court went on to say: "The Vermillion police were

indisputably engaged in a caretaking search of a lawfully impounded automobile. . . . As in *Cady* [*v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973)], there is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive." 428 U.S. at 375-76.

Butler contends there is a "one search only" rule which has been fashioned by the U.S. Supreme Court. This is not correct. In *Florida v. Meyers*, 466 U.S. 380, 104 S. Ct. 1852, 80 L. Ed. 2d 381 (1984), the Court reversed a ruling of the Florida District Court of Appeal which had ordered evidence suppressed which had been seized in an inventory search conducted some 8 hours after an initial search as a part of an arrest. The Supreme Court said:

> The District Court of Appeal either misunderstood or ignored our prior rulings with respect to the constitutionality of the warrantless search of an impounded automobile. In *Michigan v. Thomas*, 458 U.S. 259 [102 S. Ct. 3079, 73 L. Ed. 2d 750] (1982), we upheld a warrantless search of an automobile even though the automobile was in police custody and even though a prior inventory search had already been made. That ruling controls the disposition of this case. In *Thomas*, we expressly rejected the argument accepted by the District Court of Appeal in the present case, noting that the search upheld in *Chambers* [*v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970),] was conducted "after [the automobile was] impounded and [was] in police custody" and emphasizing that "the justification to conduct such a warrantless search does not vanish once the car has been immobilized." 458 U.S., at 261. The District Court of Appeal's ruling that the subsequent search in this case was invalid because the car had been impounded is clearly inconsistent with *Thomas* and *Chambers*.

466 U.S. at 382.

The judgment of the district court in sustaining defendant's motion to suppress is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MAPCO AMMONIA PIPELINE, INC., APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE. MID-AMERICA PIPELINE COMPANY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE. TRAILBLAZER PIPELINE COMPANY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE. NATURAL GAS PIPELINE COMPANY OF AMERICA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

471 N.W.2d 734

Filed July 10, 1991. Nos. 90-871, 90-872, 90-873, 90-874.

1. **State Equalization Board: Taxation: Valuation: Appeal and Error.** In an application before the State Board of Equalization and Assessment, a taxpayer may employ any factual or legal argument in support of his, her, or its position requesting equalization, subject to the final determination of questions of law on a de novo basis by the Supreme Court on appeal.
2. **Constitutional Law: Legislature: Statutes: Presumptions.** In every constitutional challenge, it is presumed that all acts of the Legislature are constitutional, and all reasonable doubts are resolved in favor of constitutionality.
3. **Constitutional Law: Legislature: Taxation.** Although the Legislature has broad power to define property for tax purposes, its power to define is limited, since the Legislature cannot abrogate or contradict an express constitutional provision and the legislative definition must be reasonable, and cannot be arbitrary or unfounded.
4. **Constitutional Law: Legislature.** The Legislature's power of definition may not be employed to nullify or circumvent the provisions of the Nebraska Constitution.
5. **Constitutional Law: Taxation: Valuation: Property: Words and Phrases.** Personal property and real property are both "tangible property" under Nebraska law and must be equalized and taxed uniformly pursuant to Neb. Const. art. VIII, § 1.
6. **Constitutional Law: Statutes: Special Legislation.** A legislative act can violate Neb. Const. art. III, § 18, as special legislation (1) by creating a totally arbitrary and unreasonable method of classification or (2) by creating a permanently closed class.
7. **Taxation: Valuation: Words and Phrases.** Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.
8. **Taxation: Valuation.** The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.
9. _____: _____. The process of equalization cannot be applied to property that

is not taxed.

10. **Constitutional Law: Federal Acts: States.** U.S. Const. art. VI, cl. 2, the supremacy clause, binds the several states; subordinates state law, whether constitutional, statutory, or judicially enunciated, to a congressional enactment; and supersedes state law which conflicts with federal law.
11. **Courts: Jurisdiction: Taxation.** Courts do not have jurisdiction to grant tax exemptions.
12. **Taxation: Discrimination: Federal Acts.** Tax exemptions are to be considered in determining whether there has been discriminatory treatment under § 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976.
13. **Case Overruled.** *Stahmer v. State*, 192 Neb. 63, 218 N.W.2d 893 (1974), is overruled.
14. **Constitutional Law: Statutes: Appeal and Error.** Although the parties ordinarily must raise constitutional issues before they will be considered on appeal, where the invalidity of the act is plain, and such a determination is necessary to a reasonable and sensible disposition of the issues presented, we are required by necessity to notice the plain error in the premise on which the case was tried.
15. **State Equalization Board: Taxation: Valuation: Constitutional Law.** If the State Board of Equalization and Assessment arbitrarily undervalues a particular class of property so as to make another class of property disproportionately higher, or achieves the same result because of legislative action, complaining taxpayers are entitled to relief pursuant to Neb. Const. art. VIII, § 1.
16. **Constitutional Law: Taxation.** The property tax exemptions enumerated in Neb. Rev. Stat. § 77-202(6) through (9) (Reissue 1990) are unconstitutional under Neb. Const. art. VIII, § 1.

Appeal from the State Board of Equalization and Assessment. Reversed and remanded for further proceedings.

William R. Johnson, of Kennedy, Holland, DeLacy & Svoboda; Bruce J. McWhirter, of Ross & Hardies; and Charlene H. Sinclair for appellants.

Don Stenberg, Attorney General, and L. Jay Bartel for appellee.

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

PER CURIAM.

These are appeals from the findings and order of the State Board of Equalization and Assessment (State Board) dated August 15, 1990, denying claims for property tax relief submitted by various centrally assessed and locally assessed claimants. Pursuant to our order of September 17, 1990, the

parties filed a "case stated" in accordance with Neb. Ct. R. of Prac. 5L (rev. 1989), separately setting forth the rulings of the State Board complained of by the appellants and the exceptions and contentions of the parties with respect to those issues.

The appellants are public service entities within the meaning of Neb. Rev. Stat. § 77-801.01 (Reissue 1990) and are centrally assessed for purposes of personal property taxation. Due to an identity of issues and counsel, we have consolidated the appeals of MAPCO Ammonia Pipeline, Inc. (case No. 90-871), Mid-America Pipeline Company (case No. 90-872), Trailblazer Pipeline Company (case No. 90-873), and Natural Gas Pipeline Company of America (case No. 90-874) for disposition.

Following our decision in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), *cert. denied* ____ U.S. ____, 110 S. Ct. 1130, 107 L. Ed. 2d 1036 (1990), but prior to our decision in *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991), the appellants appeared before the State Board requesting equalization of their real and personal property (1) with railroad rolling stock, which had been exempted from taxation by the passage of L.B. 7 on November 17, 1989 (codified at Neb. Rev. Stat. § 77-202(11) (Reissue 1990)), and (2) with center pivot and other irrigation systems used for agricultural purposes and equipment and machinery used for business purposes that had been excluded from the definition of real property by L.B. 1, also passed November 17, 1989 (now codified at Neb. Rev. Stat. § 77-103 (Reissue 1990)).

I

The record shows that the State Board convened on August 8, 1990, for the purpose of determining the value of the appellants' property for 1990 and to equalize such valuations for tax purposes within the state. The evidence presented at the August 8 hearing consisted of essentially the same record as that considered by the State Board in 1988 and 1989. Dennis Donner, a manager in the property tax division of the Nebraska Department of Revenue, testified he was of the opinion that 75 percent of commercial and industrial personal property remained exempt from taxation in Nebraska in tax year 1990.

In light of the passage of L.B. 7 on November 17, 1989, which exempted railroad rolling stock from taxation, the State Tax Commissioner did not value, assess, or tax any rolling stock of railroad or carline companies operating in Nebraska. The State Board also considered issues related to L.B. 1, which changed the statutory definition of "fixture." The appellants contended that L.B. 7 and L.B. 1 were unconstitutional.

During the August 8 hearing, the State Board declined to grant the relief sought by the appellants and set the statewide equalization rate at 92.13 percent of actual value. The State Tax Commissioner subsequently adjusted the total taxable value of the appellants' property and certified those values to the various counties using the 92.13-percent figure as determined by the State Board.

In its findings and order of August 15, 1990, the State Board described the appellants' requests as "purported claims for 'equalization' . . . which are, in fact, based on a request of the State Board to declare unconstitutional [certain] acts of the Nebraska Legislature . . . ." The State Board then found that it did not have jurisdiction to consider claims for equalization of property within a class of taxable property to property which is separately classified and exempted from taxation, and that the constitutionality of legislative acts granting exemptions from property taxation may not be raised before and decided by the State Board.

Although the State Board found it did not have subject matter jurisdiction to hear and decide various claims made based on the alleged unconstitutionality of certain legislative acts, several issues of this nature were presented to the State Board. These issues included the constitutionality of L.B. 7, pertaining to the classification of railroad rolling stock as tax exempt, and L.B. 1, which amended the statutory definition of "fixture."

We held in *Natural Gas Pipeline Co., supra* at 371, 466 N.W.2d at 470, that the portion of L.B. 7 exempting railroad rolling stock from taxation was unconstitutional because the Legislature had

> no reasonable basis for treating railroads differently from other common carriers; therefore, the distinction, as a

> classification and basis for an exemption from personal property tax, reflected in L.B. 7, result[ed] from special legislation, prohibited by Neb. Const. art. III, § 18, and violat[ed] the uniformity clause of Neb. Const. art. VIII, § 1.

With respect to L.B. 1, the State Board found that

> the Legislature has broad powers to define the nature of property for tax purposes, so long as the definitions established are reasonable. . . . [T]he Board further finds that the evidence presented shows that the valuation of irrigated agricultural land (real property), is subject to taxation, and reflects the value of the annexed portion of the irrigation system; and that the sprinkler arm and power unit used in center pivot irrigation (or the piping and power unit used in gravity irrigation) are not annexed to land (real property) and are thus easily and readily removable without injury to the real property. Therefore, these particular items constitute personal property which is reasonably excepted from the definition of real property under LB 1. This personal property is classified separately and exempted from taxation pursuant to Section 77-202(6) [(Reissue 1990)], as agricultural income-producing machinery and equipment, a classification of exempt personal property upheld as constitutional in Stahmer v. State, 192 Neb. 63, 218 N.W.2d 893 (1974). Accordingly, the State Board finds claimants [sic] contentions that LB 1 unconstitutionally exempts certain "real" property (*i.e.*, center pivot irrigation equipment) to be both contrary to the evidence and erroneous as a matter of law.

In their assignments of error, the appellants contend the State Board erred (1) in holding that it had no statutory or constitutional authority or jurisdiction to rule on the appellants' requests for relief, (2) in holding that L.B. 7 was constitutional, (3) in applying L.B. 1 and finding L.B. 1 constitutional, and (4) in failing to grant the appellants' requests for relief based on the absence of uniformity and proportionality of taxation, in violation of Neb. Const. art. VIII, § 1. The appellants further contend the taxation of their

property at 92.13 percent of actual value is in violation of the equal protection clause of U.S. Const. amend. XIV.

As the State Board now concedes, it did have jurisdiction to consider the appellants' requests for relief in these cases. In *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 815, 443 N.W.2d 249, 255 (1989), we held that "in an application before the [State] Board, a taxpayer may employ any factual or legal argument in support of his, her, or its position requesting equalization, subject to the final determination of questions of law on a de novo basis by this court on appeal."

The State Board also agrees that its finding that the portion of L.B. 7 exempting railroad rolling stock from taxation was constitutional was in error in view of our holding in *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991), that the portion of L.B. 7 exempting railroad rolling stock from taxation was unconstitutional.

The remaining issues in these appeals, therefore, involve (1) the constitutionality of L.B. 1 and (2) the validity of the appellants' arguments that the taxation of their personal property under Nebraska law violates Neb. Const. art. VIII, § 1, and the equal protection clause of U.S. Const. amend. XIV.

II

Section 77-103, as amended by L.B. 1, provides:

> The terms real property, real estate, and lands shall *mean* city and village lots and all other lands, and all buildings, fixtures, improvements, cabin trailers or mobile homes which shall have been permanently attached to the real estate upon which they are situated, mines, minerals, quarries, mineral springs and wells, oil and gas wells, overriding royalty interests and production payments with respect to oil or gas leases, units of beneficial interest in trusts, the corpus of which includes any of the foregoing, and privileges pertaining thereto, *and pipelines, railroad track structures, electrical and telecommunication poles, towers, lines, and all items actually annexed to such property, and any interest*

pertaining to the real property or real estate.

The sole test for determining whether an item is a fixture or an improvement shall be whether there is actual annexation to the real property or real estate or something appurtenant thereto. Unless specifically enumerated in this section, real property and real estate shall not include machinery and equipment used for business purposes or center pivot or other irrigation systems of a type used for agricultural or horticultural purposes.

(Amendatory language emphasized.)

The appellants contend L.B. 1 is unconstitutional (1) as an abuse of the Legislature's power to define, in that it tends to nullify certain provisions of Neb. Const. art. VIII, §§ 1 and 2, and (2) as it creates an arbitrary classification, in violation of Neb. Const. art. III, § 18. In every constitutional challenge, it is presumed that all acts of the Legislature are constitutional, and all reasonable doubts are resolved in favor of constitutionality. *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989). Bearing this standard in mind, we conclude that L.B. 1 is unconstitutional in its entirety.

As we noted in *Natural Gas Pipeline Co., supra*, L.B. 1 changed the statutory definition of "fixture," apparently to avoid the characterization of certain pipeline property as personal property rather than real estate, thus increasing the proportion of pipeline property presumably taxable as real estate under *Northern Natural Gas Co. v. State Bd. of Equal., supra*. (We note that in *Northern Natural Gas Co.*, the taxpayers did not ask for any relief regarding real estate.)

Although the Legislature has broad power to define property for tax purposes, its power to define is limited, since (1) the Legislature cannot abrogate or contradict an express constitutional provision and (2) the legislative definition must be reasonable, and cannot be arbitrary or unfounded. See, *State ex rel. Meyer v. Peters*, 191 Neb. 330, 215 N.W.2d 520 (1974); *Moeller, McPherrin & Judd v. Smith*, 127 Neb. 424, 255 N.W. 551 (1934).

The Legislature's power of definition may not be employed to nullify or circumvent the provisions of the Nebraska Constitution. In *State ex rel. Meyer v. Peters, supra*, we

considered legislation purporting to exempt "household goods" from taxation pursuant to Neb. Const. art. VIII, § 2, which provided: "Household goods and personal effects, as defined by law, may be exempted from taxation in whole or in part. . . ." The definition of "household goods" in the taxing statute at issue in *Peters*, however, included "major appliances either attached or detached to real property." See § 77-202(1)(d) (Reissue 1971). In other words, the statute purported to exempt property which would, under the common law of fixtures, be considered real estate. In holding that the Legislature could not constitutionally exempt such fixtures from taxation, we recognized the difficulty inherent in granting the Legislature unbridled definitional powers:

> Any definitional powers given to the Legislature are prefixed and limited. The power to define household goods and personal effects necessarily is limited to those articles which ordinarily would be understood to be embraced within that term. Certainly, it cannot be interpreted to give the Legislature power to include air-conditioning systems, furnaces, automobiles, or real estate within the term "household goods and personal effects." Since there must be a limit to such powers, it is reasonable to find the common law concepts serve as guides.

State ex rel. Meyer v. Peters, supra at 334, 215 N.W.2d at 524.

Similarly, in *Moeller, McPherrin & Judd v. Smith, supra*, the Legislature attempted to tax various items of intangible personal property as tangible personal property merely by defining them as such. This court struck down the attempted redefinition, observing:

> Section 77-104, Comp. St. 1929, which House Roll No. 9 purports to amend, provided that tangible property included all personal property possessing a physical existence, but excluding money, and then defined intangible property as all other personal property, including money. Section 2 of House Roll No. 9 attempts to amend this by providing that tangible property shall consist of two classes, and that class 1 shall be all personal property possessing a physical existence, and then

> provides that class 2 of tangible property shall include stocks, notes, securities of foreign countries, accounts, judgments, liens of any kind, bonds, and all demands for labor, or other valuable thing, due or to become due. This introduces a new query, which is: May a legislature, under the guise of defining a word, do so with a definition which contravenes our Constitution, and which is not true or legal in fact? . . .
>
> Can the legislature define and designate as tangible that which is, in fact and in truth, intangible? It may be admitted that the legislature has power to define words used by it, but is this an unlimited power, or is it subject to a reasonable construction? . . . In our opinion, there is a limit to the legislature's power to nullify and circumvent constitutional provisions by putting an arbitrary, but improper and unfounded, definition upon a certain word.

Moeller, McPherrin & Judd v. Smith, supra at 432-33, 255 N.W. at 555-56.

The definition found in § 77-103, as amended, tends to nullify or circumvent a provision of the Nebraska Constitution, in that Neb. Const. art. VIII, § 2, provides, "The Legislature may classify *personal property* in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation." (Emphasis supplied.) In this case, the Legislature has not so much "classified" certain items of personal property as it has arbitrarily declared the personal property owned by an unfavored group of taxpayers to be "fixtures," so that it is presumably taxable as real estate under our decision in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989). Here, the Legislature has attempted to define and designate as a "fixture" that which is, in fact and in truth, personal property and has gone beyond the bounds of its legitimate powers under our Constitution in doing so.

In any event, personal property and real property are both "tangible property" under Nebraska law and must be equalized and taxed uniformly pursuant to Neb. Const. art. VIII, § 1. See, *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991); *Banner County v. State Board of*

Equal., 226 Neb. 236, 411 N.W.2d 35 (1987); *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984); *Grainger Brothers Co. v. Board of Equalization*, 180 Neb. 571, 144 N.W.2d 161 (1966).

Neb. Const. art. III, § 18, provides that "where a general law can be made applicable, no special law shall be enacted." A legislative act can violate Neb. Const. art. III, § 18, as special legislation (1) by creating a totally arbitrary and unreasonable method of classification or (2) by creating a permanently closed class. *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991). The classification set forth in § 77-103, as amended, also is unconstitutional under article III, § 18, because it is not based on a real and substantial difference between "machinery and equipment used for business purposes or center pivot or other irrigation systems of a type used for agricultural or horticultural purposes" and similar machinery and equipment used for other purposes.

In *State ex rel. Douglas v. Marsh*, 207 Neb. 598, 608-09, 300 N.W.2d 181, 187 (1980), we held:

> While it is true that the Legislature may classify where reasonable . . . it may not do so in an arbitrary manner. In *City of Scottsbluff v. Tiemann*, [185 Neb. 256, 266, 175 N.W.2d 74, 81 (1970)], we specifically said: "It is competent for the Legislature to classify objects of legislation and if the classification is reasonable and not arbitrary, it is a legitimate exercise of legislative power. [Citation omitted.] The classification must rest upon real differences in situation and circumstances surrounding members of the class relative to the subject of the legislation which renders appropriate its enactment. [Citations omitted.] The power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation. [Citation omitted.] A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would

> naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. *Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.* [Citations omitted.]" (Emphasis in original.)

See, also, *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989).

In § 77-103, as amended by L.B. 1, the classification of agricultural and business machinery is based solely on use. In *State ex rel. Meyer v. McNeil*, 185 Neb. 586, 177 N.W.2d 596 (1970), this court was presented with the question of whether agricultural income-producing machinery and equipment used by any business which was required by law to report taxable income pursuant to the Internal Revenue Code constituted a reasonable classification for purposes of taxation. In that case, the Legislature attempted to separately classify for taxation purposes certain agricultural income-producing machinery and equipment. This method would have provided a different value for personal property specified in the act from that applied to all other tangible property in the same class.

In *McNeil, supra*, we observed that the establishment of two methods of valuation of property in the same class for taxation purposes results in a want of uniformity, contrary to Neb. Const. art. VIII, § 1. We held:

> We necessarily find that the purported classification of property for tax purposes contained in the act does not rest on reasons of public policy, or any substantial difference of situation or circumstance that naturally suggest the justice or expediency of diverse legislation with respect to the objects classified. It is therefore an attempt to create a classification within a classification without any reasonable grounds for so doing other than to secure advantages for those falling within the purview of the act. It is violative of the uniformity provisions of Article VIII, section 1, of the Constitution. It is in effect special legislation in violation of Article III, section 18, of the Constitution.

McNeil, supra at 589-90, 177 N.W.2d at 599.

In the present case, "machinery and equipment used for business purposes or center pivot or other irrigation systems of a type used for agricultural or horticultural purposes" are tangible property which must be taxed uniformly both as to valuation and rate of tax. As we observed in *McNeil, supra* at 588-89, 177 N.W.2d at 598:

> There can be no difference in the method of determining valuation or the rate of tax to be imposed unless the separate classification rests on some reason of public policy, some substantial difference of situation or circumstance that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.

When the Legislature attempted to remove pipelines from the category of personal property after our decision in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), it apparently realized that its new test to determine what is real property would include center pivot or other irrigation systems used for agriculture or horticulture. The Legislature excluded irrigation systems used for these purposes from the definition of "real property," leaving them exempt "personal property" under § 77-202(6) (Reissue 1990) as "[a]gricultural income-producing machinery and equipment." The classification is not based on a real and substantial difference between "machinery and equipment used for business purposes or center pivot or other irrigation systems of a type used for agricultural or horticultural purposes" and the same machinery and equipment used for other purposes. The legislation is, therefore, violative of Neb. Const. art. III, § 18.

III

Since both L.B. 1 and L.B. 7 are unconstitutional, we make four observations: (1) The ratio of "real" to "personal" pipeline property remains essentially unchanged since our decision in *Northern Natural Gas Co. v. State Bd. of Equal., supra*; (2) personal property and real property are both "tangible property" under Nebraska law and must be equalized and taxed uniformly pursuant to Neb. Const. art. VIII, § 1; (3)

the State Board erred in failing to assess or tax the rolling stock of railroad or carline companies operating in Nebraska in 1990; and (4) the appellants are entitled to the same tax treatment as the railroads, carline companies, and other centrally assessed taxpayers pursuant to Neb. Const. art. VIII, § 1, and our decisions in *Northern Natural Gas Co., supra*, and *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991).

To what relief are these taxpayers entitled? The appellants contend they should be "equalized" at zero percent for 1990 because the Tax Commissioner did not value, assess, or tax any rolling stock of railroad or carline companies operating in Nebraska in 1990. We conclude that this proposed remedy is inappropriate.

Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. See, *Yellowstone Pipe Line Co. v. State Bd. Equal.*, 138 Mont. 603, 358 P.2d 55 (1960), *cert. denied* 366 U.S. 917, 81 S. Ct. 1095, 6 L. Ed. 2d 241 (1961). As we said in *Natural Gas Pipeline Co., supra* at 366, 466 N.W.2d at 467, "The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax." Accord, *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 403 N.W.2d 366 (1987); *Hacker v. Howe*, 72 Neb. 385, 101 N.W. 255 (1904). The process of equalization, therefore, cannot be applied to property that is not taxed. The appellants' remedy in this case, although based on the uniformity and proportionality requirement of Neb. Const. art. VIII, § 1, does not involve "equalization." Any language in our opinion in *Northern Natural Gas Co., supra*, which might be read as implying the contrary is hereby disapproved.

IV

The issues raised in these appeals have evolved from the decision of the U.S. Court of Appeals for the Eighth Circuit in *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), which construed § 306(1)(d) of the Railroad Revitalization and

Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, 54, codified as amended at 49 U.S.C. § 11503(b)(4) (1988) (the 4-R Act). Section 306(1)(d) prohibits the states from imposing a tax on transportation property when the tax "results in discriminatory treatment of a common carrier by railroad . . . ." The federal court considered personal property tax exemptions in determining whether there was discriminatory tax treatment of railroads in the Nebraska tax structure, and ultimately concluded that when tax exemptions applied to three-fourths of the commercial and industrial property in Nebraska, and did not apply to railcars, the tax system in Nebraska discriminated against Trailer Train in violation of § 306(1)(d) of the 4-R Act. For that reason, in *Trailer Train Co.*, the State of Nebraska was enjoined from "collection of the discriminating tax," 885 F.2d at 418, but was not prohibited from levying a lawful nondiscriminatory tax on a common carrier by railroad. The record shows that the same illegally discriminatory tax system that was at issue in *Trailer Train Co., supra*, *Northern Natural Gas Co., supra*, and *Natural Gas Pipeline Co., supra*, existed during the 1990 tax year.

U.S. Const. art. VI, cl. 2, the supremacy clause, provides that the U.S. Constitution "and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The supremacy clause of the U.S. Constitution binds the several states, subordinates state law; whether constitutional, statutory, or judicially enunciated, to a congressional enactment; and supersedes state law which conflicts with federal law. *Chapman v. Union Pacific Railroad*, 237 Neb. 617, 467 N.W.2d 388 (1991); *State ex rel. Douglas v. Karnes*, 216 Neb. 750, 346 N.W.2d 231 (1984). Cf., *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989); *State Bank v. Endres*, 109 Neb. 753, 192 N.W. 322 (1923). In other words, federal law controls over state law, including state constitutional law.

Applying this fundamental principle in *Northern Natural Gas Co. v. State Bd. of Equal., supra*, we concluded that disproportionality in taxation within a class of property

required this court to

> correct [a] constitutional inequity by lowering the complaining taxpayer's valuation to such an extent so as to equalize it with other property in the state. [Citations omitted.] This being the case, no logical reason exists why the same requirement of valuation reduction should not be imposed when the disproportionality is brought about by a final judgment of the federal court [*Trailer Train Co., supra*] exempting the personal property of the railroads and car companies from the imposition of a state tax.

232 Neb. at 815, 443 N.W.2d at 256. At this point, we note that in characterizing the federal court's action as "exempting" the property in question, we recognized only that the federal court had enjoined the collection of the particular tax that had been levied that year. Although a court may have the power to enjoin the collection of a tax, as was done in *Trailer Train Co.*, courts do not have jurisdiction to grant tax exemptions. In *Northern Natural Gas Co., supra*, we did not "exempt" the appellants' personal property from taxation, but remanded the matter to the State Board, noting that the appellants' unitary value, including both real and personal property, might need to be adjusted so as to achieve uniformity and proportionality of taxation in compliance with Neb. Const. art. VIII, § 1.

The situation presented to us in *Northern Natural Gas Co., supra*, was similar to that in *State Bank v. Endres, supra*, where the plaintiff, State Bank of Omaha, sought to enjoin the collection of taxes assessed against it under the provisions of Comp. St. § 5887 (1922).

In 1921, the Legislature classified property subject to taxation into two groups—tangible and intangible. Tangible property was required to be listed at its true value and assessed upon the mill rate levy. Intangible property, with certain exceptions, was required to be listed at its true value, and a tax was levied thereon at 25 percent of the mill rate levied upon tangible property. Regarding shares of stock in banking corporations, § 5887 required the officers of banks, loan and trust companies, or investment companies to deliver to the county assessor a sworn statement showing the number of shares of stock held by each person, the names and residences

of the stockholders, and the value of the stock. It was the duty of the assessor to assess the capital stock at the same rate as tangible property was assessed in the taxing district where the principal place of business of the bank was located. As the *Endres* court noted, the Legislature plainly intended to classify certain intangible property (bank stock) and place it for taxation purposes upon the same basis as tangible property, and the shares of stock in national banks were placed on the same basis as shares of stock in state banks.

At the time *Endres* was decided, federal law provided that state taxation of shares in the national banks "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State . . . ." U.S. Rev. Stat. § 5219 (2d ed. 1878). In *Merchants' Natl. Bank v. Richmond*, 256 U.S. 635, 41 S. Ct. 619, 65 L. Ed. 1135 (1921), the Court held that "moneyed capital in the hands of individual citizens" included bonds, notes, and other evidences of indebtedness in the hands of individuals, which were shown to come materially into competition with the national banks in the loan market.

Under § 5887, therefore, the stock of state and national banks located in Nebraska was being taxed on the same basis as tangible property, while "other moneyed capital in the hands of individual citizens" was subject to the lower tax on intangible property. Accordingly, the *Endres* court found that "the method adopted by our legislature of taxing shares of stock in banks, in so far as it applies to shares of national banks, is beyond the power of the legislature," as a violation of federal law. *State Bank v. Endres*, 109 Neb. 753, 757, 192 N.W. 322, 324 (1923).

Having concluded that the national banks could not lawfully be taxed on the same basis as tangible property, the court held that under Neb. Const. art. VIII, § 1, state banks could not be taxed on the same basis as tangible property:

> While the legislature has the undoubted right to make a reasonable classification of intangible property for the purposes of taxation, it would seem clear that a classification, the effect of which would be to tax its shares of stock four times as much as the shares of a national bank, would be an unreasonable exercise of its power, and

> would be in violation of section 1, art. VIII of the Constitution, which, while giving the legislature power to classify intangible property, nevertheless requires that taxes shall be uniform as to class.
>
> . . . [S]ection 5887, Comp. St. 1922, relating to the duty of the assessor in taxing shares of stock in banks, banking associations and trust companies, in so far only as it declares "such capital stock shall thereupon be listed and assessed by him at the same rate as tangible property . . ." is invalid as to national banks, because it conflicts with the act of congress forbidding states to tax shares of a national bank at a greater rate than is assessed upon other moneyed capital, and, with national banks excluded from its operation, it is also invalid as to state banks, because the latter would then be taxed at a higher rate than national banks, and therefore the taxation would conflict with that part of the state Constitution requiring taxes to be uniform as to class.

Endres, supra at 757-58, 192 N.W. at 324.

V

In the present case, the federal courts have determined that tax exemptions are to be considered in determining whether there has been discriminatory treatment under § 306(1)(d) of the 4-R Act. See *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988). As discussed above, Nebraska's system of ad valorem taxation discriminates against railroads and carline companies, in violation of federal law, because "[w]hen the exemptions apply to three-fourths of the commercial and industrial property in Nebraska, and do not apply to rail cars, the tax system in Nebraska discriminates against [owners of rolling stock] and violates § 306(1)(d) of the 4-R Act." 885 F.2d at 418. The record before us shows that 75 percent of commercial and industrial personal property remains statutorily exempt from taxation.

As the State Board observes in its brief, the nontaxation of railroad rolling stock, which has given rise to the plethora of equalization claims presented before the State Board and this court in recent years, has resulted from the enforcement of the

antidiscrimination provisions of § 306(1)(d) of the 4-R Act. The impermissible discrimination forming the basis for the federal court decisions interpreting and applying the 4-R Act, in turn, resulted solely from tax exemptions provided under Nebraska law to various types of property not owned by railroads or carline companies.

The State Board correctly notes that the exemptions challenged by the appellants as discriminatory under § 306(1)(d) of the 4-R Act, consisting of agricultural income-producing machinery and equipment, agricultural products, and business inventories exempted under § 77-202(6) through (9), were upheld as legitimate classifications of personal property in *Stahmer v. State*, 192 Neb. 63, 218 N.W.2d 893 (1974). In *Stahmer*, this court justified the partial exemption from taxation of an entire class of personal property, agricultural machinery, holding that the power to exempt personal property from taxation granted by the 1970 amendment to Neb. Const. art. VIII, § 2, to wit: " 'The Legislature *may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation*' " (emphasis in original), 192 Neb. at 67, 218 N.W.2d at 896, prevails over the uniformity requirement of Neb. Const. art. VIII, § 1, and is subject only, if at all, to the reasonableness of the classification of exempt property. Significantly, no issues of federal law were raised by the parties or considered by this court in *Stahmer v. State*.

The enforcement of § 306(1)(d) by the federal court's enjoining the collection of taxes, and similar relief granted by this court pursuant to Neb. Const. art. VIII, § 1, has had the effect of making Nebraska's system of taxation increasingly discriminatory as to the remaining taxpayers. A comparable situation was presented in *Casey's Gen. Stores v. Nebraska Liq. Cont. Comm.*, 220 Neb. 242, 369 N.W.2d 85 (1985), where we reconsidered *Safeway Stores, Inc. v. Nebraska Liquor Control Commission*, 179 Neb. 817, 140 N.W.2d 668 (1966), in which this court upheld the constitutionality of a statute exempting hotels with more than 25 sleeping rooms from the statutory restriction that no person could have a beneficial interest in more than two liquor licenses. In *Safeway Stores, Inc.*, we

reasoned that the classification tended to promote stability in the liquor trade and temperance by curbing a threatened monopoly by chain stores. However, by the time this court heard *Casey's Gen. Stores, supra*, the Legislature had expanded the exemptions to include certain restaurants, some cities, and selected bowling alleys. In *Casey's Gen. Stores*, we concluded that the expanded exemptions rendered the reasoning in *Safeway Stores, Inc.*, obsolete, as it could no longer be said that the exemptions protected Nebraska operations. Therefore, in *Casey's Gen. Stores*, we concluded that the liquor license prohibitions violated the equal protection clause of U.S. Const. amend. XIV.

In the present case, Nebraska's failure to correct illegal discrimination in its tax structure has caused an increasing concentration of the tax burden on a shrinking group of taxpayers. We conclude that our reasoning in *Stahmer v. State, supra*, is now obsolete in light of subsequent developments in federal law, particularly the enactment of § 306 of the 4-R Act, effective in 1979, and numerous court decisions interpreting that legislation. As Judges White and Fahrnbruch observed in their concurring opinion in *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991), even if Nebraska's present classification of property as exempt and not exempt was to be found valid under the Nebraska Constitution, the system could not withstand muster under federal law. Federal law has eviscerated the portion of Neb. Const. art. VIII, § 2, that was at issue in *Stahmer v. State*. Accordingly, *Stahmer v. State* is overruled.

VI

It is obvious that in order to reach any meaningful resolution of the problem presented to us, this court must address the legality of the exemption of three-fourths of the commercial and industrial property in Nebraska. See § 77-202(6) through (9). We determine that the appellants' remedy in this case is not for their property to be "equalized" at zero percent of actual value, but for it to be taxed uniformly and proportionately in compliance with Neb. Const. art. VIII, § 1. In their apparent zeal to avoid taxation entirely, however, the appellants have not

specifically questioned the constitutionality of the tax exemptions found in § 77-202.

In *State v. Goodseal*, 186 Neb. 359, 368, 183 N.W.2d 258, 263-64 (1971), *cert. denied* 404 U.S. 845, 92 S. Ct. 146, 30 L. Ed. 2d 82, this court held that although the parties ordinarily must raise constitutional issues before they will be considered on appeal, "where the invalidity of the act is plain, and such a determination is necessary to a reasonable and sensible disposition of the issues presented, we are required by necessity to notice the plain error in the premise on which the case was tried." The same is true in this case.

Pursuant to § 77-202(1), household goods and certain property owned by nonprofit religious, educational, charitable, horticultural, or cemetery organizations is exempt from taxation. The validity of these exemptions has not been challenged in this court and, to our knowledge, has not been challenged in federal court. Section 77-202 further provides:

> (6) Agricultural income-producing machinery and equipment shall be exempt from the personal property tax except: (a) Motor vehicles, as defined in section 60-301; (b) property assessed by the Tax Commissioner as provided in sections 77-601 to 77-623 [railroad property]; (c) property owned by parties deemed public service entities subject to the provisions of sections 77-801 to 77-803; and (d) any building or fixture, whether permanently attached to the land or not.
>
> (7) Business inventory shall be exempt from the personal property tax.
>
> (8) Feed, fertilizer, and farm inventory shall be exempt from the personal property tax.
>
> (9) Grain, seed, livestock, poultry, fish, honeybees, and fur-bearing animals shall be exempt from the personal property tax.

In *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), the U.S. Court of Appeals condemned as discriminatory Nebraska's constitutional and statutory scheme of taxing only 25 percent of personal property while exempting the remaining 75 percent and enjoined the State of Nebraska from collecting the discriminatory tax on railroad rolling stock. In *Northern*

Natural Gas Co. v. State Bd. of Equal., 232 Neb. 806, 815, 443 N.W.2d 249, 256 (1989), this court held that "if the [State] Board arbitrarily undervalues a particular class of property so as to make another class of property disproportionately higher, or achieves the same result because of legislative action," the complaining taxpayer was entitled to relief pursuant to Neb. Const. art. VIII, § 1. We also determined in *Northern Natural Gas Co., supra* at 815, 443 N.W.2d at 256, that the state, "by not taxing the personal property of railroads and car companies, although acting involuntarily and under compulsion of federal law, nevertheless, by complying with that mandate, has denied Enron equal protection of the law contrary to the 14th amendment to the U.S. Constitution."

As in *State Bank v. Endres*, 109 Neb. 753, 192 N.W. 322 (1923), federal law has now rendered Nebraska state law invalid under the Nebraska Constitution. We hold that the property tax exemptions enumerated in § 77-202(6) through (9) are unconstitutional under Neb. Const. art. VIII, § 1, in that they prevent the levy of taxes "by valuation uniformly and proportionately upon all tangible property and franchises."

VII

In light of the foregoing, the order of the State Board of Equalization and Assessment is reversed and the cause remanded with directions to assess the property of the appellants and equalize its value as required by article VIII, § 1, of the Nebraska Constitution and the applicable statutes.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

FAHRNBRUCH, J., concurring.

I concur fully with the majority opinion. Although to reach its conclusion it was unnecessary for the majority to expressly rely upon the equal protection clause of the 14th amendment to the U.S. Constitution, that clause, nevertheless, might well be a viable consideration in future tax cases, as it has been in the determination of various tax cases since 1923. See, *Sioux City Bridge v. Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340 (1923); *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989); *State ex rel. Douglas v.*

State Board of Equalization and Assm't, 205 Neb. 130, 286 N.W.2d 729 (1979) (the equal protection clause of the 14th amendment is applicable to state tax legislation and imposes restraint upon state taxing power); *Knoefler Honey Farms v. County of Sherman*, 196 Neb. 435, 243 N.W.2d 760 (1976).

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

Since the State Board of Equalization and Assessment has failed to carry out its duty to equalize taxable property, a nonperformance the same as noted and disapproved in *Natural Gas Pipeline v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991) (Shanahan, J., concurring), the equalization board's order must be vacated and these causes must be remanded for further proceedings. However, the grounds used by this court's majority today, striking down certain tax legislation, lack foundation in the Nebraska Constitution.

As a result of *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), Nebraska had only a judicial or common-law definition for "fixture" in reference to taxation of property, a definition which directed that three elements or factors determined whether an article was a fixture and, therefore, real estate, or whether the article was personal property. Under the judicial definition expressed in *Northern*, the three elements or factors were (1) annexation or attachment to real estate whereby an article was actually added to the real estate to form a unit comprised of land and the article fastened to the land, (2) appropriation to the use or purpose of the land to which the article was connected, and (3) whether the one who connected the article to the land intended that the article be part of the land after the article's annexation.

In view of *Northern* and to avoid the foregoing three-part judicially formulated test, the Nebraska Legislature, in L.B. 1, Neb. Rev. Stat. § 77-103 (Reissue 1990), eliminated appropriation to use and a connector's intention as determinative factors for a fixture and directed that "actual annexation" was the only determinant for a fixture. In that manner, the Legislature statutorily replaced and narrowed the previous common-law definition of a "fixture" expressed in *Northern*.

Can the Legislature define types of property for tax purposes? The Legislature's power to define is subject to two constitutional limitations: (1) The Legislature cannot abrogate or contradict a definitional provision in the Constitution and (2) the legislative definition cannot be arbitrary or without foundation in reality. See, *State ex rel. Meyer v. Peters*, 191 Neb. 330, 215 N.W.2d 520 (1974); *Moeller, McPherrin & Judd v. Smith*, 127 Neb. 424, 255 N.W. 551 (1934).

The Nebraska Constitution contains no provision specifying a definition for "real estate" or prohibiting the Legislature from defining "real estate." Thus, subject to limitations imposed by a constitution and reality, a legislature can statutorily change the usually accepted common-law definition of real estate and can designate subjects to be assessed and taxed as real estate. See, *Roberts v. Assessment Bd. of Rev. of New Windsor*, 84 Misc. 2d 1017, 375 N.Y.S.2d 988 (1975) (a legislature has the power to determine that certain types of property, ordinarily characterized as personal property, may be deemed real property within a tax statute); *United States v. Town of Marlborough, New Hampshire*, 305 F. Supp. 718 (D.N.H. 1969) (a legislature has the power, through proper classification, to designate personal property as real estate for purposes of taxation, although the property is real estate by common-law definition for all other purposes); *McCaslin v. DeCamp*, 248 Cal. App. 2d 13, 56 Cal. Rptr. 42 (1967) (for purposes of taxation, the definition of real property, expressed in tax statutes, controls irrespective of whether the tax definition conforms with definitions for real estate used outside the tax statutes); *Lantz Appeal*, 199 Pa. Super. 310, 184 A.2d 127 (1962) (a legislature can change the usually accepted definition of real estate and can designate the subjects to be assessed and taxed as real estate); *Matter of Beagell v. Douglas*, 2 Misc. 2d 361, 157 N.Y.S.2d 461 (1955) (a legislature has the power to classify and define what property is taxable as real property, including property which under the common law is personal property); *Portland Terminal Co. v. Hinds et al.*, 141 Me. 68, 39 A.2d 5 (1944) (a legislature has the authority, for the purposes of taxation, to use a valid definition by which real estate shall be assessed as personalty or that personalty shall be

taxed as realty).

Legislatures in other states have included within the definition of "real estate" various articles or items annexed to real estate and have utilized a definition identical or substantially similar to the definition contained in L.B. 1; for example, see, *Transcontinental Gas v. Bernards Tp.*, 111 N.J. 507, 545 A.2d 746 (1988) (gas transmission pipelines taxed as real property); *Pitre v. Louisiana Tax Com'n*, 493 So. 2d 196 (La. App. 1986) (pipelines as real property for tax purposes); *Fischbach & Moore, Inc. v. State Bd., Etc.*, 117 Cal. App. 3d 627, 172 Cal. Rptr. 923 (1981) (transmission lines and supporting structures properly classified as realty); *Wilmington Suburb. Water Corp. v. Board of Assess.*, 316 A.2d 211 (Del. 1973) (water pipelines as real property for taxation); *Transco Corp. v. Prince William Co.*, 210 Va. 550, 172 S.E.2d 757 (1970) (gas mains classified as real property for tax purposes); *Bangor-Hydro Electric Company v. Johnson*, 226 A.2d 371 (Me. 1967) (lines of electric light and power companies defined and classified as real estate for tax purposes); *People ex rel. Holmes Elec. v. Chambers*, 1 Misc. 2d 990, 125 N.Y.S.2d 436 (1953) (telegraph lines, wires, poles, and appurtenances defined as real property for tax purposes); *Railroad Co. v. Jefferson County*, 114 Kan. 156, 217 P. 315 (1923) (railroad structures); *Buffalo Gas Co. v. Volz*, 31 Misc. 160, 64 N.Y.S. 534 (1900) (tangible property of a gas corporation, consisting of mains and pipes, has no status which prevents the legislative option of defining the property as land, or as personalty, or classifying property anew); *People, ex rel. v. Com'rs of Taxes of N. Y.*, 101 N.Y. 322, 4 N.E. 127 (1886) (railroad structures as real estate); and *Board of Directors v. Reconstruction Finance Corp.*, 170 F.2d 430 (8th Cir. 1948) (pipelines defined as real property under Arkansas' tax law).

To maintain that only a court can define property for tax purposes, which is precisely the position of today's majority in MAPCO's case, is undeniable hubris and a claim of unique definitional capacity which is neither warranted nor countenanced under the Constitution.

Since the Legislature has the constitutional power to define types of property for taxation, the question is: Has the

Legislature, in its definition of "real estate" in L.B. 1, acted reasonably, that is, consistent with reality and not arbitrarily? A very real and substantial difference separates the items of property classified as "real estate" in L.B. 1, such as pipelines and telecommunications towers, from the property excluded from "real estate," such as a center pivot irrigation system. That difference between the various items of property was described and pointed out in *Natural Gas Pipeline v. State Bd. of Equal.*, 237 Neb. 357, 390-91, 466 N.W.2d 461, 481 (1991) (Shanahan, J., dissenting):

> When used on real estate, each of the items added in the expanded definition of "real estate" in § 77-103 (Reissue 1990) is rendered immobile and becomes stationary as the result of some physical connection to the real estate. For instance, a pipeline is usually buried in the ground which it crosses, while structures such as electrical and telecommunications poles and towers are immobile when part of the structure is buried in the earth to support the remaining part above ground or when such items are securely fastened to buried foundations for additional support.
>
> . . . Irrigation systems used for agricultural and horticultural purposes may also consist of movable surface pipes as conduits for water sprayed from sprinklers attached to the pipes, thereby allowing mobility from one irrigation site to another. Therefore, mobility of a center pivot and other surface irrigation system distinguishes the foregoing property from those items which the Legislature has defined as "real estate" in L.B. 1.

Anyone who cannot distinguish between microwave towers and center pivot towers in an irrigation system has less than a working knowledge about center pivot irrigation systems. More than likely, a center pivot irrigation system qualifies as personal property under the common-law definition of "fixture" recognized in *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989). In any event, someone out there had better tell creditors who repossessed and hauled away center pivot systems from debt-ridden irrigators that

those creditors have replevied real estate—quite a legal phenomenon to say the least. In the final analysis, this court's conclusion that the Legislature acted arbitrarily in defining "real estate" for L.B. 1 lacks valid and rational premises. The vice of arbitrariness, which this court now levies at the Legislature in conjunction with the legislative definition of "real estate," is the very vice infecting the majority's conclusion, which is, at most, a result without a stated reason or rational foundation.

Arbitrariness in the majority's opinion is not so disturbing as is the inexorable destiny of property classifications and tax exemptions in Nebraska. The majority's focal point is Neb. Const. art. VIII, § 1, the "uniformity" clause, that is, "Taxes shall be levied by valuation uniformly and proportionately upon all tangible property . . . ."

However, before consideration of the majority's view on the "uniformity" clause, there is the majority's misunderstanding of *Casey's Gen. Stores v. Nebraska Liq. Cont. Comm.*, 220 Neb. 242, 369 N.W.2d 85 (1985), a misperception which must be set straight. In *Casey's*, we observed that a statutory limitation on the number of liquor licenses was a legitimate state policy, namely, trade stability and temperance, and, therefore, a proper subject for legislation. However, as noted in *Casey's*, subsequent legislation, which eliminated restrictions on many licensees, effectively expanded the number of licenses to such a level that any restriction on the number of licensees no longer served a valid governmental interest. See *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989) (when a fundamental right or suspect classification is not involved in legislation, a legislative act is a valid exercise of a state's police power, if the act is reasonably related to a legitimate governmental interest). To adhere to the view that classification of property and tax exemptions serve no legitimate governmental purpose, which was the basis for the conclusion in *Casey's*, is so farfetched that comment is unnecessary beyond the expression that *Casey's* is absolutely inapplicable to MAPCO's case.

Also, because the majority focuses on the "uniformity" clause, another part of the Nebraska Constitution is brought to

bear in MAPCO's case, namely, Neb. Const. art. VIII, § 2, which provides in part: "The Legislature by general law may exempt property owned and used exclusively for educational, religious, [or] charitable . . . purposes . . . ." Section 2 of article VIII further provides in part: "The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation."

Considering the "uniformity" clause in § 1 of article VIII in relation to tax exemption authorization in § 2 of article VIII, the majority pounces on *Stahmer v. State*, 192 Neb. 63, 218 N.W.2d 893 (1974), in which this court held that after allowance for exemptions authorized by the Legislature pursuant to § 2 of article VIII, tangible property, which is subject to taxation, must be taxed uniformly in accordance with § 1 of article VIII. By ousting *Stahmer* from Nebraska's interpretative decisions concerning tax classifications and exemptions in relation to the uniformity clause, this court today reaches the utopian view and constitutionally indefensible position that uniformity in taxation is equated with and, therefore, requires absolute equality, since tax classifications and exemptions undermine equal treatment of property in Nebraska's tax structure. In the majority's view, since absolute equality of treatment is essential to uniformity in taxation, all tangible property must be treated the same for tax purposes, that is, taxed equally or not taxed at all. Moreover, according to the majority, Nebraska's structure of property taxation, which includes classifications and exemptions, cannot "withstand muster under federal law." That is a preview of coming attractions to be shown by this court.

None can realistically and justly contend that any within a valid class should be treated differently from the rest of the class. What, then, is the real meaning and effect of this court's disdain for classifications of property, including the distinction between taxable and exempt tangible property? Carried to the logical and inevitable conclusion, judicial rejection of classification for tangible property means that residential property must be valued and taxed the same as commercial property; hence, a home must be valued the same as an

industrial tract or a railroad's right-of-way.

What is more frightening and disconcerting is the fact that the majority, without any litigant's request or suggestion, has struck down and cut out the exemptions in Neb. Rev. Stat. § 77-202(6) to (9) (Reissue 1990) and thereby abolished 4 of Nebraska's 13 categories of tax exemptions for tangible property, action which the majority then characterizes as a "meaningful resolution to the problem presented" in MAPCO's case. While those excisions from § 77-202 may be "meaningful," by no stretch of the imagination is the majority's action a "required or plausible resolution." In a stroke of poetic justice, however, the majority has abolished the tax exemption for previously exempt business inventories of several appellants in these tax cases, and other businesses similarly situated, which have challenged the status of various tax exemptions in Nebraska's personal property tax system. Defeat is snatched from the jaws of victory.

Certainly, not many will lament the demise of tax exemptions for honeybees and fur-bearing animals, see § 77-202(9), which this court has struck down today. Although this court has taken the sting out of the bee exemption and skinned the furry animal exemption, one has to wonder what motivated the court to withhold a coup de grace to some of the other tax exemptions in § 77-202. Constitutional principle or personal predilection? For instance, § 77-202(10) provides a tax exemption for personal property of companies which qualify under Neb. Rev. Stat. §§ 77-4101 et seq. (Reissue 1990), Nebraska's Employment and Investment Growth Act, the much publicized L.B. 775 enacted in 1987. Yet, the exemption under § 77-202(10) remains unscathed and intact. There is no logical and legal reason why exemptions under L.B. 775 are not constitutionally condemned and disallowed under the majority's view and volunteered action abolishing other tax exemptions in § 77-202.

According to the majority, the Legislature has thwarted "the levy of taxes 'by valuation uniformly and proportionately upon all tangible property . . .' " as a consequence of exemptions authorized by the Constitution. If exemptions pertaining to bees, fur-bearing animals, agricultural machinery, and business

inventories are judicially abolished, which is the feat accomplished by this court's majority today, what about exemptions regarding household furnishings and personal effects, which are presently tax exempt under § 77-202(1)(d)? Obviously, judicial abolition of the tax exemption for household furnishings and personal effects would hit pretty close to almost everyone's home, regardless of one's occupation or station in life. However, for the time being and for some undisclosed reason, the majority has elected to spare the "household goods and personal effects" exemption from the gratuitous chain saw surgery performed on other exemptions in § 77-202. In any event, the legacy of the majority's view is inevitable taxation of household furnishings and personal effects. It is only a matter of time, if logic has any place in the tax decisions of this court.

Then, there is the exemption for tangible property of educational, religious, and charitable organizations. In *Indian Hills Comm. Ch. v. County Bd. of Equal.*, 226 Neb. 510, 412 N.W.2d 459 (1987), we recognized that a constitutional provision for tax exemption of property owned by a religious organization is not a matter of right, automatically extended as a self-executing right under the Nebraska Constitution, but depends entirely on legislative grace in the form of exemptive legislation. However, in the majority's view, again carried to its logical and inevitable conclusion, tax exemption for tangible property of a religious organization is anathema and subject to excommunication from the body of tax exemptions, since the majority dictates that exemptions destroy the absolute equality which is essential for acceptable uniformity in taxation of tangible property, both real and personal. The tax exemption dominoes begin to fall. Would anyone have the audacity to challenge the present tax exemption for tangible property of a charitable, educational, or religious organization? Who would dare challenge the tax exemption of a hospital operated for charitable purposes? A university owned by an organization other than the State of Nebraska? Tangible property used exclusively for a religious purpose, even a church, synagogue, or other place of worship? Sound highly improbable, perhaps impossible? As Al Jolson quipped, "You ain't heard nothin'

yet, folks."

All of which brings us back to the majority's focal point, the uniformity clause in Neb. Const. art. VIII, § 1. So long as the majority's view about classification and tax exemptions exist, the uniformity clause is irreconcilable with the constitutional authorization for tax classification and exemption from taxation. Eventually, the house of cards built on classifications and tax exemptions must collapse if the uniformity clause is to subsist and endure as viewed and desired by this court's majority. Amendatory augmentation of the Constitution, adding clause after clause and provision upon provision, while leaving the uniformity clause, as presently construed by this court's majority, at odds with tax classifications and exemptions, is quite likely no solution, but a pollyanna approach to a Nebraska crisis that will soon reach epoch-making proportions, if such level has not already been reached. If classifications related to taxation and exemptions are totally incompatible with the uniformity clause, something must give way. Since the uniformity clause, as construed by this court's majority, and all classifications and exemptions, destined to be categorically rejected by the majority of this court, are absolute contradictions in Nebraska's present tax structure, one of those aspects of Nebraska taxation, namely, the uniformity clause or classifications and exemptions, must cease so that some semblance of order is substituted for the current chaos. That decision is left to the people of Nebraska and their Legislature.

RICHARD L. STAUFFER, PERSONAL REPRESENTATIVE OF THE ESTATE OF THERESA R. STAUFFER, DECEASED, APPELLANT, V. SCHOOL DISTRICT OF TECUMSEH, IN THE COUNTY OF JOHNSON, IN THE STATE OF NEBRASKA, APPELLEE.

473 N.W.2d 392

Filed July 12, 1991. No. 88-1011.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** The findings of the trial court in an action under the Political Subdivisions Tort Claims Act have the effect of jury findings and will not be disturbed on appeal unless clearly wrong.
2. **Trial: Evidence: Negligence: Juries.** In a court's determination of the question of whether the evidence is sufficient to submit the issues of negligence and

contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury.

3. **Trial: Evidence: Juries.** Where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury. The credibility of witnesses and the weight to be given their testimony are solely for the consideration of the jury.
4. **Motor Vehicles: Highways: Right-of-Way: Negligence: Presumptions: Juries.** When a motorist enters an intersection of two highways, he is obligated to look for approaching motor vehicles and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right-of-way, and the question of his contributory negligence in proceeding to cross the intersection is a jury question.
5. **Motor Vehicles: Highways: Right-of-Way: Negligence.** The right-of-way which the driver of a vehicle is required to yield to the vehicle on the right is a qualified right-of-way. The driver on the right must exercise due care, may not proceed in disregard of the surrounding circumstances, and where necessary to avoid a collision may be required to yield the right-of-way. The fact that one may have the directional right-of-way does not permit him to proceed in utter disregard of traffic approaching from the left.
6. _____: _____: _____: _____. 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.

Appeal from the District Court for Johnson County: ROBERT T. FINN, Judge. Affirmed.

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

Donald R. Witt and Michael A. England, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

BOSLAUGH, J.

This is an appeal in a wrongful death action brought under

the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 et seq. (Reissue 1987).

The plaintiff and appellant herein, Richard L. Stauffer, the personal representative of the estate of Theresa R. Stauffer, deceased, brought this action against the School District of Tecumseh to recover for Theresa Stauffer's death in an intersectional collision with the school district's schoolbus. The collision occurred on September 25, 1986, at the intersection of two county roads about 1 mile north and 6 miles west of Tecumseh, Nebraska. The accident involved a pickup truck driven by Theresa Stauffer (hereinafter plaintiff's decedent) from the north into the intersection in a southerly direction, and a schoolbus driven into the intersection by the defendant's driver, Gary R. Peters, who was proceeding from the east to the west.

The schoolbus was a typical schoolbus painted yellow, 9 feet 6 inches tall and 22 feet 4 inches long.

In his petition, the plaintiff alleged that the defendant's schoolbus driver was negligent (1) in failing to maintain a proper lookout, (2) in failing to maintain reasonable control of the schoolbus, (3) in failing to yield the right-of-way, and (4) in driving at an excessive speed for the conditions, and that his negligence was the proximate cause of the wrongful death of the plaintiff's decedent. In its answer, the defendant admitted the accident occurred but alleged that the plaintiff's decedent was guilty of contributory negligence sufficient to bar any recovery because she (1) failed to maintain a proper lookout, (2) failed to yield the right-of-way to the defendant's schoolbus, (3) operated the pickup at a rate of speed greater than was reasonable and prudent under the conditions, and (4) failed to have her pickup under reasonable control.

At the conclusion of all the evidence the plaintiff moved for a directed verdict against the defendant, arguing that the defendant was negligent as a matter of law. Similarly, the defendant moved that the plaintiff's petition be dismissed because the evidence showed as a matter of law the plaintiff's decedent was contributorily negligent in a degree sufficient to bar any recovery. The trial court reserved ruling on these motions and eventually decided the case on its merits.

The trial court found that the defendant's schoolbus driver, Peters, was negligent in his failure to keep a proper lookout, failure to yield right-of-way, and excessive speed for the conditions, and that such negligence was one of the proximate causes of the accident. The court further found that plaintiff's decedent was contributorily negligent because of her failure to maintain a proper lookout and because she operated her pickup at an unreasonable rate of speed under the traffic conditions. The court concluded by holding that decedent's contributory negligence, when compared with the negligence of the defendant's driver, was more than slight and that the negligence of the defendant's driver, when compared with that of the decedent, was less than gross, and awarded judgment to the defendant.

Following the trial court's decision, the plaintiff filed motions for new trial and for judgment notwithstanding the verdict. Both motions were overruled. The plaintiff has appealed from the judgment for the defendant and from the denial of his motions.

The plaintiff's assignments of error may be consolidated into one. The plaintiff contends the trial court erred in finding that the plaintiff's decedent was guilty of contributory negligence sufficient to bar any recovery. This is essentially a finding of fact. The findings of the trial court in an action under the Political Subdivisions Tort Claims Act have the effect of jury findings and will not be disturbed on appeal unless clearly wrong. *Kumar v. Douglas County*, 234 Neb. 511, 452 N.W.2d 21 (1990); *Ohnstad v. Omaha Public Sch. Dist. No. 1*, 232 Neb. 788, 442 N.W.2d 859 (1989); *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988). Under this standard, we review the record and consider the evidence in the light most favorable to the defendant in order to determine whether the trial court was clearly wrong in its findings.

In this case there is no presumption that the plaintiff's decedent was exercising due care. Such a presumption obtains only when there is no substantial evidence as to care or want of care on the part of the deceased. When there is such evidence, the presumption has no place in the case. *Bush v. James*, 152 Neb. 189, 40 N.W.2d 667 (1950).

> The presumption of due care arising out of the natural instinct of self-preservation is not evidence but a mere rule of law and obtains only in the absence of direct or circumstantial evidence one way or the other on the subject. When such evidence is produced, the presumption disappears and may no longer be considered. Anderson v. Nincehelser, 153 Neb. 329, 44 N.W.2d 518.

Omaha Nat. Bank v. Omaha P. P. Dist., 186 Neb. 6, 10-11, 180 N.W.2d 229, 232 (1970).

The record shows that the accident took place on September 25, 1986, about 1 mile north and 6 miles west of Tecumseh, at the intersection of two open and uncontrolled gravel roads. The collision occurred at about 7:15 a.m. on a clear, dry day. The plaintiff's decedent's vehicle, a 1983 Chevrolet S-10 pickup, was traveling in a southerly direction on a north-south minimum-maintenance road. The defendant's vehicle, a 1968 Chevrolet 36-passenger schoolbus, which was being driven by Peters, was westbound on an east-west gravel road with its headlights lighted. Both parties were familiar with the intersection.

The defendant's schoolbus driver, Peters, testified that on the east-west road about a quarter of a mile east of the intersection there is a small, gradual incline leading up to the intersection. Peters testified that he had accelerated slowly as he approached the intersection because of this hill and that his bus was traveling about 40 miles per hour as it entered the intersection. Peters saw the decedent's vehicle a "[s]plit second" before the collision. At that time his bus was at the fence line east of the intersection. He testified that the decedent's vehicle was near the fence line north of the intersection when he first saw it. The vehicles collided near the center of the intersection. The front of the defendant's schoolbus struck the pickup at the driver's door or shortly behind it.

Photographs taken by Keith Rodaway, a Nebraska state patrolman, on the day of the accident and received in evidence, show scattered trees and bushes to the north and east of the intersection. The patrolman testified that there were two possible locations where the bus would be "completely hidden" as it approached the intersection, and on his official report

stated that the "major reason for not seeing danger was trees for both vehicles."

The photographs themselves indicate, however, that it is very doubtful the trees and bushes were sufficient to obscure the bus as it approached the intersection. In fact, although the plaintiff testified that there were "some good sized trees and brush," he had stated in a deposition, "I think I did look to the left to see whether or not, you know, you'd be able to see a big yellow school bus coming and, in my opinion, there was no way of missing it."

After impact, the pickup spun a full 180° in a counterclockwise direction, with its rear end rotating toward the west. The pickup spun and ended up facing north in the right-hand ditch, southwest of the intersection. The force generated from the collision caused the schoolbus to also spin 180° counterclockwise. When the wheels on the right side of the bus struck a ridge of dirt along the south side of the east-west road, a bolt in the steering mechanism of the right front wheel snapped and the bus fell over on its side. The bus came to rest lying on its right side, facing east just west of the intersection.

Trooper Rodaway, who investigated the accident, testified that there were no skid marks or evidence of evasive action to indicate that either driver had made an attempt to stop or swerve. The patrolman testified that when he arrived, some 2 hours after the accident occurred, he found the decedent's vehicle in third gear. The plaintiff argues that this evidence suggests that the decedent attempted to slow down.

Peters testified that he went to the decedent's vehicle immediately after the collision and found that the gearshift lever was "down" and that the vehicle was in "road gear." The gearshift lever may have been moved later into third gear position to facilitate the removal of the decedent's body from the passenger's side of the vehicle.

Peters testified that when he first observed the decedent's vehicle, it was just north of the east-west fence line north of the intersection. He further testified that at that time, his bus was about even with the north-south fence line east of the intersection. Peters then testified that he had measured the distance from a cornerpost where the two fence lines intersect to

the road edges and that the distance from the cornerpost to the east edge of the north-south road was 23 feet 8 inches and the distance from the cornerpost to the north edge of the east-west road was 26 feet. This evidence suggests that the plaintiff's decedent was traveling at a rate of speed approximately the same as that of the defendant's driver just before the impact.

Although the plaintiff's decedent approached the intersection from the right,

> [a] car approaching an intersection is not in a favored position and entitled to proceed regardless of the circumstances merely because [it] is on the right of the other car. . . .
>
> . . . [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.

Hodgson v. Gladem, 187 Neb. 736, 742-43, 193 N.W.2d 779, 783 (1972). 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).

The right-of-way granted by the statute is relative and the duty of avoiding collisions at uncontrolled intersections rests upon both drivers.

Although the plaintiff's decedent's view to the left was partially obstructed as she approached the intersection, she nevertheless proceeded into the intersection at a speed which the trial court could find was unreasonable. Under the holding in *Hodgson, supra*, it was the decedent's duty, her directional right-of-way notwithstanding, as well as that of the defendant's busdriver, to "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." *Hodgson, supra* at 740, 193 N.W.2d at 782. The plaintiff's decedent's failure to do so amounted to contributory negligence in a degree sufficient to bar recovery. See *Hodgson, supra*. See, also, *Schenk v. Yosten, supra*; *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988).

Pearson v. Richard, 201 Neb. 621, 271 N.W.2d 326 (1978), involved a factual situation very similar to that in this case. The *Pearson* case arose out of a collision at an uncontrolled intersection of county roads. An automobile driven by the plaintiff's decedent approached the intersection from the north. A milk truck driven by the defendant approached the intersection from the east. The trial court submitted the issues of the plaintiff's decedent's contributory negligence in failing to keep a proper lookout and maintain reasonable control of her vehicle to the jury, which returned a verdict for the defendant. On appeal the judgment was affirmed.

In the *Pearson* case the point of impact was near the center of the intersection. After the impact the vehicles veered to the southwest into a field on the southwest corner of the intersection. At the time of the accident the milk truck was traveling at 40 to 45 miles per hour. No skid marks from either vehicle were found.

In the *Pearson* case we said at 627, 271 N.W.2d at 329-30:

> [I]n determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury. Costanzo v. Trustin Manuf. Corp., 176 Neb. 136, 125 N.W.2d 556 (1963); Flanagin v. DePriest, 182 Neb. 776, 157 N.W.2d 389 (1968). Negligence is a question of fact and may be proven by circumstantial evidence and physical facts. . . . Where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury. The credibility of witnesses and the weight to be given their testimony are solely for the consideration of the jury.

Price v. King, 161 Neb. 123, 72 N.W.2d 603 (1955).

In the *Pearson* case we further stated at 629, 271 N.W.2d at 330:

> While it is questionable whether, in the instant case, the circumstantial evidence and physical facts were sufficient to warrant a finding by the court as a matter of law that the decedent was guilty of contributory negligence more than slight, we need not reach that issue for the reason that we conclude that in any event the evidence was sufficient to warrant the submission of the issue of decedent's contributory negligence to the jury, which was done, and the jury has decided the issue by its verdict. The law is well established in this state that when a motorist enters an intersection of two highways he is *obligated* to look for approaching motor vehicles and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favored position the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is a *jury* question.

The plaintiff contends that the trial court erroneously admitted the testimony of the defendant's driver concerning the position of the decedent's vehicle. Peters testified that he saw the decedent's vehicle a "[s]plit second" before the collision and testified as to the respective positions of the vehicles relative to the fence lines running east-west and north-south at the intersection. This testimony was rationally based upon his perceptions and, as such, was admissible. See Neb. Rev. Stat. § 27-701 (Reissue 1989). The defendant's driver testified that he had firsthand knowledge of the positions of the decedent's vehicle and his bus a "[s]plit second" before impact. Furthermore, he personally revisited the accident site, observed that conditions appeared the same as they had on the date of the accident, and then personally took measurements from the cornerpost to the respective road edges. The trial court did not abuse its discretion by admitting evidence which was rationally based upon the perceptions of the defendant's driver.

In any event, this was a trial to the court, and it is presumed that the trial court, in reaching its decision, disregarded any evidence which was inadmissible. See, *Suess v. Lee Sapp Leasing*, 229 Neb. 755, 428 N.W.2d 899 (1988); *Jeffres v. Countryside Homes*, 220 Neb. 26, 367 N.W.2d 728 (1985); *Abel v. Southwest Cas. Ins. Co.*, 182 Neb. 605, 156 N.W.2d 166 (1968).

The plaintiff also contends that apart from Peters' testimony, there was no evidence to establish that the decedent was driving at an unreasonable rate of speed. The circumstantial evidence concerning the positions of and the damage to the vehicles following the collision was some evidence as to the speed of the pickup when the vehicles collided. The positions of the vehicles at the time of impact is shown by the marks made by two "tow hooks" located on the bus' front bumper when they creased the pickup's left side door. The tow hooks, which were bent to the left, or south, by the force of the collision, are some indication of the pulling effect the motion of the pickup had upon the bus. It was a matter for the trier of fact to draw the inferences and conclusions from the evidence. Based on the foregoing evidence, when considered in the light most favorable to the defendant, the trial court could find that the plaintiff's decedent was traveling at an unreasonable rate of speed under the conditions and that the plaintiff's decedent was guilty of contributory negligence sufficient to bar any recovery.

The judgment of the trial court is affirmed.

AFFIRMED.

SHANAHAN, J., dissenting.

Saying that the fatal intersection was "partially obstructed" does not make it so, especially since the quoted characterization is only the majority's conclusion and not a reflection of evidence in the Stauffer case. A verbal characterization of the intersection cannot displace visual truth. Consequently, attempted description is no substitute for actual depiction. While the majority offers that "it is very doubtful the trees and bushes were sufficient to obscure the bus as it approached the intersection," photographic evidence removes all semblance of doubt whatsoever. Since "[o]ne picture is worth more than a thousand words," here is at least a thousand words:

The preceding photograph shows Theresa Stauffer's view to her left, looking southeast, as she drove her pickup south toward the intersection. At the extreme left of the photograph, a tree at the east-west fence line marks the bottom of a hill several hundred feet east of the intersection which Theresa Stauffer was approaching in her pickup. At that time, Peters was driving the bright-yellow 36-passenger schoolbus, which was 22 feet 4 inches long and 9 feet 6 inches high, down the westward-sloping hill at 30 to 35 miles per hour. One can readily discern that a schoolbus is not only painted yellow to be easily seen, but is designed so that the busdriver has a panoramic view for safe operation of the vehicle. In the driver's seat of the bus and while looking from right to left and vice versa, Peters had an elevated vantage point 8 feet above the ground as the westbound bus began accelerating to 40 miles per hour on the road behind the volunteer and intermittent scrub depicted in the photograph. The light-blue Stauffer pickup was 17 feet long and had a "camper" located in the pickup's bed just behind the cab, which was approximately 5 1/2 feet from its top to ground level. Accompanying Theresa Stauffer in the family pickup was the Stauffers' 7-month-old son, Adam, and both were secured with seatbelts. Adam survived the collision.

As shown in the photograph, no tree is large enough or dense enough to completely conceal the bus. Thus, nothing obstructed Theresa Stauffer's total view of the big yellow bus as it traveled the distances between or behind the trees or shrubs. To paraphrase a well-known expression, while a tree might have concealed some of the bus some of the time, no tree concealed all the bus at any time. Also, Peters, recounting his panoramic view of the intersection, never mentioned that any obstruction was a factor for him regarding the collision. Rather, as Peters described the collision to Trooper Rodaway, Peters "[d]idn't see [Stauffers'] pickup till [the] crash, and didn't have time to brake." Peters testified that he failed to see the Stauffer vehicle until the very "[s]plit second" before the bus struck the Stauffer vehicle at the juncture of the pickup's cab and bed.

Both Theresa Stauffer and Peters were acquainted with the intersection. The only direct evidence of vehicular velocity pertains to the schoolbus, namely, 40 miles per hour at impact.

Neither the Stauffer pickup nor the schoolbus left marks on the road surface to indicate braking or evasive action.

In that factual setting, the district court concluded that Theresa Stauffer "was contributorily negligent, sufficient to bar recovery because of her failure to maintain a proper lookout and because she operated her automobile at an unreasonable rate of speed under the traffic conditions then existing," negligence which "when compared with that of [defendant school district] was more than slight and the negligence of the defendant, when compared with that of the decedent, was less than gross." The exact nature of the deficiency in Theresa Stauffer's "lookout" is undisclosed. However, in a further factfinding step, the majority concludes that Theresa Stauffer's view "to the left was partially obstructed as she approached the intersection . . . at a speed which the trial court could find was unreasonable"; hence, according to the majority, a partially obstructed view of the intersection rendered the pickup's velocity, whatever that velocity may have been, "unreasonable."

"Negligence is never presumed, and cannot be inferred from the mere fact that an accident happened." *Bixby v. Ayers*, 139 Neb. 652, 662, 298 N.W. 533, 539 (1941). Accord *Howell v. Robinson Iron & Metal Co.*, 173 Neb. 445, 113 N.W.2d 584 (1962). Also, contributory negligence is an affirmative defense, and the defendant has the burden to prove contributory negligence. See, *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. 1, 459 N.W.2d 178 (1990); *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987).

The preceding expressions of Nebraska law bring us to a rule which this court has frequently expressed over several years: A decedent is presumed to have exercised reasonable care for the decedent's own safety, a rule which is based on the instinct of self-preservation and the natural inclination to avoid personal harm. See, *Pearson v. Richard*, 201 Neb. 621, 271 N.W.2d 326 (1978); *Sheets v. Davenport*, 181 Neb. 621, 150 N.W.2d 224 (1967); *Wolstenholm v. Kaliff*, 176 Neb. 358, 126 N.W.2d 178 (1964). The foregoing "presumption" is, perhaps, nothing more than a combination of procedural rules pertaining to production of evidence: To recover in a negligence action, a

plaintiff must prove the defendant's negligence, but a recovery may be barred by the plaintiff's contributory negligence proved by the defendant. In the Stauffer case, however, the evidence clearly establishes negligence on the part of Peters, the school district's driver, but fails to establish any negligence of Theresa Stauffer.

As an additional rule, one of the "Nebraska Rules of the Road," Neb. Rev. Stat. § 39-635(1) (Reissue 1988), provides: "When two vehicles approach or enter an intersection from different roadways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right." In *Reese v. Mayer*, 198 Neb. 499, 502, 253 N.W.2d 317, 319 (1977), this court construed § 39-635(1) and stated:

> When two vehicles approach an intersection at approximately the same time, the vehicle on the right has the right to proceed in a lawful manner in preference to the vehicle on the left. In other words, the vehicle on the right has the right to the immediate use of the intersection, and it is this use of the roadway that the vehicle on the left is required to yield to the vehicle on the right.
>
> It should be noted that the right-of-way which the vehicle on the left is required to yield to the vehicle on the right is a qualified right-of-way. The driver on the right must exercise due care, may not proceed in disregard of the surrounding circumstances, and where necessary to avoid a collision may be required to yield the right-of-way.

(Emphasis omitted.)

In *Wolstenholm v. Kaliff, supra* at 363-64, 126 N.W.2d at 182, an action for wrongful death caused by an intersection accident in which the decedent had the directional right-of-way, this court, affirming a plaintiff's verdict, stated:

> The evidence herein is undisputed. Janet A. Kaliff did not see the vehicle being driven by the deceased. No evidence was adduced which would impose any duty on the deceased to raise a question as to the right to proceed. The vehicle of the deceased did have the directional right-of-way, and, in the absence of evidence to the contrary, deceased was presumed to be exercising due

> regard for her own safety and the safety of others. [Citations omitted.] Deceased also had the right to assume that the driver of any other vehicle approaching the intersection in an unfavored position would take the steps necessary to permit her to clear the intersection.
>
> To sustain appellants' contention that the deceased was guilty of contributory negligence, we must assume contributory negligence merely because a collision occurred. This we cannot do. Negligence is never presumed, and it cannot be inferred from the mere fact that an accident happened. [Citation omitted.] Negligence must be proved by direct evidence, or by facts from which negligence can reasonably be inferred. In the absence of such proof, negligence will not be presumed.

Remarkably similar to the Stauffer case is the situation considered in *Price v. King*, 161 Neb. 123, 72 N.W.2d 603 (1955), which was also a wrongful death action on account of a fatal intersection accident in which the plaintiff's decedent, Nellie Price, in the operation of her automobile had the directional right-of-way over a truck owned by Orville Conn and driven by Harry King. Nellie Price was driving her car north on a gravel county road. At the same time, King was driving the truck eastbound at 35 miles per hour on a county road which eventually intersected the road on which Nellie Price was driving. King never slowed the truck's speed as he approached the intersection and did not apply the truck's brakes before impact. The truck struck Price's automobile on the east side of the intersection's north-south centerline. After the accident, physical facts were inconclusive. King gave contradictory versions concerning his observation, or lack of observation, with respect to the Price automobile before the collision. In an extrajudicial version expressed shortly after the collision, King admitted that "he did not see [Price] until he hit her." 161 Neb. at 125, 72 N.W.2d at 605. In another version, expressed at trial, King testified that he saw the Price auto approaching the intersection and assumed that he had time to pass safely through the intersection. King and Conn appealed from an adverse verdict. In affirming the plaintiff's verdict, this court rejected the King-Conn contention that contributory

negligence precluded recovery in Price's case and stated:

> The defendants contend primarily that the evidence shows Nellie Price was guilty of negligence more than slight as a matter of law when compared with the negligence of the defendants. The only negligence shown on the part of Nellie Price was that she was driving fast. There is no evidence that she was violating any speed limit fixed by statute. Whether she was negligent in failing to keep a proper lookout, or in failing to yield the right-of-way, is dependent upon the facts proved . . . . The presumption is that she used due care. There is a natural presumption that everyone will act with due care. The mere fact that an accident happens does not prove contributory negligence. Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred. In the absence of such proof, negligence cannot be presumed. . . . It cannot be said that Nellie Price was guilty of negligence which would as a matter of law preclude a recovery. From the record before us, she could well have assumed that her right-of-way was going to be respected by the driver of the truck.

161 Neb. at 128-29, 72 N.W.2d at 607.

Therefore, in any analysis of Theresa Stauffer's operation of the pickup, there is a "presumption" that she was operating her vehicle with due care. Consequently, the defendant school district had the burden to prove Theresa Stauffer's contributory negligence based on established facts. Applying the preceding to the Stauffer case, Peters, from his elevated vantage point inside the bus, glanced at the southbound approach to the intersection for which the Stauffer pickup had the directional right-of-way. Notwithstanding the majority's characterization that a southbound driver's view of the intersection was "partially obstructed," the photographic evidence emphatically and totally dispels the mistaken notion that the entire schoolbus was hidden at any time from Theresa Stauffer's view. Hence, there is no evidence which can legitimately serve as a basis for the conclusion that Theresa Stauffer was prevented from seeing the westbound schoolbus as it approached the intersection.

In the absence of evidence that Theresa Stauffer was prevented from seeing the bus, this court must operate on the premises that she exercised due care and saw the westbound bus, which was visible during its approach to the intersection. Theresa Stauffer then had every reason to believe that Peters saw her vehicle approaching the intersection and that Peters would yield the directional right-of-way. See, *Steinauer v. Sarpy County*, 217 Neb. 830, 353 N.W.2d 715 (1984) (driver had right to assume that a nonfavored driver would respect the directional right-of-way); *Price v. King, supra* (driver had a right to assume that a nonfavored driver would respect directional right-of-way). "[W]e are not prepared to say that the driver of a motor vehicle must slow down at every intersection in anticipation that the driver of the vehicle on the nonfavored street is about to commit a negligent act." *Steinauer v. Sarpy County, supra* at 840, 353 N.W.2d at 722.

Hence, the photographic evidence blows away the arboreal smokescreen. With elimination of the trees as an obstruction to Theresa Stauffer's view, as readily acknowledged in the majority's statement "it is very doubtful the trees and bushes were sufficient to obscure the bus as it approached the intersection," the bogus issue of lookout falls out. Undaunted at the evaporation of the lookout issue, the majority rushes to the pickup's "speed" as a basis to defeat Stauffer's recovery. However, there is no direct evidence concerning velocity of the Stauffer pickup. But "[w]hen there's a will there's a way." The majority settles on the bus' bent tow hooks and comes to rest at the postaccident position of the two vehicles. Given that the rapidly moving juggernaut of a bus drilled the southbound Stauffer pickup at a point behind the pickup's left front or driver's door, the bus' kinetic energy was transformed into a counterclockwise reactive movement by the Stauffer pickup as the fast-moving and much larger bus tended to come to rest after impact. Thus, the postimpact evidence is so utterly indecisive regarding vehicular velocity that the only reasonable conclusion is absolute inconclusiveness of the physical facts on the question of speed. At that point, without the boot of negligence by Theresa Stauffer, the majority pulls itself up by its bootstraps in a factually unsupported conclusion: Theresa

Stauffer was driving her pickup at an unreasonable rate of speed sufficient to bar recovery. Quite to the contrary, the evidence fails to support the majority's conclusion and the district court's findings.

Moreover, in pertinent part, Neb. Rev. Stat. § 25-21,185 (Reissue 1989) states:

> In all actions brought to recover damages for injuries to a person . . . caused by the negligence . . . of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence . . . of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the [fact finder] in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff . . . .

Through a process of evaluation and reevaluation involving various calculations for operation of her vehicle, Theresa Stauffer decided that, at her pickup's present velocity, she could enter and pass safely through the intersection, that is, if Peters would honor the statutory directional right-of-way. Even if Theresa Stauffer, at the edge of the intersection, made a last-second decision against abandoning her right-of-way, or if, just before entry into the intersection, her failure to brake, accelerate, or veer might be characterized as negligence, such conduct would be, at the utmost, negligence not more than slight when compared with Peters' virtually reckless driving, which was grossly negligent in light of the comparative operation of the colliding vehicles. If there were any negligence on the part of Theresa Stauffer, her negligence is not considered in the abstract and evaluated by reference to a hypothetical, fictional, or mythical person, namely, the reasonably or ordinarily prudent person. Rather, Theresa Stauffer's negligence, if any, must be analyzed in concrete actuality: her negligence compared with Peters' negligence. After such comparison, the conclusion reached by the trial court and this court, "plaintiff's decedent was guilty of contributory negligence sufficient to bar any recovery," is unrealistic and unsustainable under the evidence and applicable Nebraska

precedential decisions.

Consequently, the Stauffer case does not turn on a question of fact, but, rather, on the question whether there is fact, a factual basis for the conclusion reached by the district court. Neither creating facts nor arriving at a conclusion without a factual foundation has a legitimate place in the process of factfinding appropriate in a trial, much less in an appellate review. Consequently, the district court was clearly erroneous in its conclusions that Theresa Stauffer failed to maintain a proper lookout and exceeded a reasonable rate of speed under the circumstances. If "comparative negligence" has any meaning in Nebraska, nothing in Theresa Stauffer's conduct precludes a recovery on account of the school district's unquestionably gross negligence. Since there was ample evidence on the wrongful death damages sustained by Theresa Stauffer's next of kin, the district court's judgment should have been reversed and this cause remanded for a determination of damages.

Not too long ago, in *Koncaba v. Scotts Bluff County*, 237 Neb. 37, 464 N.W.2d 764 (1991), this court set aside a plaintiff's recovery when there was evidence supporting the trial court's judgment under the Political Subdivisions Tort Claims Act. It seems only logical and fair that this court set aside a judgment for a political subdivision when there is no supportive evidence; hence, the district court's judgment should have been reversed in the Stauffer case.

WHITE, J., joins in this dissent.

MICHAEL CLOBES, APPELLANT, V. NEBRASKA BOXED BEEF ET AL., APPELLEES.

472 N.W.2d 893

Filed July 12, 1991. No. 90-417.

1. **Workers' Compensation: Appeal and Error.** Findings of fact 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: Proof.** 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.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded with directions.

Scott M. Kirshenbaum for appellant.

Joseph E. Andres, of Naviaux, Kinney, Andres & Titus, for appellee Nebraska Boxed Beef.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

GRANT, J.

Plaintiff, Michael Clobes, appeals from an order by a three-judge panel of the Workers' Compensation Court on rehearing. The order dismissed his claim for workers' compensation based on a tear in his aorta. He had originally been awarded compensation by a single judge of that court. We reverse and remand.

Plaintiff was employed by defendant-appellee Nebraska Boxed Beef from October 11 to November 3, 1988. During this period, he worked approximately 14½ days as a bull saw operator trainee. The bull saw operator position is a two-person operation which consists of one employee guiding a 150- to 250-pound hindquarter of beef from an overhead track onto a dumping table, and then another employee pushing the hindquarter through a powersaw and onto a conveyor belt. The two employees would trade positions about every half hour. Approximately 300 to 400 hindquarters per hour could be processed in this manner.

It is unclear exactly how much heavy labor was required of plaintiff as a trainee. There was testimony that when plaintiff was being trained, a third party helped with the operation of the bull saw. The third party did much of plaintiff's work.

On the same day that plaintiff began work at Nebraska Boxed Beef's plant, he also began a second job vacuuming car interiors at Stacy's Wash & Shine. Both businesses are located in Omaha. Plaintiff worked 16.5 total hours at the carwash during

the 4 weeks prior to his hospitalization. The record indicates that plaintiff had previously held a number of other jobs involving manual labor.

Plaintiff was 28 years old at the time of his hospitalization and had a known heart murmur. Plaintiff suffered from a congenital condition known as Marfan's syndrome, although this was not diagnosed until after plaintiff left his work at Nebraska Boxed Beef. Marfan's syndrome affects the connective tissues of the body and frequently manifests itself as a defect in the aortic valve of the heart. Plaintiff had an insufficiency in an aortic valve which allowed blood to leak back into his left ventricle, causing the ventricle to become enlarged.

Plaintiff testified that he began to experience shortness of breath and chest tightness soon after beginning work at Nebraska Boxed Beef's plant. He worked, without reporting any pain or discomfort, on October 11, 12, 13, 14, 17, 18, 19, and 20. Defendant's plant was closed on Friday, October 21. Plaintiff testified that because he had difficulty breathing Sunday night, on Monday, October 24, he went to his hometown of Humboldt to see his family doctor, Dr. Stephen Stripe. Before this trip to the doctor, plaintiff had last worked for Nebraska Boxed Beef on Thursday the 20th and had last worked at the carwash on Friday, October 21. Although Dr. Stripe ordered a chest x ray and noted that the heart had increased in size, he found that plaintiff was in no immediate danger and allowed him to return to work at both jobs. Dr. Stripe set up an appointment for him for the following Monday, October 31, with Dr. James Morgan, an Omaha cardiologist.

On October 31, after having worked on October 26, 27, and 28 the previous week, plaintiff saw Dr. Morgan. An echocardiogram was ordered. The echocardiogram revealed the presence of the aortic insufficiency and the enlarged heart. Plaintiff returned to work on the day of the examination and worked on November 1 and 2.

Plaintiff testified that he continued to experience problems breathing during those 3 days at work. On Thursday, November 3, plaintiff left work early and telephoned Dr. Morgan.

Liz Cramer, defendant Nebraska Boxed Beef's personnel

manager, testified that plaintiff came in the following day, Friday, November 4, and requested that she help him fill out a first report of injury for workers' compensation. She testified plaintiff said that he had a degenerative heart valve and that his doctor had told him it was work related. The company's work records show that plaintiff was absent on November 4. Plaintiff's last day of work for Nebraska Boxed Beef was November 3, when he left work early.

Work records from the carwash show that plaintiff worked from 12:40 p.m. to 1:05 p.m. on Friday, November 4, vacuuming car interiors. Plaintiff's girl friend was a regular employee at Stacy's. The manager at Stacy's testified that plaintiff was allowed to work at the carwash almost anytime that he wanted to fill in some time. Plaintiff had no regular schedule at the carwash.

Plaintiff testified that later that afternoon he returned to Humboldt. He told his mother that he was having difficulty breathing. He saw Dr. Stripe later that evening and was admitted to Community Memorial Hospital in Humboldt. Test results showed that plaintiff was suffering from congestive heart failure. After spending the weekend at the hospital in Humboldt, he returned to Omaha, where Dr. Morgan admitted him to Methodist Hospital for a heart catheterization. The catheterization was performed on Monday, November 7. It showed the aortic insufficiency, marked left ventricle failure, and an aneurysm of the ascending aorta. The catheterization also showed a dissection, or tear, in the aorta. On Thursday, November 10, surgery was performed to correct the aortic insufficiency, or leaky heart valve. During the operation, plaintiff's aortic valve and the ascending portion of his aorta were replaced. This operation corrected the aortic dissection. On December 9, plaintiff returned to work at the carwash. He never worked again at Nebraska Boxed Beef's plant.

Dr. Morgan testified that plaintiff had Marfan's syndrome. He testified that Marfan's is a congenital disease which weakens the connective tissues of the body. He testified that it frequently manifests itself in damage to blood vessels, especially the aorta. He testified, however, that it is not inevitable that a Marfan's patient would experience blood vessel damage and, in fact, that

many Marfan's patients do not.

Dr. Morgan stated that it was his opinion, to a reasonable degree of medical certainty, that the tear in plaintiff's aorta was caused by sudden increases in blood pressure resulting from the repetitive strenuous nature of plaintiff's work at Nebraska Boxed Beef's plant. He stated that plaintiff would be forced to lead a sedentary lifestyle and that he would be at severe risk if he sought to engage in isometric activities such as lifting or carrying heavy objects.

Defendants presented evidence from two physicians who disputed Dr. Morgan's opinion as to causation. When asked if plaintiff's work at Nebraska Boxed Beef contributed to the aortic dissection, Dr. Michael Sketch testified:

> We have no evidence that it contributed to or that it didn't contribute to.
>
> Since we don't have any evidence to state when or where it occurred, we can't say his work had anything to do with it because of the fact that's previously stated that these aneurysms will rupture or dissect, if you want to use that term, either spontaneously or with minimal exertion.
>
> And it could have occurred while Mr. Clobes was watching TV, sitting down, carrying the groceries in, having a bowel movement, or working at his second job which was cleaning out cars.

Dr. Sketch did testify that sudden increases in blood pressure enhance the risk of aortic tears in Marfan's patients who have aneurysms of the aorta or aortic insufficiency. He testified that because of the corrective surgery, plaintiff is better off today than he was prior to his employment with Nebraska Boxed Beef.

Dr. Randolph Ferlic also reviewed plaintiff's medical records and concluded that plaintiff had a purely congenital problem that had been aggravated by lifelong expansion of his aorta. He concluded that the aortic tear could have occurred at any time, during the course of any strain.

On rehearing, the three-judge panel of the Workers' Compensation Court dismissed plaintiff's claim. The court stated that "[t]his was an interesting case that was well tried by both parties," and noted that there was "a conflict in the

medical testimony between three respected physicians as to the cause of the tear." In its conclusion, the court stated:

> The Court finds that the medical evidence is inconclusive as to when and how the tear in the aorta occurred and that due to the fact the plaintiff suffered from a preexisting congenital condition, namely marfan's syndrome, that the plaintiff has an enhanced burden of proof as to causation which he has failed to meet. For the above reasons, the plaintiff's petition should be dismissed.

In our review, findings of fact 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. *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991).

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); *Yager, supra*. This court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Yager, supra*.

After the compensation court's order on rehearing and subsequent to the submission of briefs in this case, this court decided the case of *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990). In that case, this court expressly disapproved language in earlier cases which imposed an "enhanced" burden of proof as to causation upon claimants with preexisting disabilities. The compensation court's order in this case reflects that the court imposed an "enhanced" burden upon the claimant. This court noted in *Heiliger* that Neb. Rev. Stat. § 48-151(2) (Reissue 1988) requires that the claimant has the burden of establishing causation by only a preponderance of the evidence. There is no exception for claimants with preexisting disabilities. We said:

> [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.

Heiliger, supra at 467, 461 N.W.2d at 571-72.

We also said:

> Although a claimant with a preexisting disability or condition may face various obstacles . . . 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.

Heiliger, supra at 468, 461 N.W.2d at 572.

The word "enhanced" has a meaning which results in imposing a greater burden on injured workers in cases involving preexisting physical disabilities or conditions than the statutory burden set out in § 48-151(2). "Enhanced" is defined in Black's Law Dictionary 529 (6th ed. 1990) as "[m]ade greater; *e.g.* in value . . . . This word, taken in an unqualified sense, is synonymous with 'increased,' and comprehends any increase of value, however caused or arising."

In this case, the doctors agreed that plaintiff had a preexisting condition. One doctor testified that plaintiff's injury was caused by the repetitive, strenuous nature of his work for Nebraska Boxed Beef. Two doctors stated that there was no evidence that plaintiff's employment caused, or did not cause, plaintiff's injury.

On such a record, the fact finder could determine that the employment caused the injury or did not. In making that determination, however, the fact finder must not require that the injured worker prove causation by more than a preponderance of the evidence. To use an "enhanced" burden of proof is to require proof by more than a preponderance of the evidence.

In *Heiliger*, we held that we were incorrect in stating that an enhanced burden of proof was required in cases such as this. Our mistake has caused the Workers' Compensation Court to

err in this case.

In *Gray v. Fuel Economy Contracting Co.*, 236 Neb. 937, 464 N.W.2d 366 (1991), this court affirmed an order of the compensation court which contained language that referred to an enhanced burden of proof. The court in *Gray* held that it was irrelevant that an erroneous standard was imposed in that case because the evidence in the record was so lacking that as a matter of law it was insufficient to support claimant's theory of causation. See, also, *Bell Fed. Credit Union v. Christianson*, 237 Neb. 519, 466 N.W.2d 546 (1991).

Gray is distinguishable from the present case. One of plaintiff's treating physicians has testified as to causation to a reasonable degree of medical certainty. It is true that the compensation court, as a finder of fact, is not bound by the testimony of an expert. See *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991). The evidence adduced by plaintiff in this case, however, was not so insufficient that the court would be forced to deny compensation as a matter of law.

The compensation court's finding that the evidence relating to causation was inconclusive is also insufficient to support the court's order dismissing plaintiff's petition. Under a preponderance of the evidence standard, a claimant does not need to conclusively prove causation. The evidence must merely preponderate in the claimant's favor. That is, the evidence need show only that the fact that the injury arose out of and in the course of claimant's employment is more probable than not. It is not possible from a review of the record in this case to know if the compensation court might have found that plaintiff was unable to meet this less exacting standard.

It is apparent from the compensation court's order that the court considered this to be a close case. This judgment is reversed and the cause remanded so that the compensation court may apply the correct standard regarding plaintiff's burden of proof.

It is so ordered.

REVERSED AND REMANDED WITH DIRECTIONS.

FAHRNBRUCH, J., concurring.

I concur in the result. However, I write separately to note our recent decision in *Leitz v. Roberts Dairy*, 237 Neb. 235, 465

N.W.2d 601 (1991). Under *Leitz*, there was sufficient evidence in this case to present the compensation court with a question of fact on the issues of legal and medical cause of the worker's injury.

CAPORALE, J., dissenting.

I respectfully dissent. On January 25 of this year, in *Yarns v. Leon Plastics, Inc.*, 237 Neb. 132, 464 N.W.2d 801 (1991), we observed that *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990), did nothing more than correct the improvident language we had theretofore used to describe the enhanced degree of persuasion confronting a workers' compensation claimant suffering from a preexisting condition.

Yarns observes that our earlier language declaring that a previously impaired claimant must meet an enhanced burden of proof meant only that such a claimant faced a more difficult task in persuading the compensation court that the exacerbated condition for which he or she sought benefits would not exist but for the work-related accident.

Finding nothing which suggests that in parroting our old language the compensation court meant anything other than it was not convinced plaintiff's preexisting condition was exacerbated by the work-related accident, I would affirm.

IN RE INTEREST OF N.W. AND R.W., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE, V. T.J.W., APPELLANT.

472 N.W.2d 887

Filed July 12, 1991. No. 90-685.

1. **Parental Rights.** Materiality regarding a rehabilitative plan exists when a parent's noncompliance results in a continued condition which was the basis for an adjudication and which is deleterious to a child expected to benefit from parental compliance with the rehabilitative plan.
2. _____. A juvenile's best interests are the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.

3. **Parental Rights: Evidence: Proof.** A parent's natural right to the custody of his or her own child must yield when the two requirements of Neb. Rev. Stat. § 43-292 (Reissue 1988) have been met. First, there must be clear and convincing evidence of the existence of one or more of the circumstances described in subsections (1) to (6) of § 43-292. Second, if one of the conditions prescribed in subsections (1) to (6) has been evidentially established, there must be an additional showing by clear and convincing evidence that termination of parental rights is in a child's best interests. It is a combination of the best interests of the child and evidence of fault or neglect on the part of the parent that is required.
4. **Parental Rights.** A parent afforded a program of rehabilitation must realize that the courts will examine a pattern of parental conduct in determining an appropriate disposition for the best interests of a child.

Appeal from the County Court for Burt County: F.A. GOSSETT III, Judge. Affirmed.

Steven M. Delaney, of Hascall, Jungers & Garvey, for appellant.

Ralph M. Anderson, Jr., Special Prosecutor, and Daniel A. Smith, guardian ad litem, for appellee.

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

HASTINGS, C.J.

The father has appealed the order of the county court for Burt County which terminated his parental rights to his minor children, N.W. and R.W.

The father assigns as error (1) the lack of jurisdiction of the trial court to terminate parental rights due to a failure to conduct a prior adjudication hearing, (2) the court's finding that the rehabilitation plan was reasonable, (3) the court's determination that the father willfully failed to comply with the rehabilitation plan, and (4) the court's decision that it was in the best interests of the minor children to terminate the father's parental rights.

A petition was filed by the county attorney in the county court for Burt County on September 30, 1986. The petition alleged that R.W., a girl born on March 13, 1981, and N.W., a girl born on January 26, 1984, children of the appellant, were living in the appellant's home together with their half brother,

R.Y., born September 28, 1971, and their half sister, C.Y., born September 3, 1976. The children's mother is deceased. R.Y. and C.Y. are not involved in these proceedings. The petition goes on to allege that C.Y. had complained she had been sexually abused by her stepfather, the appellant, and that the latter had been arrested and was incarcerated. As a result, the petition stated, the children were without proper support and were in need of necessary subsistence, education, and other care necessary for their health, morals, and well-being. An order seeking temporary custody in the Department of Social Services was sought and obtained. The record discloses no service of summons on the father.

A hearing was had on October 27, 1986, seeking a formal order of custody. At that hearing, only the county attorney and a representative of the Department of Social Services were present before the court. That hearing revealed that at the time of the filing of the petition there was no need to secure a custody order because the children's grandmother took over the care of the children. However, it was disclosed that the grandmother later felt that she could no longer handle the children, and therefore they were placed in foster care. An order granting temporary custody to the Department of Social Services was entered by the court.

The court appointed a guardian ad litem for the children on December 15, 1986, and an attorney for the father on February 23, 1987. A hearing, at which the father's attorney appeared, was held on April 13, 1987, on the father's application for temporary custody of the children. The father was denied custody and was ordered to have no contact with the children.

A July 13, 1987, hearing was had, with the father's attorney present, and the court ordered visitation of N.W. and R.W. with their paternal grandparents. An order appointing a replacement guardian ad litem was entered by the court on November 16, 1987. A copy of that order was served on the father at the Lincoln Correctional Center, and a copy was served on his attorney.

On November 23, 1987, a hearing was had on the application of the father for visitation. The order entered on that date is rather confusing. It grants permission for the paternal

grandmother to have a specific 2-day visit with the children. It provides that the father shall not be permitted to speak with either child by telephone while the children are in the custody of the grandmother and that "[a]pplicant's request for additional overnight visitations is hereby denied at this time." A similar order was entered on December 14, 1987, granting a specific 3-day visitation with the grandmother. The court again denied the father the right to speak to the children by telephone while they were in the custody of the grandmother.

On April 11, 1988, a review hearing was held at which the father was represented by his attorney. The motion of the State for a new rehabilitation plan and order was denied. Additional visitation was provided to the paternal grandparents. It was also ordered that in the event the father was released from incarceration prior to the next review hearing, he would not be permitted any visitation with the children.

According to an order dated October 24, 1988, the father had filed a petition for a writ of habeas corpus ad testificandum on October 21, 1988. No such petition appears in the record. The order indicated that the attorney for the father had testified as to the circumstances surrounding his withdrawal as attorney for the father. The order went on to recite that the father's petition for a writ was overruled as not having been timely filed and that when the father's court-appointed attorney withdrew, the father advised his former attorney that he had hired an attorney of his own choice. The court then found that "the credibility of the father was not an issue at this review hearing and that the decision to proceed pro se was the father's own choice." A copy of that order was ordered to be sent to the father. On August 14, 1989, the court appointed an attorney to represent the father. However, at a hearing at which the father was present held on that same day, the court found that the father informed the court that he desired to retain his own counsel.

The father appeared in court on September 18, 1989, in person and with his attorney, who was the same attorney appointed by the court. At the hearing conducted on that date, the father stated that he would accept the rehabilitation plan developed by the Department of Social Services. Later, on

February 26, 1990, the father, through his attorney, filed a motion to amend the rehabilitation plan. That motion alleged among other things that the plan required that he participate in a sex offenders' group, but that he was not allowed to participate, and he therefore requested that the plan be amended.

A motion for termination of the parental rights of the father was filed on February 26, 1990. On March 12, 1990, the father's motion to amend the rehabilitation plan was overruled and the hearing on the motion to terminate parental rights was set for March 19, 1990.

The court then conducted a hearing on April 9, 1990, to act on the State's motion "moving for an Order of Adjudication as to all four children involved in this matter Nunc Pro Tunc journalizing verbal orders entered April 11, 1988 by the County Court of Burt County, Nebraska, and appearing at such hearing [was the] father of the juveniles, with his attorney . . . ." The court granted the motion of the special prosecutor and further found:

> The Court took judicial notice of its file and its testimony in this matter and again found the children or childrens [sic] as defined in 43-247 (3)(a), based upon that I am quoting directly from page 9 of the document. (Exhibit 1) I still do not believe the October 27, 1986 was a [sic] adjudication, but April 11, 1988 was an adjudication.

The father's motion to dismiss for lack of jurisdiction was denied.

A hearing on the State's motion to terminate the parental rights of the father was held. By order dated June 27, 1990, the court found that the father was not allowed to enter the prescribed psychotherapy program because he would not admit to prior sexual problems, although he had pleaded guilty to sexual assault. The court further found that the father had willfully failed to comply in part with the reasonable provisions material to the court-ordered rehabilitation plan and that termination of parental rights of the father was in the best interests of the children. The parental rights were terminated.

Whatever deficiencies there were in acquiring personal jurisdiction over the father in the first instance because of

equivocal findings regarding adjudication were corrected by the voluntary acts of the father.

By the father's acceptance of the rehabilitation plan in open court on September 18, 1989, he submitted his person to the jurisdiction of the court, and by agreement he implicitly accepted the adjudication procedure of the court. Of even more significance, the father appeared in person at a hearing on April 9, 1990, and in response to the father's motion to dismiss for lack of jurisdiction absent an adjudication, the court, by order nunc pro tunc on April 23, 1990, declared that its adjudication occurred at the April 11, 1988, hearing. Although there may be some doubt that such action was properly a nunc pro tunc order, the fact remains that for the first time the court declared on the record that the children were adjudicated to be within the provisions of the Nebraska Juvenile Code. It was an order from which the father could have appealed. See *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990). He did not choose to do so and has waived any rights he might have in that regard. That disposes of the father's first assignment of error.

We must now examine the facts in light of the remaining assignments of error, which may be combined to state that the court erred in finding that the rehabilitation plan was reasonable, that the father willfully failed to comply with the plan, and that the best interests of the children required that the court terminate parental rights.

At the outset, we feel compelled to comment on the infirmities present in the procedure used in this case, or at least on the deficiency of the record covering such procedure. In the first place, there apparently was no service of summons on the father nor any type of appearance by him until well into the proceedings, other than by an attorney appointed for the father without notice to the latter. Also, it should not be necessary for a reviewing court to go to such lengths to find that an adjudication hearing has been held. Apparently, not all of the hearings held were on the record. Certain orders representing hearings, although dated when signed, did not show the date of the proceedings. Perhaps of more serious concern is the apparent lack of physical evidence of the court-ordered

rehabilitation plan.

Proceedings were instituted alleging the children were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), being without proper support and being in need of necessary subsistence, education, and other care necessary for their health, morals, and well-being. Emergency action was taken, presumably under the provisions of Neb. Rev. Stat. § 43-248 (Reissue 1988), because the mother was deceased and the father had been incarcerated for sexually abusing one of the other juvenile girls residing in the father's household. Section 43-248 permits an officer of the peace to take temporary custody of a juvenile without an order of the court "when such juvenile is seriously endangered in his or her surroundings and immediate removal appears to be necessary for the juvenile's protection . . . ."

There should appear in the record at the very least an affidavit or similar sworn statement by the officer substantiating this claim. The petition filed in the county court was subscribed and sworn before the county judge and would seem to meet this requirement.

Neb. Rev. Stat. § 43-250 (Cum. Supp. 1986) requires the officer who takes a juvenile into custody to make a full written report to the county attorney within 24 hours of taking temporary custody of the juvenile. To continue temporary custody in the Department of Social Services it is necessary to obtain an order from the appropriate court within 48 hours of obtaining temporary custody.

The order granting temporary custody of the juveniles in the Department of Social Services is one dated October 27, 1986. That order recites that the temporary custody was effective September 19, 1986. Thus, apparently, the 48-hour rule was not followed. Perhaps in explanation of that apparent failure to follow the statute is the information obtained at the October 27, 1986, hearing, in which it was suggested that the grandmother had taken custody of the children and the children were later turned over by the grandmother to the Department of Social Services.

The father's parental rights were terminated because he failed to make reasonable efforts to comply with the

court-ordered rehabilitation plan. Thus is raised the problem, What is and where is the plan?

A plan is first mentioned in the record of a proceeding held on June 25, 1990, which seems to be the hearing on the State's motion to terminate parental rights. The record does not show the presence of the father, but it does indicate that the father's attorney was present. A written order appears in the transcript, which was signed and filed on June 27, 1990, in which the parental rights were terminated, and which order indicates that the father was present with his attorney.

At that hearing Lori Aman, an employee of the Department of Social Services, testified that at a hearing held on September 18, 1989, "the rehabilitation plan was adopted." She stated that the father was present at that hearing and agreed that he would follow the plan. An order dated September 18, 1989, disclosed that "[the father] stated that he would accept the rehabilitation plan."

Aman was asked, "Do you have a copy of that plan in front of you?" to which she answered, "Yes, I do." Unfortunately that is as close as a reviewer of the record ever gets to the actual plan.

However, she did testify, without objection, as to the pertinent parts of the plan. First, "pursuant to evaluation of Sally Grosse in November of 1987, [the father] shall initiate, through the case worker, individual psychological testing, particularly evaluating for organic changes from chemical dependency. Such testing will indicate parental limits for progress and/or change."

According to Aman, the father was referred to Boys and Girls Home and Family Services in Sioux City, Iowa, represented by Aman as the best resource available in the father's geographic area. The father was evaluated by and responses were received from two different staff people in that organization.

A family therapist responded that the organization's treatment program is for individuals who admit they have sexually abused a child. That response went on to state that the father states, although he pleaded guilty to abusing his stepdaughter, he did not sexually abuse her. The conclusion was

reached that he was not an appropriate person for the treatment program because of that denial.

There was a report from another family therapist who repeated the same information, i.e., the father repeatedly denied sexually abusing his stepdaughter, and he was informed that because of that he could not be accepted into the program. Siouxland Mental Health Center was suggested as a "program for sexual offenders with a somewhat different focus." There is a letter in the file addressed to Judge F.A. Gossett and written by Aman, stating that she had begun the referral process to Siouxland Mental Health and, although she had not heard back from Siouxland Mental Health, she would advise the father when she did.

The second item on the rehabilitation plan, according to Aman, was the requirement that the father have a further chemical dependency evaluation done and that he participate in inpatient treatment for chemical dependency. The father did complete the chemical dependency evaluation, but inpatient treatment was not recommended, apparently by the evaluating agency. However, some educational classes were recommended, which the father did attend. According to the counselor, the evaluation was based on the responses made by the father in which he "did not indicate an ongoing diagnosis of abuse or dependence."

The third plan requirement was that the father begin involvement in Parents United, a group for parents in incestuous families. Aman stated that this requirement was not complied with, and she thought that the father never asked for any information about that service.

The fourth plan item required that the father begin individual psychotherapy upon release from incarceration, with particular focus on perpetration issues and parenting skills. This requirement tied in with the first plan requirement, and the father was not accepted in the program because of his refusal to admit responsibility for the sexual assault.

The fifth plan item required that the father initiate involvement in parenting classes, and Aman had no knowledge that that had been done.

The last requirement was that the father have no contact

either with the stepdaughter whom he assaulted or with any of the children, and Aman testified that the father had had no contact with any of the children.

Aman said that the father had never admitted the assault to her except that on one occasion he told her that there had been no penetration and therefore he should not have been charged.

The father had been evaluated while still incarcerated by a psychotherapist, Sally Grosse, M.S.N., R.N., C.S., in 1987. According to her, the father refused to participate in a sex offenders' group provided by the correctional center because of his denial of the sexual assault. In a December 16, 1987, letter to Aman, Grosse recommended psychological testing, with attention to evaluation of organic change, followed by inpatient alcohol treatment. She went on to state, "Following alcohol treatment, but prior to any involvement with the children I am recommending family therapy since at this time the children do not have a relationship with [their father]."

As far as the record discloses, the father has had no contact with his children since he was arrested and incarcerated in September 1986.

The record demonstrates that the father of these two children has made no effort whatsoever to become a part of his children's lives. He has been absent from the children during his incarceration for sexual assault of a minor stepdaughter. He has refused to accept, for purposes of therapy, the fact that he has any problem with sexual conduct with children—this in spite of the fact that he admitted by his plea of guilty that he did in fact sexually assault a minor stepchild.

The rehabilitation plan required that he submit himself to therapy to approach a status where he would no longer subject minor children, including his own, to sexual assault. Does a provision in the plan tend to correct, eliminate, or ameliorate the situation or condition on which the adjudication has been obtained under the Nebraska Juvenile Code? An affirmative answer to the preceding question provides the materiality necessary in a rehabilitative plan for a parent involved in proceedings within a juvenile court's jurisdiction. Materiality regarding a rehabilitative plan exists when a parent's noncompliance results in a continued condition which was the

basis for the adjudication and which is deleterious to a child expected to benefit from parental compliance with the rehabilitative plan. *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

In light of the father's guilty plea to the child sexual assault charge, it was not unreasonable for the rehabilitation plan to include the requirement of therapy which was conditioned on the father's admission of such a problem. The father acknowledged that he felt unable to control his stepchildren and that his family life had gotten out of control prior to the alleged sexual assault, as other adults were drinking, partying, and watching pornography at times when the children were present. Based on the evaluations and the recommendations, there is sufficient evidence that the rehabilitation plan was reasonable.

A juvenile's best interests are the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code. *In re Interest of A.A.Y., F.E.Y., and K.C.Y.*, 237 Neb. 414, 466 N.W.2d 93 (1991). A parent's natural right to the custody of his or her own child must yield when the two requirements of Neb. Rev. Stat. § 43-292 (Reissue 1988) have been met. First, there must be clear and convincing evidence of the existence of one or more of the circumstances described in subsections (1) to (6) of § 43-292. Second, if one of the conditions prescribed in subsections (1) to (6) has been evidentially established, there must be an additional showing by clear and convincing evidence that termination of parental rights is in a child's best interests. It is a combination of the best interests of the child and evidence of fault or neglect on the part of the parent that is required. *In re Interest of J.B. et al.*, 235 Neb. 530, 455 N.W.2d 817 (1990).

A parent afforded a program of rehabilitation must realize that the courts will examine a pattern of parental conduct in determining an appropriate disposition for the best interests of a child. *In re Interest of L.O. and B.O.*, 229 Neb. 889, 429 N.W.2d 388 (1988). A review of the rehabilitation plan in its entirety shows that the father not only failed to have the required therapy because of his failure to admit sexual assault of a child, but also failed to comply with other aspects of the plan. His pattern of parental conduct regarding the

rehabilitation plan fails to reflect a genuine effort at rehabilitation toward the end of reunification with his children. The best interests of the children will be served by termination of the parental rights.

The judgment of the trial court is correct and is affirmed.

AFFIRMED.

NORTHERN NATURAL GAS COMPANY ET AL., APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

471 N.W.2d 755

Filed July 12, 1991. Nos. 90-796 through 90-804.

Appeal from the State Board of Equalization and Assessment. Reversed and remanded for further proceedings.

John K. Boyer, Amy S. Bones, Norman H. Wright, and John M. Ryan, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellants.

Don Stenberg, Attorney General, and L. Jay Bartel for appellee.

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

PER CURIAM.

These are appeals from the findings and order of the State Board of Equalization and Assessment dated August 15, 1990, denying the appellants' claims for property tax relief. The appellants in these cases are the owners of centrally assessed property in the State of Nebraska and operate pipeline systems in Nebraska.

The issues raised in these appeals are disposed of by *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, *ante* p. 565, 471 N.W.2d 734 (1991). In light of our decision in that case, the causes are remanded to the State Board of Equalization and Assessment for further proceedings consistent with our opinion

in *MAPCO Ammonia Pipeline, supra*, and the relief requested by the appellants.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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

For the reasons expressed in my concurrence and dissent filed in *MAPCO Ammonia Pipeline v. State Bd. of Equal., ante* p. 565, 471 N.W.2d 734 (1991), I also concur in part and dissent in part concerning the majority's opinion filed in this appeal.

NORTHWESTERN BELL TELEPHONE COMPANY, DOING BUSINESS AS US WEST COMMUNICATIONS, A SUBSIDIARY OF US WEST, INC., ET AL., APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

471 N.W.2d 754

Filed July 12, 1991. Nos. 90-813 through 90-820.

Appeal from the State Board of Equalization and Assessment. Reversed and remanded for further proceedings.

John K. Boyer, Amy S. Bones, Norman H. Wright, and John M. Ryan, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellants.

Don Stenberg, Attorney General, and L. Jay Bartel for appellee.

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

PER CURIAM.

These are appeals from the findings and order of the State Board of Equalization and Assessment dated August 15, 1990, denying the appellants' claims for property tax relief. The appellants in these cases are public service entities within the meaning of Neb. Rev. Stat. § 77-801.01 (Reissue 1990) and

own, maintain, and operate telecommunications systems in Nebraska. The appellants' property is centrally assessed for property tax purposes pursuant to Neb. Rev. Stat. §§ 77-801 et seq. (Reissue 1990).

The issues raised in these appeals are disposed of by *MAPCO Ammonia Pipeline v. State Bd. of Equal., ante* p. 565, 471 N.W.2d 734 (1991). In light of our decision in that case, the causes are remanded to the State Board of Equalization and Assessment for further proceedings consistent with our opinion in *MAPCO Ammonia Pipeline, supra*, and the relief requested by the appellants.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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

For the reasons expressed in my concurrence and dissent filed in *MAPCO Ammonia Pipeline v. State Bd. of Equal., ante* p. 565, 471 N.W.2d 734 (1991), I also concur in part and dissent in part concerning the majority's opinion filed in this appeal.

WAUNETA TELEPHONE CO. ET AL., APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

471 N.W.2d 754

Filed July 12, 1991. Nos. 90-821 through 90-837.

Appeal from the State Board of Equalization and Assessment. Reversed and remanded for further proceedings.

Paul M. Schudel and Nana G.H. Smith, of Woods & Aitken, for appellants.

Don Stenberg, Attorney General, and L. Jay Bartel for appellee.

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

PER CURIAM.

These are appeals from the findings and order of the State Board of Equalization and Assessment dated August 15, 1990, denying the appellants' claims for property tax relief. The appellants in these cases are public service entities within the meaning of Neb. Rev. Stat. § 77-801.01 (Reissue 1990) and own, maintain, and operate telecommunications systems in Nebraska. The appellants' property is centrally assessed for property tax purposes pursuant to Neb. Rev. Stat. §§ 77-801 et seq. (Reissue 1990).

The issues raised in these appeals are disposed of by *MAPCO Ammonia Pipeline v. State Bd. of Equal., ante* p. 565, 471 N.W.2d 734 (1991). In light of our decision in that case, the causes are remanded to the State Board of Equalization and Assessment for further proceedings consistent with our opinion in *MAPCO Ammonia Pipeline, supra*, and the relief requested by the appellants.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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

For the reasons expressed in my concurrence and dissent filed in *MAPCO Ammonia Pipeline v. State Bd. of Equal., ante* p. 565, 471 N.W.2d 734 (1991), I also concur in part and dissent in part concerning the majority's opinion filed in this appeal.

CLARKS TELEPHONE COMPANY ET AL., APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

471 N.W.2d 753

Filed July 12, 1991. Nos. 90-855 through 90-862.

Appeal from the State Board of Equalization and Assessment. Reversed and remanded for further proceedings.

Tim Engler, of Harding & Ogborn, for appellants.

Don Stenberg, Attorney General, and L. Jay Bartel for appellee.

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

PER CURIAM.

These are appeals from the findings and order of the State Board of Equalization and Assessment dated August 15, 1990, denying the appellants' claims for property tax relief. The appellants in these cases are public service entities within the meaning of Neb. Rev. Stat. § 77-801.01 (Reissue 1990) and own, maintain, and operate telecommunications systems in Nebraska. The appellants' property is centrally assessed for property tax purposes pursuant to Neb. Rev. Stat. §§ 77-801 et seq. (Reissue 1990).

The issues raised in these appeals are disposed of by *MAPCO Ammonia Pipeline v. State Bd. of Equal., ante* p. 565, 471 N.W.2d 734 (1991). In light of our decision in that case, the causes are remanded to the State Board of Equalization and Assessment for further proceedings consistent with our opinion in *MAPCO Ammonia Pipeline, supra*, and the relief requested by the appellants.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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

For the reasons expressed in my concurrence and dissent filed in *MAPCO Ammonia Pipeline v. State Bd. of Equal, ante* p. 565, 471 N.W.2d 734 (1991), I also concur in part and dissent in part concerning the majority's opinion filed in this appeal.

DIAL-NET, INC., APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
WILLIAMS TELECOMMUNICATIONS GROUP, INC., APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

471 N.W.2d 752

Filed July 12, 1991. Nos. 90-867, 90-868.

Appeal from the State Board of Equalization and Assessment. Reversed and remanded for further proceedings.

William E. Peters, of Peters & Chunka, P.C., for appellants.

Don Stenberg, Attorney General, and L. Jay Bartel for appellee.

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

PER CURIAM.

These are appeals from the findings and order of the State Board of Equalization and Assessment dated August 15, 1990, denying the appellants' claims for property tax relief. The appellants in these cases are public service entities within the meaning of Neb. Rev. Stat. § 77-801.01 (Reissue 1990) and own, maintain, and operate telecommunications systems in Nebraska. The appellants' property is centrally assessed for property tax purposes pursuant to Neb. Rev. Stat. §§ 77-801 et seq. (Reissue 1990).

The issues raised in these appeals are disposed of by *MAPCO Ammonia Pipeline v. State Bd. of Equal., ante* p. 565, 471 N.W.2d 734 (1991). In light of our decision in that case, the causes are remanded to the State Board of Equalization and Assessment for further proceedings consistent with our opinion in *MAPCO Ammonia Pipeline, supra*, and the relief requested by the parties.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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

For the reasons expressed in my concurrence and dissent filed in *MAPCO Ammonia Pipeline v. State Bd. of Equal., ante* p. 565, 471 N.W.2d 734 (1991), I also concur in part and

dissent in part concerning the majority's opinion filed in this appeal.

WILLIAMS NATURAL GAS COMPANY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
WILLIAMS PIPELINE COMPANY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

471 N.W.2d 752

Filed July 12, 1991. Nos. 90-869, 90-870.

Appeal from the State Board of Equalization and Assessment. Reversed and remanded for further proceedings.

William E. Peters, of Peters & Chunka, P.C., for appellants.

Don Stenberg, Attorney General, and L. Jay Bartel for appellee.

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

PER CURIAM.

These are appeals from the findings and order of the State Board of Equalization and Assessment dated August 15, 1990, denying the appellants' claims for property tax relief. The appellants in these cases are the owners of centrally assessed property in the State of Nebraska and operate pipeline systems in Nebraska.

The issues raised in these appeals are disposed of by *MAPCO Ammonia Pipeline v. State Bd. of Equal., ante* p. 565, 471 N.W.2d 734 (1991). In light of our decision in that case, the causes are remanded to the State Board of Equalization and Assessment for further proceedings consistent with our opinion in *MAPCO Ammonia Pipeline, supra*, and the relief requested by the parties.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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

For the reasons expressed in my concurrence and dissent filed in *MAPCO Ammonia Pipeline v. State Bd. of Equal., ante* p. 565, 471 N.W.2d 734 (1991), I also concur in part and dissent in part concerning the majority's opinion filed in this appeal.

BERT CATTLE COMPANY, INC., AND STANLEY D. BERT, APPELLANTS, V. JAY W. WARREN ET AL., APPELLEES.

471 N.W.2d 764

Filed July 19, 1991. No. 88-986.

1. **Pleadings: Demurrer: Appeal and Error.** One must stand on a pleading against which a demurrer has been sustained in order to preserve the right to appeal the decision on the particular demurrer.
2. **Records: Appeal and Error.** The party appealing has the responsibility for making an appropriate record in a proceeding to be reviewed by an appellate court and for providing the appellate court with a basis for addressing an issue or answer a question presented in a trial court.
3. **Trial: Records: Appeal and Error.** The responsibility for preserving for appellate review a judge's reasons concerning a particular ruling is not upon the judge, but is squarely upon a party challenging the ruling. In the absence of an appropriate motion, a trial court is not required to give any reasons for its rulings.
4. **Trial: Appeal and Error.** It is elementary that a correct ruling of the trial court will not be reversed merely because the trial court announced a wrong reason.
5. **Actions: Dismissal and Nonsuit: Presumptions: Appeal and Error.** This court will not presume, when a trial court fails to state a reason for the dismissal of an action, that the dismissal was based on an invalid ground.
6. **Actions: Courts: Dismissal and Nonsuit.** Courts have the inherent power to dismiss an action for disobedience of a court order.
7. **Actions: Dismissal and Nonsuit.** It is within the discretion of the trial court to dismiss a petition for disobedience.

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

Ronald L. Eggers and Robert D. Kinsey, of Heron, Burchette, Ruckert & Rothwell, for appellants.

Michael A. Nelsen, of Dixon & Dixon, P.C., for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and RONIN, D.J., Retired.

PER CURIAM.

The plaintiffs appeal the district court for Douglas County's refusal to vacate its earlier order dismissing the plaintiffs' second amended petition and refusal to permit the plaintiffs to file a third amended petition. We affirm.

Bert Cattle Company, Inc., and Stanley D. Bert, herein collectively designated "Bert," brought an action in the district court for Douglas County against Jay W. Warren; J & W Cattle Company; J. W. Cattle Corporation; Jay W. and Mabel M. Warren, in their capacity as the coexecutors of the estate of Ward B. Warren, deceased; and the Home National Bank of Arkansas City, Kansas. All defendants are hereinafter referred to as "Warren."

In an amended petition filed on June 25, 1987, Bert alleged in substance (1) that a third party converted the plaintiffs' funds; (2) that the proceeds from those funds, which were subject to a constructive trust for the benefit of the plaintiffs, were transferred to one or more of the defendants; and (3) that there should be an accounting. On July 23, 1987, the defendants demurred to the amended petition, claiming that another action was pending between the same parties for the same cause and that the petition did not state facts sufficient to constitute a cause of action. See Neb. Rev. Stat. § 25-806 (Reissue 1989). The district court, on September 14, 1987, sustained the demurrer and granted the plaintiffs 10 days to file another amended petition.

On September 24, 1987, Bert filed a second amended petition, which in essence contained the same allegations as the amended petition. Warren, on April 12, 1988, demurred on three grounds: (1) The petition failed to allege facts sufficient to state a cause of action, (2) there was a defect of parties defendant, and (3) another action was pending between the same parties for the same cause. Without specifying the basis for its ruling, the district court entered an order on April 28, 1988, sustaining Warren's demurrer and granting Bert 2 weeks to file a third amended petition.

During the 2-week period allowed by the court to file a third amended petition, Bert took no action. Neither did Bert file a notice of appeal within 30 days of April 28, 1988. See Neb. Rev. Stat. § 25-1912 (Reissue 1989). Instead of complying with the trial court's order of April 28, 1988, Bert waited until some 4 1/2 months later to take any action. On September 13, 1988, Bert filed a motion for leave to file a third amended petition. At the hearing on Bert's motion, the court denied Bert leave to file a third amended petition and then sustained Warren's motion to dismiss the action. We infer that Warren's motion to dismiss was made orally, since the record's only mention of Warren's motion is the court's notation as a docket entry: "Defendant's motion to dismiss sustained." Our inference about the oral motion is supported by Warren's statement in their brief: "Warren orally moved to dismiss the case. The Trial Court sustained that motion." Brief for appellees at 3.

Bert timely filed a motion for a new trial. During a hearing on the motion for a new trial, Bert tendered a third amended petition. The district court, after consideration of that amended petition, entered an order stating that Bert's "motion for new trial [was] argued and overruled." Bert timely appealed the overruling of its motion for a new trial.

Bert's three assignments of error merge to allege that (1) the district court erred in sustaining Warren's demurrer to Bert's second amended petition and (2) the district court erred by overruling Bert's motion for a new trial, that is, the court's refusal to reinstate the action and allow Bert to file a third amended petition. As it is well established that one must stand on a pleading against which a demurrer has been sustained in order to preserve the right to appeal the decision on the particular demurrer, *Raskey v. Michelin Tire Corp.*, 223 Neb. 520, 391 N.W.2d 123 (1986), we address solely the second assignment of error.

Much has been made in this case concerning Warren's failure to disclose the reasons for its motion to dismiss and the district court's failure to state its reason for sustaining Warren's motion to dismiss. The party appealing has the responsibility for making an appropriate record in a proceeding to be reviewed by an appellate court and for providing the appellate court with a

basis for addressing an issue or answer a question presented in a trial court. See, *State v. Biernacki*, 237 Neb. 215, 465 N.W.2d 732 (1991); *State v. Schaneman*, 235 Neb. 655, 456 N.W.2d 764 (1990); *State v. Isikoff*, 223 Neb. 679, 392 N.W.2d 783 (1986). The responsibility for preserving for appellate review a judge's reasons concerning a particular ruling is not upon the judge, but is squarely upon a party challenging the ruling. *In the absence of an appropriate motion, a trial court is not required to give any reasons for its rulings. Peitz v. Hausman*, 198 Neb. 344, 252 N.W.2d 628 (1977). Here, Bert made no such motion.

If Bert had assumed the responsibility of preserving a record for appeal, the matter could have been approached in either one of two ways. First, Bert could have requested that the trial court require Warren to place on the record the reason for the motion to dismiss. Second, Bert could have made an appropriate motion for the trial court to give its reasons for its dismissal ruling. See *Peitz, supra*.

It is elementary that a correct ruling of the trial court will not be reversed merely because the trial court announced a wrong reason. *Id.* See, also, *In re Interest of G.G. et al.*, 237 Neb. 306, 465 N.W.2d 752 (1991). It follows, therefore, that this court will not presume, when a trial court fails to state a reason for the dismissal of an action, that the dismissal was based on an invalid ground.

Guided by the above-cited principles, a proper reason for the court's dismissal of Bert's action becomes immediately apparent. It is provided in Neb. Rev. Stat. § 25-601 (Reissue 1989) that "[a]n action may be dismissed without prejudice to a future action . . . (5) by the court for disobedience by the plaintiff of an order concerning the proceedings in the action." Not only may a court sua sponte dismiss an action without prejudice under § 25-601(5), but a defendant may file a motion to dismiss without prejudice under that subdivision. See *Rosnick v. Renstrom*, 210 Neb. 759, 316 N.W.2d 765 (1982).

Applicable to this case is the following language from *Rosnick, supra* at 761, 316 N.W.2d at 767 (quoting *Scudder v. Haug*, 197 Neb. 638, 250 N.W.2d 611 (1977)):

> " '[I]t has almost universally been held or recognized that courts have the inherent power to dismiss an action for

> disobedience of a court order. . . . Without this right, a court could not control its dockets; business before it would become congested; its functions would be impaired; and speedy justice to litigants would largely be denied.' "

In this case, the trial court had ample reason to dismiss Bert's petition for failure to comply with the court's order. The court granted Bert 2 weeks to amend its second amended petition. Instead, Bert waited well over 4 months to file its motion to file what would have been its fourth petition. The trial court did not abuse its discretion in dismissing Bert's action for disobedience of its order. See *Vodehnal v. Grand Island Daily Independent*, 191 Neb. 836, 218 N.W.2d 220 (1974) (it is within the discretion of the trial court to dismiss a petition for disobedience).

Warren's counsel at oral argument before this court disavowed that the dismissal was a sanction for disobedience. However, this court is not bound by a counsel's characterization on a question of law. From the record made in this case, counsel is in no better position than this court to know the reason for the trial court's dismissal of Bert's action.

No verbatim record has been presented to this court of the hearing of September 28, 1988, on Bert's motion for leave to file a third amended petition. Nor was there any documentation filed at that time as to any reason why Bert's motion for leave to file an amended petition was not filed sooner. It is true that an excuse for the failure to file a third amended petition was presented at the hearing on Bert's motion for a new trial. However, although that information must have been available on September 13, 1988, Bert sat on the excuse and did not present it to the judge at the hearing on September 28, 1988. Certainly, the reason for Bert's failure to comply with the trial court's order of April 28, 1988, cannot be considered as newly discovered evidence as grounds for a new trial under Neb. Rev. Stat. § 25-1142(7) (Reissue 1989). The trial court did not abuse its discretion in overruling Bert's motion for a new trial. See *DeCamp v. Lewis*, 231 Neb. 191, 435 N.W.2d 883 (1989).

The judgment of the district court for Douglas County is affirmed.

AFFIRMED.

CAPORALE, J., not participating.

SHANAHAN, J., dissenting.

Involved in this appeal is a courtroom conundrum: a dismissal order, which expresses no reason for the dismissal, entered in response to a pretrial motion which failed to specify a ground for dismissal.

We start with the established procedural principle: "A pretrial motion to dismiss is not permissible as a pretrial pleading but may sometimes be recognized as a demurrer on stipulation of the parties or by rule of court." *Voyles v. DeBrown Leasing, Inc.*, 222 Neb. 250, 256, 383 N.W.2d 36, 40 (1986). See, also, *Nelson v. Sioux City Boat Club*, 216 Neb. 484, 344 N.W.2d 634 (1984); *Blitzkie v. State*, 216 Neb. 105, 342 N.W.2d 5 (1983). In Bert's case, nothing indicates that Warren's dismissal motion attained the stature or character of a demurrer, perhaps because the court sustained Warren's demurrer to Bert's last amended petition, leaving no petition pending before the court at the time of Warren's motion. Whatever may have been the premise for Warren's pretrial dismissal motion, a basis which appears nowhere in the record, a pretrial dismissal motion is, generally, unavailable under Nebraska's code of civil procedure.

Without addressing the limited availability of a pretrial dismissal motion, the majority attempts to salvage the dismissal by asserting that the district court's judgment was correct, although "the trial court announced a wrong reason." Since the district court expressed no reason whatsoever for the dismissal, Bert's appeal tests the tensile strength of the preceding principle invoked by the majority for appellate review. For that reason, the majority delves into Nebraska's civil procedure in search of possible justification for dismissal of Bert's action.

The majority observes that Bert did not appeal from the district court's sustaining of Warren's demurrer on April 28, 1988. Of course, there was not a dismissal at that point; hence, a sustained demurrer, without dismissal of the action, presented no final order subject to appellate review. See, *Snell v. Snell*, 230 Neb. 764, 433 N.W.2d 200 (1988); *Federal Land Bank of Omaha v. Johnson*, 226 Neb. 877, 415 N.W.2d 478 (1987);

Standard Federal Savings & Loan Assn. v. Meins, 226 Neb. 853, 415 N.W.2d 462 (1987); *Koll v. Stanton-Pilger Drainage Dist.*, 207 Neb. 425, 299 N.W.2d 435 (1980).

Then, the majority chides Bert's failure to "require Warren to place on the record the reason for the motion to dismiss." A motion to make an opponent's motion more definite and certain? That new development, now recognized as a part of Nebraska civil procedure, may turn out to be the greatest innovation since sliced bread. A more likely result, however, will be pettifogging, vaulted to the forefront of a legal system which is supposed to resolve disputes and not, reminiscent of the Jarndyce case in "Bleak House," prolong a dispute into perpetuity.

Next, although the district court's dismissal order contains nothing but silence as the basis for dismissal of Bert's action, the majority asserts that it is "immediately apparent" that dismissal was a sanction for Bert's "failure to comply with the court's order" entered on April 28, 1988, that is, dismissal on the basis of Neb. Rev. Stat. § 25-601(5) (Reissue 1989) (a plaintiff's disobedience to an order concerning proceedings in an action). However, Warren does not argue that dismissal of Bert's action was a sanction for disobedience to the order regarding an amended petition within the 2-week period allowed for repleading. In fact, during oral argument in this appeal and in direct response to inquiry from this court, Warren's lawyer disavowed that the dismissal was a sanction for disobedience to, or failure to comply with, the court's order concerning Bert's further pleading. The majority, nevertheless, brushes aside counsel's acknowledgment concerning the dismissal and concludes that "counsel is in no better position than this court to know the reason for the trial court's dismissal of Bert's action." In that manner, the majority asks: What do lawyers know about cases they try?

Bert's case involves an appellate exercise in the attempt to ascertain, as the majority concedes, "the reason for the trial court's dismissal of Bert's action." Although the majority has embarked on a journey through Nebraska's civil procedure to find a sustainable basis for dismissal of Bert's action, an appellate court should not have to make that trip. In searching

for an unspecified, but possibly justifiable, basis for sustaining the trial court's action, an appellate court runs the risk of becoming an advocate in a search for some plausible and valid basis for the very judgment or decision under review. In this appeal, none, except this court, believed and considered that the dismissal order was a sanction pursuant to § 25-601(5). Until the majority's opinion in this appeal, Bert has never been openly confronted with the sanction issue. Therefore, how do litigants, especially an appellant, present an analysis and argument concerning a generic dismissal motion and a subsequent judgment founded on a secret basis used by the trial court? Truly, the movant and the trial court are "[s]hips that pass in the night," assuming that court and counsel are even on the same procedural surface. To avoid that situation, there should be a rather fundamental and simple rule: A defendant's dismissal motion or pleading for dismissal of a plaintiff's action, when authorized by a statute governing civil procedure or a rule of practice in civil actions, must adequately express a ground which entitles the defendant to a dismissal based on the ground specified. See, *McLearn v Cowen & Co.*, 60 N.Y.2d 686, 455 N.E.2d 1256, 468 N.Y.S.2d 461 (1983); *Moravek v. Davenport Community Sch. Dist.*, 262 N.W.2d 797 (Iowa 1978); *Hoyle v. City of Charlotte*, 276 N.C. 292, 172 S.E.2d 1 (1970); *Bolin v. Anders*, 559 S.W.2d 235 (Mo. App. 1977); *City Nat. Bank of Miami v. Simmons*, 351 So. 2d 1109 (Fla. App. 1977).

A rationale for the preceding rule is readily apparent: An authorized pleading or other recognized and acceptable practice, especially those designed for pretrial disposition of an action without a determination on the merits of a claim, must provide suitable information to the plaintiff so that a procedural deficiency in the proceeding may be corrected or remedied if permissible and possible. Cf., *Meyerson v. Coopers & Lybrand*, 233 Neb. 758, 762, 448 N.W.2d 129, 133 (1989) (a trial court's undisclosed reason for sustaining a multiground demurrer "makes it somewhat difficult to identify and analyze the question presented" to an appellate court); *Clyde v. Buchfinck*, 198 Neb. 586, 254 N.W.2d 393 (1977) (demurrer, containing several grounds, sustained without specification of

a reason for the ruling). The suggested rule procedurally identifies the dismissal question for a trial court and reduces the likelihood of an appellate court's advocacy necessarily involved in searching for a justifiable basis which is undisclosed and, therefore, lacking in a trial court's dismissal order. Without the suggested rule, this court encourages a helter-skelter approach to civil procedure regarding dismissal motions, disorder which will unnecessarily vex courts, both at trial and appellate levels, and thoroughly bewilder litigants.

The district court's dismissal of Bert's action is untenable and deprived Bert of the substantial right to a disposition of asserted claims according to law. In short, the district court abused its discretion in dismissing Bert's action. Therefore, the district court's judgment should have been set aside and this cause remanded to the district court with direction to reinstate Bert's action and allow Bert to file the third amended petition.

DOUGLAS BROWN, APPELLANT, V. CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., APPELLEE.

472 N.W.2d 381

Filed July 19, 1991. No. 88-1023.

1. **Appeal and Error.** This court need not consider assignments of error not argued in an appellant's brief.
2. **Employment Contracts: Wages: Words and Phrases.** Where an employment contract provides for the sharing of possible financial losses, sums collected under such a provision are not "benefits" which could be considered "wages" under Neb. Rev. Stat. § 48-1229(3) (Reissue 1984).
3. **Appeal and Error.** In an action at law, the factual findings of the trial court have the effect of a jury verdict and will not be set aside unless clearly wrong.

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

Jerold V. Fennell, of Peter, Peter & Fennell, for appellant.

Warren S. Zweiback and Mary Lou Perry, of Zweiback, Hotz & Lamberty, P.C., for appellee.

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

GRANT, J.

Douglas Brown, plaintiff-appellant, filed his petition, styled "Equity Action," against defendant-appellee, Clayton Brokerage Co. of St. Louis, Inc. (Clayton), seeking relief under Neb. Rev. Stat. §§ 48-1228 et seq. (Reissue 1984), the Nebraska Wage Payment and Collection Act. Plaintiff's original petition had "a written contract of employment" attached to it and alleged that Clayton "intentionally and willfully [refused] to pay wages due plaintiff under the terms of said contract." Clayton filed an "Amended Answer and Counter-Claim." The answer generally denied plaintiff's allegations and alleged that Clayton was entitled to a setoff of $22,848 against any amounts due plaintiff. Clayton's counterclaim alleged that Clayton had paid to plaintiff $22,848 in excess of Clayton's obligation "under the terms of the contract" and sought judgment against plaintiff in that amount. Plaintiff did not reply to defendant's answer. He filed an answer denying the allegations of the counterclaim.

After trial without a jury, the trial court entered its order denying plaintiff relief and granting Clayton judgment on its counterclaim in the amount of $16,968.22 after offsetting certain expenses which the court determined had been erroneously charged by Clayton to plaintiff. Plaintiff timely appealed. In this court he assigns as error the actions of the trial court in (1) failing to order an accounting, (2) finding that the Nebraska Wage Payment and Collection Act was not applicable, and (3) failing to offset certain amounts alleged to have been erroneously charged by Clayton to plaintiff's office, to wit: $10,258.50 for one of plaintiff's brokers' account debits, $1,311 in wages that Clayton did not pay to one of plaintiff's brokers, $10,792.98 in wire and hotline expenses overcharged to plaintiff, and $3,040.83 in office expenses charged to plaintiff after his office was closed. Clayton did not cross-appeal. We affirm.

We first note that the "contract" attached to plaintiff's petition, introduced in evidence without objection as the

contract between the parties and consistently referred to by both parties in the evidence and in their briefs as a contract, is not a contract. Exhibit 1 is a one-page typed document, with handwritten deletions and additions, which appears in its entirety on the following page. The initials on the document were identified as those of Bill Reisner, an employee of Clayton's who supervised the closing of Clayton's branch office in Omaha and negotiated with plaintiff to go to work for Clayton thereafter. His authority is not further described.

The document is obviously not a contract. No party is bound to do anything. Nonetheless, the parties treat this document as a contract and not as an understanding of some oral agreement or as a summary of some fully executed contract not before the court. In our review we will treat the case in the manner in which it was tried in the district court. *Sikyta v. Arrow Stage Lines, ante* p. 289, 470 N.W.2d 724 (1991); *Peterson v. Don Peterson & Assoc. Ins. Agency*, 234 Neb. 651, 452 N.W.2d 517 (1990). As have the parties, we will treat exhibit 1 as the operative contract between the parties.

As a further preliminary matter, we note that plaintiff filed an amended petition on July 25, 1988—27 days after the case was tried and submitted to the court. The trial court's order and opinion were rendered on October 20, 1988. The amended petition set out a "Second Cause of Action" after repeating the allegations of plaintiff's first petition. The second cause of action generally alleges a breach of contract action. The record does not show a responsive pleading by Clayton addressed to the amended petition. The trial court addressed the breach of contract theory in its opinion, and the parties also address it in their briefs. We assume the allegations of the amended petition were considered to be denied by Clayton, and Clayton's affirmative defenses pled in its amended answer were considered as defenses to the amended petition. Further, in view of the fact that both parties and the court treat the affirmative allegations of Clayton's amended answer as controverted, we will ignore the fact that the record does not show that plaintiff filed a reply to Clayton's amended answer. See *Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989).

COPY

OMAHA

Douglas Brown

CONTRIBUTING OFFICE CONCEPT

Clayton will credit the office 70% of gross commission revenue. Of the remaining 30% the following items would be partially subsidized:

Rent:

[redacted]d $350 per broker.*

Administrative Personnel:

$200 per broker.

Communication:

$100 per broker.

Health Insurance:

$100 per broker.

Quotation:

$1,000 per location ~~or actual cost, whichever is less~~.

These are monthly amounts. The remaining normal P & L expenses would be charges against the 70%. Additionally, Clayton would pay, upon prior consultation and agreement, certain one-time expenses associated with changes necessary to put this operation in effect.

* ~~$500~~ 500 @ 2 brokers -- ~~$350~~ 500 @ 3 brokers, ~~also~~ 350 @ 4 etc

ACKNOWLEDGEMENT:

Signature: Douglas Brown
Douglas Brown

Date: _____

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.

By Its: _____

Date: _____

EXHIBIT 1

The record shows the following: Clayton is a commodities brokerage firm with its headquarters in St. Louis, Missouri. Plaintiff was initially employed by Clayton in 1976 as a commodities option trader. He worked for Clayton until 1981, when he quit after a dispute regarding payment of a customer's account deficit. Plaintiff then opened his own business in the Livestock Exchange Building in Omaha as an independent introducing broker with Cargill Investing Service.

In 1984, Clayton closed the office it had maintained in the Livestock Exchange Building. Soon after, plaintiff was approached with an offer to return to work for Clayton as the manager of Clayton's recently vacated Omaha office.

The parties began discussions and eventually agreed that plaintiff would take over operation of the Omaha office on December 1, 1984. It was testified to that exhibit 1, discussed above, was signed in March 1985 at a convention in New Orleans, after plaintiff had already been operating the office since the preceding December.

Clayton operated three types of offices. In its company-owned offices, all employees were paid a set salary or commission. The company was responsible for all expenses and any risk of loss. Another office arrangement was that of an independent introducing broker, who assumed all expenses and all risk of loss in exchange for a predetermined percentage of all commissions generated by the office.

The third arrangement, which was chosen by plaintiff, was known as a "shared office" concept. Under this arrangement, plaintiff received 70 percent of all commissions generated by the office. He was responsible for all ordinary and usual operating expenses, and apparently bore the risk of loss if those expenses exceeded the office's share of commissions. In exchange for its 30 percent, Clayton subsidized certain office expenses, paid payroll taxes, provided health insurance and other employee benefits, and provided some equipment. Clayton would also pay all salaries and expenses, and then would deduct those amounts from the office's 70-percent share of commissions. All commissions were collected by Clayton. Only a small percentage of Clayton's offices operated in this manner.

Plaintiff's operation showed a profit until April 1986, when one of the plaintiff's brokers lost a large account. Commissions dwindled, the office was unable to meet expenses, and the office began incurring debt to Clayton. In November 1986, Clayton closed the Omaha office.

At the trial, 72 exhibits were submitted by the parties. Plaintiff's evidence supported his theories that he was an employee and had been underpaid in his commissions. Clayton's evidence supported its theory that it had paid plaintiff more than required by the contract and that plaintiff was indebted to Clayton on Clayton's counterclaim.

We first address plaintiff's contention that the trial court erred in its refusal to order an accounting. The point is not argued in plaintiff's brief. We have held that this court need not consider assignments of error not argued in an appellant's brief. *State v. Contreras*, 236 Neb. 455, 461 N.W.2d 562 (1990).

Plaintiff next assigns as error the trial court's finding that the Nebraska Wage Payment and Collection Act, §§ 48-1228 et seq., is not applicable to this case. We recently held in *Waite v. A. S. Battiato Co., ante* p. 151, 469 N.W.2d 766 (1991), that where an employment contract provides for the sharing of possible financial losses, sums collected under such a provision are not "benefits" which could be considered "wages" under § 48-1229(3). In this case, the contract between the parties provided for a sharing of possible losses. Clayton agreed to make certain payments to plaintiff, whether plaintiff generated income or not. Plaintiff agreed to make the balance of any required payments, whether the operation generated sufficient money or not. Plaintiff stood to make profits or pay losses depending on his operation of the business. The trial court was correct in holding that the contract between the parties did not come under §§ 48-1228 et seq.

Plaintiff's third assignment of error challenges the district court's refusal to offset various expenses pursuant to the contract. This action is one at law, and thus the factual findings of the trial court have the effect of a jury verdict and will not be set aside unless clearly wrong. *Waite v. A. S. Battiato Co., supra*. We do not reweigh the evidence but, instead, consider the judgment in the light most favorable to the successful party on

each of the issues. That party is entitled to the benefit of every inference which can reasonably be deduced from the evidence. *Id.* Finally, in a bench trial, the judge sitting as the trier of fact is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Id.*

First, plaintiff contends that $10,258.50 was improperly charged to the plaintiff's office for one of plaintiff's brokers' account debits. Plaintiff contends that the industry practice is to deduct debit losses from the individual broker in charge of the defaulting customer's account. Clayton adduced evidence that plaintiff requested Clayton to deduct losses from plaintiff instead of the account of his star producer. In its order, the trial court stated:

> Aside from the filing of this suit . . . there was no protest by the Plaintiff at any time concerning these deductions. While I do not rely on the doctrine of estoppel, the Plaintiff's failure to protest these substantial deductions reasonably close to the time they were made supports the finding that more likely than not the Plaintiff agreed to the deductions from his commissions.

We determine that this finding was reasonably deducible from the evidence. There was no error in the court's refusal to offset these deductions.

Plaintiff then contends that the trial court erred in failing to offset $1,311 in wages that the company allegedly did not pay to one of plaintiff's brokers. The practice of the parties was that the company would issue the paychecks, and then the wages for plaintiff's employees would be deducted from the office's share of commissions. Whether or not the paycheck was issued is a question of fact. The court did not allow the offset, thereby finding, in effect, that the check was issued. The evidence is not conclusive either way. The trial court did not err in this regard.

Plaintiff then contends the trial court erred in refusing to offset alleged overcharges for wire and hotline expenses. The wire expense consisted of a rental fee for Teletype equipment and a monthly charge for the telephone wire over which the Teletype information was transmitted. The hotline expense was for an open line between all Clayton offices and traders on the floor of the Chicago exchange. The two expenses were

combined as one on the monthly reports received by plaintiff.

Plaintiff testified, over objection, that the parties orally agreed that the hotline portion of expenses would not exceed $150. The monthly statements consistently showed a charge in excess of that amount. The trial court found that the expenses were owed by plaintiff. There is sufficient evidence to support the trial court's findings.

Finally, plaintiff contends that the trial court erred in failing to offset $3,040.83 in office expenses that the plaintiff alleged were charged to him after the office had closed. The court received an exhibit prepared by an employee of Clayton's which divided the expenses on the November and December 1986 billing statements between those expenses which accrued before the closing of the office and those which accrued after the closing. Clayton conceded that plaintiff was not responsible for the latter amounts. It is apparent that the court found that the expenses before closing were owed by plaintiff under the contract. The trial court was correct in that determination.

At the conclusion of its brief on this appeal, Clayton moved for sanctions for a frivolous appeal under Neb. Rev. Stat. § 25-824(4) (Reissue 1989). We find that the appeal was not frivolous. The motion is denied.

The order of the district court is affirmed.

AFFIRMED.

WHITE, J., concurs.

MICHAEL G. KATSKEE, MITCHELL D. KATSKEE, AND SALLY A. SHIELDS, COPERSONAL REPRESENTATIVES OF THE ESTATE OF LOYAL KATSKEE, DECEASED, DOING BUSINESS AS L.K. COMPANY, APPELLANTS, V. NEVADA BOB'S GOLF OF NEBRASKA, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS NEVADA BOB'S, APPELLEE.

472 N.W.2d 372

Filed July 19, 1991. No. 89-170.

1. **Waiver: Words and Phrases.** A waiver is the voluntary and intentional relinquishment or abandonment of a known existing legal right, or conduct which warrants an inference of relinquishment of such a right.
2. **Waiver: Estoppel.** To establish waiver of a legal right, there must be clear, unequivocal, and decisive action by the party which demonstrates such purpose, or acts amounting to estoppel.
3. **Contracts: Waiver: Proof: Intent.** A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the party's intention to waive.
4. **Decedents' Estates: Claims: Limitations of Actions: Pleadings: Recoupment.** Notwithstanding a defendant's failure to file a claim in estate proceedings pursuant to the provisions of Neb. Rev. Stat. § 30-2485 (Reissue 1989), the defendant may assert a counterclaim that arises out of the transaction or occurrence on which the plaintiff estate's action is founded for purposes of recoupment to prevent or reduce a judgment for plaintiff, but affirmative relief will not be given defendant on such a counterclaim.
5. **Decedents' Estates: Claims: Limitations of Actions: Pleadings: Waiver.** Failure to plead the nonclaim statute, Neb. Rev. Stat. § 30-2485 (Reissue 1989), does not effect a waiver of the bar.
6. **Jury Instructions: Appeal and Error.** Failure to object to an instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error indicative of a probable miscarriage of justice; however, the trial court must instruct the jury on the law of the case, whether so requested or not.
7. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
8. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion.
9. **Breach of Contract: Damages.** One injured by a breach of contract is entitled to recover all its damages, including the gains prevented as well as the losses sustained, provided the damages are reasonably certain and such as might

naturally be expected to follow the breach.

10. **Damages: Proof.** While it is true that damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.

11. _____: _____. The loss of prospective profits may be recovered if the evidence shows with reasonable certainty both the loss and the extent thereof. Uncertainty as to the fact of whether damages were sustained at all is fatal to recovery, but uncertainty as to amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded for a new trial.

Paul R. Elofson, of Abrahams, Kaslow & Cassman, for appellants.

Charles L. Titus for appellee.

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

CAPORALE, J.

Plaintiffs-appellants, Michael G. Katskee, Mitchell D. Katskee, and Sally A. Shields, personal representatives of the estate of Loyal Katskee, deceased, alleged that by failing to make certain payments, defendant-appellee, Nevada Bob's Golf of Nebraska, Inc., a Nebraska corporation doing business in Omaha, Nebraska, as Nevada Bob's, breached its obligations as the lessee of certain shopping mall space from decedent's sole proprietorship, L.K. Company. Nevada Bob's in turn counterclaimed, pleading that L.K. Company is estopped from asserting the breach by Nevada Bob's, as L.K. Company had earlier breached the lease by failing to allow Nevada Bob's to exercise its right of first refusal to lease and occupy space adjacent to the demised space, thereby diminishing its profits, and by overcharging for common area expenses. Pursuant to verdict, the district court dismissed the personal representatives' second amended petition and entered a judgment in the sum of $58,000 in favor of Nevada Bob's on its counterclaim. The personal representatives claim the district court erred in (1) failing to find that Nevada Bob's, as a matter of law, waived its right of first refusal, (2) failing to require

Nevada Bob's to prove it had filed a claim in the estate proceedings, (3) denying the personal representatives leave to amend their pleadings to allege the failure of Nevada Bob's to file the aforesaid claim, (4) instructing the jury that it could not find both for the personal representatives on their petition and for Nevada Bob's on its counterclaim, and (5) finding Nevada Bob's sufficiently proved its damages to submit that issue to the jury. We reverse and remand for a new trial.

The lease in question was executed on October 12, 1983, and provided that Nevada Bob's would have a right of first refusal on adjoining space.

In May or June 1984, Nevada Bob's decided it needed to expand its facilities. In July or August 1984, Richard Johnson contacted L.K. Company about renting space in the mall for his business, Frank's Music Collectibles. Johnson was interested in the space which was subject to Nevada Bob's right of first refusal.

Michael Katskee, decedent's son in charge of L.K. Company's operations and one of the personal representatives, testified that he informed Paul Mulligan, Nevada Bob's manager, that L.K. Company had a prospective tenant for the adjacent space and needed to speak with Craig Reitz, president of Nevada Bob's. The son said he met with Reitz approximately 2 weeks later, reminded him that Nevada Bob's had a right of first refusal on the space, and told him of Johnson's interest. According to the son, Reitz told him that Nevada Bob's was not interested in the space, and a few weeks later Johnson rented it.

In contrast, Reitz testified that he first learned of Johnson's lease of the adjacent space after the fact and that it was he who reminded the son that Nevada Bob's had a right of first refusal on the space. According to Reitz, the son told him he would "see what he could do." Reitz further testified that the son informed him in October 1984 that Johnson would be unable to leave the adjacent space until after Christmas. When Johnson did not relocate after Christmas, Reitz again contacted the son and was informed that Johnson would not be moving. In February 1985, Nevada Bob's offered to help relocate Johnson and pay the first month's rent at the new location on the theory that this would be more expedient and cost-effective than

vacating the leased premises and defending a lawsuit.

Reitz stated that he had another conversation with the son in May 1985, in which Reitz informed the son that Nevada Bob's would have to relocate in the fall unless permitted to expand. According to Reitz, the son said that Johnson's lease expired on August 31, and suggested that Nevada Bob's wait and see if Johnson would renew. Johnson's lease was renewed in October.

Reitz testified that Nevada Bob's informed the son in August 1985 that they would be seeking new space and that as soon as such was found, Nevada Bob's would vacate the leased premises.

Decedent died on November 12, 1985. On December 6, 1985, Nevada Bob's sent L.K. Company a registered letter informing it that Nevada Bob's would vacate the leased premises as of January 31, 1986. Nevada Bob's vacated the premises in mid-January 1986. It was $900 in arrears on the rent due as of the date it tendered its final payment in January 1986 and did not pay rent for the remaining 9 months of its lease term. L.K. Company was unable to relet the space.

The claim that the district court erred by failing to find that as a matter of law Nevada Bob's waived its right of first refusal is controlled by the rule that a waiver is the voluntary and intentional relinquishment or abandonment of a known existing legal right, or conduct which warrants an inference of relinquishment of such a right. To establish waiver of a legal right, there must be clear, unequivocal, and decisive action by the party which demonstrates such purpose, or acts amounting to estoppel. *Wheat Belt Pub. Power Dist. v. Batterman*, 234 Neb. 589, 452 N.W.2d 49 (1990); *Jelsma v. Scottsdale Ins. Co.*, 231 Neb. 657, 437 N.W.2d 778 (1989). A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the party's intention to waive. *Jelsma, supra*; *Pearce v. ELIC Corp.*, 213 Neb. 193, 329 N.W.2d 74 (1982).

If the jury wished to do so, it could reasonably interpret Reitz' testimony as demonstrating not an intent on the part of Nevada Bob's to waive its option on the adjacent space but,

rather, a willingness by Nevada Bob's to go to great lengths to find a way to exercise its right without resorting to litigation. Consequently, the district court could not properly conclude that Nevada Bob's as a matter of law waived its right of first refusal.

We thus reach the second claimed error, the district court's failure to obligate Nevada Bob's to prove, as an element of its counterclaim, that it had filed a claim with the decedent's estate as required by Neb. Rev. Stat. § 30-2485 (Reissue 1989).

Section 30-2485(a), in pertinent part, provides:

> All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:
>
> (1) within two months after the date of the first publication of notice to creditors if notice is given in compliance with section 30-2483 [providing for notice by publication] . . . . If any creditor has a claim against a decedent's estate which arose before the death of the decedent and which was not presented within the time allowed by this subdivision, including any creditor who did not receive notice, such creditor may apply to the court within sixty days after the expiration date provided in this subdivision for additional time and the court, upon good cause shown, may allow further time not to exceed thirty days;
>
> (2) within three years after the decedent's death, if notice to creditors has not been published.

The personal representatives offered but were not permitted to prove that estate proceedings were commenced in the county court for Douglas County on November 25, 1985, that notice to creditors of decedent's death was published and the final date for filing a claim against the estate was January 27, 1986, and that Nevada Bob's did not file any claim. Although it is true that

the lease was signed on behalf of L.K. Company by the son, the document identified the lessor as "L.K. Company (Loyal Katskee)." Thus, the suggestion by Nevada Bob's that it could not have known its lease was with decedent's sole proprietorship is untenable.

Nevada Bob's next argues that § 30-2485 is inapplicable because the lease defines "lessor" (and lessee) to include the "heirs, executors, administrators, successors and assigns," and thus, by implication, personal representatives. According to Nevada Bob's, the fact that the lease defines lessor to include personal representatives takes its counterclaim out of the provisions of the probate code. This assertion is without merit. The statutory language is clear: "All claims against a decedent's estate which arose before the death of the decedent . . . are barred against the estate, the personal representative, and the heirs and devisees" unless presented within the appropriate period. The counterclaim of Nevada Bob's is against the personal representatives in their capacity as such for a breach by decedent during his life. The claim is barred unless filed within the period set forth in § 30-2485.

Recognizing the likelihood that we would reject the position just dismissed, Nevada Bob's next contends that the nonclaim statute does not apply to counterclaims. Following a long line of earlier cases holding that a statute of limitations will not bar a defense of recoupment, we recently reaffirmed that the defense of recoupment is not barred by § 30-2485. *In re Estate of Massie*, 218 Neb. 103, 353 N.W.2d 735 (1984), *disapproved on other grounds, In re Estate of Price*, 223 Neb. 12, 388 N.W.2d 72 (1986). Nevada Bob's invites us to extend the *Massie* exception to include counterclaims as well; it is an invitation we decline, for there is a difference between recoupment and a counterclaim. The former is purely defensive, while the latter seeks to recover an affirmative judgment.

According to C. Wright, The Law of Federal Courts at 534-35 (4th ed. 1983):

> The usual doctrine, with respectable common law origins, is that an unrelated counterclaim is barred by the statute of limitations. A counterclaim that arises out of the transaction or occurrence on which the action is founded

> may be asserted for purposes of recoupment to prevent or reduce a judgment for plaintiff but affirmative relief will not be given on such a counterclaim.

The counterclaim of Nevada Bob's arises out of the same transaction as does the personal representatives' action, i.e., the lease between L.K. Company and Nevada Bob's. Therefore, the rights of Nevada Bob's under the lease may be asserted for recoupment and thus limit or defeat the personal representatives' claim, but cannot become the basis of an affirmative award against the personal representatives. To hold otherwise would be to open the door to collusive lawsuits. It is to avoid such suits that we have held a personal representative cannot waive the bar of the nonclaim statute to the detriment of the estate, even by failing to plead it. *In re Estate of Masopust*, 232 Neb. 936, 443 N.W.2d 274 (1989). This rule prevents a personal representative from favoring a particular late claimant. If we were to hold that an otherwise barred claim could be raised as a counterclaim, a personal representative would be able to avoid the rule against waiver simply by filing a meritless suit against a favored creditor, thereby permitting that creditor to avoid the bar of the nonclaim statute and defeat the very purpose of the rule against waiver.

Having concluded that the nonclaim statute is applicable, we must address the third assignment of error by determining the effect of the personal representatives' failure to plead the statute in their answer to the counterclaim of Nevada Bob's.

We have already noted that failure to plead the nonclaim statute does not effect a waiver of the statutory bar. *In re Estate of Masopust, supra*. See, also, *Storm v. Cluck*, 168 Neb. 13, 95 N.W.2d 161 (1959); *In re Estate of Golden*, 120 Neb. 226, 231 N.W. 833 (1930); *Estate of Fitzgerald v. First Nat. Bank of Chariton*, 64 Neb. 260, 89 N.W. 813 (1902) (cases in accord with *Masopust* but predating adoption of the present probate code).

Neb. Rev. Stat. § 30-2484 (Reissue 1989) provides, in pertinent part: "Unless an estate is insolvent the personal representative, *with the consent of all successors*, may waive any defense of limitations available to the estate." (Emphasis supplied). Since the personal representatives cannot waive the defense without the consent of all the successors and failure to

plead the nonclaim defense does not act as a waiver, the effect is to make proof of compliance with the claim procedure a condition precedent to, or an essential element of, the counterclaim of Nevada Bob's, irrespective of the allegations in the personal representatives' answer.

The foregoing resolution of the second and third assignments of error obviously requires a reversal of the district court's judgment and a remand of the cause for a new trial. Nonetheless, we address the fourth assignment of error, which challenges an instruction to the jury, for the analysis of that assignment further explains the interplay between the personal representatives' petition and the counterclaim of Nevada Bob's.

In presenting their argument in this regard, the personal representatives acknowledge they failed to object to the instruction when it was tendered for review, but contend that the instruction was plain error and for that reason warrants reversal of the district court's judgment.

In view of the determination that, in any event, further proceedings must be had, the personal representatives' failure to object is academic. Nonetheless, it is worth recalling that failure to object to an instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error indicative of a probable miscarriage of justice; however, the trial court must instruct the jury on the law of the case, whether so requested or not. *State v. Lohman*, 237 Neb. 503, 466 N.W.2d 534 (1991). Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion. *State on behalf of Garcia v. Garcia, ante* p. 455, 471 N.W.2d 388 (1991); *In re Interest of M.B. and J.B.*, 233 Neb. 368, 445 N.W.2d 618 (1989).

The questioned instruction advised the jury it could not "return a verdict for the [personal representatives] on [their] petition <u>and</u> for [Nevada Bob's] on [its] counterclaim. A recovery by the one precludes a recovery by the other."

(Emphasis in original.) It is erroneous in two respects.

First, the instruction ignores the fact that the jury could have found in favor of the personal representatives on their claim for the $900 in arrearages which accrued before Nevada Bob's vacated the premises, while still finding that the claim for rent accruing after the departure by Nevada Bob's was defeated by L.K. Company's failure to give Nevada Bob's an opportunity to exercise its right of first refusal. Second, because of the bar imposed by the nonclaim statute, Nevada Bob's could only use its counterclaim for recoupment; absent a recovery by the personal representatives, Nevada Bob's would have nothing against which to recoup.

Because the same issue is likely to arise during the course of a new trial, we look to the adequacy of the proof of damages sustained by Nevada Bob's.

The witness called as an expert on the topic by Nevada Bob's testified that Nevada Bob's lost $130,445 in profits because it was not permitted to expand into the adjacent L.K. Company space. The witness computed this figure by determining the yearly revenue produced per square foot at the location to which Nevada Bob's moved after vacating the L.K. Company premises and multiplying that figure by the square footage of the adjacent space. The witness called that result the revenue Nevada Bob's lost per year because it was unable to expand. He next multiplied this computation by gross profit margin and subtracted therefrom his estimate of the additional expenses incident to the increased square footage. He then divided this figure by 12 to obtain what he designated as lost profits per month and multiplied that figure by the number of months Nevada Bob's stayed at the L.K. Company premises after L.K. Company's breach of the option provision of the lease.

> One injured by a breach of contract is entitled to recover all its damages, including the gains prevented as well as the losses sustained, provided the damages are reasonably certain and such as might naturally be expected to follow the breach. [Citations omitted.] While it is true that such damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural. [Citation omitted.] [We have]

> observed that loss of prospective profits may be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof. Uncertainty as to the fact of whether damages were sustained at all is fatal to recovery, but uncertainty as to amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss. [Citation omitted.]

Buell, Winter, Mousel & Assoc. v. Olmsted & Perry, 227 Neb. 770, 774, 420 N.W.2d 280, 283-84 (1988).

As noted previously, the lost-revenue figure was based upon the performance of Nevada Bob's at the new location, not at the L.K. Company premises. The expert assumed that the only difference between the two locations was the square footage. No studies or comparisons were made as to differences in the customer base, relative accessibility of the facilities, proximity to recreation areas or other shopping areas, parking, or any other external factors.

The witness also used sales figures from a different time period and made no study as to any changes in the relevant market. He did not evaluate whether there was any change in the number of competitors, whether there was any change in consumer interest in the relevant products, or whether there were any changes in the products sold by Nevada Bob's.

He assumed that since Nevada Bob's sold $216 worth of merchandise per square foot at the new location for 1986, it would have had identical revenue per square foot at the L.K. Company premises during the previous 17 months. As the expert provided no foundation for this assumption, there is no basis upon which the jury could conclude that the two locations and time periods were comparable. Thus, the revenue per square foot from the new location was irrelevant, and the witness' lost-profits figure is mere speculation and conjecture.

Nor did the testimony of Reitz provide a basis upon which the jury could assess damages. This witness, who has a degree in corporate finance, who has been in the sporting goods business since 1970, and who operates a number of sporting goods stores, opined that as a result of its inability to expand into the adjacent L.K. Company space, Nevada Bob's lost $130,000 in profits. His opinion was based upon a review of the corporate

books and records; the "substantial similarity" between the operations of Nevada Bob's at the L.K. Company location and the new location, as well as between those locations and his other stores; discussions with other Nevada Bob's franchise owners as to optimum square footage; and his experience in the business. He also testified that both the L.K. Company and the new Omaha locations had the identical customer base. Although he testified that he made a traffic survey of the new location "by sight," he did not relate the results of this survey to his opinion, and he admitted that he made no such survey at the old location.

This testimony, like that of the other expert testifying for Nevada Bob's, fails to establish that the L.K. Company location was similar to the locations with which it was compared. Although Reitz stated that the operations at the various locations were substantially similar, he did not establish that the locations themselves were similar. In addition, Reitz' comparison of performance at the L.K. Company location with that at the new location suffers from the same temporal problems as did that of the other witness. In sum, Reitz' testimony is as speculative and conjectural as that of the other expert.

For the foregoing reasons, the judgment of the district court is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

WHITE, J., dissenting.

The majority has reversed the judgment and remanded this cause on other grounds, but has nonetheless found it necessary to advise all the parties, as well as the trial court, that the testimony by the expert witness of Nevada Bob's was "speculative and conjectural." I disagree with the majority's comments concerning the adequacy of proof of damages for lost profits, as well as the advisory nature of these comments.

A trial court's ruling in receiving or excluding an expert's opinion will be reversed only when there has been an abuse of discretion. *Fuglsang v. Blue Cross*, 235 Neb. 552, 456 N.W.2d 281 (1990). Neb. Rev. Stat. § 27-702 (Reissue 1989) permits an expert to testify if his scientific, technical, or other specialized

knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. The witness must have sufficient skill, knowledge, experience, training, or education in order to qualify as an expert.

The majority concludes that the calculation of lost revenue sustained by Nevada Bob's at the L.K. Company premises cannot be based on the performance of Nevada Bob's at the new location. The majority asserts that this testimony, as well as the testimony of the company president, Reitz, was insufficient because it failed to establish that the L.K. Company location was similar to the locations with which it was compared and upon which the lost-profit figures were based. The majority does not dispute the expert status of either witness.

The evidence strongly tended to show an optimum sales potential was achieved when space available reached the desired size. To what extent the damages calculation should be discounted or credited was and is a question for the finder of fact. According to our standard of review, that finding may not be overturned unless there has been an abuse of discretion by the trial court.

I agree that in any event Nevada Bob's is entitled only to a setoff of any damages awarded to the L.K. Company. The record contains sufficient evidence for the trial court to conclude that the lost profits of Nevada Bob's at the L.K. Company location equaled $130,445. Therefore, since the damages of Nevada Bob's far exceed any damages that could possibly be awarded to the L.K. Company, the L.K. Company's claim should be dismissed and the counterclaim of Nevada Bob's should be dismissed.

Once again the majority has seen fit to substitute its judgment for that of the trial court. I find no abuse of discretion by the trial court in this case.

FRANCES E. WORKMAN, APPELLANT, V. STEVEN L. STEHLIK AND DUANE L. STEHLIK, APPELLEES.

471 N.W.2d 760

Filed July 19, 1991. No. 89-324.

1. **Courts: Judgments: Appeal and Error.** On appeal, the district court reviews the county court judgment for error appearing on the record made in the county court.
2. _____: _____: _____. As appellate courts reviewing a judgment in a bench trial of a law action in the county court, the Supreme Court and the district court do not reweigh evidence, but consider the judgment in the light most favorable to the successful party and resolve evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. **Appeal and Error.** Appellate courts are required to review questions of law de novo on the record.
4. **Negligence: Words and Phrases.** Contributory negligence is conduct for which a plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury.
5. **Negligence.** An actor is contributorily negligent if (1) he or she fails to protect himself or herself from injury, (2) his or her conduct concurs and cooperates with the defendant's actionable negligence, and (3) his or her conduct contributes to his or her injuries as a proximate cause.
6. **Motor Vehicles: Right-of-Way.** When two vehicles approach or enter an intersection from different roadways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right.
7. _____: _____. When a collision occurs in the ordinary city or country intersection, unless there is evidence that one of the vehicles was traveling at a very much greater rate of speed than the other, it is self-evident that the vehicles were reaching the intersection "at approximately the same time." A driver who does not have the right-of-way is not justified in taking close chances, but has the duty to yield if there is a reasonable risk of collision should both vehicles continue on their course.
8. **Motor Vehicles: Right-of-Way: Negligence.** A driver approaching an unprotected intersection where he or she knows and can readily observe that his or her view is obstructed must do so at such a speed as will afford him or her a reasonable opportunity to make effective observations for cars approaching on the intersecting road and give him or her a reasonable opportunity to properly react to the situation he or she then observes or could observe, and where his or her view is completely obstructed and his or her speed is such that he or she has given himself or herself no opportunity at all to observe and react appropriately, he or she may, where the facts are undisputed, be found negligent as a matter of law.

Appeal from the District Court for Pawnee County, ROBERT T. FINN, Judge, on appeal thereto from the County Court for

Pawnee County, THOMAS J. GIST, Judge. Judgment of District Court affirmed.

Kevin Ruser for appellant.

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

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

HASTINGS, C.J.

Plaintiff, Frances E. Workman, appeals from the judgment of the district court which reversed a judgment in the amount of $945 plus costs entered in her favor by the county court following a bench trial. She assigns as error the findings by the district court that she was guilty of contributory negligence as a matter of law and that her negligence was sufficient to bar her recovery as a matter of law. We affirm.

On May 20, 1988, between 5 and 6 p.m., plaintiff was driving her Oldsmobile automobile west on Luzerne Street in Table Rock. At that time she was struck by the motor vehicle being driven by Steven L. Stehlik, who was southbound on 9th Street. This was a 90° angle intersection with no traffic control signs or signals on either street. The roads' surfaces were unpaved, and it had rained in the afternoon and was raining at the time of the accident.

Workman testified in county court that as she approached the intersection she looked to the north as soon as possible when an embankment was no longer blocking her view. By the time Workman could see around the embankment to the north she was already in the middle of the intersection and could see Stehlik's vehicle approaching from her right approximately two or three car lengths north of the intersection. Workman estimated that she was traveling between 12 and 20 miles per hour as she approached the intersection. Stehlik, in his testimony, estimated that Workman was traveling over 20 miles per hour as her vehicle entered the intersection. Workman testified that she was almost through the intersection when her vehicle was struck behind her passenger door. Workman

produced an estimate of $945 for the repair of her vehicle.

Stehlik pled guilty to a citation for failure to yield the right-of-way. He estimated that prior to entering the intersection he was traveling 15 miles per hour. Workman estimated that Stehlik was traveling 25 miles per hour as his vehicle approached the intersection. Stehlik testified that the embankment obstructed his view of the other road near the intersection, or to his left, the direction from which Workman was approaching. Before entering the intersection Stehlik slowed and looked to his left and right and saw a red blur as he looked to his left again. Stehlik said that he tried to brake his vehicle, but his brakes locked. He estimated that after his brakes locked his vehicle slid 4 or 5 feet.

Following a bench trial, the county court found that Stehlik was negligent in the operation of his motor vehicle and that Workman was not contributorily negligent. Judgment was entered for Workman for $945 plus costs.

Upon the defendants' appeal to the district court, the district court concurred with the county court in finding Stehlik negligent, but found that the plaintiff was contributorily negligent as a matter of law in failing to keep a proper lookout as she proceeded through the intersection. The district court, in reversing the judgment of the county court, found that Workman's contributory negligence barred her recovery as a matter of law. Workman has appealed and requests that the judgment of the district court be reversed and the judgment of the county court be reinstated.

On appeal, the district court reviews the county court judgment for error appearing on the record made in the county court. Neb. Rev. Stat. § 25-2733(1) (Reissue 1989).

As appellate courts reviewing a judgment in a bench trial of a law action in the county court, the Supreme Court and the district court do not reweigh evidence, but consider the judgment in the light most favorable to the successful party and resolve evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Dammann v. Litty*, 234 Neb. 664, 452 N.W.2d 522 (1990).

However, appellate courts are required to review questions

of law de novo on the record. *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989).

Contributory negligence is conduct for which a plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury. An actor is contributorily negligent if (1) he or she fails to protect himself or herself from injury, (2) his or her conduct concurs and cooperates with the defendant's actionable negligence, and (3) his or her conduct contributes to his or her injuries as a proximate cause. *Horst v. Johnson*, 237 Neb. 155, 465 N.W.2d 461 (1991).

According to Neb. Rev. Stat. § 39-635(1) (Reissue 1989), when two vehicles approach or enter an intersection from different roadways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right.

Workman contends that the statutory right-of-way rule does not apply in the case at bar because she was already in the intersection when Stehlik entered it. However, this court has held:

> "When a collision occurs in the ordinary city or country intersection, unless there is evidence that one of the vehicles was traveling at a very much greater rate of speed than the other, it is self-evident that the vehicles were reaching the intersection 'at approximately the same time.' "

Curlile v. Lindner, 227 Neb. 510, 511, 418 N.W.2d 256, 257 (1988). Under *Curlile*, there is insufficient evidence that Workman reached the intersection prior to Stehlik, and thus Workman cannot avoid the finding of contributory negligence because of the limited evidence that she reached the intersection momentarily before Stehlik.

There is also case law which supports a finding that evidence regarding Workman's alleged presence in the intersection prior to Stehlik is irrelevant to the determination of liability. In *Kendall v. Hongsermeier*, 217 Neb. 109, 347 N.W.2d 855 (1984), this court noted that § 39-635(1) was intended to avoid

collisions between vehicles at intersections and that the right-of-way was not to be determined by the single test of which vehicle actually entered the intersection first. The court said that the driver who does not have the right-of-way is not justified in taking close chances, but has the duty to yield if there is a reasonable risk of collision should both vehicles continue on their course.

Under the rule announced by this court in *Hodgson v. Gladem*, 187 Neb. 736, 193 N.W.2d 779 (1972), Workman was negligent in failing to keep a proper lookout, regardless of the right-of-way rule. It was stated there:

> [T]he 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.

Id. at 742, 193 N.W.2d at 783.

The defendant in *Hodgson* was traveling 45 miles per hour as he approached the intersection. The defendant saw the plaintiff's vehicle about 30 feet from impact and applied his brakes. The court, in finding both parties guilty of negligence more than slight as a matter of law, held as follows:

> [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.

Id. at 742-43, 193 N.W.2d at 783.

In *Crink v. Northern Nat. Gas Co.*, 200 Neb. 460, 263

N.W.2d 857 (1978), both drivers approached a blind, uncontrolled intersection at about the same time and at such a rate of speed that neither could take any effective action to avoid the accident when they first saw or could have seen one another. The plaintiff in *Crink*, who had the directional right-of-way, attempted to distinguish *Hodgson* on the grounds that the plaintiff in that case was traveling 40 to 45 miles per hour, whereas the plaintiff in *Crink* was traveling 25 miles per hour and applied his brakes shortly before impact. The court, in finding the plaintiff at least more than slightly negligent when compared to the defendant's negligence, commented that the plaintiff's speed was such that he could not avoid the collision, even though he braked when he first observed the defendant's vehicle. The court said that the plaintiff's speed, as was also the case in *Hodgson*, left him with 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. The case at bar is analogous to *Crink*, in that Workman testified that she could not have avoided the accident by stopping.

Workman did not have the directional right-of-way, she entered an intersection in which her view to her right was blocked by an embankment, she could not see oncoming traffic until she entered the intersection, and she was driving at such a rate of speed that by her own admission she was unable to stop in time to avoid a collision with a vehicle which was favored over her. It is obvious that Workman was guilty of contributory negligence more than slight as a matter of law and therefore was barred from recovery.

The judgment of the district court is affirmed.

AFFIRMED.

WALTER FETTY, APPELLEE, V. SEWARD COUNTY RURAL PUBLIC POWER DISTRICT, APPELLANT.

471 N.W.2d 756

Filed July 19, 1991. No. 89-362.

1. **Negligence.** The determination of contributory negligence is generally a matter for the trier of fact.
2. **Negligence: Words and Phrases.** Contributory negligence is conduct for which a plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury.
3. **Negligence.** An actor is contributorily negligent if (1) he or she fails to protect himself or herself from injury, (2) his or her conduct concurs and cooperates with the defendant's actionable negligence, and (3) his or her conduct contributes to his or her injuries as a proximate cause.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Reversed and remanded with direction to dismiss.

Steven E. Guenzel, of Barlow, Johnson, DeMars & Flodman, for appellant.

John M. Guthery, of Perry, Guthery, Haase & Gessford, P.C., and Thomas Dawson for appellee.

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

CAPORALE, J.

In this political subdivisions tort claims action, the defendant-appellant, Seward County Rural Public Power District, challenges the judgment obtained against it and in favor of the plaintiff-appellee, Walter Fetty. The power district asserts the trial court erred in, among other things, failing to find that Fetty was contributorily negligent in a degree sufficient to bar his recovery as a matter of law. The record sustaining that assignment of error, we reverse and remand with the direction that the cause be dismissed, without consideration of the power district's other claimed errors.

In 1979, Fetty and his wife purchased a going gasoline and sundries retail business in Seward County, which they thereafter

expanded by adding camping facilities. As part of the addition, a second electrical service was provided by the power district to supplement the service it originally provided in 1966. The electrically energized wires for both services originated at a transformer pole, spanned to a support pole, and thence spanned to the west side of the metal building from which the business was conducted, at which point the services were connected to wires exiting conduits leading to two separate meters affixed to the building.

Each service consisted of two insulated energized wires, that is, wires carrying 120 volts of electrical current, wrapped around one uninsulated, nonenergized ground wire. Among other things, the ground wire provided support for the energized wires. The two services were affixed to the building adjacent to one another at a point more than 11 feet above ground and between the conduits. From this building connection point, the energized wires of each service, no longer wrapped around the ground wire, looped away from each other and were spliced to the conduit wires, which were insulated. Each of the splices connecting the energized wires to the conduit wires was encased in an aluminum connector, which appears to have been not more than 6 inches in length, thereby energizing the conduit wires. The encased wire splices on the 1979 service were insulated with tape which had deteriorated. The encased splices on the 1966 service were not insulated at all. There is testimony that because of oxidation, an encasing connector "could very well look like an insulator to an average person that doesn't know the difference."

During the afternoon of May 8, 1986, while on an aluminum ladder painting between the conduits, which apparently were several feet apart, Fetty, then 61 years old, suffered an electrical shock when his left hand came into contact with one of the splices on the 1966 service. The charge knocked Fetty from his position near the top of the ladder, which was stationed against the left conduit, to the ground, as the result of which he sustained injury.

Fetty is a college graduate, knew that electrical powerlines are dangerous and ought not be touched, and exhibited familiarity with the process of arc welding, which uses

electricity to heat and melt metals. He also knew that aluminum conducts electricity. He, nonetheless, being aware of the energized wires and never having noticed the connectors, assumed that it would be safe to work around the wires.

The record reveals that one coming into contact with an electrically energized wire would not suffer a shock unless he or she also came into contact with a grounding source. It is for that reason that employees of the power district use fiberglass ladders, which will normally not carry a current.

For purposes of our analysis, we assume, without deciding, that the power district was negligent in failing to insulate the connectors when they were installed and in thereafter failing to properly inspect and maintain them. The question is whether the power district is correct in claiming that in comparing its negligence to that of Fetty, Fetty was contributorily negligent in a degree sufficient to bar his recovery as a matter of law.

Neb. Rev. Stat. § 25-21,185 (Reissue 1989) provides:

> In all actions brought to recover damages for injuries to a person or to his property caused by the negligence . . . of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence . . . of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence . . . and contributory negligence shall be for the jury.

We have said:

> Contributory negligence is conduct for which a plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury. [Citations omitted.]
>
> An actor is contributorily negligent if (1) he or she fails to protect himself or herself from injury, (2) his or her conduct concurs and cooperates with the defendant's

> actionable negligence, and (3) his or her conduct contributes to his or her injuries as a proximate cause. [Citations omitted.]

Horst v. Johnson, 237 Neb. 155, 160-61, 465 N.W.2d 461, 465 (1991). Accord *Workman v. Stehlik, ante* p. 666, 471 N.W.2d 760 (1991).

While the determination of whether conduct constitutes contributory negligence is generally a question of fact, *Horst v. Johnson, supra*, we have ruled on a number of occasions that a plaintiff's conduct in coming into contact with electrical powerlines constituted contributory negligence in a degree sufficient to bar recovery as a matter of law. See, *Engleman v. Nebraska Public Power Dist.*, 228 Neb. 788, 424 N.W.2d 596 (1988); *Tiede v. Loup Power Dist.*, 226 Neb. 295, 411 N.W.2d 312 (1987); *Suarez v. Omaha P. P. Dist.*, 218 Neb. 4, 352 N.W.2d 157 (1984); *Rodgers v. Chimney Rock P.P. Dist.*, 216 Neb. 666, 345 N.W.2d 12 (1984); *Lorence v. Omaha P. P. Dist.*, 191 Neb. 68, 214 N.W.2d 238 (1974); *Omaha Nat. Bank v. Omaha P. P. Dist.*, 186 Neb. 6, 180 N.W.2d 229 (1970); *Disney v. Butler County Rural P. P. Dist.*, 183 Neb. 420, 160 N.W.2d 757 (1968).

While the foregoing cases involved overhead electrical wires carrying high-voltage electrical current, the principle remains that one is required to respect the properties of electrical energy. Fetty's cavalier assumption that it was safe to work around energized electrical wires while standing on an aluminum ladder leaning against a conduit attached to a metal building was ill founded and should have been recognized by him to be such.

This case is not unlike *Hulett v. Central Illinois Light Co.*, 99 Ill. App. 3d 211, 424 N.E.2d 1366 (1981), which held that a plaintiff, injured while spraying a liquid in the vicinity of observable exposed electrical wires, was contributorily negligent as a matter of law. That court, in affirming the trial court's grant of the defendant's motion for summary judgment, relied heavily upon the plaintiff's acknowledgment that he could have inspected the wires and that he was aware that spraying liquid on electric lines could produce a shock. While, here, there is testimony that perhaps the uninsulated condition of the connectors might not have been readily apparent to the

average person, the fact is that Fetty had firsthand experience with the powers of electrical energy and knew that aluminum conducts electricity.

Thus, the trial court's finding that the power district failed to prove that Fetty was contributorily negligent in a degree sufficient to bar his recovery as a matter of law is clearly erroneous.

Accordingly, the trial court's judgment must be, and hereby is, reversed and the cause remanded with the direction that it be dismissed.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

WHITE, J., dissenting.

In this most recent decision, the majority continues to usurp the role of the trial judge as the finder of fact. See, also, *Koncaba v. Scotts Bluff County*, 237 Neb. 37, 464 N.W.2d 764 (1991). Once again the court has ignored our standard of review in a bench trial of a law action and substituted its own judgment for that of the trial court. This court does not reweigh evidence but considers the judgment in the light most favorable to the successful party and resolves any evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Ohnstad v. Omaha Public Sch. Dist. No. 1*, 232 Neb. 788, 442 N.W.2d 859 (1989). The majority has again failed to give such deference to the decision of the trial judge in this case.

I cannot agree with the majority's contention that Walter Fetty's negligence was as a matter of law more than slight so as to totally bar compensation for his injuries. In reversing the decision of the trial court, the majority relies upon the facts that Fetty was a college graduate, had some experience with the process of arc welding, used an aluminum ladder to paint between the powerlines near his business, and knew that aluminum conducted electricity. According to the majority, these facts were sufficient to conclude, as a matter of law, that Fetty was more than slightly contributorily negligent, despite testimony in the record that the insulation protecting a wire splice had deteriorated and that because of oxidation, the connectors encasing the spliced wires "could very well look like

an insulator to an average person that doesn't know the difference."

Apparently, the majority presumes that Fetty should have known that the splices on the wires to the conduits were, or could have been, defectively insulated, based on the fact that he was an educated man familiar with the properties of electricity. While I concede that Fetty's action in using an aluminum ladder near the electrical lines was *evidence* of his contributory negligence, I cannot agree that his actions in this case were so grossly out of step with the "reasonable man" that he was negligent as a matter of law. The trial court agreed and rendered judgment in favor of Fetty.

CITIZENS FIDELITY BANK & TRUST CO., A KENTUCKY BANKING CORPORATION, APPELLEE, V. SOUTHWEST BANK & TRUST CO., A NEBRASKA BANKING CORPORATION, APPELLANT.

472 N.W.2d 198

Filed July 19, 1991. No. 89-363.

1. **Uniform Commercial Code: Banks and Banking: Negotiable Instruments: Liability: Proof.** A plaintiff establishes a prima facie case for liability of a payor bank when the plaintiff shows that a check which is the basis for the suit has been untimely dishonored, and the payor bank then has the burden to prove an excuse or defense for the untimely dishonor.
2. **Uniform Commercial Code: Banks and Banking: Negotiable Instruments: Damages.** If Neb. U.C.C. § 4-302 (Reissue 1980) is applicable, a payor bank is accountable for the full amount of the draft, even in the absence of actual damages.
3. **Uniform Commercial Code: Banks and Banking: Negotiable Instruments: Time: Strict Liability.** The primary reason for automatic or strict liability under Neb. U.C.C. § 4-302 (Reissue 1980) is a need for finality and certainty in business transactions; accordingly, if a payor bank fails to fulfill its statutory duty to return or dishonor an item in a timely manner, the payor bank is subject to sanction for its tardiness under the Uniform Commercial Code.

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

Michael G. Helms and Mark R. Scherer, of Schmid, Mooney & Frederick, P.C., for appellant.

Thomas M. Locher and Donald J. Pavelka, Jr., of Hansen, Engles & Locher, P.C., for appellee.

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

SHANAHAN, J.

Citizens Fidelity Bank & Trust Co., a Kentucky banking corporation, brought an action against Southwest Bank & Trust Co., a Nebraska banking corporation, and claimed that Southwest, payor of a counterfeit check, wrongfully refused to honor the check which Citizens had forwarded to Southwest for payment. After a bench trial in which evidence was presented through testimony, exhibits, and a stipulation between the parties, the district court entered a $70,000 judgment for Citizens, Southwest appealed, and we affirm.

THE CHECK

On June 30, 1986, John Greenwade deposited a $138,427 check into his checking account at Citizens. Regarding this check, Southwest was the payor, Country Wide Insurance Agency was the drawer, and Greenwade was the payee. The check was dated June 26, 1986, bearing check No. 021586 and a facsimile signature of Diederike Fulkerson, a Country Wide employee who is authorized to sign and issue checks on behalf of the insurance company. The parties stipulated that the counterfeit check appeared to be identical to checks used by Country Wide, except for a slight difference in "check safety paper," and that Country Wide "did not prepare or issue the original of the [check] nor did any person on behalf of Countrywide [sic] Insurance Agency cause the facsimile signature of Diedericke [sic] Fulkerson to appear thereon."

THE COLLECTING PROCESS

Citizens forwarded the check to the Federal Reserve bank in Louisville, Kentucky, which federal bank on July 3, 1986, presented the check to Southwest in Omaha, Nebraska. A computer servicing company employed by Southwest posted

and sorted the check and then returned the check to Southwest on July 7. That same day, Greenwade withdrew $20,000 cash and $50,000 in certified funds from his checking account at Citizens.

DISCOVERY OF THE COUNTERFEIT

On July 7, a corporate officer of Exchange Bank in Mount Sterling, Kentucky, called Louise Smith, head bookkeeper for Citizens, and told her that Exchange Bank, which maintained some type of deposit account for Greenwade, was having a "large" check returned to them because the check was counterfeit. Smith immediately notified all of Citizens' tellers that if Greenwade attempted any transaction concerning his account at Citizens, the tellers should alert a senior bank officer at Citizens. However, Greenwade had already withdrawn $70,000 from Citizens 15 minutes before Smith's instructions to the bank's tellers. Smith telephoned Southwest and spoke with Jacqueline Schneider. Smith inquired whether the Greenwade check had been paid, and Schneider replied that the check had been paid and cleared. Smith testified that after Schneider told her that the check had been paid, she believed it was unnecessary to tell Schneider that the check might be counterfeit.

On July 9, Country Wide informed Smith that the Greenwade check was counterfeit. That same day, Southwest notified Citizens that Southwest refused to honor the check and returned the check to Citizens. The parties agree that Southwest's deadline for giving notice of dishonor under Neb. U.C.C. §§ 4-302(a) and 4-104(h) (Reissue 1980) was midnight July 7 and that Southwest did not give such notice until July 9. On August 5, Citizens demanded payment of $138,427, a demand rejected by Southwest. Citizens attempted to collect the funds withdrawn by Greenwade, but failed to recover proceeds from the counterfeit check.

Citizens sued Southwest to recover the proceeds from the counterfeit check paid to Greenwade, claiming two theories of recovery: Southwest failed to give timely notice of dishonor in accord with § 4-302, and Citizens is a holder in due course under Neb. U.C.C. § 3-418 (Reissue 1980). As the result of a

bench trial, the district court entered a $70,000 judgment against Southwest.

ASSIGNMENTS OF ERROR

Southwest contends that the evidence is insufficient to establish that Citizens was actually damaged or that Citizens was a holder in due course. Southwest also contends that the district court failed to recognize Southwest's defenses, namely, nonholders in due course are not entitled to payment on a counterfeit check and Citizens' breach of presentment warranties and of the obligation of good faith. Thus, the appellate questions are whether Southwest is liable to Citizens on account of the counterfeit check transaction and whether Citizens, as a part of its cause of action, must prove actual damages from the transaction. None question the method utilized by the district court in determining the amount of the judgment.

We note that Nebraska law applies to this case in accord with Neb. U.C.C. § 4-102(2) (Reissue 1980): "The liability of a bank for action or nonaction with respect to any item handled by it for purposes of presentment, payment or collection is governed by the law of the place where the bank is located. . . ."

STANDARD OF REVIEW

> In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. . . . In reviewing a judgment awarded in a bench trial of a law action, the Supreme Court does not reweigh evidence but considers the evidence in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. . . .

Oddo v. Speedway Scaffold Co., 233 Neb. 1, 2, 443 N.W.2d 596, 598-99 (1989). Accord, *Wurst v. Blue River Bank*, 235 Neb. 197, 454 N.W.2d 665 (1990); *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

> In a bench trial of a law action, the court, as the "trier of fact," is the sole judge of the credibility of witnesses and the weight to be given their testimony. Among the factors

> entering into the trial court's resolution of any conflicts of evidence are such items as the respective interests of the parties in the litigation; the demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by witnesses; the extent to which testimony of various witnesses is corroborated; and the reasonableness or unreasonableness of testimony from the witnesses.

Lynn v. Metropolitan Utilities Dist., 225 Neb. 121, 125, 403 N.W.2d 335, 338 (1987). Accord *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985).

PAYOR BANK'S RESPONSIBILITY FOR LATE RETURN OF ITEM

Section 4-302 provides:

> In the absence of a valid defense such as breach of a presentment warranty (subsection (1) of Section 4-207), settlement effected or the like, if an item is presented on and received by a payor bank the bank is accountable for the amount of
>
> (a) a demand item other than a documentary draft whether properly payable or not if the bank, in any case where it is not also the depositary bank, retains the item beyond midnight of the banking day of receipt without settling for it or, regardless of whether it is also the depositary bank, does not pay or return the item or send notice of dishonor until after its midnight deadline. . . .

A counterfeit check, as an instrument for the payment of money, is an "item" under § 4-104(g). Although a counterfeit check is not a valid instrument, the Greenwade check was, nevertheless, an instrument payable on demand in accordance with the Uniform Commercial Code. Since no other document, security, or paper accompanied the counterfeit check, that instrument was not a "documentary draft" under § 4-104(f). According to the parties' stipulation, after presentment of the counterfeit check, Southwest refused to pay the check and failed to return the check by the midnight deadline. A plaintiff establishes a prima facie case for liability of a payor bank when the plaintiff shows that a check which is the basis for the suit has

been untimely dishonored, and the payor bank then has the burden to prove an excuse or defense for the untimely dishonor. *First Wyo. Bank v. Cabinet Craft Distrib.*, 624 P.2d 227 (Wyo. 1981). Therefore, in the absence of any valid defense, Southwest is "accountable" for the amount of the counterfeit check. See § 4-302.

Neb. U.C.C. § 4-207 (Reissue 1980), in relevant part, provides:

> (1) Each customer or collecting bank who obtains payment or acceptance of an item and each prior customer and collecting bank warrants to the payor bank or other payor who in good faith pays or accepts the item that
>
> (a) he has a good title to the item or is authorized to obtain payment or acceptance on behalf of one who has a good title; and
>
> (b) he has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by any customer or collecting bank that is a holder in due course and acts in good faith
>
> (i) to a maker with respect to the maker's own signature; or
>
> (ii) to a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or
>
> (iii) to an acceptor of an item if the holder in due course took the item after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorized; and
>
> (c) the item has not been materially altered, except that this warranty is not given by any customer or collecting bank that is a holder in due course and acts in good faith
>
> (i) to the maker of a note; or
>
> (ii) to the drawer of a draft whether or not the drawer is also the drawee; or
>
> (iii) to the acceptor of an item with respect to an alteration made prior to the acceptance if the holder in due course took the item after the acceptance, even though the acceptance provided "payable as originally drawn" or equivalent terms; or
>
> (iv) to the acceptor of an item with respect to an

alteration made after the acceptance.

Neb. U.C.C. § 1-203 (Reissue 1980) provides that "[e]very contract or duty within this act imposes an obligation of good faith in its performance or enforcement." Southwest claims that Citizens breached several presentment warranties under § 4-302 and its obligation of good faith under § 1-203, namely, "concealment of information from Southwest, at a time when Southwest would have been in a position to act upon the information prior to the expiration of its midnight deadline, clearly evidences a lack of good faith on the part of Citizens," and "information available to Citizens provided sufficient notice to it of the probable counterfeit . . . check prior to Southwest's acceptance of that check so as to constitute a breach of Citizens' presentment warranties." Brief for appellant at 25.

Neb. U.C.C. § 1-201(25) (Reissue 1980) provides in part that

> [a] person has "notice" of a fact when (a) he has actual knowledge of it; or (b) he has received a notice or notification of it; or (c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.

Citizens knew that the Greenwade check bore the facsimile signature of Fulkerson, who was authorized to sign and issue checks on behalf of Country Wide and that the check appeared authentic. When Citizens learned that Greenwade had presented a "large" counterfeit check to Exchange Bank in Kentucky, Citizens alerted its tellers and instructed them to monitor the Greenwade account. Citizens immediately contacted Southwest, and Southwest told Citizens that the check had been paid and cleared; thus, Citizens believed it was unnecessary to inform Southwest that the Greenwade check might be counterfeit. Two days after Southwest's midnight deadline, Citizens gained actual knowledge that the Greenwade check was a counterfeit check. Clearly, before Southwest's midnight deadline Citizens had only a suspicion that the Greenwade check might be counterfeit.

Since Citizens did not have actual knowledge or notice before Southwest's midnight deadline that the Greenwade check was counterfeit, the question is whether Citizens had

reason to know that the check was counterfeit. A visual examination of the Greenwade check would not have disclosed that the check was counterfeit. Any suspicion that may have resulted from the conversation between Citizens and Exchange Bank was negated by Southwest's statement that the check had been paid and cleared. See *Peoria S & L Ass'n v. Jefferson Tr. & Sav. Bk*, 81 Ill. 2d 461, 471, 410 N.E.2d 845, 850 (1980): "Facts and circumstances calculated to merely arouse or excite suspicion cannot be equated with knowledge, or a reason to know." The evidence, therefore, supports the district court's finding that Citizens did not breach presentment warranties or an obligation of good faith.

Southwest next contends that Citizens has not proved that it suffered any damages from processing the Greenwade check. Southwest argues that since Greenwade had maintained a checking account at Citizens for 20 years, Citizens failed to establish whether any part of the $70,000 paid to Greenwade was paid from funds of the Country Wide check or from other funds currently on deposit for Greenwade at Citizens. Southwest insists that even if it is "strictly liable" under § 4-302, Citizens still must prove damages to recover on the counterfeit check.

Southwest, however, misconstrues accountability under § 4-302. If § 4-302 is applicable, a payor bank is accountable for the full amount of the draft, even in the absence of actual damages. *Union Bank of Benton v. First Nat. Bank*, 621 F.2d 790 (5th Cir. 1980) (failure of payor to timely pay or return items mandates strict liability for the face amount of any late items); *First State Bank v. Twin City Bank*, 290 Ark. 399, 720 S.W.2d 295 (1986) (since notification of dishonor was late, payor is accountable for the amount of the documentary drafts); *Reynolds-Wilson Lumber v. Peoples Nat. Bank*, 699 P.2d 146 (Okla. 1985) ("accountable" means strict liability for the amount of the draft with no requirement of actual damages); *Northwestern Nat. Ins. v. Midland Nat. Bank*, 96 Wis. 2d 155, 292 N.W.2d 591 (1980) (if payor fails to give timely notification of dishonor, payor is liable for the amount of the checks without any showing of actual damages); *Engine Parts v. Citizens Bank of Clovis*, 92 N.M. 37, 582 P.2d 809 (1978)

(payor is strictly liable for the amount of the items which it returned untimely); *Farmers Coop. Livestock Mkt. v. Second Nat. Bank*, 427 S.W.2d 247 (Ky. 1968) (payor is liable for the face amount of the item without proof of damages); *Rock Island Sales v. Empire Packing*, 32 Ill. 2d 269, 204 N.E.2d 721 (1965) (payor is liable for the face amount of the item after it fails to give timely notice of dishonor).

Courts have consistently expressed that the primary reason for automatic or strict liability under § 4-302 is a need for finality and certainty in business transactions; accordingly, if a payor bank fails to fulfill its statutory duty to return or dishonor an item in a timely manner, the payor bank is subject to sanction for its tardiness under the Uniform Commercial Code. For example, *First State Bank v. Twin City Bank, supra*; *Town & Country State Bank v. First State Bank*, 358 N.W.2d 387 (Minn. 1984); *State & Sav. Bank of Monticello v. Meeker*, 469 N.E.2d 55 (Ind. App. 1984); *Van Senus v Mi Nat'l Bank, Wy*, 116 Mich. App. 342, 323 N.W.2d 391 (1982). See, also, 6 W. Hawkland, Uniform Commercial Code Series § 4-302:01 at 61 (1984) (§ 4-302 provides the sanction of accountability for the full amount as a "remedy for the protection of depositary banks" based on "a need to protect depositary banks who were making funds available for withdrawal to their customers on the basis of a lapse of time without notice of nonpayment"). Hence, Citizens was not required to prove actual damages from the counterfeit check transaction.

It is unnecessary to discuss Citizens' other theory of recovery because Citizens has established a right to recover under § 4-302. Accordingly, we affirm the district court's judgment for Citizens in the amount of $70,000.

AFFIRMED.

ANNA MARGRETHE HALL, APPELLEE, V. PATRICK JAMES HALL, APPELLANT.

472 N.W.2d 217

Filed July 19, 1991. No. 89-410.

1. **Divorce: Modification of Decree: Equity.** An action for divorce or for modification of a divorce decree sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Divorce: Appeal and Error.** In an appeal involving an action for dissolution of marriage the standard of review is de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
4. **Divorce: Courts: Taxation.** Any Nebraska state court having jurisdiction in a divorce action shall have the power to allocate tax dependency exemptions as part of the divorce decree.
5. **Modification of Decree: Taxation: Waiver.** The trial court may modify a divorce decree by reallocating the tax dependency exemptions, and the party holding the exemptions may be ordered to execute a waiver of the exemptions to the other party.
6. **Modification of Decree: Taxation.** A tax dependency exemption is nearly identical in nature to an award of child support or alimony and is thus capable of being modified as an order of support.

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

Steven O. Stumpff, of Stumpff Law Office, for appellant.

No appearance for appellee.

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

WHITE, J.

Patrick James Hall appeals the denial by the Custer County District Court of his motion seeking to modify the divorce decree dissolving his marriage to Anna Margrethe (Lassen) Hall. Through his motion Hall asked that the tax dependency exemptions for his and Anna Hall's three minor children be granted to him.

The marriage of Patrick and Anna Hall was dissolved by the

district court on March 28, 1988. Custody of the minor children was awarded to Anna Hall, who now resides in California with the children. Patrick Hall was ordered to pay child support of $266 per month for each child and maintain health and dental insurance policies on the children. Patrick Hall was also ordered to pay alimony of $100 per month for 20 months. The issue of the tax dependency exemptions was not ruled on by the court in the final decree, and the record does not contain any discussion of which party would retain the exemptions.

On November 17, 1988, Patrick Hall moved the court to modify the divorce decree by granting him the tax dependency exemptions. On December 22, the court denied the motion, stating that a final order had been entered on this issue April 5, and there had not been a substantial change in circumstances since that time. Hall filed a motion for rehearing on February 16, 1989, which was treated as a motion to modify. A hearing was held on the matter on March 16, and the court denied the motion, stating:

> While this court agrees with the majority of states that it can order one of the parties to execute a relinquishment of the exemption (IRS Form 8332), the party requesting the exemption in a modification hearing must first show that a substantial change in circumstances has occurred since the entry of the decree. Absent an appeal, the final decree of dissolution is final. As such, it is res judicata as to the rights of the parties. Neujahr v. Neujahr, 223 Neb. 722, 393 N.W.2d 47 (1986).
>
> . . . At the time of the decree in April 1988, Respondent had monthly gross income of $3,961 and Petitioner $966. At the hearing on modification, Respondent had a gross monthly income of $4,799 and Petitioner $1,334. If the record shows any change, it shows a change for the need of the exemption by the Petitioner. Respondent would have this court force the Petitioner to give up any small refund she may have coming, in order that he may increase his standard of living. The Respondent's children and the Petitioner have already gone through a substantial reduction in their standard of living, and this court will not assist Respondent in lowering their standard of living

or harassing them further.

Patrick Hall appeals from this order.

Anna Hall did not file responsive pleadings to Patrick Hall's motion for modification or motion for rehearing. She did not appear at the March 16, 1989, hearing and did not file a brief in this appeal. Apparently she did receive notice of the modification proceedings, since the trial judge stated at the hearing that he had received a letter from her. Hall indicates in his brief that she was notified of the motions and hearing by regular mail as permitted by the district court rules for Custer County.

Hall's assignments of error can be summarized as follows: The court erred in not granting a default judgment in favor of Patrick Hall due to Anna Hall's failure to file responsive pleadings and appear at the March 16, 1989, hearing and erred in finding that a final determination had been made as to the exemptions, that the issue was res judicata as to the parties, and that the exemptions should not be awarded to Patrick Hall absent a showing of a substantial change in circumstances. After conducting our de novo review of the record, we affirm the judgment of the district court.

We first consider Hall's claim for a default judgment against Anna Hall for her failure to file responsive pleadings or appear at the hearing to modify the judgment. It is well-recognized law in this state that an action for divorce or for modification of a divorce decree sounds in equity. See, *Kouth v. Kouth*, 238 Neb. 230, 469 N.W.2d 791 (1991); *Huffman v. Huffman,* 236 Neb. 101, 459 N.W.2d 215 (1990). In an appeal of an equity action, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Abboud v. Lakeview, Inc.*, 237 Neb. 326, 466 N.W.2d 442 (1991); *Citizens State Bank v. Jennings State Bank*, 236 Neb. 307, 461 N.W.2d 78 (1990). Our standard of review in an appeal involving an action for dissolution of marriage is de novo on the record to determine whether there has been an

abuse of discretion by the trial judge. *Wilson v. Wilson, ante* p. 219, 469 N.W.2d 750 (1991).

We note the following principles of equity jurisprudence that govern in this case: " ' "[E]quity seeks the real and substantial rights of the parties, and applies the remedy in such manner as to relieve those having the controlling equities." ' " *Miller v. School Dist. No. 69*, 208 Neb. 290, 296, 303 N.W.2d 483, 487 (1981) (quoting *National Mortgage Loan Co. v. Hurst*, 120 Neb. 37, 231 N.W. 519 (1930)). " ' "Equity looks through forms to substance," or as stated in similar language, "A court of equity goes to the root of a matter and is not deterred by forms." ' " *Miller, supra* at 296, 303 N.W.2d at 487 (quoting *Darnell v. City of Broken Bow*, 139 Neb. 844, 299 N.W. 274 (1941)).

Accordingly, the fact that Anna Hall did not respond to Patrick Hall's motion for modification of their divorce decree is not determinative of the status of the tax exemptions. Patrick Hall may not be granted the exemptions simply on Anna Hall's failure to respond or appear. Rather, this court, under its equity powers, balances the interests of the parties and then determines where the equities lie. Therefore, Hall's claim for a default judgment against Anna Hall has no merit.

We now turn to the remaining assignments of error. We note initially that Anna Hall is presumptively entitled to the tax exemptions. Dependency tax exemptions are governed by 26 U.S.C. § 152 (1988). Under § 152(e), as amended in 1984, the custodial parent is automatically granted the tax exemptions except in three instances. The noncustodial parent may claim the exemptions if (1) a multiple-support agreement is in effect, (2) a qualified pre-1985 support agreement between the parties provides that the noncustodial parent is entitled to the exemptions and that parent provides at least $600 per child per year in support, and (3) the custodial parent signs a written declaration stating he or she will not claim the exemptions for that tax year.

Since the amendment to this section, a majority of jurisdictions have considered the issue of whether, in the face of § 152(e), a state court may exercise its equity power to allocate the tax exemptions to a noncustodial parent. A majority of

states have concluded that the exemptions may be allocated as a part of the divorce decree. See, e.g., *McKenzie v. Jahnke*, 432 N.W.2d 556 (N.D. 1988); *Hughes v. Hughes*, 35 Ohio St. 3d 165, 518 N.E.2d 1213 (1988); *Marriage of Pergolski v. Pergolski*, 143 Wis. 2d 166, 420 N.W.2d 414 (1988); *Cross v. Cross*, 363 S.E.2d 449 (W. Va. 1987); *Lincoln v. Lincoln*, 155 Ariz. 272, 746 P.2d 13 (1987); *Serrano v. Serrano*, 213 Conn. 1, 566 A.2d 413 (1989); *In re Marriage of Einhorn*, 178 Ill. App. 3d 212, 533 N.E.2d 29 (1988).

Nebraska has adopted this majority rule in *Babka v. Babka*, 234 Neb. 674, 452 N.W.2d 286 (1990). In that case we held that the trial court may modify a divorce decree by reallocating the tax dependency exemptions and that the party holding the exemptions may be ordered to execute a waiver of the exemptions to the other party. We again hold that any Nebraska state court having jurisdiction in a divorce action shall have the power to allocate tax dependency exemptions as part of the divorce decree. The court has the power to order the custodial parent to execute a waiver of his or her right to declare the tax exemptions if the situation of the parties so requires.

The trial court in this case did not specifically allocate the tax exemptions. However, since federal tax laws determine the placement of the exemptions absent reallocation by the state court, the custodial parent is presumed to retain the tax exemptions. Anna Hall is the custodial parent in this case and is thus presumptively entitled to the exemptions. The parties do not have a multiple-support agreement, nor was a pre-1985 agreement regarding the tax exemptions in effect. The parties were not even divorced until 1988. Therefore, none of the exceptions to § 152(e) apply. Anna Hall retains the right to claim the three children as dependents on her tax returns unless this court modifies the divorce decree and reallocates the exemptions to her ex-husband.

We must now determine if the allocation of a tax exemption in a divorce decree is subject to modification. Neb. Rev. Stat. § 42-365 (Reissue 1988) provides that an award for alimony may be revoked or modified for good cause. An award of child support can also be modified. See Neb. Rev. Stat. § 42-364 (Reissue 1988). See, also, *State v. Easley*, 207 Neb. 443, 299

N.W.2d 439 (1980); *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991). To justify modification of alimony or child support, there must be a showing of a material change in circumstances subsequent to the entry of the decree. *Schulze, supra*. We stated in *Schulze, supra* at 85, 469 N.W.2d at 142, quoting *Morisch v. Morisch*, 218 Neb. 412, 355 N.W.2d 784 (1984):

> " 'Material change in circumstances' in reference to modification of child support is analogous to modification of alimony for 'good cause.' . . . 'Material change in circumstances' eludes precise and concise definition. Courts may consider various factors to determine if a material change in circumstances has occurred. Among some of the factors or circumstances considered by a court are a change in the financial resources or ability to pay on the part of the parent obligated to pay support, needs of the child or children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction of income, and the duration of the change, namely, whether the change is temporary or permanent. . . . Alteration and passage from one condition to another is essential for a material change in circumstances."

We hold that a tax dependency exemption is nearly identical in nature to an award of child support or alimony and is thus capable of being modified as an order of support. We find this proposition supported by other jurisdictions, as well as our own. See, *Babka, supra* at 677, 452 N.W.2d at 288 ("[t]he dependency exemption for income tax returns is an economic benefit"); *Niederkorn v. Niederkorn*, 616 S.W.2d 529, 533 (Mo. App. 1981) ("[t]he federal exemption bears directly on the financial positions of the parties. An award of the tax exemption to one party is nearly identical in nature to an order that the other party pay as child support a sum equal to the value of the exemption"); *McKenzie v. Jahnke, supra* at 558 (Levine, J., concurring) ("the exemption is so clearly aligned with child support and custody, that it is properly considered to be support rather than property and is . . . subject to modification").

As in the cases of alimony and child support, the allocation of a tax exemption will be modified only upon a showing of a material change in circumstances. See *Schulze, supra*. Patrick Hall has not demonstrated how his circumstances or the circumstances of his children or ex-wife have changed since the divorce decree was entered. Hall's only contention is that granting the exemptions to him in exchange for larger child support payments would benefit him on his income tax. This may be true, but we do not consider a potential reduction of one's indebtedness to the Internal Revenue Service a material change in circumstances sufficient to modify the allocation of tax exemptions. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KEITH J. ESTES, APPELLANT.

472 N.W.2d 214

Filed July 19, 1991. No. 90-265.

1. **Courts: Appeal and Error.** The Supreme Court, in reviewing decisions of the district court which affirmed, reversed, or modified decisions of the county court, will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the Supreme Court.
2. **Prior Convictions: Sentences.** To constitute a basis for enhancement of punishment on a charge of a second or subsequent offense, the prior conviction relied upon for enhancement must be a final conviction.
3. **Prior Convictions: Sentences: Appeal and Error.** A prior conviction that is pending on appeal will not support enhanced penalties because it has not yet become final.
4. _____: _____: _____. If a conviction has been affirmed on appeal or the time for appeal has expired, the conviction is final for purposes of enhancement.

Appeal from the District Court for Douglas County, STEPHEN A. DAVIS, Judge, on appeal thereto from the County Court for Douglas County, JOHN J. MCGRATH, Judge. Judgment of District Court reversed, and cause remanded with directions.

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

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

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

WHITE, J.

The defendant, Keith J. Estes, appeals from his conviction for second-offense driving while under the influence of alcohol, following the district court's affirmation of the county court's judgment.

On June 13, 1989, Estes appeared in Douglas County Court with his court-appointed counsel to enter a plea of no contest to second-offense driving while under the influence, for which he was arrested on April 30. Prior to the entry of his plea, the court advised him of all his constitutional rights except his right to counsel.

After the plea was accepted, the court held an enhancement hearing and found that this conviction was for a second offense. Estes had pled no contest on March 24, 1989, to an earlier driving while under the influence charge. Judgment and sentence were entered for that charge on May 11, and Estes timely appealed to the district court on May 12. Estes' first-offense conviction and sentence were affirmed by this court on August 3, 1990.

On October 5, 1989, the county court sentenced Estes to a term of 30 days' imprisonment, a $500 fine, and a driver's license suspension of 1 year for the second offense. Estes appealed this judgment and sentence to the district court on October 5, and they were affirmed on February 16, 1990. He then appealed the district court's decision to this court.

Estes claims the enhancement of his sentence was improper because the first-offense conviction was pending on appeal to this court at the time of the enhancement hearing and therefore could not be used for enhancement purposes. He also claims that his no-contest plea to the second offense was invalid because the court did not specifically inform him of his right to

counsel, despite the fact that he had a court-appointed attorney at the time he entered his plea, as well as at an earlier suppression hearing and at sentencing.

Estes did not assign as error the improper enhancement of the second-offense conviction in his appeal from the county to the district court. Prior to our decision in *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990), in cases where the district court acted as an intermediate court of appeals, both the district court and the Nebraska Supreme Court generally reviewed appeals from the county court for error appearing on the record. See, Neb. Rev. Stat. §§ 25-2733 and 25-1911 (Reissue 1989); *Communications Workers of America v. Abrahamson*, 228 Neb. 335, 422 N.W.2d 547 (1988); *Kuehl v. Diesel Power Equip. Co.*, 228 Neb. 353, 422 N.W.2d 361 (1988). It was not generally necessary that errors be raised on appeal to the district court in order to be considered by this court. See *State v. Lesac*, 231 Neb. 718, 437 N.W.2d 517 (1989). In *Erlewine, supra* at 857, 452 N.W.2d at 767, we announced the new rule pertaining to appeals from the county court:

> The Supreme Court, in reviewing decisions of the district court which affirmed, reversed, or modified decisions of the county court, will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the Supreme Court. This rule shall be effective so as to apply to all county court decisions appealed to the district court after the filing date of this opinion.

The *Erlewine* decision was filed March 23, 1990. Estes appealed to the district court on October 5, 1989. Therefore, our decision in *Erlewine* is not applicable to this case, and we will review the record in the county court for error despite Estes' failure to assign the enhancement issue as error in his appeal to the district court.

Neb. Rev. Stat § 39-669.07(b) (Reissue 1988) requires that a person who has previously been convicted of the offense of driving while under the influence of alcoholic liquor or any drug or of driving with a blood, breath, or urine alcohol level equal to or greater than .10 percent in the 10 years prior to the date of the current conviction shall be guilty of a Class W

misdemeanor. For a second violation of § 39-669.07, the court shall order the defendant not to drive for a period of 1 year and shall revoke the driver's license of the defendant for the same period, in addition to any other sentence imposed. The court must make a finding on the record as to the number of the defendant's previous convictions, and the defendant must be given the opportunity to review the record of his or her prior convictions, object to the validity of the convictions, and bring mitigating evidence to the attention of the court.

The issue in this case is what constitutes a conviction for purposes of enhanced punishment for a second violation of § 39-669.07. Estes claims that a previous conviction on appeal at the time of the second offense may not be considered a conviction for purposes of enhanced punishment because the conviction is not yet final and may be overturned by the appellate court. We agree.

To constitute a basis for enhancement of punishment on a charge of a second or subsequent offense, the prior conviction relied upon for enhancement must be a final conviction. Accordingly, a prior conviction that is pending on appeal will not support enhanced penalties because it has not yet become final. The conviction may be reversed by the appellate court. Nebraska adopted this rule in 1927 in *Nelson v. State*, 116 Neb. 219, 216 N.W. 556 (1927), and it remains the law today in Nebraska, as well as in the majority of other jurisdictions. See, e.g., *Frazier v. State*, 452 So. 2d 1015 (Fla. App. 1984); *Juskulski v. State*, 206 Ind. 503, 190 N.E. 423 (1934); *Neal v. Commonwealth*, 221 Ky. 239, 298 S.W. 704 (1927); *State v. Gani*, 157 La. 231, 102 So. 318 (1924); *State v. Mims*, 566 So. 2d 661 (La. App. 1990); *Williams v. State*, 125 Miss. 347, 87 So. 672 (1921); *Staniforth v. State*, 24 Ohio App. 208, 156 N.E. 924 (1927); *Bob Pollock v. The State*, 132 Tex. Crim. 463, 104 S.W.2d 863 (1937); *Anthony v. State*, 794 S.W.2d 526 (Tex. Crim. App. 1990); *State v. Zounick*, 133 Wash. 638, 234 P. 659 (1925); *State v. Alexander*, 10 Wash. App. 942, 521 P.2d 57 (1974). If the conviction has been affirmed on appeal or the time for appeal has expired, the conviction is final for purposes of enhancement. *Gani, supra*; *Mims, supra*. The defendant's habitual offender status is determined at the time the

subsequent offense is committed. *Mims, supra*. Therefore, even if the first conviction is affirmed before sentencing on the second conviction, it may not be used for sentencing enhancement purposes, since it was not final at the time the second offense was committed.

At the time of his enhancement hearing and sentencing hearing on the second offense, Estes had timely filed an appeal of his first conviction before this court. Therefore, under *Nelson, supra*, Estes' first conviction could not be used to enhance his punishment to that of a second offender because his first conviction was not final. The county court was in error in sentencing Estes as a second offender. We reverse the decision of the district court and remand the cause with directions to remand to the county court for resentencing based on the decision in this case.

Because of our decision here, we find it unnecessary to discuss Estes' second assignment of error. We note, however, that any failure of the county court to specifically inform Estes of his right to counsel at the time of his entry of plea is not error, since at that time he was represented by counsel and had been so represented throughout the proceedings. We may conclude from this that he was aware he was entitled to a court-appointed attorney.

REVERSED AND REMANDED WITH DIRECTIONS.

DAIRYLAND POWER COOPERATIVE ET AL., APPELLEES, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT ET AL., APPELLANTS.

472 N.W.2d 363

Filed July 19, 1991. Nos. 90-764 through 90-780, 90-785.

1. **Records: Appeal and Error.** In general, rulings of the trial court which do not appear in the record are not considered on appeal.
2. **Administrative Law: Courts: Pleadings: Time: Appeal and Error.** Under Neb. Rev. Stat. § 84-917 (Cum. Supp. 1990), if a petition instituting proceedings for review of the decision of an administrative agency was filed in the district court before July 1, 1989, the review shall be conducted by the district court without a

jury on the record of the agency. The district court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if the substantial rights of the appellants may have been prejudiced because the agency's decision is (1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or (6) arbitrary or capricious.

3. _____: _____: _____: _____: _____. Under Neb. Rev. Stat. § 84-918(2) (Cum. Supp. 1990), petitions which were filed in the district court before July 1, 1989, seeking review of the action of an administrative agency are reviewed by the Supreme Court de novo on the record.
4. **Judicial Notice.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
5. _____. A judge or court may take judicial notice, whether requested or not.
6. _____. A judge or court shall take judicial notice if requested by a party and supplied with the necessary information.
7. _____. Judicial notice may be taken at any stage of the proceeding.
8. **Judicial Notice: Statutes: States.** Neb. Rev. Stat. § 25-12,101 (Reissue 1989) of the Uniform Judicial Notice of Foreign Law Act provides that every court of this state shall take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States.
9. **Judicial Notice: Statutes: Legislature.** It is the duty of the courts to take judicial notice of the laws enacted by the Legislature, and all courts must take judicial notice of the public law prevailing within the forum.
10. **Judicial Notice: Federal Acts.** Courts take judicial notice of the public and general acts of Congress.
11. **Judicial Notice: Legislature: Appeal and Error.** The Supreme Court takes judicial notice of the contents of legislative journals.
12. **Judicial Notice: Administrative Law: Proof: Appeal and Error.** The Supreme Court generally does not take judicial notice of administrative rules or regulations. It is the burden of the party relying on an administrative rule or regulation to prove both its existence and its language.
13. **Judicial Notice: Records: Rules of Evidence: Collateral Estoppel: Res Judicata.** The existence of court records and certain judicial action reflected in a court's record are, in accordance with Neb. Evid. R. 201(2)(b), Neb. Rev. Stat. § 27-201(2)(b) (Reissue 1989), facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. A court may, therefore, judicially notice existence of its records and the records of another court, but judicial notice of facts reflected in a court's records is subject to the doctrine of collateral estoppel or of res judicata.
14. **Actions: Statutes: Time.** In the absence of a general saving statute, the repeal without reservation of a statute granting a right of action is generally construed to defeat all remedies provided thereunder and to defeat all actions pending

under the statute at the time of repeal.

15. _____: _____: _____. Under Neb. Rev. Stat. § 49-301 (Reissue 1988), the general saving statute, the repeal of a statute shall in no manner affect pending actions founded thereon, except as may be provided in such repealing statute.

16. _____: _____: _____. The simultaneous repeal and reenactment of substantially the same statutory provisions is ordinarily construed to be an affirmation or continuation of the original provisions rather than a true repeal. Where a statute has been repealed and substantially reenacted with additions or changes, the additions or changes are treated as amendments effective from the time the new statute goes into effect.

17. **Taxation: Discrimination: Federal Acts: Railroads.** Discriminatory taxes levied against railroad rolling stock in violation of § 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 are invalid within the meaning of Neb. Rev. Stat. § 77-1775 (Reissue 1986).

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Don Stenberg, Attorney General, and L. Jay Bartel for appellants.

George A. Penry for appellees.

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

PER CURIAM.

The State Board of Equalization and Assessment (State Board) and the State Tax Commissioner appeal the judgment of the district court for Lancaster County that the appellee claimants were entitled to refunds of personal property taxes paid for the 1986 tax year.

In 1986 and previous years, the claimants were taxed as car companies under Neb. Rev. Stat. §§ 77-624 to 77-633 (Reissue 1986). In December 1988, the claimants submitted requests for refunds to the Tax Commissioner pursuant to Neb. Rev. Stat. § 77-1775 (Reissue 1986). In its request, Dairyland Power Cooperative (case No. 90-764) sought a refund of Nebraska private car company personal property taxes paid for tax years 1984, 1985, and 1986. In two requests submitted to the Tax Commissioner, Midwest Energy Services Company (case No. 90-765) sought refunds of private car company personal property taxes paid for tax years 1985 and 1986. The other claimants sought refunds of private car company personal

property taxes paid for tax year 1986.

In support of their requests for refunds, the claimants contended the assessment of their personal property and the imposition, levying, or collection of any taxes against them or their property pursuant to §§ 77-624 et seq. violated § 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, 54, codified as amended at 49 U.S.C. § 11503(b)(4) (1988) (the 4-R Act), and were illegal. The claimants advised the Tax Commissioner that the illegality of such taxation had been determined by the U.S. District Court for the District of Nebraska in *Trailer Train Co. et al. v. Leuenberger*, No. CV87-L-29, (D. Neb. Dec. 11, 1987), *aff'd* 885 F.2d 415 (8th Cir. 1988), *cert. denied, Boehm v. Trailer Train Co.*, 490 U.S. 1066, 109 S. Ct. 2065, 104 L. Ed. 2d 630 (1989).

On March 1, 1989, the Tax Commissioner recommended to the State Board that the claims for refund be denied. A hearing was held before the State Board on March 22, 1989. On April 12, 1989, the State Board denied the requests. The State Board found that for claims filed for tax year 1986 and prior tax years, the car companies'

> reliance upon the U.S. District Court for the District of Nebraska decision in Trailer Train v. Donald S. Leuenberger, CV87-L-29, issued December 11, 1987, is misplaced. One, the Trailer Train decision is limited to a determination of discrimination pursuant to the federal 4-R Act applicable only to the plaintiffs in the case for tax year 1986. Two, the exclusive remedy for relief, pursuant to the 4-R Act, is injunctive relief. It does not invalidate a state tax, except as to plaintiffs who have raised the claim of discrimination in a manner timely to avail themselves of injunctive relief. . . .
>
> . . . For claims filed for tax year 1985 and prior tax years, the claims are barred by the statute of limitations contained in section 25-218, R.R.S. 1943. The statute requires that claims against the state must be brought within two years from the date such claims arose. Section 77-629, R.R.S. 1943, states that the due date for car company taxes is December 31. Therefore, all claims filed

> for tax years 1985 filed after January 1, 1988, are barred by the statute of limitations, as are all claims filed for tax years prior to 1985. Alternatively, [regarding] all claims for 1985 and prior years, there has been no determination that the tax is invalid for any reason for those tax years.
>
> . . . For claims made that the valuation so determined for the tax years involved is not uniform and proportionate as compared with all other tangible property, the claim is not properly before the State Board. Pursuant to Rule 11 of the State Board, repealed on January 1, 1986, or Nebraska Department of Revenue Regulation 33-006, the Claimant had 30 days from the date of the assessment to protest the assessment. The Claimant's exclusive remedy for redress of disproportionate valuation is to appeal the assessment in the manner prescribed. The State Board is without jurisdiction to hear the claim. Beshore v. Sidwell, 222 Neb. 441 (1986).

The claimants timely appealed to the district court for Lancaster County pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-917 through 84-920 (Reissue 1987). (Sections 84-917 through 84-919 were amended, effective July 1, 1989. See Cum. Supp. 1990.) In their petitions, filed in late April and early May 1989, the claimants alleged they were entitled to refunds because the assessment, imposition, and collection of car company taxes were illegal due to the decision of the U.S. District Court for the District of Nebraska in *Trailer Train Co. et al. v. Leuenberger, supra*. The claimants contended that in light of the federal district court's decision in *Trailer Train Co.*, their substantial rights had been prejudiced because the State Board's decision was (1) in violation of constitutional due process and made upon unlawful procedure, (2) affected by errors of law, (3) arbitrary and capricious, and (4) unsupported by competent, material, and substantial evidence. See § 84-917(6)(a) (Cum. Supp. 1990).

On July 27, 1990, the district court for Lancaster County affirmed the orders of the State Board denying claims for refunds of car company taxes paid in 1984 and 1985. Regarding tax year 1986, however, the district court reversed the decision

of the State Board and ordered judgment for each claimant in the amount of car company taxes it paid in 1986 (totaling $263,011.74), plus interest.

The State Board and Tax Commissioner have appealed to this court, contending the district court erred (1) in basing its decision on evidence which was in addition to and outside the scope of the record created before the State Board, (2) in finding the claimants were entitled to a refund under § 77-1775 for taxes imposed pursuant to §§ 77-624 et seq. for the 1986 tax year, and (3) in finding the claimants were entitled to a refund under Neb. Rev. Stat. § 77-1736.04 (Reissue 1986) for taxes imposed pursuant to §§ 77-624 et seq. for the 1986 tax year. There is no cross-appeal.

I

In connection with the appellants' first assignment of error, the record shows that the claimants offered 14 exhibits in evidence during the district court hearing. The appellants objected to the offer because the materials were not contained in the record made before the State Board. See § 84-917(5)(a). The district court took the matter under advisement but made no ruling on the admissibility of the claimants' exhibits. The exhibits, therefore, were not received in evidence, but the appellants contend the district court "plainly considered certain of these exhibits in rendering its decision reversing the action of the State Board," brief for appellants at 10, particularly the federal district court's rulings in *Oklahoma Gas & Elec. Co. v. Boehm*, No. CV88-L-52 (D. Neb. June 13, 1989), and *Oklahoma Gas & Elec. Co. v. Boehm*, No. CV89-L-32 (D. Neb. June 13, 1989).

In response, the claimants argue that the district court erred if it did *not* receive the exhibits in evidence by judicial notice, in contravention of Neb. Evid. R. 201, Neb. Rev. Stat. § 27-201 (Reissue 1989), and apparently want this court to take judicial notice of the exhibits.

In general, rulings of the trial court which do not appear in the record are not considered on appeal. See, e.g., *County of Dakota v. Mallett*, 235 Neb. 82, 453 N.W.2d 594 (1990); *Howard v. Howard*, 234 Neb. 661, 452 N.W.2d 283 (1990);

Chalupa v. Chalupa, 220 Neb. 704, 371 N.W.2d 706 (1985). In this case, neither party requested a ruling on the claimants' offer. Therefore, we consider the State Board's first assignment of error only to determine the scope of the record for purposes of review in this court.

Section 84-917(5)(a) provides that if a petition instituting proceedings for review of the decision of an administrative agency was filed in the district court before July 1, 1989, the review shall be conducted by the district court without a jury "on the record of the agency." The district court's standard of review in this case was prescribed by § 84-917(6)(a), pursuant to which the district court

> may affirm the decision of the [State Board] or remand the case for further proceedings, or it may reverse or modify the decision if the substantial rights of the [claimants] may have been prejudiced because the [State Board] decision is:
>
> (i) In violation of constitutional provisions;
>
> (ii) In excess of the statutory authority or jurisdiction of the agency;
>
> (iii) Made upon unlawful procedure;
>
> (iv) Affected by other error of law;
>
> (v) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or
>
> (vi) Arbitrary or capricious.

See, also, *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985).

Since the claimants' petitions seeking review of the State Board's orders were filed in the district court before July 1, 1989, the scope of review in this court is de novo on the record. § 84-918(2) (Cum. Supp. 1990). See, also, *Department of Soc. Servs. v. Person*, 234 Neb. 865, 453 N.W.2d 390 (1990).

The claimants contend it was proper for the district court to take judicial notice of exhibits 1 through 14. Neb. Evid. R. 201, which governs judicial notice of adjudicative facts, provides in part:

> (2) A judicially noticed fact must be one not subject to reasonable dispute in that it is either (a) generally known

within the territorial jurisdiction of the trial court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(3) A judge or court may take judicial notice, whether requested or not.

(4) A judge or court shall take judicial notice if requested by a party and supplied with the necessary information.

. . . .

(6) Judicial notice may be taken at any stage of the proceeding.

The record shows that the claimants offered the following exhibits during the district court hearing: (1) § 306 of the 4-R Act; (2) 28 U.S.C.A. § 1341 (West 1976); (3) part of 1983 Neb. Laws, L.B. 193, regarding the amendment of § 77-624 in 1983; (4) legislative history of L.B. 193, including the introducer's statement of intent, the committee statement, and testimony before the Committee on Revenue; (5) another copy of § 306 of the 4-R Act; (6) order granting summary judgment in *Oklahoma Gas & Elec. Co. v. Boehm*, No. CV88-L-52 (D. Neb. June 13, 1989); (7) order granting summary judgment in *Oklahoma Gas & Elec. Co. v. Boehm*, No. CV89-L-32 (D. Neb. June 13, 1989); (8) class action complaint for injunctive and declaratory relief in *Oklahoma Gas & Elec. Co. v. Boehm*, No. CV88-L-52, *supra*, filed January 25, 1988; (9) memorandum and order certifying class in *Oklahoma Gas & Elec. Co. v. Boehm*, No. CV88-L-52, *supra*, filed June 28, 1988; (10) order for disbursement of funds in *Oklahoma Gas & Elec. Co. v. Boehm*, No. CV88-L-52, *supra*, and *Oklahoma Gas & Elec. Co. v. Boehm*, No. CV89-L-32, *supra*, filed October 6, 1988; (11) practice and procedure rule 11 of the State Board, as published by Commerce Clearing House; (12) S. Rep. No. 499, 94th Cong., 2d Sess. 1, *reprinted in* 1976 U.S. Code Cong. & Admin. News 14, 79-80, and S. Conf. Rep. No. 595, 94th Cong., 2d Sess. 133, *reprinted in* 1976 U.S. Code Cong. & Admin. News 148, 180-81, containing part of the legislative history of § 306 of the 4-R Act; (13) agreed order on injunction and leave to deposit money into the Registry of Court in *Oklahoma Gas & Elec. Co. v. Boehm*, No. CV88-L-52, *supra*,

filed January 26, 1988; and (14) part of the stipulation of facts in *Trailer Train Co. et al. v. Leuenberger*, No. CV87-L-29 (D. Neb.).

The appellants do not contend that these items are subject to reasonable dispute or are incapable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

We first observe that exhibits 13 and 14 appear in the record of the State Board hearing and were, for that reason, unquestionably within the scope of the district court's review.

Exhibits 1, 2, 3, and 5 consist of federal and state statutes. Neb. Rev. Stat. § 25-12,101 (Reissue 1989) of the Uniform Judicial Notice of Foreign Law Act provides that "[e]very court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States." We held in *State v. Thayer*, 235 Neb. 70, 453 N.W.2d 474 (1990), that it is the duty of the courts to take judicial notice of the laws enacted by the Legislature and that all courts must take judicial notice of the public law prevailing within the forum. Courts also take judicial notice of the public and general acts of Congress. *Standard Federal Savings & Loan Assn. v. Meins*, 226 Neb. 853, 415 N.W.2d 462 (1987).

Exhibits 4 and 12 consist of legislative history. This court takes judicial notice of the contents of legislative journals. *City of Grand Island v. Ehlers*, 180 Neb. 331, 142 N.W.2d 770 (1966); *Omaha Nat. Bank v. Jensen*, 157 Neb. 22, 58 N.W.2d 582 (1953). We have, on occasion, taken judicial notice of other legislative history. See, e.g., *Kaup v. Sweet*, 187 Neb. 226, 230, 188 N.W.2d 891, 894 (1971) ("[w]e take judicial notice of the legislative history of L.B. 1378, as we may").

Regarding exhibit 11, we have held that "[b]ecause establishing the existence and contents of a particular administrative rule or regulation at any given time is often a difficult and uncertain process, it is an established principle that, as a general rule, this court will not take judicial notice of such rules or regulations." *Donahoo v. Nebraska Liquor Control Comm.*, 229 Neb. 197, 199, 426 N.W.2d 250, 251 (1988). It is the burden of the party relying on an administrative rule or regulation to prove both its existence and its language.

Id. We therefore decline to take judicial notice of exhibit 11. In any event, exhibit 11 sets forth the State Board's procedure for valuing rail cars and is largely irrelevant to the disposition of this matter.

The remainder of the exhibits pertain to the federal district court decisions in *Oklahoma Gas & Elec. Co. v. Boehm*, No. CV88-L-52 (D. Neb. June 13, 1989), and *Oklahoma Gas & Elec. Co. v. Boehm*, No. CV89-L-32 (D. Neb. June 13, 1989), which involved the Nebraska car company tax for 1987 and 1988. Although this lawsuit involves only taxes paid in 1984, 1985, and 1986, the claimants contend the *Oklahoma Gas* decisions are relevant to this appeal because both *Oklahoma Gas* cases were class actions involving all car companies subject to the Nebraska car company tax and included the appellee claimants in these appeals. Both *Oklahoma Gas* cases were decided on June 13, 1989, approximately 2 months after the State Board denied the claimants' requests for refunds in the present case. In both *Oklahoma Gas* cases the plaintiff taxpayers were granted summary judgment "[f]or the reasons stated by the Eighth Circuit in its opinion in Trailer Train Co. v. Leuenberger, [885 F.2d 415 (8th Cir. 1988)] aff'g Trailer Train Co. v. Leuenberger, CV87-L-29 (D. Neb. Dec. 11, 1987)," and the Tax Commissioner was ordered to refund taxes paid by the car companies for the 1987 and 1988 tax years.

We said in *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 835, 458 N.W.2d 443, 455 (1990), that "as a subject for judicial notice, existence of court records and certain judicial action reflected in a court's record are, in accordance with Neb. Evid. R. 201(2)(b), facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." A court may, therefore, judicially notice existence of its records and the records of another court, but judicial notice of facts reflected in a court's records is subject to the doctrine of collateral estoppel or of res judicata. *Gottsch, supra.*

In light of the foregoing, we conclude that the record in this court consists of (1) the transcripts and bill of exceptions of the proceedings before the State Board and (2) the exhibits offered in the district court which may be judicially noticed by this

court, that is, all the exhibits except exhibit 11. We therefore review the record de novo, pursuant to § 84-918(2) (Cum. Supp. 1990), and consider the materials offered in the district court to the extent they are relevant to the issues involved in this appeal.

II

We also note that §§ 77-1775 and 77-1736.04 were repealed and reenacted after the claimants perfected their appeals to the district court. The statutes, as amended, still set forth procedures for refunding property taxes.

In the absence of a general saving statute, the repeal without reservation of a statute granting a right of action is generally construed to defeat all remedies provided thereunder and to defeat all actions pending under the statute at the time of repeal. 82 C.J.S. *Statutes* §§ 439 and 440 (1953). However, Nebraska has enacted a general saving statute, Neb. Rev. Stat. § 49-301 (Reissue 1988), which provides that the repeal of a statute "shall in no manner affect pending actions founded thereon . . . except as may be provided in such repealing statute." In any event,

> [t]he simultaneous repeal and reenactment of substantially the same statutory provisions is ordinarily construed to be an affirmation or continuation of the original provisions rather than a true repeal. Where a statute has been repealed and substantially reenacted with additions or changes, the additions or changes are treated as amendments effective from the time the new statute goes into effect.

Denver Wood Products Co. v. Frye, 202 Neb. 286, 289, 275 N.W.2d 67, 70 (1979). We determine, therefore, that the repeal and reenactment of §§ 77-1775 and 77-1736.04 did not defeat the claimants' remedies and that the cases should be decided under the statutes existing at the time the actions were commenced.

III

Section 306 of the 4-R Act was enacted in 1976 " 'to eliminate the long-standing burden on interstate commerce resulting from discriminatory State and local taxation of common and contract carrier transportation property.' "

Ogilvie v. State Bd. of Equalization, 657 F.2d 204, 206 (8th Cir. 1981). As noted by Judge Robert Van Pelt in *Ogilvie*, the legislative history of the 4-R Act shows that, in the 1959-60 session, the 86th Congress passed Senate resolutions 29, 151, and 244 requesting a national transportation policy study. The portion of the resulting report pertaining to ad valorem property taxation of railroads related that information compiled by the Association of American Railroads confirmed the finding of the congressional committee that there was a " 'studied and deliberate practice of assessing railroad property at a proportion of full value substantially higher than other property subject to the same tax rates.' " 657 F.2d at 206. The committee proposed two plans to help alleviate the tax burden on railroads. One was a right-of-way exemption. The other proposal submitted by the Association of American Railroads formed the basis for § 306 of the 4-R Act when it was enacted by the 94th Congress approximately 15 years later. See *Ogilvie, supra*.

In the 94th Congress, the House and the Senate introduced separate versions of the bill. The difference between the two versions was that the Senate bill provided that any state having in its constitution a "reasonable classification of property" provision would be exempt from the act. The House rejected this proviso as an amendment to its bill. In the debate, it was argued that such a constitutional provision was a form of discrimination in that the constitutions of approximately 19 states contained such a provision. Critics also argued that there was nothing to prevent other states from amending their constitutions before the bill took effect and that such action would defeat the bill's purpose. A conference committee ultimately recommended the adoption of what was substantially the original Senate bill, minus the constitutional exemption provision. This bill passed, in 1976, and became § 306 and was to take effect 3 years after enactment. See *Ogilvie, supra*.

Section 77-1775 was enacted in 1983 as part of L.B. 193 in response to the passage of § 306 of the 4-R Act and in anticipation of lawsuits filed pursuant thereto. For example, Tax Commissioner Donna Karnes testified before the

Committee on Revenue that

> [f]ederal legislation was recently enacted to correct the discriminatory taxation of such property in many states. In the case of railroads, this legislation is known as the Federal 4-R Act . . . . Basically, these acts require that such property be taxed at a rate that does not exceed the rate of taxation for commercial and industrial property in the same taxing jurisdiction. For Nebraska this means that the actual assessed value of this property must be adjusted by the statewide average assessment sales ratio for commercial and industrial property. It should be noted that the railroads are now suing other states under this federal legislation and the airlines can be expected to follow suit.
>
> Under current Nebraska law, airline and carline properties are taxed at a rate which is equal to the average statewide property tax rate for the preceding tax year. This is not true of any other types of property taxed in Nebraska. Recent case law from other jurisdictions indicates that this type of treatment can be a discriminatory and therefore illegal taxation practice under the new federal laws. This would be true where the preceding year's commercial and industrial property tax rate was higher than the present year's tax rate. So if this situation existed in Nebraska, the current state law could be challenged and found in violation of these new federal acts and the United States Constitution. This is exactly what has occurred in other states with similar provisions and this is why these changes proposed by the Department [of Revenue] are necessary.

Committee on Revenue Hearing, L.B. 193, 88th Leg., 1st Sess. 13-14 (Jan. 24, 1983).

Section 77-1775 provides that if a taxpayer demands a refund from the Tax Commissioner, the Tax Commissioner must "immediately" transmit a copy of the demand, along with the Tax Commissioner's recommendation, to the State Board. The State Board "shall approve the refund if the board finds the tax . . . to be invalid for any reason" and must make its determination within 120 days of filing the claim for refund. If

the refund claim is denied, the taxpayer may appeal to the district court pursuant to the Administrative Procedure Act. If it is determined that the tax was invalid, judgment shall be rendered in the amount of the refund claim with interest.

The district court found that the car company personal property taxes paid by the claimants for tax year 1986 were "invalid" within the meaning of § 77-1775 in light of the decisions in *Trailer Train Co. et al. v. Leuenberger*, No. CV87-L-29 (D. Neb. Dec. 11, 1987), *aff'd* 885 F.2d 415 (8th Cir. 1988), *cert. denied, Boehm v. Trailer Train Co.*, 490 U.S. 1066, 109 S. Ct. 2065, 104 L. Ed. 2d 630 (1989), and *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), *cert. denied* ____ U.S. ____, 110 S. Ct. 1130, 107 L. Ed. 2d 1036 (1990).

The appellants contend that the taxes levied on the claimants' property pursuant to §§ 77-624 et seq. were not "invalid" within the meaning of § 77-1775 because the taxation of the claimants' property was not for an illegal or unauthorized purpose and was not void for want of jurisdiction to impose the tax. Indeed, the decision in *Trailer Train Co. et al. v. Leuenberger, supra*, did not prohibit the State of Nebraska from levying lawful taxes on railroad rolling stock, although collection of a "discriminating tax" was enjoined in federal court. See, also, *MAPCO Ammonia Pipeline v. State Bd. of Equal., ante* p. 565, 471 N.W.2d 734 (1991); *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991); *Northern Natural Gas Co. v. State Bd. of Equal., supra*. Even assuming that the taxation of railroad rolling stock was not void ab initio, we conclude that the 1986 personal property taxes in question were collected from the claimants in violation of federal law and are "invalid" within the meaning of § 77-1775.

Section 306 of the 4-R Act provides:

> (1) . . . It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:
>
> . . . .
>
> (d) The imposition of any other tax which results in

> discriminatory treatment of a common carrier by railroad subject to this part.

We have referred to the text of the original 4-R Act instead of the codification appearing at 49 U.S.C. § 11503, as did the court in *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988). As summarized in *Alabama Great Southern R. Co. v. Eagerton*, 663 F.2d 1036, 1037 (11th Cir. 1981),

> 49 U.S.C. § 11503 is an official revision and codification of Pub.L.No. 94-210, Section 306, 90 Stat. 54 (February 5, 1976), which was originally enacted as part of the [4-R Act] and codified unofficially as 49 U.S.C.A. § 26c (1978 Supp.). 49 U.S.C. § 11503 was published as part of Pub.L.No. 95-473, 92 Stat. 1337 (October 13, 1978), which was "an act to revise, codify and enact without substantive change the Interstate Commerce Act and related laws as Subtitle IV, Title 49, United States Code, 'Transportation'." Pursuant to Pub. L. No. 95-473, 92 Stat. 1466, § 3(a), the statutory language of 49 U.S.C. § 11503 cannot be construed as making a substantive change in § 306.

See, also, *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (1981). Therefore, since the language of 49 U.S.C. § 11503 differs from the language of § 306 as enacted, we rely on the language used in § 306.

As we have noted in previous decisions, the U.S. Court of Appeals, in *Trailer Train Co. v. Leuenberger, supra*, held that when tax exemptions applied to three-fourths of the commercial and industrial property in Nebraska, and did not apply to rail cars, the tax system in Nebraska discriminated against Trailer Train in violation of § 306(1)(d) of the 4-R Act. For that reason, in *Trailer Train Co.*, the State of Nebraska was enjoined from "collection of the discriminating tax," 885 F.2d at 418, but was not prohibited from levying a lawful nondiscriminatory tax on a common carrier by railroad.

In *Northern Natural Gas Co. v. State Bd. of Equal., supra*, *Natural Gas Pipeline Co. v. State Bd. of Equal., supra*, *MAPCO Ammonia Pipeline v. State Bd. of Equal., supra*, and several related cases, this court considered the contentions of nonrailroad centrally assessed taxpayers that the decision in

Trailer Train Co. entitled them to relief under Neb. Const. art. VIII, § 1. In holding that these taxpayers were entitled to relief, we recognized that the impermissible discrimination forming the basis for the decision in *Trailer Train Co.* and other federal court decisions interpreting and applying the 4-R Act resulted solely from tax exemptions provided under Neb. Rev. Stat. § 77-202(6) through (9) (Reissue 1990) to various types of property not owned by railroads or car companies. In *MAPCO Ammonia Pipeline, supra* at 583, 471 N.W.2d at 745, we specifically observed that "Nebraska's failure to correct *illegal discrimination* in its tax structure has caused an increasing concentration of the tax burden on a shrinking group of taxpayers." (Emphasis supplied.)

In our decisions following *Trailer Train Co., supra*, this court has consistently interpreted the discriminatory taxation of railroad rolling stock to be in violation of federal law. The railroad rolling stock owned by the claimants in these cases was taxed in 1986 under the same illegally discriminatory tax system that was at issue in *Trailer Train Co.*, *Northern Natural Gas Co.*, *Natural Gas Pipeline Co.*, and *MAPCO Ammonia Pipeline*. Section 77-1775 specifically provides for the refund of "invalid" taxes. We hold that the tax levied in 1986 against the rolling stock of the claimants in these cases was in violation of § 306(1)(d) of the 4-R Act and was invalid within the meaning of § 77-1775. The district court, therefore, did not err in ordering that said taxes be refunded with interest pursuant to § 77-1775.

IV

Because we determine the claimants are entitled to refunds of personal property taxes for 1986 pursuant to § 77-1775, we need not address the appellants' contentions regarding § 77-1736.04.

V

Finally, the claimants contend they are entitled to an award for reasonable attorney fees pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1989) "for the defenses raised by the appellants that are frivolous." Brief for appellees at 49. We do not believe the defenses raised by the State Board and Tax

Commissioner were frivolous or made in bad faith, and we decline to award attorney fees in this case.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., not participating in the decision.

IN RE INTEREST OF L.J., M.J., AND K.J., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. H.J., APPELLANT.

472 N.W.2d 205

Filed July 19, 1991. No. 90-1046.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries the factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court.
2. **Trial: Evidence: Appeal and Error.** Where the evidence is in conflict, the Supreme Court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
3. **Parental Rights: Evidence: Proof: Appeal and Error.** If a trial court fails to state in its order terminating a parent's right in a child that the clear and convincing evidence established grounds for termination, the Supreme Court reviews the record de novo and makes findings independent of the findings of the juvenile court and may make the appropriate and necessary findings on review if in fact they are supported by the record.
4. **Parental Rights: Juvenile Courts: Evidence.** A juvenile court is not necessarily limited to reviewing the efforts of a parent under a plan of reunification last ordered by the court; rather, the court looks at the entire reunification program and the parent's compliance with the various plans involved in the program which would bring the parent closer to reunification.
5. **Parental Rights: Evidence.** It does not follow that once a court orders a rehabilitation plan, it is prohibited from considering prior events when deciding whether to terminate parental rights. It is often necessary for a court to determine the reasonableness of a plan or its individual provisions. It is impossible to determine whether a plan to reunite a parent and child is reasonable without considering whether the plan is designed to correct problems which required the State's intervention in the first place. Review of prior events is essential to this determination.
6. **Parental Rights.** The primary considerations in determining whether to terminate parental rights are the best interests of the children.
7. _____. When a parent is unwilling or unable to rehabilitate herself or himself

within a reasonable period of time after the adjudication hearing, the best interests of the children usually require that a final disposition be made without delay.

8. _____. The right of a parent to custody and control of his or her children is not an inalienable right. The public has a paramount interest in the protection of the children from neglect.
9. **Parental Rights: Juvenile Courts.** Although a juvenile court is not required to implement a plan of rehabilitation, the failure to comply with such a plan which has been implemented presents an independent reason justifying termination of parental rights.
10. **Parental Rights.** A parent is not only required to follow the plan of the court to rehabilitate herself or himself, but also to make reasonable efforts on her or his own to bring about rehabilitation.
11. _____. Children cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.
12. **Juvenile Courts: Judicial Notice: Records.** A juvenile court has a right to examine its own records and take judicial notice of its own proceedings and judgment in an interwoven and dependent controversy where the same matters have already been considered and determined.
13. **Parental Rights: Trial: Evidence: Appeal and Error.** The improper admission of evidence by the trial court in a parental rights termination proceeding does not, in and of itself, constitute reversible error. As long as the appellant properly objected at trial, the Supreme Court will not consider any such evidence in its de novo review.
14. **Parental Rights: Appeal and Error.** The adjudication that a child is one within the meaning of the Nebraska Juvenile Code is a final, appealable order.

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

Connie Kearney for appellant.

James S. Jansen, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

Karen L. Vervaecke, guardian ad litem for L.J., M.J., and K.J.

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

HASTINGS, C.J.

The mother appeals the September 26, 1990, order of the juvenile court terminating her parental rights to her three children, L.J., M.J., and K.J., in that the children were within the meaning of Neb. Rev. Stat. § 43-292(6) (Reissue 1988). The

children had previously been found to be children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988). She assigns as error the sufficiency of the evidence, the failure of the trial court to state that its order of termination was based on clear and convincing evidence, the overruling of appellant's motion to strike certain evidence, the failure of the court to find whether reasonable efforts had been made under the direction of the court to correct the conditions leading to termination, the overruling of appellant's motion for a psychiatric examination of appellant and her children, the overruling of appellant's objection to the taking of judicial notice of the court's records and exhibits in the instant case, and the finding that the children had previously been found to be children within the meaning of § 43-247(3)(a). We affirm.

In an appeal from a judgment terminating parental rights, the Supreme Court tries the factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court. *In re Interest of T.F.P.*, 237 Neb. 922, 468 N.W.2d 116 (1991). Where the evidence is in conflict, the Supreme Court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. *In re Interest of T.F.P., supra.*

The children were born on August 10, 1984, July 30, 1986, and October 15, 1987. On March 23, 1989, the children were found alone, without supervision and without food, at the home of appellant's mother. The Omaha Police Division was alerted to the situation by a neighbor who became concerned after one of the children present in the grandmother's household had requested food. The children were removed from that home and placed with the Nebraska Department of Social Services.

On March 31, 1989, the Douglas County Attorney filed a petition in the juvenile court alleging that the three children came within the meaning of § 43-247(3)(a) in that they lacked proper parental care due to the fault of their mother.

On May 9, 1989, the children were adjudicated children within the meaning of § 43-247(3)(a) based on the admission plea entered by the appellant.

The court ordered a reunification plan at the disposition

hearing held on July 18, 1989. The appellant was ordered to comply with the following:

> 1. That [appellant] shall obtain adequate housing with the assistance of a support worker provided by the Nebraska Department of Social Services.
>
> 2. That [appellant], once adequate housing is obtained, shall cooperate with an in-home parenting program and follow any and all recommendations of that therapist.
>
> 3. That [appellant] shall complete a psychological evaluation as arranged by the Nebraska Department of Social Services.
>
> 4. That [appellant] shall cooperate with all workers involved t [sic] include notifying the probation officer on a weekly basis and notifying the workers within 24 hours of any change in address or situation.

A review hearing was held on October 19, 1989. Of the four items ordered in the reunification plan, two were not completed. Although a worker from the Child Saving Institute parenting program was assigned to assist the appellant in obtaining adequate housing, the appellant was dropped from the program because she would not return any phone calls or answer any letters. Appellant also failed to cooperate in participating in the parenting program sponsored by the Child Saving Institute, and she was terminated from that program. Appellant did complete the psychological evaluation and did maintain contact with her probation officer. However, the appellant did fail to consistently visit her children.

The court amended its rehabilitation plan and ordered the appellant to participate in a parenting program, as arranged by the Department of Social Services; maintain suitable and stable housing; involve herself in a job training/vocational program or obtain employment; participate in relinquishment counseling, as arranged by the Department of Social Services; abstain from alcohol and drugs and submit to random alcohol and drug screenings; and maintain visitation with her children, as arranged by the Department of Social Services.

A second review hearing was held on March 19, 1990. Appellant did not appear at that hearing. Since the court had already granted one continuance due to her failure to appear on

a previous occasion and since her attorney was present, the court proceeded without her. There was testimony that the appellant's probation officer had reminded the appellant on three different occasions about the hearing and had also contacted her the morning of the hearing to remind her of the hearing. The probation officer then contacted the appellant once again to determine her whereabouts, but the appellant was still in the process of "getting ready." The appellant was notified that the court would be proceeding without her.

Testimony at the review hearing established that the appellant had failed to perform most of the items on the rehabilitation plan. The appellant did not follow through with the Building Nurturing Families program offered by the Child Saving Institute and, after being encouraged to sign up again, refused to participate. The appellant had lived in several residences, and she failed to notify the probation officer of her changes of residence. The appellant failed to involve herself in a job training program. She was enrolled in a program to earn her GED, but quit after only a few days. The appellant was required to go to relinquishment counseling, but she attended only one session and then did not continue with the program. The appellant also continued to drink and refused to submit to random alcohol and drug screenings. Finally, the appellant did not visit her children on a consistent basis.

The State filed a motion to terminate appellant's parental rights on April 9, 1990, alleging that reasonable efforts, under the direction of the court, had failed to correct the conditions leading to the original jurisdictional finding. The motion further alleged:

> A. [Appellant] has failed to participate in any parenting programs.
>
> B. [Appellant] has failed to obtain and maintain adequate and stable housing.
>
> C. [Appellant] has failed to obtain employment.
>
> D. [Appellant] has refused to participate in a job training/vocational program.
>
> E. [Appellant] has failed to participate in relinquishment counseling.
>
> F. [Appellant] has failed to abstain from alcohol and

drug use.

G. [Appellant] has failed to submit to random alcohol and drug screenings.

H. [Appellant] has failed to maintain consistent visitation with said children, having visited only 5 times out of 33 scheduled visits since July, 1989.

I. [Appellant] has failed to cooperate with all workers involved in her case and to notify the probation officer within 24 hours of any change in residence.

Although the record discloses that appellant was represented throughout these proceedings by the same attorney commencing on April 10, 1989, the date of the detention hearing, through proceedings in this court, an order dated June 27, 1990, also appears in the record, appointing a guardian ad litem, an attorney, for the appellant for the stated reason that she was without representation. The guardian ad litem moved for and was granted a continuance prior to the termination hearing. The appellant and the guardian ad litem also moved for a psychiatric examination for both the appellant and her children to assess the bonding relationship between the appellant and her children. An objection to the motion was filed by the guardian ad litem for the children and by the county attorney. The bases of the objection were that the appellant had not set forth good cause why the examination should be conducted, the mental condition of the children was not in controversy in the proceedings, and the evaluation would cause the children unnecessary trauma. The motion was overruled.

The court proceeded with the motion to terminate the appellant's parental rights. The evidence supported affirmative findings on all of the failures alleged by the State. The appellant had refused to participate in any of the programs designed to aid her. She had not abstained from alcohol use. She had failed to keep her probation officer advised of her whereabouts. She had visited her children but 11 times out of a possible 53 visits made available to her. The Child Protective Services office arranged for taxi transportation to all visitation and programs, but these services were eventually discontinued because the appellant would send the taxi away or would not meet the taxi.

The trial court found that the allegations in the motion to

terminate parental rights were true, that the minor children had previously been found to be children within the meaning of § 43-247(3)(a), that the children were within the meaning of § 43-292(6), and that the best interests and welfare of the children required termination of appellant's parental rights.

The failure of the court to state in its termination order that the decision was based on clear and convincing evidence is not in itself grounds for reversal. In the case *In re Interest of A.G.G.*, 230 Neb. 707, 433 N.W.2d 185 (1988), this issue was addressed. The trial court had failed to state in the order terminating the mother's parental rights that the clear and convincing evidence established the grounds for termination or that it would be in the child's best interests to terminate the mother's parental rights. This court found that it reviews the record de novo and makes findings independent of the findings of the juvenile court and that, therefore, on its de novo review, this court may make the appropriate and necessary findings if in fact they are supported by the record.

In *State v. Souza-Spittler*, 204 Neb. 503, 283 N.W.2d 48 (1979), this court was faced with a similar situation. The decision of the trial court was not reversed. We stated that the issues are tried de novo and the findings of fact are made independently in this court. This court also stated that the clear and convincing evidence established that termination of the mother's parental rights was clearly in the best interests of the child.

In our de novo review of the record, we find that clear and convincing evidence supports the juvenile court's finding that reasonable efforts under the direction of the juvenile court have failed to correct the conditions which resulted in the adjudication that the children were within the meaning of § 43-247(3)(a).

The appellant argues that certain testimony should have been stricken in that it related to a previous plan ordered by the court, not the plan actually in effect on the date the motion to terminate was filed. The appellant further contends that since this testimony was not properly before the court, the allegations in the motion to terminate relating to that plan were not relevant or true.

Section 43-292 states:

> 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 exists:
>
> . . . .
>
> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination.

It is clear from reading the statute that the court is not limited to reviewing the efforts of the parent under the plan last ordered by the court; rather, the court looks at the entire reunification program and the parent's compliance with the various plans involved in the program, as well as any effort not contained within the program which would bring the parent closer to reunification.

In the case *In re Interest of P.D.*, 231 Neb. 608, 617, 437 N.W.2d 156, 162-63 (1989), this court stated:

> [I]t does not follow that, once a court orders a rehabilitation plan, it is prohibited from considering prior events when deciding whether to terminate parental rights. . . . [I]t is often necessary for a court to determine the reasonableness of a plan or its individual provisions. It is impossible to determine whether a plan to reunite a parent and child is reasonable without considering whether the plan is designed to correct problems which required the State's intervention in the first place. Review of prior events is essential to this determination.

Next, we address the findings of the court that the allegations in the motion to terminate were true.

The court found that the appellant had failed to participate in any parenting programs. The appellant argues this was not possible until housing was obtained, and therefore this condition should be excused. The appellant was dropped from the program because she failed to contact the caseworker

involved. She told her probation officer that she did not wish to participate in the program. The program is a voluntary program, and thus the failure to participate results in termination from the program.

The court determined that appellant had failed to obtain housing. Appellant insists that that was because no one assisted her in that effort. However, the appellant refused to participate in the voluntary program which was to assist her in finding housing. The appellant refused to return phone calls and answer letters from the Child Saving Institute parenting program, which was the program designed to help her find adequate housing. A caseworker from the Department of Social Services also tried to assist her in finding housing. She was taken to apply for public assistance by a caseworker from the Child Saving Institute so that she could afford housing; however, she moved from her previous address and did not let that worker know where she was located. It is clear that appellant did not choose to take advantage of the assistance being offered to her.

The appellant had failed to obtain employment or participate in a job training program. She refused to participate in relinquishment counseling. The appellant not only failed to abstain from the use of alcohol and to submit to random alcohol and drug screenings, but actually used alcohol in the presence of her probation officer.

The trial court found that appellant had visited her children only 5 times out of a possible 33 scheduled visits since July 19, 1989. The truth of the matter is that out of a possible 53 visits since the children have been in the custody of the Department of Social Services, appellant has visited only 11 times.

Finally, it is quite apparent that appellant had not cooperated in the least with her various probation officers and caseworkers, refusing to follow their suggestions and refusing to keep them informed of her whereabouts.

It is clear that the findings of the juvenile court are supported by the evidence.

Next, the appellant contends that the court erred in finding that it is in the best interests of the children that her parental rights be terminated. The primary considerations in

determining whether to terminate parental rights are the best interests of the children. *In re Interest of T.F.P.*, 237 Neb. 922, 468 N.W.2d 116 (1991). When a parent is unwilling or unable to rehabilitate herself or himself within a reasonable period of time after the adjudication hearing, the best interests of the children require that a final disposition be made without delay. *In re Interest of T.F.P., supra.* The right of a parent to custody and control of his or her children is not an inalienable right. The public has a paramount interest in the protection of the children from neglect. *In re Interest of A.L.N.*, 223 Neb. 675, 392 N.W.2d 780 (1986).

We have held that while the juvenile court is not required to implement a plan of rehabilitation, the failure to comply with a plan which has been implemented presents an independent reason justifying termination of parental rights. *In re Interest of K.L.N. and M.J.N.*, 225 Neb. 595, 407 N.W.2d 189 (1987). In addition, this court has stated that a parent is required not only to follow the plan of the court to rehabilitate herself or himself, but also to make reasonable efforts on her or his own to bring about rehabilitation. *In re Interest of R.A.*, 226 Neb. 160, 410 N.W.2d 110 (1987).

During the period between adjudication of the children under § 43-247(3)(a) and the filing of the motion to terminate, the appellant took few steps to bring her closer to reunification with her children. The few steps taken were done grudgingly. We have set forth those failures in detail. The best interests of these children require that final disposition be made. These children cannot wait and hope that the mother will eventually take the steps necessary for reunification with her children when they have already waited in vain for such change to take place. Children cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity. *In re Interest of C.D.C.*, 235 Neb. 496, 455 N.W.2d 801 (1990). In the best interests of the minor children, the appellant's parental rights must be terminated.

The appellant alleges that the trial court erred in failing to find whether reasonable efforts had been made under the direction of the court to correct the conditions leading to termination. We have devoted much time and space to this

allegation as we addressed appellant's other complaints. There is no merit to this contention.

The appellant asserts that the court erred in overruling the appellant's motion for a psychiatric examination of the appellant and her children to assess their bonding relationship. The children were removed from the appellant's care when they were 1, 2, and 4 years old, some 2 1/2 years ago. Appellant has failed to show a consistent interest in the children that would indicate a bond has been formed.

The case cited by appellant in support of her proposition is the case *In re P.A.B.*, 391 Pa. Super. 79, 570 A.2d 522 (1990). That case is easily distinguished. In the Pennsylvania case, the parents visited their children bimonthly despite the hardship involved in that they lived in a rural area and lacked private transportation. They also attended parenting classes as required. They attempted to perform all requirements ordered by the court; however, their mental incapacity prevented full achievement of the requirements. The appellant here has willfully failed to complete or even substantially complete the plans ordered by the court. Furthermore, the appellant has shown no evidence of any bonding between her and her children. There was no abuse of discretion by the trial court in refusing this request.

Next, the appellant claims that the court erred in overruling the appellant's objection to taking judicial notice of its records and exhibits in this case. This court stated in the case *State v. Norwood*, 203 Neb. 201, 204-05, 277 N.W.2d 709, 711 (1979), that

> [a] court must take judicial notice of its own records in the case under consideration. . . . [The court] has a right to examine its own records and take judicial notice of its own proceedings and judgment in an interwoven and dependent controversy where the same matters have already been considered and determined.

Norwood involved the taking of judicial notice of prior proceedings in a termination of parental rights adjudication.

The appellant argues that the issue of termination was raised for the first time in the April 9, 1990, motion to terminate parental rights. She alleges that the hearings prior to the

September 13, 1990, termination hearing had reunification as the goal. The evidence that is now objected to was entered at disposition hearings. The appellant contends that the exhibits and testimony were admitted into evidence under "relaxed" rules of evidence.

Neb. Rev. Stat. § 43-283 (Reissue 1988) states that "[s]trict rules of evidence shall not be applied at any dispositional hearing." It was under this standard that the evidence was admitted.

There was no objection to the exhibits admitted at the July 18, 1989, hearing and the October 19, 1989, hearing. There was an objection to the exhibits admitted at the March 19, 1990, hearing. The objection to these exhibits was that the attorney for the appellant had not reviewed the exhibits with the appellant because the appellant was not present at the hearing.

In the case *In re Interest of S.C., S.J., and B.C.*, 232 Neb. 80, 439 N.W.2d 500 (1989), this court addressed that issue. We stated that there was a complete verbatim report of the juvenile court proceedings and all reports were entered without objection. Furthermore, at many of the hearings the authors of the reports were present for cross-examination. There was no showing that any authors who might not have been present could not have been compelled to attend.

Furthermore, this court stated in *In re Interest of D.S. and T.S.*, 236 Neb. 413, 461 N.W.2d 415 (1990), that the improper admission of evidence by the trial court in a parental rights termination proceeding does not, in and of itself, constitute reversible error. As long as the appellant properly objected at trial, this court will not consider any such evidence in its de novo review. *Id.*

That is the case here. In our de novo review of the record this court has disregarded impermissible or improper evidence in determining that the clear and convincing evidence justifies termination of parental rights under the Nebraska Juvenile Code.

Finally, the appellant alleges that the trial court erred when it found that the children had previously been found to be children within the meaning of § 43-247(3)(a) and overruled the motion to dismiss raised by the appellant's guardian ad litem.

At the adjudication hearing on May 9, 1989, jurisdictional facts were admitted by the appellant, accompanied by her attorney, after being fully advised of her rights. The appellant did not appeal the order of adjudication.

The adjudication that a child is within the meaning of § 43-247(3)(a) is a final, appealable order. *In re Interest of P.L., S.L., and A.L.*, 236 Neb. 581, 462 N.W.2d 432 (1990). Appellant did not appeal the adjudication until over a year later. Thus, the appeal of this order is out of time.

The judgment of the juvenile court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. JAMES C. BAIRD, APPELLEE.

472 N.W.2d 203

Filed July 19, 1991. No. 90-1167.

1. **Criminal Law: Judgments: Jurisdiction: Appeal and Error.** In the absence of specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.
2. _____: _____: _____: _____. In an appeal of an adverse ruling in a criminal case, the State must, among other things, comply with the requirements of Neb. Rev. Stat. § 29-2315.01 (Reissue 1989).

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Appeal dismissed.

Joe Kelly, Deputy Lancaster County Attorney, for appellant.

No appearance for appellee.

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

CAPORALE, J.

In this case which charges defendant-appellee, James C. Baird, with the theft of money by deception, in violation of Neb. Rev. Stat. § 28-512 (Reissue 1989), the trial court determined that each of several separate acts constituted a separate offense. Accordingly, the court instructed the jury that

in fixing the value of the theft, it could not add together the sum taken as the result of a series of separate acts but, instead, must fix the amount of money stolen based upon a single act occurring on or between the dates the plaintiff-appellant State alleged the crime took place. The State assigns that determination and instruction as error and seeks review under the provisions of the general appeal statute, Neb. Rev. Stat. § 25-1912 (Reissue 1989). We dismiss for want of jurisdiction.

In the absence of specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case. *State v. Halsey*, 232 Neb. 658, 441 N.W.2d 877 (1989); *United States v. Wilson*, 420 U.S. 332, 95 S. Ct. 1013, 43 L. Ed. 2d 232 (1975); *United States v. Sanges*, 144 U.S. 310, 12 S. Ct. 609, 36 L. Ed. 445 (1892); 3 W. LaFave & J. Israel, Criminal Procedure § 26.3 (West 1984); 4 Wharton's Criminal Procedure § 639 (12th ed. 1976). But cf. *State v. Thompson*, 224 Neb. 922, 402 N.W.2d 271 (1987) (on criminal defendant's appeal of intermediate appellate court's ruling on sentence, State has right to cross-appeal on that issue).

Neb. Rev. Stat. § 29-2315.01 (Reissue 1989) provides, in relevant part:

> The county attorney may take exception to any ruling or decision of the court made during the prosecution of a cause by presenting to the trial court the application for leave to docket an appeal to the Supreme Court with reference to the rulings or decisions of which complaint is made. . . . Such application shall be presented to the trial court within twenty days after the final order is entered in the cause, and upon presentation, if the trial court finds it is in conformity with the truth the judge of the trial court shall sign the same . . . . The county attorney shall then present such application to the Supreme Court within thirty days from the date of the final order. If the application is granted the county attorney shall . . . proceed to obtain a review of the case in the Supreme Court as provided in section 25-1912.

This jurisdiction thus grants the State the right to seek Supreme Court review of adverse criminal rulings such as those involved in this case, and specifies the special procedure by

which to obtain such review. Under that procedure, the general appeal statute does not come into play until there has been compliance with the special requirements of § 29-2315.01. The State ignored the provisions of the special statute and instead undertook to appeal simply by filing a notice of appeal under the provisions of the general appeal statute. Having failed to make a timely presentation to the trial court of the application for appeal required by the special appeal statute, the State has failed to confer jurisdiction upon this court. As noted in *State v. Halsey, supra*, the failure to comply with the provisions of the special appeal statute prevents any review of a final order of the trial court in a criminal case.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLANT, V. JAMES C. BAIRD, APPELLEE.

471 N.W.2d 756

Filed July 19, 1991. No. 91-082.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Appeal dismissed.

Joe Kelly, Deputy Lancaster County Attorney, for appellant.

No appearance for appellee.

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

CAPORALE, J.

This case duplicates the situation presented in *State v. Baird, ante* p. 724, 472 N.W.2d 203 (1991), and is therefore controlled by the same rules and dismissed for the same reason.

APPEAL DISMISSED.

KATHRYN N. LOVING, APPELLANT, V. BAKER'S SUPERMARKETS, INC., A NEBRASKA CORPORATION, APPELLEE.

472 N.W.2d 695

Filed July 26, 1991. No. 88-1014.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court. In the absence of an abuse of discretion, a trial court's disposition of a motion for new trial will be upheld on appeal.
2. **Jury Misconduct: Words and Phrases.** "Misconduct of the jury," used in Neb. Rev. Stat. § 25-1142(2) (Reissue 1989), does not necessarily mean a jury's bad faith or malicious motive, but means a jury's violation of, or departure from, an established rule or procedure for production of a valid verdict.
3. **Rules of Evidence: Jurors: Affidavits.** Neb. Evid. R. 606(2) permits use of a juror's affidavit to establish that the jury considered prejudicial information emanating from a source other than evidence presented at trial.
4. _____: _____: _____. Neb. Evid. R. 606(2) prohibits a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during deliberations, which enter into the verdict.
5. **Rules of Evidence: Jury Misconduct.** Neb. Evid. R. 606(2) does not equate with, or govern, grounds for a new trial, but indicates and governs the character or type of information properly used in determining whether juror misconduct has occurred in reference to a verdict.
6. **Jury Misconduct: Proof.** As a ground for setting aside a verdict in view of alleged misconduct by a juror, one must show that the questioned conduct entered into a verdict prejudicial or adverse to the party alleging such misconduct.
7. **Rules of Evidence: Jury Misconduct: Proof.** Since Neb. Evid. R. 606(2) precludes and excludes testimony, including a juror's affidavit, concerning motives, methods, misunderstanding, thought processes, or discussions by a jury in reaching a verdict, Rule 606(2) also precludes juror testimony to establish that extraneous prejudicial information actually entered into the verdict.
8. **Jury Misconduct: Proof.** Prejudice from jury misconduct in considering extraneous information, as a ground for setting aside a verdict, may be inferentially established.
9. _____: _____. Extraneous material or information considered by a jury may be deemed prejudicial without proof of actual prejudice if the material or information relates to an issue submitted to the jury and there is a reasonable possibility that the extraneous material or information affected the verdict to the detriment of a litigant.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed and remanded for a new trial.

Steven M. Renteria, of Welsh & Sibbernsen, for appellant.

Thomas J. Culhane and Deborah D. McLarney, of Erickson & Sederstrom, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

In her negligence action against Baker's Supermarkets, Inc. (Baker's), Kathryn N. Loving claimed damages from her fall on the floor of a Baker's supermarket. After a verdict for Baker's, the court overruled Loving's motion for new trial; hence this appeal in which Loving's primary contention is misconduct by the jury in reaching the verdict.

LOVING'S SLIP AND FALL

While Timothy Jones, a Baker's employee, was carrying out groceries for a supermarket patron, he dropped some glass bottles of beer on the floor near the supermarket's checkout area. To clean up the beer and broken bottles, Jones got a mop, bucket, and two yellow signs with the inscription "caution wet floor." Jones put one "caution" sign in the center of the spill and the other at the edge of the spill. In leaving the store, several customers walked around Jones at the spill area.

Meanwhile, Loving and her sister, Tomi Thomas, purchased groceries at a cash register in the "express lane" near the spill area. After Loving and her sister left the express lane cash register, they saw Jones standing with his back to Loving and Thomas. As the sisters passed Jones, Loving twisted her right ankle and fell onto her knee in a "big puddle" which Loving had not seen until she was "in it." Loving then looked back at Jones, who she discovered was mopping, and saw a warning sign. According to Jones, however, he was holding the mop and facing Loving and Thomas as the two women approached the spill area. He moved aside to allow the pair to walk through the area, which he believed to be free from any residue of the dropped bottles.

Shortly after this incident, while she was still at the supermarket, Loving gave Baker's store manager her name, telephone number, and an account of the accident. From the information supplied by Loving, the manager prepared one of

Baker's "public liability claim" forms concerning Loving's accident. Loving subsequently underwent surgery for a chondral fracture of her left patella.

LOVING'S TRIAL

In cross-examining Loving, Baker's counsel read a part of Loving's petition in which she alleged lost wages as a result of her injury, although Loving, on cross-examination, admitted that she was unemployed for the 10 years preceding the accident at Baker's. Also, Baker's counsel read into evidence interrogatory No. 13 answered by Loving:

> Please state in your own words how this accident happened. Answer: Plaintiff and her sister were walking south towards the exit. A man was mopping the floor. When plaintiff approached the man stepped back so plaintiff assumed it would be clear to walk. Plaintiff stepped down with her right foot onto a piece of glass and continued down to twist her right ankle and fell down onto the left knee.

To counteract her answer to the interrogatory, Loving testified that only after she had fallen and looked at Jones did she know that he was mopping the floor. A large diagram, exhibit 4, reflecting the floor plan at the spill area was received in evidence and marked by Loving and Jones to show their locations when Loving slipped and fell. A diagram similar to exhibit 4 appeared in the accident report which Loving had submitted to Baker's and which was marked exhibit 10 and received in evidence, but the diagram in exhibit 10 did not depict the same location of the spill or the locations of Loving and Jones. Loving testified that she attended at least three sessions for physical therapy at Immanuel Hospital. Later, a typed list of medical expenses claimed by Loving was received in evidence and showed:

1-14-88		
4-23-88	IMMANUEL	161.25.

At the conclusion of Loving's testimony, the court commented to the jury, "[W]e do have some witnesses coming in apparently tomorrow and no one else is available right now, so we're going to take our evening recess . . . ." The court

admonished the jury and recessed the trial until 9:30 the next morning, when Loving's sister, Tomi Thomas, was the first witness to testify and generally corroborated Loving's testimony concerning the accident and supplied a description of Loving's disability and pain after the accident. In cross-examination of Thomas, Baker's lawyer asked whether Loving had told Thomas "what she said yesterday in court." Thomas responded: "No, she didn't." Baker's lawyer then asked Thomas: "Did you talk to her attorney?" Thomas answered: "This morning, yes." Baker's lawyer: "Did he tell you what she testified to?" Thomas: "No, he didn't." Cross-examination ended shortly thereafter. The subject of any conversation between Thomas and Loving or her lawyer was not pursued on redirect examination.

At the conclusion of the evidence, the court instructed the jury:

> [Y]ou should be governed solely by the evidence introduced before you. . . . [I]f any of you be personally acquainted with any material or particular fact not supported by the evidence, you should not consider your personal knowledge of such fact or mention it to your fellow jurors.
>
> . . . .
>
> . . . The law demands of you a just verdict uninfluenced by . . . considerations outside the evidence . . . .

The jury returned a verdict for Baker's.

EXTRANEOUS MATERIAL IN JURY ROOM

After the verdict, the court and counsel learned that when the bailiff brought to the jury room those exhibits which had been received in evidence, the bailiff inadvertently included four documents which had not been received in evidence, namely, photocopies of three items—Loving's petition, Loving's answers to interrogatories, and the accident report prepared by Baker's manager—and a "Legal Pad," a note pad containing handwritten notes by Baker's lawyer. Parts of the photocopies had been bracketed, circled, or underlined in blue ink before delivery to the jury room.

The most significant markings on the first three documents

included inked underscoring in Loving's petition of the statement "because of her injuries plaintiff has lost a sum in wages and her earning capacity has been permanently decreased and impaired"; bracketing of Loving's answer to interrogatory No. 13, containing her description of the accident; and a hand-drawn illustration of the spill site, inserted on the accident report.

The fourth item delivered to the jury, the note pad, contained handwritten notes made by counsel for Baker's regarding testimony from various witnesses. Apparently outlining his intended cross-examination of Loving, Baker's counsel wrote on the note pad a list of points actually mentioned during his cross-examination of Loving, for example, "wages" in reference to the petition, "man mopping floor," "Tim [Jones] back—yet steps aside . . . place was busy," and "says nothing about lack of signs." In other notes pertaining to Loving, but without reference to testimony from Loving or any other witness, Baker's counsel wrote "take extra caution," "plan lawsuit," "exagerate [sic]—p.t. [physical therapy]—$120." Regarding Loving's sister, Baker's counsel wrote:

> Tomi Thomas—
> -never discussed w/ sister
> - " " " atty—Steve a better atty.

LOVING'S MOTION FOR NEW TRIAL

In conjunction with her motion for new trial, Loving claimed jury misconduct as a result of the jury's consideration of the documents which were not received in evidence. See Neb. Rev. Stat. § 25-1142(2) (Reissue 1989) (jury misconduct as a ground for a new trial). To support her motion, Loving offered the four items in question—the three photocopies and legal pad—and affidavits of three jurors, who stated that each of them had "considered" those items during jury deliberations. A fourth juror, by affidavit, stated that the documents in question were "read aloud" during the jury's deliberations and that the affiant had "considered" those documents during deliberations in Loving's case. See Neb. Rev. Stat. § 25-1144 (Reissue 1989) (affidavits required to support new trial motion based on jury misconduct). Baker's counsel objected to the jurors' affidavits

in relation to Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 1989), and argued that to the extent the affidavits showed "what effect these exhibits had on [the jurors] . . . they are not receivable." The district court received the juror affidavits and subsequently overruled Loving's motion for new trial.

ASSIGNMENT OF ERROR

Loving's main contention is that the trial court abused its discretion by denying Loving a new trial in view of the jury's consideration of documents which were not introduced into evidence at Loving's trial.

STANDARD OF REVIEW

"A motion for new trial is addressed to the discretion of the trial court. In the absence of an abuse of discretion, a trial court's disposition of a motion for new trial will be upheld on appeal." *DeCamp v. Lewis*, 231 Neb. 191, 200, 435 N.W.2d 883, 888 (1989).

JURY MISCONDUCT AS GROUND FOR NEW TRIAL

Loving argues that the jury's consideration of the documents in question constituted "misconduct of the jury," a ground for a new trial in accordance with § 25-1142(2).

"Misconduct of the jury," used in § 25-1142(2), does not necessarily mean a jury's bad faith or malicious motive, but means a jury's violation of, or departure from, an established rule or procedure for production of a valid verdict. See, *Chicago, St. P., M. & O. R. Co. v. Deaver*, 45 Neb. 307, 63 N.W. 790 (1895); *Cerf v. Smolderen*, 39 N.J. Super. 222, 120 A.2d 793 (1956); *Railroad v. Green*, 100 Tenn. 238, 47 S.W. 221 (1898).

INQUIRY INTO A VERDICT'S VALIDITY

Rule 606(2) of the Nebraska Evidence Rules states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or

> concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

As this court noted in *Ellis v. Far-Mar-Co*, 215 Neb. 736, 744, 340 N.W.2d 423, 427 (1983), Rule 606(2) "specifically provides for inquiry into the validity of a verdict when extraneous prejudicial information may have been improperly brought to the jury's attention."

In *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 455-57, 412 N.W.2d 56, 77-78 (1987), we stated:

> In Neb. Evid. R. 606(2), the important phrase is "extraneous prejudicial information," and within that phrase the crucial word is *extraneous*, which means "existing or originating outside or beyond: external in origin : coming from the outside . . . brought in, introduced, or added from an external source or point of origin." Webster's Third New International Dictionary, Unabridged 807 (1981).
>
> . . . .
>
> . . . Neb. Evid. R. 606(2) permits use of a juror's affidavit to establish that the jury considered prejudicial information emanating from a source other than evidence presented at trial. However, it is just as clear that Neb. Evid. R. 606(2) prohibits a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during deliberations, which enter into the verdict.

(Emphasis in original.) Accord, *State v. Meyer*, 236 Neb. 253, 460 N.W.2d 656 (1990); *Zeeb v. Delicious Foods*, 231 Neb. 358, 436 N.W.2d 190 (1989); *State v. Woodward*, 210 Neb. 740, 316 N.W.2d 759 (1982).

A graphic illustration of a jury's consideration of extraneous prejudicial information is found in *Klein v. Wilson*, 167 Neb. 779, 94 N.W.2d 672 (1959), a negligence action concerning an

automobile-truck accident. In *Klein*, two jurors conducted experiments to ascertain the stopping distance of a vehicle and, during jury deliberations, informed the other jurors about the results of the experiments. The *Klein* court concluded that "the making of statements of fact by jurors which are not in evidence is error and is to be condemned." 167 Neb. at 788, 94 N.W.2d at 678. Other Nebraska decisions illustrating a jury's consideration of extraneous prejudicial information include *Kremlacek v. Sedlacek*, 190 Neb. 460, 209 N.W.2d 149 (1973) (during trial, a juror inspected the accident site involved in a motor vehicle negligence action and reported his observations to the other jurors), and *De Porte v. State Furniture Co.*, 129 Neb. 282, 261 N.W. 419 (1935) (juror's imparting to other jurors information claimed to have been obtained by the juror's visit to the accident site in a premises liability action).

Thus, Rule 606(2) does not equate with, or govern, grounds for a new trial, but indicates and governs the character or type of information properly used in determining whether juror misconduct has occurred in reference to a verdict. *Rahmig v. Mosley Machinery Co., supra.*

Regarding "misconduct of the jury," we stated in *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 543, 407 N.W.2d 146, 157 (1987): "As a ground for setting aside a verdict in view of alleged misconduct by a juror, one must show that the questioned conduct entered into a verdict prejudicial or adverse to the party alleging such misconduct." Accord, *Auer v. Burlington Northern RR. Co.*, 229 Neb. 504, 428 N.W.2d 152 (1988); *Ellis v. Far-Mar-Co, supra*; *State v. Woodward, supra*; *Zancanella v. Omaha & C. B. Street R. Co.*, 96 Neb. 596, 148 N.W. 158 (1914).

However, since Rule 606(2) precludes and excludes testimony, including a juror's affidavit, concerning motives, methods, misunderstanding, thought processes, or discussions by a jury in reaching a verdict, Rule 606(2) also precludes juror testimony to establish that extraneous prejudicial information actually entered into the verdict. See *Rahmig v. Mosley Machinery Co., supra*. See, also, *Wiser v. People*, 732 P.2d 1139, 1141-42 (Colo. 1987):

Under [Rule 606(2)], affidavits from jurors about

> exposure to extraneous information or influences are admissible. The rule, however, precludes admission of the only evidence relevant to prove whether a defendant was prejudiced as a result of the improper contact. . . .
>
> An approach that avoids the problems arising under [Rule 606(2)] requires the trial court to determine what effect juror misconduct would have had on a typical jury.

See, also, *Lanza v. Poretti*, 537 F. Supp. 777 (E.D. Penn. 1982) (whether prejudice resulted from an unauthorized jury experiment must be resolved by a court's drawing reasonable inferences regarding the effect of jury misconduct in considering the experiment); *Simon v. Kuhlman*, 488 F. Supp. 59 (S.D.N.Y. 1979) (whether prejudice resulted from the jury misconduct must be resolved by the court by drawing reasonable inferences about the effect of the misconduct on an average juror). See, further, J. Friedenthal, M. Kane & A. Miller, Civil Procedure § 12.5 at 567 (1985) ("prejudice will have to be inferred since [Rule 606(2]) precludes any testimony regarding the effect this extraneous information may have had on the jury"); Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 Neb. L. Rev. 920, 963 (1978) ("the question whether [jury] misconduct affected the verdict cannot be resolved by asking jurors why they voted as they did . . . . The question whether prejudice resulted must be resolved by drawing inferences"). Referring to Fed. R. Evid. 606(b), after which Neb. Evid. R. 606(2) was patterned, Wright and Gold state:

> Rule 606(b) creates two exceptions, permitting testimony "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." . . .
>
> . . . .
>
> While it is clear that a juror may not testify under either exception unless the information or influences affected the jury's decision, it is not always clear how such prejudice may be proven. This is because most courts preclude jurors from testifying as to the effect on their verdict of extraneous information or outside influence.

> This position is based on the language of Rule 606(b) precluding testimony concerning "the effect of anything upon [a juror's] mind or emotions as influencing him to assent to or dissent from the verdict." As a result, it is impossible to prove prejudice through direct evidence since the only potential witnesses are precluded from testifying that prejudice occurred. . . .
>
> . . . .
>
> . . . [Some] courts resolve the prejudice issue through a common-sense inquiry into the likely effect of the information or influences on the average juror. Under this approach, the inquiry is whether there is a "reasonable possibility" the extraneous information or outside influence effected the verdict. . . .
>
> . . . [T]he court must attempt to draw inferences as to the probable effects of the extraneous information or outside influence in light of objectively apparent facts about the context in which those matters came to the jury's attention.

27 C. Wright & V. Gold, Federal Practice and Procedure § 6075 at 442, 464, 468-69 (1990).

Thus, in *Ellis v. Far-Mar-Co*, 215 Neb. 736, 340 N.W.2d 423 (1983), we reaffirmed the recognized rule that prejudice from jury misconduct in considering extraneous information, as a ground for setting aside a verdict, may be inferentially established. See, also, *Schwank v. County of Platte*, 152 Neb. 273, 40 N.W.2d 863 (1950); *Wessel v. Bishop*, 76 Neb. 74, 107 N.W. 220 (1906).

Various courts have expressed a test for determining whether prejudicial extraneous information has entered a verdict. In *Bellows Falls v. State Highway Board*, 123 Vt. 408, 414, 190 A.2d 695, 699 (1963), the court stated: "[T]he test is not whether the irregularity actually influenced the result, but whether it had the capability of prejudicing the verdict." Also, as the court noted in *Kirby v. Rosell*, 133 Ariz. 42, 45, 648 P.2d 1048, 1051 (1982): "[E]xtraneous material considered by the jury may be deemed prejudicial without proof of actual prejudice if it relates to the issues of the case and there is a reasonable possibility of prejudice." See, also, *Sayih v.*

Perlmutter, 561 So. 2d 309 (Fla. App. 1990) (generally, prejudice exists in delivering to jury room an item not in evidence when the item is of such character as to influence the jury); *United States v. Vasquez*, 597 F.2d 192 (9th Cir. 1979) (reasonable possibility that extrinsic material, such as a court file for the case being tried, was inadvertently left in the jury room and could have affected the verdict); *Lanza v. Poretti, supra* (extraneous information, e.g., a jury experiment, could create a reasonable possibility of prejudice); *Wiser v. People*, 732 P.2d 1139 (Colo. 1987) (most courts have decided that the relevant question is whether there is a reasonable possibility that extraneous contact or influence affected the verdict to the detriment of a litigant). See, further, M. Graham, Handbook of Federal Evidence § 606.2 (3d ed. 1991) (verdict will be set aside if there is a reasonable possibility that extraneous influence or information affected the verdict). Therefore we conclude, and now hold, that extraneous material or information considered by a jury may be deemed prejudicial without proof of actual prejudice if the material or information relates to an issue submitted to the jury and there is a reasonable possibility that the extraneous material or information affected the verdict to the detriment of a litigant.

We now examine Loving's appeal in terms of inferentially established prejudice from the jury's consideration of extraneous information and whether there is a reasonable possibility that the information affected the verdict against Loving.

Although Loving's petition, her answers to interrogatories, and the accident report were extraneous documents inasmuch as those items were never received in evidence and, therefore, should not have been delivered to the jury room, the jury's consideration of those documents, under the circumstances, does not rise to the level of prejudice which warrants setting aside the verdict. We note that each of the documents in question contained information presented to the jury through the introduction of evidence in the course of Loving's trial. For instance, on cross-examination, Loving admitted that she was unemployed when the accident occurred and had been unemployed for the 10 years immediately preceding the

accident. The factual content of the accident report, exhibit 10, including its diagram, was extensively explored by Loving's lawyer and counsel for Baker's. Also, the spill site, hand illustrated on the photocopy inadvertently delivered to the jury room, substantially corresponded with the illustration drawn on exhibit 4, the large diagram received in evidence. Use of Loving's answer to interrogatory No. 13 was an aspect of counsel's cross-examination of Loving, namely, her admission that she had seen "[a] man [later identified as Timothy Jones] mopping the floor. When [Loving] approached the man stepped back so [Loving] assumed it would be clear to walk." Thus, the content of the documents coincided with evidence adduced during Loving's trial.

True, circling, underscoring, or bracketing particular parts of the documents might emphasize or reiterate information already supplied to the jury through the adduction of evidence, but we are unable to conclude that the emphasis supplied or reiteration deprived Loving of her right to a fair trial in her negligence action. See, *Britt v. West Coast Cycle*, 198 Ga. App. 525, 402 S.E.2d 121 (1991) (sending copy of bad check to the jury room in a suit on an account did not require reversal, since conclusive admissions with respect to the check were part of the evidence); *Campbell v. City of Mishawaka*, 422 N.E.2d 334 (Ind. App. 1981) (notwithstanding that written jury instructions were delivered to the jury room, the verdict was upheld, since the instructions were first read in open court); *Brown v. Metropolitan Transit Authority*, 341 Mass. 690, 171 N.E.2d 869 (1961) (no reversal when a report, which was read to the jury in the opening statement but not admitted in evidence, was delivered to the jury); *Schroeder v. Lodge No. 188, I. O. O. F.*, 92 Neb. 650, 139 N.W. 221 (1912) (pleadings sent to the jury room did not result in reversal when the pleadings showed nothing more than the issues included in the statement of issues expressed by the court); *Clark v. Continental Tank Co.*, 744 P.2d 949 (Okla. 1987) (partially underlined exhibit inadvertently taken to the jury room did not require reversal, since the emphasized parts of the exhibit had been read in open court before the jury's deliberation). Thus, while the three documents in question were extraneous since

they were not among the exhibits received in evidence, the information in those exhibits was a reiteration of evidence already presented to the jury. Hence, we cannot conclude that the jury's consideration of those documents prevented a fair trial; therefore, the inadvertent delivery of the copies of Loving's petition, answers to interrogatories, and accident report, under the circumstances, is not prejudicial to such an extent that the verdict in Loving's case must be set aside.

However, the jury's considering the contents of the note pad used by Baker's lawyer is quite another matter.

In reference to Tomi Thomas, Loving's sister, the lawyer's notes reflected the following:

> Tomi Thomas—
> -never discussed w/ sister
> - " " " atty—Steve a better atty.

From the court's remarks at the conclusion of the first day in Loving's trial, it is a reasonable inference that Thomas was not present during the testimony of her sister. Since Thomas was an eyewitness and her testimony essentially corroborated Loving's descriptive testimony about the accident, Thomas' testimony was quite important on the liability issue and the defenses raised by Baker's, namely, assumption of risk and contributory negligence. Consequently, credible corroboration enhanced likelihood of a favorable verdict for Loving. Moreover, Thomas' testimony about Loving's injury and disability afforded a basis for a substantial verdict for Loving. The innuendo lurking in the notes by Baker's lawyer emerges in the form of the following syllogism: Before Thomas testified, a good lawyer would have reviewed Loving's testimony with Thomas, a key witness, who was not present during Loving's testimony. "Steve," Loving's lawyer, is a good attorney. Therefore, Steve would have discussed Loving's testimony with Thomas. However, Thomas denies that she "discussed" Loving's testimony with Loving's lawyer. Since it is a fact that a good lawyer would have discussed testimony with Thomas, a key witness, logic demands the conclusion that Thomas, before testifying, actually reviewed the matter with Loving's attorney and that her denial of such discussion is an untruth which renders Thomas' testimony suspect. Discredit of Thomas, as a

key witness for Loving, would certainly have been injurious to Loving's claim.

The note pad also mentioned the medical expense for physical therapy at Immanuel hospital, which had charged $161.25 for the therapy service. There was no testimony concerning the manner in which the expense for therapy service was computed. However, the notes by Baker's lawyer indicate that the bill should have been $120, that is, four therapy sessions at $30 per session, rather than the $161.25 charged by the hospital. Moreover, although Loving indicated through her testimony that the actual number of therapy sessions was as few as three, the itemization of medical expenses showed only two therapy sessions for Loving. The discrepancy between the amount due the hospital for therapy and Loving's testimony shows that the hospital bill was for some reason overstated or "exaggerated" or that Loving's knowledge about her therapy and, correspondingly, her injuries was inaccurate and, therefore, unreliable.

Further, counsel's reference on the note pad to a "plan[ned] lawsuit," when combined with the inferences provided by the lawyer's notes about physical therapy, intimated that Loving brought a lawsuit calculated to recover an inflated amount of damages for her injury.

Of course, whether the extraneous information was actually used by the jury as suggested above in connection with Thomas' testimony, the therapy expense, and the reference to a planned lawsuit is a subject of some surmise. What is not speculative is the fact that the jury actually considered the information contained in the lawyer's notes on the legal pad inadvertently sent to the jury room. For that reason, we conclude that prejudice from the jury's considering extraneous information was inferentially established with a reasonable possibility that the information affected the verdict against Loving; hence, the jury misconduct prevented a fair trial for Loving on her negligence claim against Baker's. Thus, the district court abused its discretion by denying a new trial to Loving as a result of the jury misconduct.

> On the question whether to permit impeachment of a verdict, it makes no difference that the "extraneous"

> matter could have been introduced into evidence. . . . The point is to insure, as far as reasonably possible, that juries will reach verdicts on the basis of information known to the parties in litigation, and to provide the party whose case is negatively affected by the data a chance to probe and rebut.

Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 Neb. L. Rev. 920, 944 (1978).

CONCLUSION

Although Loving raises questions about the instruction given on assumption of risk, in view of our disposition of Loving's appeal we find it unnecessary to consider Loving's question about the assumption of risk instruction.

The judgment of the district court is reversed, and this cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

FAHRNBRUCH, J., concurs.

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF COLORADO SPRINGS, APPELLEE, V. PAUL K. WYANT, JR., APPELLANT.

472 N.W.2d 386

Filed July 26, 1991. No. 89-105.

1. **Foreign Judgments: Actions: Pleadings: Jurisdiction: Time.** Under the Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. §§ 25-1587 et seq. (Reissue 1989), any defense, setoff, or counterclaim, which under the law of this state may be asserted by the defendant in an action on the foreign judgment, may be presented by appropriate pleadings, and the issues raised thereby shall be tried and determined as in other civil actions. If the defendant fails to plead within 30 days after jurisdiction over his person has been obtained, the registered judgment becomes a final personal judgment of the court in which it is registered.
2. **Constitutional Law: Foreign Judgments: States.** U.S. Const. art. IV, § 1, the full faith and credit clause, prevents the courts in this state from reviewing the merits of a judgment rendered in a sister state.
3. **Motions to Vacate: Default Judgments: Appeal and Error.** In reviewing a trial

court's action in vacating or refusing to vacate a default judgment, the Supreme Court will uphold and affirm the trial court's action in the absence of an abuse of discretion.

4. **Motions to Vacate: Default Judgments.** A default judgment will not ordinarily be set aside on the application of a party who, by his own fault, negligence, or want of diligence, has failed to protect his own interests. Such a party will not be permitted to ignore the process of the court and thereby impede the termination of litigation.

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

Warren S. Zweiback and Mary Lou Perry, of Zweiback, Hotz & Lamberty, P.C., for appellant.

Michael K. Huffer, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

GRANT, J.

Defendant, Paul K. Wyant, Jr., appeals the order of the district court for Douglas County denying his motion to vacate a default judgment. We affirm.

The record shows that on September 23, 1988, appellee, First Federal Savings & Loan Association of Colorado Springs (First Federal), obtained a default judgment in Colorado against Wyant and three other parties for the amount of $95,654.59. In issuing judgment, the Colorado court found that Wyant and the other defendants were legally served with process, failed to answer First Federal's complaint within the prescribed time, and were jointly and severally liable to First Federal on the subject promissory note. The other defendants named in the Colorado action were Financial Inversion Properties, a Colorado general partnership; Bruce W. Hunter; and "Phillip U. Beggs." The promissory note in question was signed by Wyant, Hunter, and "Phillip D. Beggs." The summons relating to the Colorado action was personally served on Wyant at Dale Beggs Development Co., 412 South 19th Street, Omaha, Douglas County, Nebraska, on August 11, 1988.

On November 21, 1988, First Federal filed a petition for registration of the Colorado judgment in the district court for

Douglas County. Wyant was personally served with a summons and a copy of the petition for registration of foreign judgment on November 29, 1988.

On January 5, 1989, the Douglas County District Court entered judgment for First Federal, finding that Wyant failed to answer or otherwise plead to First Federal's petition, pursuant to Neb. Rev. Stat. § 25-1593 (Reissue 1989), that it had been more than 30 days from the date personal jurisdiction was obtained over Wyant, and that Wyant owed First Federal $95,654.59 plus interest from September 23, 1988.

On January 12, 1989, Wyant filed a motion to set aside the judgment of the Douglas County District Court, and a hearing was held on January 26, 1989. During the hearing, Wyant offered three affidavits in support of his motion.

The affidavit of "P. Dale Beggs" (who is apparently the "Phillip D. Beggs" who signed the promissory note and may be the "Phillip U. Beggs" named as a defendant in the Colorado action) states that during December 1988, Beggs spoke with Thomas Haskins, the executive vice president and general counsel of First Federal. During this conversation, Haskins and Beggs purportedly agreed that a court action against Wyant would be held in abeyance pending certain settlement discussions.

In his own affidavit, Wyant stated that he did not respond to the petition for registration of foreign judgment filed in this case because First Federal had agreed that court action against Wyant would be held in abeyance pending settlement discussions. Wyant stated that he believed he had a meritorious defense to the registration because the Colorado default judgment was obtained with the understanding that enforcement and execution would not be commenced against him until all reasonable enforcement efforts had been exhausted against the assets of Financial Inversion Properties, Bruce Hunter, and P. Dale Beggs.

Finally, in a supplemental affidavit, Wyant stated that default judgments were entered in this case because Wyant relied upon representations made by Haskins at the time First Federal filed the Colorado action. Wyant claims Haskins represented that First Federal would not seek judgment against

Wyant, but would instead collect an agreed-upon settlement sum of $50,000 from Hunter or Beggs. Wyant also claims that Haskins agreed the amount due to First Federal was $50,000, rather than approximately $95,000.

Haskins' affidavit, offered by First Federal, states that on or about December 29, 1988, Haskins spoke with Beggs about the lawsuit against Wyant. During this discussion, Haskins told Beggs that First Federal would not attach or execute upon any assets in Colorado owned by or owed to Beggs for a 2-week period beginning December 29, 1988, because Beggs was returning to Omaha and did not want his Colorado assets at risk during his absence. Haskins denied that First Federal agreed to forgo any attempts to obtain a personal judgment against Wyant. He stated that he discussed this matter with Beggs on January 17, 1989, that Beggs agreed Haskins had not represented that any forbearance against Wyant was involved in their agreement, and that Beggs confirmed this understanding during a telephone call to Wyant made from Haskins' office. Haskins stated that all agreements he may have made with Beggs to delay attachment and execution proceedings against Beggs' assets had terminated because the 2-week period had run and First Federal, Beggs, and Wyant did not reach a settlement agreement regarding the underlying debt.

After the January 26, 1989, hearing, the district court for Douglas County denied Wyant's motion to vacate the default judgment.

On February 2, 1989, Wyant filed a "supplemental motion to set aside default judgment and for leave to file answer to petition." During a hearing held February 6, 1989, the court received in evidence, over First Federal's objection, Wyant's motion and proposed answer. On February 6, the district court denied Wyant's supplemental motion.

Wyant timely appealed to this court and contends the district court erred in denying his motion to set aside default judgment "when the Motion was filed within one week after entry of the default, and the evidence presented in support of the Motion disclosed allegations of a meritorious defense to the underlying action and to the default judgment which a litigant should be allowed to present on the merits."

In this case, First Federal registered the Colorado judgment against Wyant pursuant to the Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. §§ 25-1587 et seq. (Reissue 1989). Section 25-1588 provides: "On application made within the time allowed for bringing an action on a foreign judgment in this state, any person entitled to bring such action may have a foreign judgment registered in any court of this state having jurisdiction of such an action." A "foreign judgment" is defined in § 25-1587(1) as "any judgment, decree or order of a court of the United States or of any state or territory which is entitled to full faith and credit in this state."

The record shows that First Federal's petition for registration was filed in the district court on November 21, 1988, and that Wyant was personally served with process on November 29, 1988, in accordance with the act.

Wyant was entitled to respond to First Federal's petition for registration pursuant to § 25-1594, which provides that

> [a]ny defense, setoff or counterclaim, which under the law of this state may be asserted by the defendant in an action on the foreign judgment may be presented by appropriate pleadings and the issues raised thereby shall be tried and determined as in other civil actions. Such pleadings must be filed within thirty days after personal jurisdiction is acquired over him . . . .

Wyant did not appear or file a responsive pleading within 30 days after he was served. Section 25-1593 provides that if the judgment debtor fails to plead within 30 days after jurisdiction over his person has been obtained, the registered judgment shall become a final personal judgment of the court in which it is registered. Accordingly, the Colorado judgment became a final personal judgment of the district court for Douglas County.

In essence, Wyant contends the district court should have sustained his motion to vacate the Nebraska default judgment because he has a "meritorious defense on the merits" to the Colorado action.

In *Repp v. Repp*, 156 Neb. 45, 54 N.W.2d 238 (1952), this court acknowledged that U.S. Const. art. IV, § 1, the full faith and credit clause, prevents the courts in this state from reviewing the merits of a judgment rendered in a sister state. A

judgment rendered by a sister state court 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). While it is presumed that a foreign court rendering a judgment had jurisdiction over the parties, a foreign judgment can be collaterally attacked by evidence that the rendering court was without such jurisdiction, but such attack must be timely done within the framework of §§ 25-1587 to 25-15,104. See *Olson v. England*, 206 Neb. 256, 292 N.W.2d 48 (1980).

As the Supreme Court of Arkansas said in *Purser v. Corpus Christi State Nat'l Bk.*, 256 Ark. 452, 459, 508 S.W.2d 549, 553 (1974),

> We have long recognized that a judgment debtor has a right to defend against a foreign judgment sought to be enforced in the courts of this state, but not on defenses that could have been made in the action in which the judgment was rendered. [Citations omitted.] Under the full faith and credit clause of the United States Constitution, Art. 4, § 1, such a judgment is as conclusive on collateral attack, except for the defenses of fraud in the procurement of the judgment or want of jurisdiction in the court rendering it, as a domestic judgment would be. [Citations omitted.] Furthermore, a judgment entered by default is entitled to full faith and credit and is as conclusive against collateral attack as any other judgment. [Citations omitted.]

Wyant does not contend the Colorado judgment is void for lack of jurisdiction. Although void foreign judgments are not entitled to full faith and credit, the record shows that Wyant was personally served with a summons in both Colorado and Nebraska, and Wyant does not contend the Colorado court lacked jurisdiction to enter judgment against him. Compare, *Gruenewald v. Waara, supra* (Texas default judgment was void and not entitled to registration in Nebraska because defendant was not properly served in Texas, and the Texas court did not have jurisdiction over defendant); *Olson v. England, supra* (in an action on a Colorado judgment, rendered in proceedings in which there was no service of process on the defendant and no

waiver of such service, the defendant may show as a complete defense that the Colorado court had no jurisdiction over defendant because the attorney who entered an appearance for him had no authority to do so). In each of those cases, the defendant apparently timely appeared and attacked the registration of the foreign judgment.

A district court has the inherent power to vacate its own judgment anytime during the term in which it is rendered. *Fredericks v. Western Livestock Auction Co.*, 225 Neb. 211, 403 N.W.2d 377 (1987). In reviewing a trial court's action in vacating or refusing to vacate a default judgment, the Supreme Court will uphold and affirm the trial court's action in the absence of an abuse of discretion. *Fredericks v. Western Livestock Auction Co., supra*; *Starr v. King*, 234 Neb. 339, 451 N.W.2d 82 (1990); *Murphy v. Murphy*, 237 Neb. 406, 466 N.W.2d 87 (1991).

> "A default judgment will not ordinarily be set aside on the application of a party who, by his own fault, negligence, or want of diligence, has failed to protect his own interests. Such a party will not be permitted to ignore the process of the court and thereby impede the termination of litigation."

Fredericks v. Western Livestock Auction Co., supra at 217, 403 N.W.2d at 382 (quoting *Commercial Sav. & Loan Assn. v. Holly Development, Inc.*, 182 Neb. 335, 154 N.W.2d 510 (1967)).

Wyant was personally served with a summons and a copy of the petition for registration of foreign judgment in this case. He chose not to appear in this Nebraska action, as he had chosen not to appear in the Colorado action. Instead, 7 days after the Nebraska default judgment was entered, Wyant filed a motion to vacate the judgment. The trial court held a hearing on the motion on January 26, 1989. At the hearing, Wyant introduced three exhibits (two affidavits of Wyant and one affidavit of P. Dale Beggs, signed Phillip Dale Beggs). First Federal offered the affidavit of an officer of First Federal's. The trial court received Wyant's exhibits and the affidavit for First Federal and inquired of counsel, "Anything further in the way of evidence?" Wyant's counsel answered, "None, Your Honor."

First Federal's counsel then introduced the certificate of service in the Colorado action, which was received without objection. The trial court denied Wyant's motion to vacate the default judgment. Notwithstanding his statement to the court that he had no more evidence to present, Wyant was granted a second hearing, which was held on February 6, 1989. The trial court again denied Wyant's motion to vacate the default judgment.

Wyant has already had two hearings in the district court in conjunction with this matter and did not, in either hearing, satisfactorily explain his failure to timely appear before the Douglas County District Court. Wyant does not question the jurisdiction of the Colorado court or the Nebraska court. Any peripheral issues of fraud have been determined against him. It would appear that it is time for this apparently experienced businessperson to face up to the realities of litigation in the business world.

Under the circumstances in this case, the district court did not abuse its discretion in refusing to set aside its default judgment against Wyant.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, CAPORALE, and FAHRNBRUCH, JJ., concur.

CHAMBERS-DOBSON, INC., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT, V. CHARLES D. SQUIER, APPELLANT AND CROSS-APPELLEE.

472 N.W.2d 391

Filed July 26, 1991. No. 89-124.

1. **Injunction: Equity.** An injunction is a remedy available through an equity action.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

3. **Appeal and Error.** To be considered by the Supreme Court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred.
4. **Contracts: Restrictive Covenants: Vendor and Vendee: Goodwill.** A covenant not to compete which is contained in a contract for sale of a business is a seller's self-imposed restraint from trade and is frequently necessary to make goodwill in the seller's business a transferable asset and ensure that the buyer receives the full value of acquired goodwill.
5. **Restrictive Covenants: Employer and Employee.** Concerning enforcement of a postemployment restraint on competition by a former employee, the preliminary question is whether the restraint is necessary to protect the employer in some legitimate interest.
6. _____: _____. An employer has a legitimate business interest in protection against competition by improper and unfair methods, but an employer is not entitled to enforcement of a restrictive covenant which merely protects the employer from ordinary competition.
7. _____: _____. An employer has a legitimate need to curb or prevent competitive endeavors by a former employee who has acquired confidential information or trade secrets pertaining to the employer's business operations.
8. _____: _____. Ordinarily, an employer has no legitimate business interest in postemployment prevention of an employee's use of some general skill or training acquired while working for the employer, although such on-the-job acquisition of general knowledge, skill, or facility may make the employee an effective competitor for the former employer.
9. _____: _____. A covenant not to compete, as a partial restraint of trade, is available to prevent unfair competition by a former employee, but is not available to shield an employer against ordinary competition.
10. **Restrictive Covenants: Employer and Employee: Goodwill: Words and Phrases.** A key for distinguishing "unfair competition" from "ordinary competition" is an employee's appropriation of "goodwill" properly belonging to the employer.
11. **Restrictive Covenants: Employer and Employee: Goodwill.** Goodwill is that value which results from the probability that old customers will continue to trade or deal with the members of an established concern.
12. **Restrictive Covenants: Employer and Employee.** There are three general questions relative to validity of partial restraints of trade: First, is the restriction reasonable in the sense that it is not injurious to the public? Second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest? Third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee?
13. _____: _____. In determining whether a postemployment covenant not to compete is unduly harsh or oppressive, a court must balance harshness and oppressiveness on the covenantor employee against protection of the covenantee employer's valid business interest.
14. **Attorney Fees.** In Nebraska, the general rule is that an attorney fee may be recovered only when authorized by statute, or when a recognized and accepted

uniform course of procedure allows recovery of an attorney fee.

15. **Contracts: Costs: Attorney Fees.** A provision in a contract which provides that in the event of litigation involving the contract, the prevailing party shall be entitled to costs, including an attorney fee, is contrary to public policy and void.

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

Gene T. Oglesby, of Oglesby, Brown, Thomas, Peterson & Orton, for appellant.

David R. Buntain and Sonya S. Ekart, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

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

SHANAHAN, J.

Chambers-Dobson, Inc., brought an action against Charles D. Squier to enjoin him from engaging in certain insurance business, in violation of covenants not to compete with Chambers-Dobson. From permanent injunctions granted by the district court for Lancaster County and a judgment for damages, Squier appeals. Chambers-Dobson cross-appeals. We affirm.

STANDARD OF REVIEW

An injunction is a remedy available through an equity action. *Burton v. Annett*, 215 Neb. 788, 341 N.W.2d 318 (1983). In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Hughes v. Enterprise Irrigation Dist.*, 226 Neb. 230, 410 N.W.2d 494 (1987); *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990); *American Sec. Servs. v. Vodra*, 222 Neb. 480, 385 N.W.2d 73 (1986). See, also, Neb. Rev. Stat. § 25-1925 (Reissue 1989).

SALE TO CHAMBERS-DOBSON

Squier-McCashland Agency, a general partnership composed of Squier and Richard H. McCashland, was located in Lincoln, Nebraska, and operated as a general insurance agency and insurance brokerage business. On January 14, 1983, Squier, McCashland, and Chambers-Dobson signed an "Agreement to Purchase Assets" for sale of partnership assets to Chambers-Dobson for $189,825, which was allocated as follows: $5,825 for tangible property, $10,000 for goodwill, and $174,000 for an expiration list of the partnership's customers. In reference to the customer list of the Squier-McCashland Agency as an item of property, Chambers-Dobson, Squier, and McCashland considered an estimate submitted by an independent source and accepted 7 years as the "useful life" of the customer accounts reflected on the expiration list of customers. In addition to entitling Chambers-Dobson to use the name "Squier-McCashland Agency," the agreement also obligated Chambers-Dobson to pay Squier and McCashland $20,000, for which both Squier and McCashland promised that

> for the period through 1990, or for so long as Buyer, its transferees or assigns are engaged in the operation of a general insurance agency and insurance brokerage business using the customer lists and other expirations which are purchased by the Buyer herein, whichever period is less, the Seller, Charles D. Squier and Richard H. McCashland, jointly and severally agree that neither the Seller nor any of the named individuals personally will in any manner, directly or indirectly, whether through agents, employees, corporations or through any means whatsoever, at any location solicit or receive applications for or write policies of insurance to or on account of any person, firm or entity with whom Seller has policies of insurance in force as of the date of closing . . . .

Contemporaneous with the "Agreement to Purchase Assets," Squier, on January 14, 1983, signed an "Employment Agreement" with Chambers-Dobson, an agreement which, in relevant part, provided:

> In recognition of the facts that the Employer is engaged in a personal service business involving confidential

information and personal relationships with insureds, the success of which business is in large part due to the exclusive retention of such confidential information and undisturbed continuation of such personal relationships with insureds, the Employee does hereby covenant and agree as follows and acknowledges that the following covenants are reasonably necessary for the protection of the Employer and may be enforced to the extent set forth herein or to such extent as any court of competent jurisdiction may deem reasonable and proper:

(a) The Employee agrees that all information concerning the insurance of the Employer's clients, including expiration data in connection therewith, is confidential information constituting trade secrets and will be treated by him as such, and that both during and after the term of his employment, however, it may be terminated, he will not, directly or indirectly, on his own behalf or on behalf of anyone else, make use of such information concerning the Employer's business nor divulge such information to anyong [sic] nor retain or create any lists of the Employer's customers for his own personal use nor reveal the same to anyone.

(b) The Employee covenants and agrees that during the period of his employment hereunder he will not, directly or indirectly, on his own behalf or on behalf of anyone else, compete with the Corporation in any manner, and that for a period of forty-eight (48) months after the termination of his employment hereunder, however caused, he will not, directly or indirectly, solicit, attempt to obtain or accept insurance business from any of the Employer's customers nor act in the capacity of an adviser, consultant or risk manager to said customers, nor directly or indirectly, aid or assist anyone else in the solicitation of insurance business from such customers.

Squier and Chambers-Dobson later modified the term of the restrictive covenant to 24 months.

SQUIER'S EMPLOYMENT WITH CHAMBERS-DOBSON

In January 1983, pursuant to the employment agreement,

Squier entered employment with Chambers-Dobson, where he served as an account executive, a personal "lines" or accounts manager, and a unit representative on the agency operations committee. One of Squier's responsibilities was "marketing personal lines," which involved soliciting new customers and assisting present customers of Chambers-Dobson and which afforded Squier access to some 2,600 Chambers-Dobson customers. In 1987, Squier informed Chambers-Dobson that he wanted to purchase his former business and terminate his employment at Chambers-Dobson. When the parties were unable to agree, Squier terminated his employment on December 7, 1987, and started a new insurance agency without any preexisting accounts. Shortly after Squier started his new agency, at least 19 Chambers-Dobson customers transferred their insurance business, represented by 63 policies, to Squier in his new agency. Also, Squier was the agent for the issuance of new policies to at least 20 customers, formerly with the Squier-McCashland Agency and involved in the Chambers-Dobson purchase of that agency.

CHAMBERS-DOBSON'S ACTION AND THE TRIAL

On December 21, 1987, Chambers-Dobson filed an equity action, seeking injunctive relief and damages. At trial on September 14, 1988, Chambers-Dobson presented evidence relative to the requested injunction and damages. Evidence developed that the personal relationship between a policyholder and the insurance agent is important in the operation of an insurance agency. Chambers-Dobson conducted a "marketing operation" for assembly of personal data concerning a prospective customer. This information was available to Chambers-Dobson "account executives" or agents before any contact with a prospective insurance customer. The expiration date for an existing insurance policy is important because this information enables an agent to attend to insurance needs of a policyholder who is anticipating expiration of existing insurance coverage. Continuity of coverage is an essential element in the "confidential personal relationship" between an insurance customer and an insurance agent. Squier had access to information required for the "continuing business" of many

Chambers-Dobson customers. Also, as a personal lines manager, Squier had direct contact with Chambers-Dobson's "individual files" on customers who had special problems, such as "underwriting questions." Chambers-Dobson also offered evidence concerning damages sustained as the result of Squier's engaging in the insurance business notwithstanding the covenants not to compete.

Squier acknowledged that, among customers of his insurance agency after departure from Chambers-Dobson, 20 policyholders were former customers of the Squier-McCashland Agency and 19 had been customers of Chambers-Dobson.

THE INJUNCTIONS

On December 5, 1988, on the basis of the restrictive covenant in the sale agreement, the district court permanently enjoined Squier from "soliciting or receiving applications for or writing policies of insurance to or on account of any person, firm or entity with whom he or the Squier-McCashland Agency had policies of insurance in force" at the effective date of the "Agreement to Purchase Assets." This injunction remained effective "until January 31, 1990." Further, concerning the noncompetition covenant in Squier's employment contract, the district court permanently enjoined Squier from "(a) soliciting, attempting to obtain, accepting insurance business from any of [Chambers-Dobson's] customers; (b) acting in the capacity of an advisor, consultant or risk manager to said customers or (c) aiding or assisting anyone else in the solicitation of insurance business from such customers." This injunction remained in effect until December 1, 1989. Finally, the district court awarded damages to Chambers-Dobson.

ASSIGNMENTS OF ERROR

Squier claims that the district court erred in failing to find that the covenants not to compete are invalid and in issuing injunctions to enforce the restrictive covenants. Although Squier has assigned error to the judgment for damages, he has not discussed the nature of error claimed in reference to the damages award. "To be considered by the Supreme Court, an error must be assigned and discussed in the brief of one

claiming that prejudicial error has occurred." *Federal Land Bank of Omaha v. Victor*, 232 Neb. 351, 355, 440 N.W.2d 667, 670 (1989). Accord *Wells Fargo Ag Credit Corp. v. Batterman*, 229 Neb. 15, 424 N.W.2d 870 (1988). See, also, Neb. Ct. R. of Prac. 9D(1)g (rev. 1989). Consequently, we consider only Squier's contention regarding the injunctions issued on the basis of the restrictive covenants.

NONCOMPETITION COVENANT;
SALE OF GOODWILL

> [I]t has been believed to be for the general welfare that a merchant should have the power to transfer his business as a going concern with its good will. This makes the good will an "asset" convertible into money or other commodities. . . . [I]f there is harm to the seller in disabling himself from carrying on a similar business, it is in no respect different from the harm that he suffers when he transfers his building and stock in trade. For his good will as for his other property he receives an agreed equivalent that he believes to be of equal or greater advantage. . . .
>
> The restraint of trade that is permissible in accordance with the foregoing argument is no greater than is necessary to attain the desired purpose—the purpose of making good will a transferable asset. It is lawful for the seller to restrict his own freedom of trade only so far as is necessary to protect the buyer in the enjoyment of the good will for which he pays. The restraint on his own freedom must be reasonable in character and in extent of space and time.

6A A. Corbin, Corbin on Contracts § 1385 at 47-48 (1962). See, also, Restatement (Second) of Contracts § 188, comment *b*. at 42 (1981):

> Where a sale of good will is involved . . . the buyer's interest in what he has acquired cannot be effectively realized unless the seller engages not to act so as unreasonably to diminish the value of what he has sold. . . . [C]ourts have generally been more willing to uphold promises to refrain from competition made in connection with sales of good will than those made in connection with

contracts of employment.

In *Swingle & Co. v. Reynolds*, 140 Neb. 693, 1 N.W.2d 307 (1941), this court recognized that a noncompetition covenant, included as a provision in a contract for sale of a business, may be valid and observed:

> The defendant well knew that the restrictive covenant was essential to the consummation of the deal. It is almost intolerable that a person should be permitted to obtain money from another upon solemn agreement not to compete for a reasonable period within a restricted area, and then use the funds thus obtained to do the very thing the contract prohibits. Unless such contract be against the public interest, the parties should be held to their engagements.
>
> It must be admitted by a practical consideration of the subject that any restrictive covenant of this nature does to some extent eliminate competition and tend toward monopoly. Any statement to the contrary simply fails to consider its practical aspects. Also, it may be said that such contracts are generally made for the very purpose of eliminating some competition. To state it otherwise would require us to overlook actualities in modern business methods. We think the plaintiff had a right to purchase defendant's property and business for the very purpose of eliminating him as a competitor, and the contract being in all respects the voluntary act of the parties and free from misrepresentation and fraud, it is binding unless it contravenes the public interest.

140 Neb. at 695-96, 1 N.W.2d at 309. See, also, *D. W. Trowbridge Ford, Inc. v. Galyen*, 200 Neb. 103, 262 N.W.2d 442 (1978) (in a contract for sale of a business, a reasonable restrictive covenant against the seller's competition in the type of business sold may be enforced). Thus, a covenant not to compete which is contained in a contract for sale of a business is a seller's self-imposed restraint from trade and is frequently necessary to make goodwill in the seller's business a transferable asset and ensure that the buyer receives the full value of acquired goodwill.

NONCOMPETITION COVENANT; EMPLOYMENT CONTRACT

Concerning enforcement of a postemployment restraint on competition by a former employee, the preliminary question is whether the restraint is necessary to protect the employer in some legitimate interest. *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986); *Brewer v. Tracy*, 198 Neb. 503, 253 N.W.2d 319 (1977); *Diamond Match Div. of Diamond International Corp. v. Bernstein*, 196 Neb. 452, 243 N.W.2d 764 (1976); *Securities Acceptance Corp. v. Brown*, 171 Neb. 406, 106 N.W.2d 456 (1960).

Regarding a noncompetition covenant in an employment contract, this court has stated:

> "It is clear that if the nature of the employment is such as will bring the employee in personal contact with the patrons or customers of the employer, or enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers, enabling him, by engaging in a competing business in his own behalf, or for another, to take advantage of such knowledge of or acquaintance with the patrons or customers of his former employer, and thereby gain an unfair advantage, equity will interfere in behalf of the employer and restrain the breach of a negative covenant not to engage in such competing business, either for himself or for another, providing the covenant does not offend against the rule that as to the time during which the restraint is imposed, or as to the territory it embraces, it shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer."

Securities Acceptance Corp. v. Brown, supra at 418-19, 106 N.W.2d at 464 (quoting from Annot., Restrictive Covenant in Employment Contract, 9 A.L.R. 1468 (1920)).

Also, regarding a contract of employment and a covenant against postemployment competition, we have noted:

> Regarding a postemployment covenant not to compete, an employer has a legitimate business interest in protection against " 'competition by improper and unfair

methods,' " but an employer is not entitled to enforcement of a restrictive covenant which merely protects the employer from " 'ordinary competition.' " *Diamond Match Div. of Diamond International Corp. v. Bernstein, supra* at 455, 243 N.W.2d at 766. "A restraint on the employee is illegal when its purpose is the prevention of competition, except when the methods of competition to be prevented are methods commonly regarded as improper and unfair." 6A A. Corbin, Corbin on Contracts § 1394 at 100 (1962).

To distinguish between "ordinary competition" and "unfair competition," courts and commentators have frequently focused on an employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers. Where an employee has substantial personal contact with the employer's customers, develops goodwill with such customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair, and the employer has a legitimate need for protection against the employee's competition. . . . [A]n employer has a legitimate need to curb or prevent competitive endeavors by a former employee who has acquired confidential information or trade secrets pertaining to the employer's business operations. . . . From the foregoing we glean that an objective of a covenant not to compete is prevention of an employee's competitive use of information or a relationship with a customer or client, which pertains peculiarly to the employer and has been acquired in the course of the employee's employment with the employer. . . .

. . . Ordinarily, an employer has no legitimate business interest in postemployment prevention of an employee's use of some general skill or training acquired while working for the employer, although such on-the-job acquisition of general knowledge, skill, or facility may make the employee an effective competitor for the former employer.

Boisen v. Petersen Flying Serv., 222 Neb. 239, 245-47, 383 N.W.2d 29, 33-34 (1986). Thus, in *Boisen*, we concluded: "A covenant not to compete, as a partial restraint of trade, is available to prevent unfair competition by a former employee but is not available to shield an employer against ordinary competition." 222 Neb. at 248, 383 N.W.2d at 34-35.

In *American Sec. Servs. v. Vodra*, 222 Neb. 480, 487-88, 385 N.W.2d 73, 78-79 (1986), we observed that

> a key for distinguishing "unfair competition" from "ordinary competition" is an employee's appropriation of "good will" properly belonging to the employer.
>
> In reference to an employer-customer relationship, good will is that "value which results from the probability that old customers will continue to trade or deal with the members of an established concern. [Good will] is the probability that old customers will resort to the old place or seek old friends, and the likelihood of new customers being attracted to well advertised and favorably known services . . . ." *Jackson v. Caldwell*, 18 Utah 2d 81, 85, 415 P.2d 667, 670 (1966).
>
> Good will may also be characterized as "the habit of customers to return to the concern with which they have been previously dealing. The more ingrained the habit, the greater the number of such customers, the more valuable is the goodwill." *Meeker v. Stuart*, 188 F. Supp. 272, 275 (D.D.C. 1960).
>
> . . . .
>
> Clientele or customer contact is one of the most important assets, sometimes the stock, of a business. Protection of customer good will against appropriation by an employee is, generally, recognized as an employer's valid interest.

See, also, 6A A. Corbin, Corbin on Contracts § 1394 at 99-100 (1962):

> "[A]fter the promised service has been completed, a restriction on further active services requires special justification. Such a justification is commonly thought to exist if a part of the employee's compensated service consists in the creation of the good will of customers and

clients, a good will that is likely to follow the person of the employee himself."

There are three general questions relative to validity of partial restraints of trade: First, is the restriction reasonable in the sense that it is not injurious to the public? Second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest? Third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee? See, *Boisen v. Petersen Flying Serv., supra*; *Securities Acceptance Corp. v. Brown*, 171 Neb. 406, 106 N.W.2d 456 (1960).

"Reasonableness of a specific restrictive covenant must be assessed upon the facts of a particular case and must be determined on all the circumstances." *American Sec. Servs. v. Vodra, supra* at 489, 385 N.W.2d at 79.

Thus, we come to the question whether the restriction is "reasonable in the sense that it is not unduly harsh and oppressive on the employee." *Securities Acceptance Corp. v. Brown, supra* at 417, 106 N.W.2d at 463.

In determining whether a postemployment covenant not to compete is unduly harsh or oppressive, a court must balance harshness and oppressiveness on the covenantor employee against protection of the covenantee employer's valid business interest. *American Sec. Servs. v. Vodra, supra*. As we expressed in *American Sec. Servs. v. Vodra*:

> In *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982), this court recognized a "balancing test" to be applied in determining whether the restraint of a postemployment covenant not to compete is unduly harsh or oppressive and, therefore, unenforceable. The factors or considerations involved in such balancing test, required by *Philip G. Johnson & Co. v. Salmen, supra* at 128, 317 N.W.2d at 904, are "the degree of inequality in bargaining power; the risk of the covenantee losing customers; the extent of respective participation by the parties in securing and retaining customers; the good faith of the covenantee; the existence of sources or general knowledge pertaining to the identity of customers; the nature and extent of the business position held by the

> covenantor; the covenantor's training, health, education, and needs of his family; the current conditions of employment; the necessity of the covenantor changing his calling or residence; and the correspondence of the restraint with the need for protecting the legitimate interests of the covenantee."
>
> As required by *Philip G. Johnson & Co. v. Salmen, supra*, harshness and oppressiveness on the covenantor-employee is weighed against protection of a valid business interest of the covenantee-employer. However, in the balancing test applied to a postemployment covenant not to compete, there is no arithmetical computation or formula required in a court's consideration of the factors involved or to be considered. The factors or considerations to be used in that balancing test are not weighted; that is, there is no prescribed method by which more or less weight is assigned to each factor to be considered in the balancing test required by *Philip G. Johnson & Co. v. Salmen, supra*.

222 Neb. at 490-91, 385 N.W.2d at 80.

Squier contends that the covenants not to compete are injurious to the public because enforcement of the covenants would prevent the public from access to Squier as an insurance agent.

In *Dow v. Gotch*, 113 Neb. 60, 64, 201 N.W. 655, 657 (1924), this court stated that a covenant not to compete is against public policy if it has a " 'mischievous tendency, and in some way militate[s] against the public welfare and the rights of the public.' " In *Dow*, the court concluded that a beautician's promise not to compete with her former employer was not injurious to the public, since the area of noncompetition was the city of Grand Island, which "had beauty parlors a plenty, a number of them." *Id.*

In Squier's case, each of the noncompetition covenants involves a very specific category of customers. First, the covenant in the sale agreement relates only to previous customers of the Squier-McCashland Agency, individuals wherever they may be located, but who have been identified on the customer list included in the sale to Chambers-Dobson.

This category of customer exists unrelated to Squier's employment with Chambers-Dobson. Second, the covenant in Squier's employment contract relates only to persons who have been Chambers-Dobson's customers during Squier's employment with Chambers-Dobson, wherever those customers may live. Consequently, in reference to potential insurance customers, the covenants relate not to the public in general, but to very specific and limited groups of potential customers denied to Squier by the covenants. As far as an actual number is concerned, the prohibited customer pool consisted of 20 former customers of the Squier-McCashland Agency and 19 Chambers-Dobson customers. We take note that if the populace of the city of Lincoln and Lancaster County has been correctly counted by the U.S. Bureau of the Census for the 1980 census, Lincoln included 171,932 people, while Lancaster County included 192,884 persons. Although the noncompetition covenants are not restricted to Lincoln and Lancaster County, nonetheless, it is inconceivable that the aggregate number of persons comprising the potential customer pools denied to Squier by the covenants is large enough to justify the conclusion that an appreciable number of the public would be denied access to Squier as their insurance agent. Under the circumstances, the noncompetition covenants do not violate Nebraska public policy.

We now address the two remaining questions, whether the noncompetition covenants were reasonable protection for a legitimate interest of Chambers-Dobson and whether the covenants are unduly harsh and oppressive on Squier.

First, we consider the covenant in the sale agreement for the assets of the Squier-McCashland Agency purchased by Chambers-Dobson. The customer list was specific property, specially considered by the parties and included in the sale with a substantial part of the purchase price allocated for acquisition of the list. It would be more than mild inequity if one sold an item of property, received payment, and, shortly thereafter, were allowed to repossess the property without the purchaser's consent and retain the purchase price paid for the property. Yet, that is exactly what Squier will achieve if he is allowed to pursue an insurance agency which involves the former

Squier-McCashland Agency customers. A noncompetition covenant is a reasonable method to protect the property acquired by Chambers-Dobson. Also, given the acknowledged and accepted "useful life" of the customer list, the temporal restriction is reasonable.

Second, we address the covenant in Squier's employment contract. The information gained by Squier as a result of his employment with Chambers-Dobson is not a trade secret; for example, a secret device, formula, pattern, plan, process, or technique, which have commercial value and are known only to the owner of such items used in the owner's business to obtain an advantage over competitors. See *Cherne Indus., Inc. v. Grounds & Associates*, 278 N.W.2d 81 (Minn. 1979). Since the evidence establishes a basis for the view that an insurance agent has a confidential personal relationship with a customer, the noncompetition covenant was an important aspect of the employment contract. In the course of his employment at Chambers-Dobson, Squier came into possession of special information about insurance customers, both current and prospective, which Squier would not have received if he were not a Chambers-Dobson employee. Much of that information received by Squier involved data pertinent to continuation of a customer's insurance business and, hence, was a part of Chambers-Dobson's goodwill. Squier's postemployment use of that information can be characterized as Squier's siphoning Chambers-Dobson's goodwill, a legitimate property interest of Chambers-Dobson. See *American Sec. Servs. v. Vodra*, 222 Neb. 480, 385 N.W.2d 73 (1986). A noncompetition covenant is a valid means to protect an employer against postemployment unfair competition by an employee. See *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986). Squier's use of the information acquired during his employment at Chambers-Dobson would constitute unfair competition after his termination of employment with Chambers-Dobson. For that reason, injunctive relief is available to protect the goodwill of Chambers-Dobson. Under the circumstances, the 2-year time limit for vitality of the noncompetition covenant is reasonable.

The absence of specified geographic applicability of the

noncompetition covenants presents no problem under the circumstances inasmuch as Squier can conduct an insurance agency in Lincoln or any other location, provided that he does not draw customers from the pools prohibited by the covenants. The covenants' limited applicability to customers and area leaves open to Squier a rather vast market in the insurance business. That and the several other factors bearing on harshness and oppressiveness to an employee, see, *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982), and *Boisen v. Petersen Flying Serv., supra*, lead us to the conclusion that the noncompetition covenants are reasonable and are neither harsh nor oppressive to Squier.

We realize that the terms of the injunctions expired during pendency of this appeal. However, a noncompetition covenant expressed in a contract for sale of property or in an employment contract is a matter of public interest and, in Squier's appeal, involved questions which, as the result of this court's docket, would not likely be considered before expiration of the covenants' restrictive temporal duration; hence, we review the questions in Squier's appeal. See *Meyer v. Colin*, 204 Neb. 96, 281 N.W.2d 737 (1979) (mootness does not preclude appellate review of a matter of public interest). See, also, *State ex rel. Bouc v. School Dist. of City of Lincoln*, 211 Neb. 731, 320 N.W.2d 472 (1982); *Braesch v. DePasquale*, 200 Neb. 726, 265 N.W.2d 842 (1978); *State ex rel. Coulter v. McFarland*, 166 Neb. 242, 88 N.W.2d 892 (1958). Moreover, if the covenants were invalid and, therefore, an improper basis for injunctive relief, there might have been a question of damages from an improper injunction. See Neb. Rev. Stat. § 25-1067 (Reissue 1989).

Consequently, after our de novo review of the record, we independently reach the same conclusion reached by the district court, namely, injunctive relief is appropriate under the circumstances. For that reason, we affirm the district court's judgments for injunctive relief.

CROSS-APPEAL

Chambers-Dobson claims that the district court erred in not awarding an attorney fee in accord with the express

authorization for such fee as a provision in each of the contracts in Squier's case.

In Nebraska, the general rule is that an attorney fee may be recovered only when authorized by statute, or when a recognized and accepted uniform course of procedure allows recovery of an attorney fee. See, *First Nat. Bank v. Schroeder*, 218 Neb. 397, 355 N.W.2d 780 (1984); *Quinn v. Godfather's Investments*, 217 Neb. 441, 348 N.W.2d 893 (1984). We have repeatedly held that a provision in a contract which provides that in the event of litigation involving the contract, the prevailing party shall be entitled to costs, including an attorney fee, is contrary to public policy and void. *First Nat. Bank v. Schroeder, supra*; *Quinn v. Godfather's Investments, supra*; *City of Gering v. Smith Co.*, 215 Neb. 174, 337 N.W.2d 747 (1983).

Apart from the contractual provision regarding an attorney fee, Neb. Rev. Stat. § 25-824(2) (Reissue 1989) permits an attorney fee when a defense is frivolous or made in bad faith. However, under the circumstances, we are unable to conclude that Squier's defense is either frivolous or made in bad faith; hence, no attorney fee is allowable under § 25-824(2).

Therefore, the district court correctly denied Chambers-Dobson's request for an attorney fee. Correspondingly, we are unable to award an attorney fee for the services of Chambers-Dobson's lawyers in the proceedings before this court.

Accordingly, the district court's judgments are affirmed in all respects.

AFFIRMED.

STATE OF NEBRASKA EX REL. ROBERT M. SPIRE, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, RELATOR, V. GERALD A. CONWAY, RESPONDENT.

472 N.W.2d 403

Filed July 26, 1991. No. 90-097.

1. **Quo Warranto: Public Officers and Employees.** For the purposes of quo warranto, a public office is a governmental position, the duties of which invest the incumbent with some aspect of the sovereign power.
2. _____: _____. The position of assistant professor at a state college is a public office for the purposes of quo warranto under the provisions of Neb. Rev. Stat. § 25-21,121 (Reissue 1989).
3. **Constitutional Law.** Neb. Const. art. II prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives.
4. **Constitutional Law: Courts.** Courts must apply and enforce the Constitution as it is written.
5. **Constitutional Law.** Constitutional provisions are not open to construction as a matter of course; 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.
6. _____. If a constitutional provision must be construed, its words are to be interpreted in their most natural and obvious sense, although they should receive a more liberal construction than statutes and are not subject to rules of strict construction.
7. _____. The Nebraska Constitution, as amended, is to be read as a whole.
8. _____. Neb. Const. art. II prohibits one who exercises the powers of one branch of government from being a member of the others.
9. **Constitutional Law: Public Officers and Employees.** An employee of a state college is a member of the executive branch of government.

Original action. Judgment for relator.

Robert M. Spire, Attorney General, and Dale A. Comer for relator.

Robert A. Skochdopole and Thomas D. Wulff, of Kennedy, Holland, DeLacy & Svoboda, for respondent.

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

PER CURIAM.

This original action in quo warranto brought by the State of Nebraska through the relator, Robert M. Spire, its Attorney

General, challenges the right of the respondent, Sen. Gerald A. Conway, to hold a position as an assistant professor at Wayne State College while simultaneously serving as a member of the state's Unicameral Legislature.

The college is a state institution under the government of the Board of Trustees of the Nebraska State Colleges, pursuant to Neb. Const. art. VII, § 13, and Neb. Rev. Stat. § 85-301 (Cum. Supp. 1988). The State contends that because he is a senator, respondent's assistant professorship violates the distribution of powers clause found in Neb. Const. art. II, § 1, which reads:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

(Inasmuch as the quoted language is the only section this article has ever contained, we hereafter refer to the provision simply as article II.)

Respondent became a member of the Legislature, representing the 17th legislative district, in 1985. He was reelected to this position on November 8, 1988, and took his oath as a legislator in early January 1989. The unsuccessful competing candidate for the seat contested the reelection, contending that respondent was not eligible to hold the office. However, the Legislature determined otherwise and dismissed the contest.

Respondent has been teaching in the business division of the college since 1975, first as an instructor and then, upon obtaining tenure in 1979, as an assistant professor. His appointment is renewed each year, and he accepted a renewal on July 14, 1989, for the 1989 academic year. This action was commenced on January 17, 1990.

While the employment policy manual of the Nebraska state colleges does not specify the rights attendant to tenure, it does provide that of "all rewards and recognitions offered by a college to its faculty members the offer of tenure is the most significant of all," demonstrating success in "satisfying the college — its faculty, administration, and board — during a

rigorous probationary period that he/she is worthy of becoming a recognized member of the faculty with full rights and privileges." Although the policy does not detail how the employment of one having tenure may be terminated, it does provide that those not having such status "shall assume they are serving in a probationary capacity," and specifies that, with certain exceptions, " '[p]robationary faculty may be terminated for any reason without right of grievance or hearing. . . .' "

As an assistant professor, respondent serves under the direction of the division chairperson, who assigns respondent's duties and responsibilities. Respondent prepares syllabi, prepares and delivers lectures, and presides over classroom activities for the courses he teaches. Subject to the approval of his division chairperson, respondent may select the books to be used in his classes. He determines the required reading for his classes and assigns those readings, along with other course-related assignments, as he deems appropriate. He also prepares or selects testing materials, grades those tests, and assigns his students their overall grade for each of his courses.

The college does not provide respondent with either a secretary or administrative staff, and respondent has no administrative duties. Although he may advise as to course offerings, he does not determine the courses to be offered by the business division. The record does not indicate whether he chooses or is assigned the classes he is to teach. The number of class hours respondent teaches is set by the division chairperson.

Although respondent is responsible for maintaining control over his classroom and students during class sessions, he cannot directly or formally discipline any student except through established college disciplinary procedures, and he has no authority over the selection of his students. He is not involved in setting the budget of the college, nor does he have any official duties off campus unless such are specifically assigned to him by his superiors.

Respondent's position with the college does not require him to take an oath of office. His salary is set through collective bargaining, but he is not a dues-paying member or officer of the

collective bargaining unit. At the time this action was commenced, respondent's salary for the 8-month academic year ending in May 1990 was set at the highest level since his employment.

After becoming a senator, respondent requested and received from the Board of Trustees unpaid leaves of absence for the periods in which the Legislature was in regular session. The board's policy manual on leaves of absence provides that "[n]ormally, with the exception of political leaves, a leave without pay will not be granted more often than once very [sic] four years." The policy also declares that "[w]ith the exception of political leaves, unless there is an unforeseen reason, a leave of absence must be arranged at least one semester before the leave is granted." Political leaves are available to state college employees who are elected or appointed to state or national office, or who are candidates for such offices.

During his leaves of absence, respondent received no pay, insurance, retirement, or other employment benefits. However, the board did not give him a formal leave of absence during the occasions he attended several special sessions of the Legislature. Instead, the college administration removed him from the payroll for all but the November 1989 special session. The record is silent as to whether respondent received insurance, retirement, or other benefits for those periods. The record does, however, demonstrate that he has participated in interim legislative studies while on the college's payroll and that he has available to him on a year-round basis a Capitol Building office and a two-person staff housed in that building.

APPROPRIATENESS OF REMEDY

As a threshold question, we must determine whether quo warranto is an appropriate means to challenge the right of an assistant professor at a state college to hold his position. Neb. Rev. Stat. § 25-21,121 (Reissue 1989) permits the filing of an action in quo warranto "against any person unlawfully holding or exercising any public office or franchise within this state . . . or when any public officer has done or suffered any act which works a forfeiture of his office . . . ." This court's jurisdiction, then, depends upon whether an assistant professor at a state

college holds or exercises a "public office" within the meaning of § 25-21,121.

The cases from other jurisdictions respondent cites in support of his position that an assistant professor is not an officer of the executive department dealt with constitutional prohibitions on dual office holding and not with quo warranto. The applicability of those cases to the dual services question is discussed later, but the preliminary question regarding the applicability of quo warranto is resolved under the law of this jurisdiction.

In *Eason v. Majors*, 111 Neb. 288, 196 N.W. 133 (1923), we held that Eason, a teacher serving as head of the English department of the state normal school at Peru, was a public officer and thus could maintain an action in quo warranto to test the validity of his ouster and replacement. In determining that Eason exercised some portion of the sovereign power and that he thus was a public officer within the meaning of the quo warranto statute, this court stated:

> When a position based upon a provision of law carries with it continuing duties of public concern which involve some exercise of the sovereign power in their proper performance, the position may be said to be an office public in character. Perhaps a better definition is that given by the New Jersey court in *Fredericks v. Board of Health*, 82 N. J. Law, 200:
>
> "An office is a place in a governmental system created or recognized by the law of the state which, either directly or by delegated authority, assigns to the incumbent thereof the continuous performance of certain permanent public duties."

111 Neb. at 291, 196 N.W. at 134.

Arguing that subsequent decisions in *State, ex rel. O'Connor, v. Tusa*, 130 Neb. 528, 265 N.W. 524 (1936), and *Home Savings & Loan Ass'n v. Carrico*, 123 Neb. 25, 241 N.W. 763 (1932), defined "office" more narrowly, respondent suggests that *Eason* was an aberrant decision.

In *Home Savings & Loan Ass'n, supra*, Home Savings sought to garnish money owed Carrico for defending an indigent in the Adams County District Court. Home Savings'

ability to reach the funds via garnishment was dependent upon finding Carrico either an employee or an officer of the county. This court addressed the question of whether an attorney assigned by the district court to defend an indigent accused of a felony was, by virtue of that assignment, an officer or employee of the county in which the court sat. We concluded that he was neither an officer nor an employee, and stated that "a public officer is an incumbent of a public office, which is the right, duty and authority conferred by law, by which, for a given period, an individual is invested with some portion of the sovereign functions of government for the benefit of the public." *Id.* at 30, 241 N.W. at 765.

In *State, ex rel. O'Connor, supra* at 535-36, 265 N.W. at 528, office was defined as

> "a public station or employment, conferred by the appointment of government; and embraces the ideas of tenure, duration, emolument, and duties." *United States v. Hartwell*, 6 Wall. (U. S.) 385, 18 L. Ed. 830.
>
> "The words 'office' and 'officer' are terms of vague and variable import, the meaning of which necessarily varies with the connection in which they are used, and, to determine it correctly in a particular instance, regard must be had to the intention of the statute and the subject-matter in reference to which the terms are used." [Citation omitted.]
>
> It may be said that the almost universal rule is that, in order to indicate office, the duties must partake in some degree of the sovereign powers of the state. The rule is laid down in 22 R. C. L. 374, sec. 4, as follows: "One of the most important criteria of a public office is that the incumbent is vested with some of the functions pertinent to sovereignty, for it has been frequently decided that in order to be an office the position must be one to which a portion of the sovereignty of the state, either legislative, executive, or judicial, attaches for the time being."

Contrary to respondent's suggestion, *Eason* is not an anomaly; in reality, the foregoing three cases are in complete agreement as to the definition of public office: It is a governmental position, the duties of which invest the

incumbent with some aspect of the sovereign power. As noted in *Eason* at 291-92, 196 N.W. at 134:

> The teacher has a special place by the nature of things in the governmental system, so far as it provides for education. He is appointed and paid by the state. His place—we may well say his office—is created by the state because only through him can its free education be transmitted. Nor is he a mere conduit. Quite the contrary. For education can not be poured out to people like water from a pitcher. It must be carried to them in such a way as to engage their interest and reach their understanding, a labor involving knowledge of method, exercise of authority, and wide use of discretion. A teacher must prescribe courses, establish discipline, convince, lead. In the due performance of his duty he not only engages in a work of public concern, but wields a portion of the sovereign power.

There is nothing of record which demonstrates that a teacher is less important to our society today than he or she was in 1923 when *Eason* was decided. Indeed, in one of the more important and relatively recent judicial pronouncements in the field of education, the U.S. Supreme Court said: "Today, education is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S. Ct. 686, 98 L. Ed. 873 (1954). It is the teacher in the classroom who has the most effect upon the students, and it is through the teacher that the educational policies of the state are executed.

The normal schools which were at issue in *Eason* are now the state colleges. See *State ex rel. Spire v. Beermann*, 235 Neb. 384, 455 N.W.2d 749 (1990). Although respondent does not choose the courses offered, he has considerable discretion in how he teaches the subject matter. He prescribes the course materials. He is responsible for establishing classroom discipline and mental discipline in his students. He must challenge, convince, and lead his students, and he evaluates their performance. Respondent's position at the college is every bit as much a public office as was Eason's position at Peru, and his position of assistant professor at the college therefore is one

which may be challenged by quo warranto.

EFFECT OF LEGISLATIVE DETERMINATION

Further exploration of the issues must begin with the recognition that the Legislature has decided that respondent's position at the college does not prohibit him from taking his seat in the Unicameral. Because the Legislature is the sole judge of the qualifications of its members, Neb. Const. art. III, § 10, we must determine what effect, if any, that decision has upon our ability to consider this case. The same principle of the separation of powers which is at the heart of this controversy prevents us from hearing a matter the determination of which the Constitution entrusts to another coordinate department, or branch, of government.

We are not being asked, however, to determine whether respondent may retain his legislative seat; rather, we are being asked to determine his right to his position at the college. Unlike the question answered by the Legislature, this is not one which the Constitution has entrusted to another branch of government. Regardless of our decision in this case, respondent's right to sit in the Unicameral is as secure as that of any other member. The doctrine of separation of powers does not, therefore, prevent our adjudication of this matter. See, *State v. Evans*, 735 P.2d 29 (Utah 1987); *Monaghan v. School District No. 1*, 211 Or. 360, 315 P.2d 797 (1957).

NATURE AND APPLICATION OF ARTICLE II

We thus reach the central issue. The language of article II prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives. See, e.g., *State ex rel. Meyer v. State Board of Equalization & Assessment*, 185 Neb. 490, 176 N.W.2d 920 (1970); *McDonald v. Rentfrow*, 176 Neb. 796, 127 N.W.2d 480 (1964). This is its institutional aspect, which serves as the beam from which our system of checks and balances is suspended.

Article II also prohibits certain persons from serving two branches of government concurrently. This is its personnel, or individual, aspect. This aspect serves as a check against the concentration of power, and guards against conflicts of interest

which arise when one serves two masters. It has been said that " '[t]he maintenance of a strict prohibition upon dual membership of the legislative and executive branches has no doubt been the most significant aspect of the doctrine [of separation of powers] in forming the special character of American government . . . .' " Matheson, *Eligibility of Public Officers and Employees to Serve in the State Legislature: An Essay on Separation of Powers, Politics, and Constitutional Policy*, 1988 Utah L. Rev. 295, 306 (quoting M. Vile, Constitutionalism and the Separation of Powers 134 (1967)). The aspect with which we are presently concerned is this second, personnel aspect of the distribution of powers clause.

MEANING OF "BEING ONE OF THESE DEPARTMENTS"

The specific question we must answer is whether respondent, because he is both a state senator and an associate professor at a state college, is a "person . . . being one of these departments" who exercises "any power properly belonging to either of the" other departments. Respondent does not dispute the fact that, as a senator, he exercises the powers of the legislative branch. Rather, he contends that an assistant professor at a state college is not an executive officer and does not exercise any power properly belonging to the executive and that, therefore, holding the two positions does not offend the dual services prohibition of article II.

While, as discussed earlier, the officer-employee distinction is relevant to the question of whether quo warranto is applicable, it is not determinative of the issue now under consideration, for article II does not speak in terms of officers or employees; it speaks of persons "being one of" the branches of government.

This is the first time we have been asked to determine the scope of the dual services prohibition. Our determination is dependent in part upon the meaning of the phrase "being one of these departments." In conducting our study we are bound by the cardinal rule that courts must apply and enforce the Constitution as it is written. Moreover, constitutional provisions are not open to construction as a matter of course; 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. *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990). If a constitutional provision must be construed, its words are to be interpreted in their most natural and obvious sense, although they should receive a more liberal construction than statutes and are not subject to rules of strict construction. *State ex rel. Spire v. Public Emp. Ret. Bd.*, 226 Neb. 176, 410 N.W.2d 463 (1987).

The unusual expression "being one of these departments" is not clear; accordingly, construction is necessary. One thing that is clear, however, is that "being one of these departments" is not intended to be synonymous with "exercising any power of" a branch. Had such identity of meaning been intended, identical language would surely have been used. That is what was done by the framers of the Constitutions of Colorado (Colo. Const. art. III), Idaho (Idaho Const. art. II, § 1), Montana (Mont. Const. art. III, § 1), New Mexico (N.M. Const. art. III, § 1), Virginia (Va. Const. art. III, § 1), West Virginia (W. Va. Const. art. V, § 1), and Wyoming (Wyo. Const. art. II, § 1). The Oregon Supreme Court has refused to read the terms "functions" and "duties" in the separation of powers provision of that jurisdiction's Constitution as being synonymous for the same reason. See *Monaghan v. School District No. 1*, 211 Or. 360, 315 P.2d 797 (1957).

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, but its terms and provisions are constantly expanded and enlarged by construction to meet the advancing affairs of humankind. *In re Application A-16642, supra*. With this in mind, we turn to the historical record and examine the evolution of the relevant provisions of our Constitution.

Article II was adopted as part of the Constitution of 1875. Normally, we would turn to the debates of the relevant convention as part of our search for clarification of ambiguous constitutional language. Unfortunately, the proceedings of the 1875 Constitutional Convention are lost. See, 1 Neb. Const. Convs. 7 (1906); *Jaksha v. State*, 222 Neb. 690, 385 N.W.2d 922

(1986); *State ex rel. Johnson v. Chase*, 147 Neb. 758, 25 N.W.2d 1 (1946). We thus cannot avail ourselves of the debates of that convention and must look elsewhere to determine the intent of the framers of the phrase at issue.

Notwithstanding that the journal of the 1875 convention has survived, it is of little help. It merely indicates that article II was the last provision to be adopted by the convention, apparently with little or no debate. 3 Neb. Const. Convs. 672 (1913). A provision identical to article II, however, was a part of the proposed Constitution of 1871. Although that Constitution was rejected by the people, many of its provisions, including what was to become article II, found their way unchanged into the 1875 Constitution. The drafters of the Constitution of 1871 were influenced by the Constitution recently adopted by Illinois, see, e.g., 1 Neb. Const. Convs. 522 (1906) and 2 Neb. Const. Convs. 359 (1907), and some provisions, including that which was to become article II, appear to have been taken verbatim from that document. Compare, e.g., Neb. Const. 1871 Preamble; art. I, §§ 3, 7, 9, 10, 14-17, and 24; and art. II *with* Ill. Const. 1870 Preamble; art. II, §§ 3, 7, 9, 10, 14-17, and 20; and art. III.

Saxby v. Sonnemann, 318 Ill. 600, 149 N.E. 526 (1925), determined that the Illinois provision prohibited a member of the state Legislature from receiving compensation for acting as a deputy and assistant to the Attorney General. In so ruling, the Illinois Supreme Court stated at 604-06, 149 N.E. at 528:

> By this provision the people intended to provide, and did provide, a complete separation of the branches and completely deprived a member of one branch of authority to exercise any power properly belonging to the other two branches. Under the constitution of 1818 nearly all the important offices of government were filled by an election on joint ballot of the two houses of the legislature, alone. This system gave rise to injurious combinations affecting legislation and combining the departments of government. In forming the constitution of 1848 one of the things sought was to prevent the performance of duties and exercise of powers in one department of government by members of either of the other departments. In order

> that this might be brought about there was inserted in that constitution, as article 2, a provision in effect the same as article 3 of the present constitution [the provision identical to our own article II]. . . .
>
> . . . The language is plain that no person of one department shall exercise any power properly belonging to another department of the State government. . . .
>
> The appellant contends that the above provision [article 3] can apply only to cases where a member of one department acts as an officer in another department, and not to one acting in a purely ministerial capacity. There is no language in the article which limits the application of it to persons of one department acting as officers of another department. The language is, "no person" shall exercise "any power" properly belonging to another department, and the simple question arises here, Did the appellant, in the service performed, exercise any of the powers of the executive department of the State government?

Thus, Illinois considered the phrase "being one of these departments" to mean "being a member of one of these departments," and the distinction between "officer" and "employee" was not relevant to that portion of the inquiry. This reading is not, however, the interpretation Illinois has since given *Saxby*.

In 1960, Illinois held that article III of that state's Constitution did not apply to legislators performing purely ministerial duties. See *The People v. Capuzi*, 20 Ill. 2d 486, 170 N.E.2d 625 (1960). The *Capuzi* court focused on the following language in *Saxby* and apparently ignored the language we quoted earlier:

> "It may readily be conceived that one who serves as an investigator merely, collecting facts, and who thereby prepares himself to become a witness in a lawsuit, or who engages in similar service, is not exercising powers peculiar to the department of government by which he is employed, and is not, therefore, within the inhibition of article 3 of the constitution, though he may be a member of the different department of government. This is so because such employee exercises no powers of a

department in which he works."

The People v. Capuzi, supra at 492-93, 170 N.E.2d at 629 (quoting *Saxby, supra*).

From this, the *Capuzi* court concluded that a member of one coordinate branch who was employed by a second branch but did not exercise the powers of the second branch did not fall within the constitutional provision. The *Capuzi* court did not, however, question *Saxby*'s reading of "being one of these departments" as meaning being a member of such a branch. The question on which it appears to have focused was whether a state legislator who also held a ministerial position under the judicial branch exercised the powers of the judiciary. The *Capuzi* court did not consider whether the judicial employee exercised the powers of the Legislature. Because it failed to consider this second question, *Capuzi* treated "being one of these departments" as synonymous with "exercising the powers" of a branch.

While we would not presume to take issue with the Illinois Supreme Court's reading of its own precedents or its interpretation of the Constitution of its state, we do find the *Capuzi* analysis unsatisfactory when applied to our Constitution. This jurisdiction requires that its Constitution, as amended, be read as a whole. *Jaksha v. State*, 222 Neb. 690, 385 N.W.2d 922 (1986); *Elmen v. State Board of Equalization and Assessment*, 120 Neb. 141, 231 N.W. 772 (1930). There are three provisions in the Nebraska Constitution which relate to the ability of an individual to hold more than one position under the authority of the state. The first is article II set out above. The other two are Neb. Const. art. III, § 9, and art. IV, § 2. While article II has remained unchanged since it was first adopted in 1875, over the years the people have modified the other two provisions.

Since the Constitution must be read in connection with the facts of history and development of the representational form of government, see *Dwyer v. Omaha-Douglas Public Building Commission*, 188 Neb. 30, 195 N.W.2d 236 (1972), a brief overview of these changes is in order.

Under the Constitution of 1866, Neb. Const. art. III, § 15, provided: "No member of congress, or other person holding

office under the authority of this state, or of the United States, shall execute the office of governor, except as herein provided." This provision was replaced by article V, § 2, in 1875, which expanded the disqualification to cover all executive officers, but removed the bar for federal officers. The relevant portion of the provision read as follows: "None of the officers of the executive department shall be eligible to any other state office during the period for which they shall have been elected." In the past, we have given this provision broad application, holding that it prevented the Lieutenant Governor from seeking the nomination of his party for the post of Governor. See *State, ex rel. McKelvie, v. Wait*, 95 Neb. 806, 146 N.W. 1048 (1914).

The 1920 amendments to the Constitution expanded the executive branch, and the disqualification contained in article V, § 2 (which became the present article IV, § 2), was expanded correspondingly, to wit: "None of the officers mentioned in this article shall be eligible to any other state office during the period for which they have been elected or appointed." This section was again amended in 1962, expressly permitting the Lieutenant Governor to be eligible to be a candidate for Governor.

In 1966, article IV, § 2, was amended into its present form. The exception for the Lieutenant Governor was removed, and the second sentence was changed to read: "None of the *appointive* officers mentioned in this article shall be eligible to any other state office during the period for which they have been appointed." (Emphasis supplied.) This change appears to have been effected in order to permit all the elective executive officers to be eligible as candidates for other executive positions.

The strictures of article IV, § 2, operate as a prohibition against appointive executive officers' holding other positions in the executive or any other branch of state government. In this respect, article IV, § 2, is somewhat broader than the prohibition of article II against holding positions in different branches, although, since article IV, § 2, is applicable only to appointive executive officers, it is, in that respect, narrower than article II.

The earliest predecessor of article III, § 9, which prohibits

dual office holding by legislators, was Neb. Const. art. II, § 14, of the Constitution of 1866:

> No person being a member of congress, or holding any military or civil office under the United States, shall be eligible to a seat in the legislature; and if any person shall, after his election as a member of the legislature, be elected to congress, or be appointed to any office, civil or military, under the government of the United States, his acceptance thereof shall vacate his seat.

The analogous provision adopted in 1875 as article III, § 6, was much broader; the disability extended not only to those holding office under the authority of the United States, but also to those holding any lucrative office under the authority of the state:

> No person holding office under the authority of the United States, or any lucrative office under the authority of this state, shall be eligible to or have a seat in the legislature; but this provision shall not extend to precinct or township officers, justices of the peace, notaries public, or officers of the militia; nor shall any person interested in a contract with, or an unadjusted claim against the state, hold a seat in the legislature.

That the framers thought it necessary to provide an explicit exception for "precinct or township officers, justices of the peace, notaries public, or officers of the militia" indicates that the disqualification of the holder of "any lucrative office under the authority of this state" was intended to have broad scope. Clearly, the framers did not envision it as applying only to constitutional officers.

In 1972, this disqualification was again expanded. The exceptions for justices of the peace, notaries public, and precinct, township, and militia officers were dropped and a new disqualification was added. The provision (renumbered as article III, § 9, in 1920) now reads:

> No person holding office under the authority of the United States, or any lucrative office under the authority of this state, shall be eligible to, or have a seat in the Legislature. No person elected or appointed to the Legislature shall receive any civil appointment to a state

office while holding membership in the Legislature or while the Legislature is in session, and all such appointments shall be void.

This review of the evolution of article III, § 9, shows a continuing expansion in the disqualification placed upon legislators' holding other government positions.

With that in mind, we return to the language of article II. If the phrase "being one of" were to be construed as if it read, "acting in the capacity of," the relevant passage would declare that "no person or collection of persons [acting in the capacity of] one of these departments, shall exercise any power properly belonging to either of the others." Under such a construction, a violation of the personnel aspect of article II would occur only if an individual simultaneously serving more than one branch discharged his or her multibranch duties at one and the same time. Such a reading would thus leave article III, § 9, dealing with the legislative branch, and article IV, § 2, dealing with the executive branch, as the only bans against multibranch office holding. The problem with such a construction is that there would then be no constitutional prohibition against a member of the judiciary's serving as an elected executive officer, so long as that person did not discharge the duties arising from the two positions at the same time. This would be so because the article on the judiciary, article V, contains no provisions analogous to article III, § 9, and article IV, § 2. While article III, § 9, prohibits sitting judges from serving in the Legislature, article IV, § 2, only applies to appointive executive officers. Thus, there would be no constitutional prohibition against, for example, a single individual's serving as both Chief Justice and Attorney General. Clearly, the framers did not contemplate such a bizarre result.

Indeed, the development of the prohibitions now found in article III, § 9, and article IV, § 2, evidences an expanding constitutional predisposition against multibranch public service. The continual expansion of these restrictions via amendments to the Constitution demonstrates the intention of both the framers and the body politic that such restrictions be interpreted broadly.

Thus, the relevant provision of article II cannot be construed

as meaning "no person or collection of persons [exercising any power of] one of these departments," as respondent suggests, but, rather, must be read as construed in *Saxby v. Sonnemann*, 318 Ill. 600, 149 N.E. 526 (1925): "no person or collection of persons being [a member of] one of these departments."

As a consequence, article II prohibits one who exercises the power of one branch—that is, an officer in the broader sense of the word—from being a member—that is, either an officer or employee—of another branch. Is respondent a member of one branch exercising the power of another? There are two formulations this question can take: (1) Is the respondent, as an assistant professor of a state college, a member of the executive branch, and does he exercise any powers of the Legislature? or (2) Is the respondent, as a state senator, a member of the legislative branch, and does he exercise any powers of the executive? If the answer to either of these formulations is yes, then respondent, by holding both positions, is in violation of article II.

Governmental Powers and Branches

It is beyond debate that a senator is a member of the legislative branch of the state and exercises the powers of that branch. The issue thus becomes: Is an assistant professor at a state college a member of the executive branch?

Respondent argues that state college assistant professors are not executive officers within the meaning of present Neb. Const. art. IV, § 1, since they are not named in the article nor are they "the heads of such other executive departments as set forth herein or as may be established by law." In this he is quite correct. Assistant professors of state colleges are not constitutional executive officers. That does not, however, mean that they are not subject to the prohibition of article II. As noted earlier, article II is not limited in its application to officers, constitutional or otherwise, but extends to employees as well. If the state colleges are part of the executive branch, then article II prohibits respondent from maintaining his position at the college while he serves as a member of the Legislature.

When the 1875 Constitution was adopted, the executive

branch was defined in then article V, § 1, in terms of named constitutional officers: "The *executive department shall consist of* a governor, lieutenant-governor, secretary of state, auditor of public accounts, treasurer, superintendent of public instruction, attorney-general, and commissioner of public lands and buildings . . . ." (Emphasis supplied).

If article II is read in light of this language, it would appear that in 1875 a "person or collection of persons being [the executive department]" would have meant those individuals named in then article V, § 1. Had the Constitution remained unchanged since 1875, our inquiry on this question might have ended here. Our task is complicated, however, by subsequent amendments to then article V, § 1.

In 1920, article V, § 1, was amended and renumbered as article IV, § 1, and read, in relevant part: "The executive *officers* of the state shall be the Governor, Lieutenant Governor, Secretary of the State, Auditor of Public Accounts, Commissioner of Public Lands and Buildings, Treasurer, Attorney General, Superintendent of Public Instruction and the heads of such other executive departments as may be established by law." (Emphasis supplied.) In this version, the executive branch is no longer defined; instead, it states who the executive officers shall be and provides that additional executive agencies may be created by the Legislature. These changes were made in order to permit the creation of new executive agencies if and when the need should arise, see Nebraska Constitutions of 1886, 1871 & 1875 and Proposed Amendments Submitted to the People September 21, 1920, at 65, 67 (Nebraska Historical and Political Science Series Bull. 13, 1920), and appear to have been adopted in response to opinions announced by this court to the effect that the Legislature was without authority to create new executive agencies. See, e.g., *In re Railroad Commissioners*, 15 Neb. 679, 50 N.W. 276 (1884); *State v. Porter*, 69 Neb. 203, 95 N.W. 769 (1903); *Iams v. Mellor*, 93 Neb. 438, 140 N.W. 784 (1913). From this, it must be inferred that the old Constitution's definition of the executive branch was considered too restrictive and failed to meet the demands of a growing state.

In 1936, the Commissioner of Public Lands and Buildings

was deleted from article IV, § 1, and the Superintendent of Public Instruction was deleted in 1952. Except for these changes, the relevant language has remained the same since 1920. In *Swanson v. State*, 132 Neb. 82, 271 N.W. 264 (1937), we held that the 1936 amendment omitting the office of Commissioner of Public Lands and Buildings, while depriving the office of its status as a constitutional office, did not abolish the office.

Since the composition of the executive branch is no longer expressly defined in the Constitution, we must look to case law for guidance in determining what it is.

To review, article II divides the powers of government into three distinct branches, the legislative, executive, and judicial, and provides that "no person or collection of persons being one of these" branches "shall exercise any power properly belonging to either of the others, *except as hereinafter expressly permitted or directed*." (Emphasis supplied). Nothing in the Constitution expressly, or even impliedly, directs that the prohibitions of article II not be applied to state senators. The inquiry thus turns to whether Neb. Const. art. VII, § 13, providing for the government of the state colleges, falls within the exception to article II.

We have determined that Neb. Const. art. XV, § 9, authorizing the Industrial Commission with administrative, legislative, and judicial powers, was within this exception to article II. See *School Dist. of Seward Education Assn. v. School Dist. of Seward*, 188 Neb. 772, 199 N.W.2d 752 (1972). We have likewise held that Neb. Const. art. IV, § 20, creating the State Railway Commission (now the Public Service Commission), which has legislative, executive, and judicial powers, is an exception to article II. See, *Swanson v. Sorensen*, 181 Neb. 312, 148 N.W.2d 197 (1967); *In re Lincoln Traction Co.*, 103 Neb. 229, 171 N.W. 192 (1919). We have also found that the former State Department of Education could be given duties that were legislative in character because the constitutional provision authorizing it, Neb. Const. art. VII, § 14 (since repealed), fit within the exception. See *School Dist. No. 8 v. State Board of Education*, 176 Neb. 722, 127 N.W.2d 458 (1964).

School Dist. No. 8, supra, *School Dist. of Seward Education Assn., supra*, and *In re Lincoln Traction Co., supra*, dealt with the institutional aspect of the separation of powers doctrine. These cases involved challenges to the agencies' exercise of legislative and judicial powers and not individuals holding positions in more than one governmental branch. While we have determined that the constitutional provisions authorizing these agencies expressly direct or permit them to exercise the powers of more than one branch, nothing in the opinions indicates that members of the agencies are excepted from the personnel aspect of article II.

Like the two school district cases, *Swanson v. Sorensen, supra*, did not address the dual position ban of article II. In that case, Swanson, the duly elected state Treasurer, brought a quo warranto action against Sorensen, the incumbent Treasurer, who had refused to relinquish his office on the ground that Swanson was ineligible for the office because he had been a member of the railway commission when he ran for office. Sorensen's claim was based on the prior provision of article IV, § 2, that "[n]one of the officers mentioned in this article shall be eligible to any other state office during the period for which they have been elected or appointed . . . ." The *Swanson* court concluded that because the constitutional amendment creating the railway commission was not adopted as an amendment to article IV but was simply inserted into that article by the compilers at a later date, the commissioners were not among the officers mentioned in article IV, § 2.

An exception to institutional application of the separation of powers doctrine does not imply an exception to the dual personnel ban. While it may be necessary for certain agencies to share attributes with the executive, legislative, and judicial branches in order for those agencies to carry out the function assigned to them in the Constitution, those needs do not require the agency to employ personnel who exercise power in another governmental branch.

Thus, we need not determine whether the government of the state colleges is free of the institutional prohibition of article II; we need merely determine whether the state colleges are properly considered to be part of the executive branch.

Although we have neither been directed to nor found any case explicitly stating that the state colleges are part of the executive branch, there are but three branches, and the state colleges clearly are not part of the judicial or legislative branches. See, *Swanson v. State, supra*; *State v. Furse*, 89 Neb. 652, 656, 131 N.W. 1030, 1031 (1911) ("the office of railway commissioner is, under the constitution, to be classed as an executive office. Of this we think there can be no doubt, as it can neither be said to be legislative, nor judicial, and the three classes are the only ones given by that instrument").

The Board of Regents of the University of Nebraska performs a function for the university which is identical to that of the Board of Trustees of the Nebraska State Colleges. While the Board of Regents is an "independent body charged with the power and responsibility to manage and operate the University," *Board of Regents v. Exon*, 199 Neb. 146, 148, 256 N.W.2d 330, 332 (1977), it is, nevertheless, an administrative or executive agency of the state, see *Board of Regents v. County of Lancaster*, 154 Neb. 398, 48 N.W.2d 221 (1951). As the regents are part of the executive branch, so, too, are the trustees.

Since the Board of Trustees, which governs the state colleges, is part of the executive branch, those who work for those colleges likewise are members of that branch. Respondent, as an assistant professor at the college, is thus a member of the executive branch within the meaning of article II.

INTERRUPTIONS OF TEACHING RESPONSIBILITIES

Lastly, we must consider whether respondent's unpaid leaves of absence from the college during the Legislature's regular sessions and his removal from the college payroll during most of the Unicameral's special sessions have any legal significance.

As a tenured member of the college faculty, respondent likely possesses a legally protected expectation of continued employment. See *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). However, whether he does or does not possess such a legally protected right, the fact is that his position with the college has been renewed each and every year he has been a senator. While his leaves of absence and

removal from the college payroll have permitted him to interrupt his teaching responsibilities, they have obviously not severed his continuing relationship with the college.

The actuality thus is that at all relevant times respondent has simultaneously been a state senator and an assistant professor at the college. Consequently, his leaves of absence from the college and his intermittent removals from its payroll are not material to the issues presented in this case. Respondent is therefore a member of one branch of government, the executive, exercising the powers of another, the legislative, and, as a consequence, is in violation of article II of the state Constitution.

In so holding, we are not unmindful that a division of the Washington Court of Appeals, while recognizing that a violation of the canons of judicial conduct had occurred, recently determined that an attorney who heard a criminal case as a judge pro tempore while serving as a state senator had not violated the separation of powers doctrine. In so ruling, the court reasoned that the attorney had not exercised both offices simultaneously. *State v. Osloond*, 60 Wash. App. 584, 805 P.2d 263 (1991). However, the Washington Constitution does not have an express separation of powers provision, and the *Osloond* court was thus able to base its decision on more general principles than those which we are constrained to follow.

Nor are we unmindful of *State ex rel. Stratton v. Roswell Schools*, 111 N.M. 495, 806 P.2d 1085 (1991), a recent New Mexico appellate court decision which held that that state's separation of powers provision did not prohibit public school administrators and teachers from serving in the state Legislature. As we have previously noted, New Mexico's Constitution provides that "no person . . . charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others . . . ." N.M. Const. art. III, § 1. In other words, it prohibits the officers (persons charged with the exercise of powers) of one branch from exercising the powers (or acting as an officer) of a coordinate branch. Thus, the personnel aspect of the New Mexico provision is limited to

prohibiting one from being an officer in different branches simultaneously. In contrast, article II of our Constitution prohibits members of one branch from exercising the powers of a coordinate branch and therefore prohibits any member of one of the three branches—whether it be an officer or employee—from being an officer in another branch. Because the New Mexico provision is narrower than that of article II, the reasoning of *Stratton* is inappropriate under our Constitution.

Numerous other jurisdictions have addressed similar questions under various provisions of their state constitutions. The results, as illustrated earlier, are in no way uniform, but the following decisions evince that Nebraska does not stand alone in maintaining the independence of each of the coordinate branches of government: Alaska has held that its Constitution prohibits a legislator from holding a position as a teacher or superintendent in a state-operated school district. See *Begich v. Jefferson*, 441 P.2d 27 (Alaska 1968). The Arkansas Constitution prohibits a state legislator from being elected to and serving on the board of directors of a school district during his term in the Legislature. See *Williams v. Douglas*, 251 Ark. 555, 473 S.W.2d 896 (1971). The Connecticut Constitution has been held to prohibit members of the general assembly from concurrent employment as faculty or professional staff at a state college. See *Stolberg v. Caldwell*, 175 Conn. 586, 402 A.2d 763 (1978), *appeal dismissed*, *Stolberg v. Davidson*, 454 U.S. 958, 102 S. Ct. 496, 70 L. Ed. 2d 374 (1981). After Oregon held that a state legislator was ineligible for employment as a public school teacher, see *Monaghan v. School District No. 1*, 211 Or. 360, 315 P.2d 797 (1957), the Constitution was amended to permit legislators to teach; however, a judge was still prohibited from teaching at a state-funded college, see *In the Matter of Sawyer*, 286 Or. 369, 594 P.2d 805 (1979).

Justice Sutherland, commenting on the importance of the maintenance of separate branches, stated:

> If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—

> independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments. James Wilson, one of the framers of the Constitution and a justice of this court, in one of his law lectures said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers." Andrews, The Works of James Wilson (1896), Vol. 1, p. 367.

O'Donoghue v. United States, 289 U.S. 516, 530, 53 S. Ct. 740, 77 L. Ed. 1356 (1933). The dynamics of power are perhaps best illustrated in this case by the fact that the Board of Trustees' policy manual on leaves of absence treats employees of the state colleges who hold political offices differently from those who do not. As noted earlier, employees who hold no political office ordinarily may take a leave of absence but once every 4 years; however, employees who hold a political office routinely may take leaves as often as they wish. Nor are political officeholders required to make the prearrangements required of those who hold no political office.

CONCLUSION

The provisions of article II compel us to enter judgment for the relator and to order that respondent be, and he hereby is, ousted, removed, and excluded from his office as assistant professor at the college.

JUDGMENT FOR RELATOR.

HASTINGS, C.J., dissenting.

I respectfully dissent from the majority opinion because I believe that the court has gone beyond the issues as defined by the parties in this original action.

The issue before the court was "[w]hether an individual who teaches at a state college and who also serves in the Nebraska Legislature exercises the powers of both the executive and the legislative branches of state government in contravention of Article II Section 1 of the Nebraska Constitution." Brief for

relator at 1. Put another way, "[t]his is an original action in which the Attorney General seeks to determine whether the Respondent can constitutionally serve in the Nebraska Legislature and, at the same time, teach at Wayne State College." *Id.* at 2.

As I understand the claim, the relator seeks to have respondent removed from his position as a member of the faculty of a state college because "being one of these departments" (a member of the Legislature) he exercises the power "properly belonging to either of the others" (the executive department). See Neb. Const. art. II, § 1. I do not believe respondent exercises the powers of the executive department as a member of the faculty of Wayne State College and certainly the relator does not ask that the respondent, "being one of these departments" (executive), be removed for exercising the power "properly belonging" to the legislative branch.

> The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

Neb. Const. art. II, § 1. There is no question that the respondent, as a member of the Legislature, is a "person or collection of persons being one of these departments," i.e., the legislative department. The crucial question is whether the respondent "being one of these departments . . . exercise[s] any power properly belonging to either of the others," in this case, powers belonging to the executive department.

The purpose of this constitutional provision is to establish "the permanent framework of our system of government and to assign to the three departments their respective powers and duties, and to establish certain fixed principles upon which our government is to be conducted." *State, ex rel. Randall, v. Hall*, 125 Neb. 236, 242, 249 N.W. 756, 759 (1933). By adhering to this structure of government the preservation of liberty is best served. See The Federalist No. 47 (J. Madison).

However, "[a] rigid adherence to it [separation of powers] in

all cases would be subversive to the efficiency of the government and result in the destruction of the public liberties." 1 J. Story, Commentaries on the Constitution of the United States § 529 at 371 (3d ed. 1858). Furthermore, a justice of the U.S. Supreme Court has stated that while the doctrine of separation of powers "diffuses the power [of each branch of government] to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." *Youngstown Co. v. Sawyer*, 343 U.S. 579, 635, 72 S. Ct. 863, 96 L. Ed. 1153 (1952) (Jackson, J., concurring). A hermetic seal around each branch of government would preclude the establishment of an effective government. *Buckley v. Valeo*, 424 U.S. 1, 121, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

A senatorial position in the Nebraska Legislature is a part-time position. Therefore, it is not uncommon for senators to have additional sources of income and careers. An uncompromising interpretation of the separation of powers would inhibit the ability of a part-time legislature to attract qualified members.

Moreover, "the concept of separation of powers is not one that is capable of precise legal definition yielding clear solutions to intragovernmental disputes." *Stolberg v. Caldwell*, 175 Conn. 586, 596, 402 A.2d 763, 769 (1978). Consequently, the doctrine of separation of powers is not always clear in its application to the day-to-day functions of the government.

It is clear, however, that the executive branch is generally described as the branch of government that executes the laws of the state.

The members of the executive branch of government are divided into two categories: the executive officers and the employees. See, *State, ex rel. O'Connor, v. Tusa*, 130 Neb. 528, 265 N.W. 524 (1936); *Home Savings & Loan Ass'n v. Carrico*, 123 Neb. 25, 241 N.W. 763 (1932). According to the Nebraska Constitution, the executive officers of the state who are responsible for carrying out the laws of the state are the "Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, Treasurer, Attorney General, and the heads of such other executive departments as set forth herein or as may be established by law." Neb. Const. art. IV, § 1. See

Neb. Rev. Stat. § 49-1436 (Reissue 1988). An assistant professor is not named therein.

Mere exclusion of a specific government position does not dictate the person's status as an officer or employee.

State v. Loechner, 65 Neb. 814, 91 N.W. 874 (1902), was one of the first cases to recognize the division of employment in the executive branch of government. *Loechner* divided the executive branch into two categories: the ministerial officers and the executive officers. A ministerial officer is an officer with

> no power to judge the matter to be done, and [whose office requires] him to obey some superior. An executive officer, in the proper sense of the term, is one whose duties are mainly to cause the laws to be executed; such as the president, the governor of a state, or the chief executive officer of a city.

Loechner, supra at 818, 91 N.W. at 875. In *Home Savings & Loan Ass'n v. Carrico, supra* at 30, 241 N.W. at 765, an employee was described as "one who is bound, in some degree, to the duty of service, and who is subject to the master's command as to how to do the work." An officer has "the right, duty and authority conferred by law, by which, for a given period, an individual is invested with some portion of the sovereign functions of government for the benefit of the public." *Id.*

The crucial factor in determining whether a position is an executive office is whether the duties of the office include exercising some degree of the sovereign power of the state. See, *State, ex rel. O'Connor, v. Tusa, supra*; *Home Savings & Loan Ass'n v. Carrico, supra*. A precise definition of "sovereign power" is elusive. However, it has been defined as follows:

> "If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the

> latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state."

State ex rel. Webb v. Pigg, 363 Mo. 133, 138, 249 S.W.2d 435, 438 (1952). Often, the degree of independence of a governmental position has helped determine whether the position is an executive office exercising sovereign power. The greater the position's independence, the more likely it is to be categorized as an executive office. See, *State ex rel. Barney v. Hawkins et al.*, 79 Mont. 506, 257 P. 411 (1927); *Aldine Ind. Sch. Dist. v. Standley*, 154 Tex. 547, 280 S.W.2d 578 (1955). One in a position in the executive branch that does not exercise the sovereign powers of the state is normally referred to as an "employee."

Here, as a professor, Conway does not have independent control over the education policies of the state. It is true that Conway does have control over his students in a classroom setting; however, this control is limited. Conway structures the class syllabus, grades tests, and assigns homework. The independence Conway has in the classroom is illusory because at all times he is under the direct supervision of the department chairman. The chairman also decides what classes Conway will teach and evaluates his performance.

Teachers have generally been categorized as employees. See, e.g., *Jackson v. Roberts*, 774 S.W.2d 860 (Mo. App. 1989); *Ruiz v. State*, 540 S.W.2d 809 (Tex. Civ. App. 1976); *Duncan v. Koustenis*, 260 Md. 98, 271 A.2d 547 (1970); *Main v. Claremont Unified School Dist.*, 161 Cal. App. 2d 189, 326 P.2d 573 (1958); *State, ex rel. Scarl, v. Small*, 103 Ohio App. 214, 145 N.E.2d 200 (1956); *Coble, Appellant, v. Metal Twp. Sch. Dist.*, 178 Pa. Super. 301, 116 A.2d 113 (1955); *Seher v. Woodlawn School Dist.*, 79 N.D. 818, 59 N.W.2d 805 (1953); *Leymel v. Johnson*, 105 Cal. App. 694, 288 P. 858 (1930); *State ex rel. Board of D. S. D. No. 306 v. Preston*, 120 Wash. 569, 208 P. 47 (1922).

In *Ruiz v. State, supra*, the Texas Court of Civil Appeals stated that a public school teacher has "[n]o sovereign function of government . . . conferred upon him for the benefit of others, largely independent of the controls of others." 540 S.W.2d at 812. "No matter how highly we [the court] regard the

profession of teaching, we cannot conclude that this teacher is exercising some of the sovereign powers of the State . . . ." *Id.* See, *Main v. Claremont Unified School Dist., supra*; *Leymel v. Johnson, supra.*

At the college level of public education a professor is still considered an employee. See, *Boyett v. Calvert*, 467 S.W.2d 205 (Tex. Civ. App. 1971); *Tilley v. Rogers*, 405 S.W.2d 220 (Tex. Civ. App. 1966); *Martin v. Smith*, 239 Wis. 314, 1 N.W.2d 163 (1941); *Hartigan v. Board of Regents*, 49 W. Va. 14, 38 S.E. 698 (1901).

In *Hartigan v. Board of Regents, supra*, a college professor contested his dismissal from a state university. Although this case was decided at the turn of the century, its rationale has not aged and it retains its vitality. The court expressed that it is the Board of Regents that is charged with carrying out the public function. In carrying out this public function it employs professors. The court further held that "a professor in the university wields no particle of sovereign governmental authority." *Hartigan, supra* at 22, 38 S.E. at 701.

A more recent Texas case held that a professor at a state university is an agent of the board of directors, the members of which are in turn the executive officers. *Boyett v. Calvert, supra.*

Wisconsin has further strengthened the view that a college professor is not an executive officer. In *Martin v. Smith, supra*, the president of the University of Wisconsin, a public institution, was deemed an employee for the Board of Regents. The court declared that the president of the university is subject to the actions of the Board of Regents and is subordinate to it. Because of the president's lack of independence, he did not exercise the sovereign power of the state. It is the Board of Regents that exercises the sovereign power of the state. *Martin v. Smith, supra.*

It is clear from the relevant case law that the position of a public school teacher or that of a professor of a public college or university is that of an employee of the state and not an executive officer. However, some jurisdictions prohibit a professor of a state university from being a member of the legislature of the state. These cases involve statutory

prohibitions; thus they are distinguishable from the case at bar.

In *Stolberg v. Caldwell*, 175 Conn. 586, 402 A.2d 763 (1978), the Connecticut Supreme Court held that a member of the faculty at a state college is a member of the executive branch of government and therefore could not retain his position as a tenured professor and still be a member of the state's Legislature. In reaching this conclusion the court recognized that the separate branches of government do overlap and a clear distinction cannot always be made. However, unlike Nebraska, Connecticut had a statute that declared that the state board of higher education was within the executive branch of government. Furthermore, according to the Connecticut Constitution, the board of trustees is free to exercise independent judgment in carrying out the education policies of the state. *Stolberg, supra.*

Finally, the Connecticut Supreme Court also used a statutory dual-job ban as a basis for declaring a teacher an officer. The statute stated that " '[n]o member of the general assembly shall . . . be . . . appointed . . . to any position in the judicial, legislative or executive department of the state government . . . .' " *Stolberg, supra* at 593, 402 A.2d at 768. The court pronounced that the position of a teacher is an "appointive position." The court reached this conclusion by broadly defining the meanings of "appointment" and "position." The court stated:

> The fact that the position to which the plaintiff was appointed was not, in the legal sense, an office but merely an employment does not render the dual-job ban inapplicable under the facts presented since an employee can be said to have been assigned or designated to do a certain job. . . . Moreover, the term "position" . . . dealing with state employees, is defined as "a group of duties and responsibilities currently assigned or designated by competent authority to require the services of one employee." Hence . . . a "position or office," cannot be said to be limited to office-holding alone—it was clearly intended to encompass state employment generally.

Stolberg, supra at 594, 402 A.2d at 768.

In view of the fact that the board of trustees is able to appoint

teachers to their position, that position is an "appointive position," and teachers are therefore executive officers. *Stolberg, supra.*

In *Galer v. Regents of Univ. System*, 239 Ga. 268, 236 S.E.2d 617 (1977), the Supreme Court of Georgia held that a statute making it unlawful for members of the state's Legislature to hold office or employment in the executive branch was constitutional. The constitutional provision for separation of powers justified the statute. The statute, Ga. Code Ann. § 2309 (1972) states: " 'It shall be unlawful for (a) members of the General Assembly to accept or hold *office or employment* in the executive branch of the State Government, or any agency thereof . . . .' " (Emphasis supplied.) *Galer, supra* at 269, 236 S.E.2d at 618. Thus, the court held that a college professor at a state university could not maintain his teaching position. Although the court made no formal ruling on whether a professor was an officer or an employee (the statute applied equally to an officer or an employee), the terminology used by the court when referring to the teaching position was that of "employee." *Galer, supra.*

Contrary to the weight of decisions before it and the cases since its publication, *Eason v. Majors*, 111 Neb. 288, 196 N.W. 133 (1923), held that the head of the department of English at the state normal school at Peru was an executive officer of the state. In *Eason*, the State Board of Education dismissed the teacher without following the statutory guideline for dismissal. The president of the school board then appointed a new teacher to fill the vacancy. Eason brought a quo warranto action to determine whether the new teacher had the right to hold his position and whether Eason's dismissal was proper. *Eason* defined the term "office" as "any position where authority is coupled with duty . . . for a public purpose." *Eason, supra* at 290, 196 N.W. at 133. This broad definition of a public or executive office allowed the court to rule that the head of a department was an executive officer and, therefore, a person's right to exercise the powers of that office may be challenged by a quo warranto proceeding.

The *Eason* court consisted of Chief Justice Morrissey, Judges Rose and Good, and District Judge Shepherd, the last of

whom authored the opinion. That court apparently ignored prior Nebraska case law holding that a public school teacher is not an officer, nor is the position itself an office. See, *State v. Smith*, 49 Neb. 755, 69 N.W. 114 (1896). See, also, *Bays v. The State*, 6 Neb. 167 (1877). (*State v. Loechner*, 65 Neb. 814, 91 N.W. 874 (1902), held that a member of a board of education was not an executive officer.)

Furthermore, roughly 30 years after the decision in *Eason*, this court held once again that a public school teacher is not an executive officer of the state. In *Greer v. Chelewski*, 162 Neb. 450, 455, 76 N.W.2d 438, 442 (1956), this court stated:

> As to teachers' contracts, we have said: "The contract to teach in the common or free schools of the grade of the one in the district in which this controversy arose is one of employment, and the relative positions occupied by the district represented by the board and the teacher are those of employer and employee. A teacher in the schools of the ordinary district is not a public officer, nor is his position an office." State ex rel. Lewellen v. Smith, 49 Neb. 755, 69 N.W. 114.

I find no distinction in principle between the present case and those just cited. *Eason* stands alone in its holding.

Eason is also factually different from the case at bar. In *Eason*, the teacher was the head of his department. Here, Conway is not the head of the department. Conway serves under the direct control of the chairman of the business division. If one carries the layer of responsibility to its ultimate end, "[a]ll teachers and other subordinates in each state college shall be under the direction of the president thereof, subject to the general regulations of the board." Neb. Rev. Stat. § 85-306 (Reissue 1987). Preceding that language in § 85-306 is the following: "The president of each school shall be the chief executive officer thereof and shall be responsible to the board for the control and management of the same." Proceeding backward, so to speak, to Neb. Rev. Stat. § 85-301 (Reissue 1987), one finds that

> [t]he general government [of the state colleges] shall be vested, under the direction of the Legislature, in a board of seven members, to be known as the Board of Trustees of

> the Nebraska State Colleges, six of whom shall be appointed by the Governor, with the advice and consent of the Legislature . . . .

In the final analysis, Conway lacks the independence that would accompany a higher position. This independence, or rather the lack thereof, factually distinguishes this case from *Eason*.

Although this action does not deal with conflict of interest as such, i.e., the constitutional provision on its face does not prohibit one person from being a member of two branches of government, concern is raised whether Conway, as a state legislator, would have a personal interest when voting for school funding. The Nebraska Political Accountability and Disclosure Act, Neb. Rev. Stat. §§ 49-1401 to 49-14,140 (Reissue 1988 & Cum. Supp. 1990), outlines the proper procedure to be followed if there is a conflict of interest. Section 49-1493(5) (Reissue 1988) states that members of the state Legislature must file a statement of financial interests. Thus, as a legislator, Conway is required to file a statement. However, if Conway were only a professor, he would not be obligated to file any statement of interests under this statute. The only persons required to file statements in the education field are individuals holding an office, such as the Commissioner of Education, members of the State Board of Education, or members of the Board of Regents of the University of Nebraska. § 49-1493(2). Interestingly enough, members of the Board of Trustees of the Nebraska State Colleges are not specifically named, and it is doubtful that they would be included in the "catchall" sections.

When a conflict of interest arises or is about to arise, a legislator must submit a written statement describing the conflict and whether or not he will participate in the vote. § 49-1499 (Reissue 1988). The statute does not require a senator to abstain from voting. Accordingly, Conway must file such a statement when school funding is being discussed or voted upon.

The Legislature has taken steps to remedy any possible conflicts of interest. Whether the procedures are adequate is a question not before us at this time.

In order for a part-time Legislature to run efficiently, it may be necessary to allow some overlap between the different branches of government. Generally, people who are government employees may serve as members of the Legislature if their duties do not conflict. Here, Conway is in a unique position to serve in the Legislature, as well as to be an employee of the executive branch. In his capacity as a professor he is not in a position to make policy judgments, he does not exercise independent power over the curriculum, and he does not receive any compensation when he takes the required leave of absence when the Legislature is in session. By allowing this degree of overlap between the executive branch and the legislative branch, the central purpose behind the rationale of separation of powers will not be grossly undermined.

I would deny and dismiss relator's petition in quo warranto.

SHANAHAN, J., dissenting.

Chief Justice Hastings is correct in his analysis, which is based on sound legal principles, but common sense and logic prompt further comment. For that reason, I join in the Chief Justice's dissent and conclusion that this court's majority has misconstrued the limitation expressed in Neb. Const. art. II, § 1: "[N]o person . . . being one of these departments [legislative, executive, or judicial] shall exercise any power properly belonging to either of the others." To paraphrase the foregoing, Gerald A. Conway, as a member of the Nebraska Legislature, cannot exercise power which constitutionally belongs only to the executive branch. That premise serves as the foundation for answering the question in Conway's case. As Chief Justice Hastings has emphasized, the constitutional provision under examination is not designed against a "conflict of interests" situation, which is covered in other areas of Nebraska law. Consequently, the constitutional provision's clear language controls the disposition of Conway's case.

However, the majority sinks in a sea of sophistry with its "separation of powers" argument. For instance, all agree that Conway is subject to departmental supervision at Wayne State, including departmental specification of the hours taught, and further agree that Conway does not determine which courses

will be included in Wayne State's curriculum and cannot personally, either directly or formally, discipline any of his students. The majority, however, derives great strength, if not total support, from the characterization of a "teacher" expressed in *Eason v. Majors*, 111 Neb. 288, 292, 196 N.W. 133, 134 (1923), namely, a teacher has "wide use of discretion . . . must prescribe courses [and] establish discipline." Applying those criteria to Conway's case, he is not a teacher within the characterization or definition found in *Eason*. Nevertheless, everyone knows that Conway is a teacher. As Chief Justice Hastings has carefully pointed out, *Eason* is an aberrancy, neither based on Nebraska precedent nor recognized as precedent, except by the majority of this court today, concerning a definition of "teacher," and is unworthy of adherence.

In Conway's case, key questions are: What power is exercised by Gerald Conway as a teacher? Is that power constitutionally reserved to the executive branch only? More simply, is Conway doing something that only the executive branch can constitutionally perform? Therefore, pivotal in Conway's case is whether sovereign power is exercised in common by Conway and the executive branch of government. Executive power, in a constitutional form of government such as Nebraska's, is the capability to carry laws into effect as a matter of state policy. Conway teaches a business course in college. He is not officially promulgating state policy, that is, furthering a course of action selected by the executive branch of government in political matters. In contact with students, Conway, as a teacher, has the basic duty, and corresponding fundamental power, to convey truth to his students. Is providing truth an exercise of sovereign power constitutionally reserved to the executive branch? Why, even a legislature or a court traffics in truth on occasion.

Nevertheless, the majority proposes: Conway exercises power; but a member of the executive branch of government exercises power; therefore, Conway is a member of the executive branch of government. Anyone who stops to examine the preceding pseudosyllogism will immediately realize that the term of comparison is "power," a term which must have the same meaning for both Conway and the executive branch;

otherwise, under the laws of logic, there is no means of comparison through a middle term for a valid syllogism. Still, one cannot rationally reject the self-evident truth in the proposition that if logic is inapplicable in Conway's case, the laws of logic are equally inapplicable; hence, according to the majority's methodology, the following becomes irrefutable syllogistic truth: Horses pull wagons; but cows give milk; therefore, it will rain tomorrow.

There need be no concern that this court's Chief Justice will serve as Attorney General of Nebraska. Rather, the grave concern is that this court will presently serve as conventioneers to a past constitutional convention and insert into Neb. Const. art. II, § 1, an interpretation for language which needs no interpretation, constitutional language which, thanks to teachers of yesteryear, is a clearly expressed prohibition against one branch of government's usurpation of a constitutionally separated sovereign power belonging only to another governmental branch, and is not a prohibition against one's offer of teaching talents.

STATE OF NEBRASKA, APPELLEE, V. MICHELLE P. JENSEN, APPELLANT.

472 N.W.2d 423

Filed July 26, 1991. No. 90-415.

1. **Trial: Appeal and Error.** A trial court's determination of the credibility of a statement is a question of fact which will be upheld on appeal unless it is clearly erroneous.
2. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a new trial 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.
3. **Trial: Evidence: Appeal and Error.** When a court overrules a motion in limine to exclude evidence, the movant must object when the particular evidence, previously sought to be excluded by the motion, is offered during trial and cannot predicate error on the admission of evidence to which no objection was made when the evidence was adduced.

4. _____: _____: _____. A party is barred from asserting a different ground for his or her objection to the admission of evidence on appeal than was offered before the trier of fact.
5. **Trial: Evidence: Motions to Suppress: Waiver: Appeal and Error.** A failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.
6. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those 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.
7. **Verdicts: Appeal and Error.** On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
8. **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.
9. **Criminal Law: Intent: Circumstantial Evidence.** When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence.
10. **Controlled Substances: Intent.** A defendant possesses a controlled substance when the defendant knows of the nature or character of the substance and its presence and has dominion or control over the substance.
11. **Controlled Substances: Evidence: Proof.** A defendant's control or dominion over premises where a controlled substance is located may establish the defendant's constructive possession of the controlled substance.

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

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

Robert M. Spire, Attorney General, and James A. Elworth for appellee.

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

FAHRNBRUCH, J.

Michelle P. Jensen appeals her district court for Douglas County convictions of (1) possession with intent to manufacture, distribute, deliver, or dispense cocaine and (2) possession of methamphetamine.

On the first count, the defendant was sentenced to not less than 5 nor more than 8 years in prison, and on the second count to not less than 20 months nor more than 5 years, the sentences to run concurrently. We affirm.

Jensen's four assignments of error allege that the trial court erred in (1) failing to grant her motion for a new trial, (2) allowing a witness to testify as to the contents of letters without requiring production of the letters, (3) admitting her statements made while in custody, and (4) finding the evidence sufficient to support her convictions.

Sometime prior to August 4, 1989, the defendant became the focus of a law enforcement narcotics investigation. A search warrant for the home of Kevin Hansen was obtained. At trial, there was testimony that although Hansen was listed on the search warrant, the warrant was directed toward Jensen's activities. It was explained by a police officer that Hansen's name was on the warrant because it was standard practice to list all names of persons residing in the premises to be searched, regardless of whether that person was a suspect in an investigation.

At approximately 10:45 p.m. on August 4, 1989, law enforcement officers executed a search warrant at Hansen's residence at 8019 Northridge Drive. The search was conducted by five members of a multijurisdictional narcotics task force in conjunction with four or five Omaha Police Division officers. The officers entered through a front door and secured four persons, including Jensen. Hansen was not present during the search, and he has never been charged as a result of the search of his residence. The four individuals were held in the living room while the house was searched.

Tilford N. Tucker, a sergeant with the Sarpy County Sheriff's Department who coordinated the task force, testified that even before the search warrant was executed, he knew that Jensen controlled the northwest bedroom in the residence. In the

northwest bedroom, officers found women's clothing and jewelry; more than a dozen pieces of correspondence addressed to Jensen at a different location; a .32-caliber handgun; a triple-beam scale; a knife, razor blade, and plate, all with a white powdery residue on them; and a purse containing drug paraphernalia. A cigarette case containing suspected cocaine was discovered underneath a mattress in that bedroom. Also found in the northwest bedroom were baggies with a white powdery residue in them; a number of bottles containing cutting agents, which can be used to dilute the drug; pipes; spoons; Q-Tips; syringes; an assortment of plastic bags, baggies, and a snuffbox, all of which are commonly used to transport drugs; a small mirror capable of use for nasal ingestion of cocaine and other drugs; rubber tubing which can be employed for intravenous drug use; empty snow seals, which are folded pieces of paper utilized for distributing smaller amounts of narcotics; various items of drug paraphernalia; and a book entitled "The Construction and Operation of Clandestine Drug Laboratories." A glass crack cocaine pipe was seized from a dresser in the northwest bedroom. A test tube and beaker, which are commonly used to manufacture crack cocaine, were also seized from the northwest bedroom.

Later analysis performed by a chemist determined that the cigarette case contained approximately one-half ounce of 100 percent pure cocaine. A number of snow seals taken from the northwest bedroom contained over 22 grams of cocaine, ranging in purity from 40 to 100 percent. The cocaine which was not 100 percent pure had been cut with table sugar or a substance known as "Vitablend." Bottles recovered from the bedroom were found through chemical analysis to contain Vitablend. Residue taken from snow seals, a crack pipe, a syringe, glass pipes, baggies, a knife, a razor blade, a plate, and the triple-beam scale all tested positive for cocaine or crack cocaine. In addition, a vial and plastic bags seized from the northwest bedroom contained over 1 1/2 grams of methamphetamine, as shown by later chemical analysis.

Officer Mark Sundermeier of the Omaha Police Division, an expert in the area of narcotics sales and paraphernalia in Douglas County, assisted in the execution of the search warrant

at 8019 Northridge Drive. With respect to the items seized from the northwest bedroom, Sundermeier testified that the number of packaging materials, the presence of the cutting agents, the triple-beam scale, and the large amount of cocaine were consistent with the sale of controlled substances.

Jensen consented to a search of her purse, wherein officers found $3,332 in six envelopes, with one envelope bearing the term "crank." Methamphetamine in slang language is called crank. The envelope with the word "crank" written on it contained $560. Approximately 10 percent of the money from each envelope was subjected to a gas chromatograph mass spectrograph test. Over objection, a chemist testified that each of the bills which was tested was positive for cocaine. A small amount of marijuana was discovered in Jensen's purse.

In addition to the northwest bedroom, there were two other bedrooms, designated as the southwest and southeast bedrooms. No male clothing was found in the northwest bedroom, but male clothing was discovered in the southeast bedroom. The southeast bedroom contained no female clothing. The remaining, or southwest, bedroom was used for storage.

In addition to the items found in the northwest bedroom, the search of the premises yielded a large bag of marijuana stems and seeds discovered in the southwest bedroom, a tablespoon with a white residue in the southeast bedroom, and various items of drug paraphernalia in the kitchen and southeast bedroom.

On August 23, 1989, an information was filed in the district court for Douglas County, charging Jensen in substance with unlawful possession with intent to distribute cocaine. Jensen was later charged by amended information in the district court with knowingly or intentionally possessing with intent to manufacture, distribute, deliver, or dispense a controlled substance, to wit: cocaine, and with knowingly or intentionally possessing a controlled substance other than marijuana, to wit: methamphetamine.

After a 4-day trial which began on January 19, 1990, a jury found Jensen guilty of both counts alleged in the amended information.

I. MOTION FOR NEW TRIAL

The jury was impaneled on January 19, 1990. A weekend recess followed. On Monday morning, January 22, Jensen's counsel verbally made a motion in limine to exclude any evidence that traces of cocaine were found on the money taken from the defendant's purse. Defense counsel advised the court that the county attorney had informed him that when the information was initially filed, the money and envelopes would be tested for traces of a controlled substance, that he later understood that a stipulation would be made that there was no controlled substance on the money and envelopes, and that a call was received on the previous Friday that evidence was going to be introduced showing that cocaine was discovered on the currency. At the time the motion was heard, Jensen's attorney had not seen the report concerning the determination that traces of cocaine were found on the money in Jensen's purse.

A deputy Douglas County Attorney, Marie Leslie, testified under oath that when a suppression hearing was first scheduled, she offered to stipulate that no controlled substance was on the money, but that Jensen's attorney insisted on testing the money. At that time, she advised defense counsel that she would have the money tested. The record is silent as to the date of the first scheduled suppression hearing. The deputy county attorney further testified that 4 to 5 weeks prior to trial, defense counsel asked her if she would make the money available to him for testing and that she told him that the money would be available at the property department of the Sarpy County sheriff's office. Members of that office participated in the search and seizure of items at 8019 Northridge Drive. Leslie testified that defense counsel advised her that he would have his expert test the money at the Sarpy County sheriff's office. Jensen's attorney never requested the money for testing. Leslie testified that because she assumed defense counsel would have the money tested, she placed a request on December 28 to have the money tested. The actual test was performed on January 18. Leslie knew on January 18 that the test results were positive, although she did not receive the written report of the test until January 19. As soon as Leslie learned of the results of the test on January 18, she personally informed defense counsel that a

controlled substance was found on the money. Another deputy Douglas County Attorney stated that he read the test results over the telephone to defense counsel's secretary on Friday, January 19.

The court overruled Jensen's motion in limine and granted the defendant leave to have the currency tested. Jensen's attorney did not request a continuance. Defense counsel was provided a recess so that he could telephone an expert in order to have the money tested. As stated, the State at trial introduced, over objection, expert testimony that cocaine was found on the money recovered from Jensen's purse.

On February 8, 1990, Jensen moved for a new trial. In part, in support of the new trial motion was an affidavit wherein an expert witness stated that his office was contacted on January 22, that he needed 10 days to conduct the testing of the money, that one could arbitrarily take currency from the general population and find cocaine residue on the bills, and that law enforcement officers may have contaminated the money through their handling of it. The court overruled the defendant's motion for a new trial.

> A new trial, after a verdict of conviction, may be granted, on the application of the defendant, for any of the following reasons affecting materially his substantial rights . . . (3) accident or surprise which ordinary prudence could not have guarded against . . . (5) newly discovered evidence material for the defendant which he could not with reasonable diligence have discovered and produced at the trial . . . .

Neb. Rev. Stat. § 29-2101 (Reissue 1989). On the basis of subdivisions (3) and (5) of § 29-2101, Jensen contends that because a representation was made that the money was not going to be tested for cocaine residue and because she was not apprised of the analysis performed on the money until the day before the jury was selected, she was unprepared to rebut that evidence. Therefore, she maintains that the trial court should have granted her motion for a new trial.

During the hearing on the motion in limine, the State and Jensen presented two entirely different scenarios regarding the testing of the money. Jensen's attorney, without being placed

under oath, claimed that there was a stipulation to be made that the money did not contain traces of a controlled substance and that it came as a complete surprise to him when he was informed at the eleventh hour that the results of the test on the money would be offered in evidence by the State. In contrast, a deputy county attorney testified under oath that defense counsel refused the stipulation and insisted on testing the money; that at that time, she advised defense counsel that she would have the money tested; that 4 to 5 weeks prior to trial, she told Jensen's attorney that the money would be available for testing at the property department of the Sarpy County sheriff's office; and that defense counsel advised her that he would have his expert test the money onsite at the Sarpy County sheriff's office.

This issue presented a question of fact for the trial court to determine, and it obviously found in favor of the State on that matter. We cannot say that the trial court was clearly in error in finding the State's sworn testimony more credible than defense counsel's unsworn statements. A trial court's determination of the credibility of a statement is a question of fact which will be upheld on appeal unless it is clearly erroneous. *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991). Based upon the trial court's factual determination that defense counsel refused to enter into a stipulation, was advised by the county attorney that the money would be tested, and was provided the opportunity several weeks before commencement of the trial to test the money, the test results could not have surprised Jensen. Likewise, the affidavit from Jensen's expert offered with her motion for new trial could not have constituted newly discovered evidence which could not have been produced at trial with reasonable diligence, given the defendant's ample opportunity before trial to have an expert examine the currency. The trial court did not abuse its discretion in overruling Jensen's motion for a new trial. See *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991) (in a criminal case, a new trial 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).

II. BEST EVIDENCE RULE

Citing the hearsay and the best evidence rules, Jensen made a motion in limine to prevent law enforcement officers from referring to correspondence, including old bills, which was found in a box in the northwest bedroom. The motion in limine was overruled. Sarpy County Deputy Sheriff Gary Lyle testified at trial that the "letters" numbered "[m]ore than a dozen" and were addressed to the defendant. The address on the correspondence was different from that of the premises being searched. None of the correspondence was seized by law enforcement officers, and, consequently, it was never offered in evidence. At trial, Jensen, claiming the State had not established foundation for Lyle to testify about what he observed in the bedroom, objected to any testimony concerning the addresses. The defendant further objected on hearsay grounds. Both objections were overruled.

In this assignment of error, Jensen asserts that because the correspondence was not in evidence, Lyle should not have been allowed to testify to the address on the correspondence. The defendant maintains that Lyle's testimony in regard to the address on the correspondence was prejudicial. Her argument is based upon this state's codification of the best evidence rule, to wit: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required . . . ." Neb. Rev. Stat. § 27-1002 (Reissue 1989).

Jensen overlooks the fact that she failed to object to the evidence at trial on the grounds asserted on appeal.

> When a court overrules a motion in limine to exclude evidence, the movant must object when the particular evidence, previously sought to be excluded by the motion, is offered during trial and cannot predicate error on the admission of evidence to which no objection was made when the evidence was adduced. [Citation omitted.]

State v. Cox, 231 Neb. 495, 506, 437 N.W.2d 134, 142 (1989). A party is barred from asserting a different ground for his or her objection to the admission of evidence on appeal than was offered before the trier of fact. *Rocek v. Department of Public Institutions*, 225 Neb. 247, 404 N.W.2d 414 (1987). See, also, *State v. Richard*, 228 Neb. 872, 424 N.W.2d 859 (1988)

(relevancy objections made at trial are not adequate to raise a question on appeal of improper impeachment); Neb. Rev. Stat. § 27-103 (Reissue 1989) (specific ground for objection must be made unless it is apparent from the record). Due to Jensen's failure to assert a best evidence ground for her objection at trial, this court does not reach this assignment of error.

III. CUSTODIAL INTERROGATION

The district court overruled Jensen's motion to suppress any statements made by her after she was placed in the custody of law enforcement officers. Jensen contends that because she was not advised of her rights as guaranteed by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the trial court prejudicially erred in failing to suppress her statements made to a police officer.

The relevant portions of the record reflect the following: After law enforcement officers entered the premises in question, Jensen and the other three individuals were placed prone on the floor in handcuffs. Officer Patricia Gentleman of the Omaha Police Division participated in the search of the house. She testified that she escorted Jensen into a bathroom, removed the handcuffs, and asked if she could search Jensen's person and purse.

Both at the suppression hearing and at trial, Gentleman testified that after Jensen had been taken to the bathroom, Jensen asked if she could have a cigarette to smoke, that Gentleman asked where the cigarettes were, and that Jensen responded that the cigarettes were in *her* bedroom on a stereo or entertainment center. The cigarettes were retrieved from the entertainment center in the northwest bedroom. No objection on the ground of *Miranda* was made at trial to Gentleman's testimony concerning the conversation about Jensen's cigarettes.

Gentleman further testified at the suppression hearing and at trial that she asked Jensen if she resided at the house. Jensen responded that she had been staying at the house in question for a couple of weeks and that she was storing a lot of effects in the home. At both the suppression hearing and trial, the officer characterized her questioning as "basic fact finding." Jensen

objected at trial to Gentleman's testimony for the "same objection." Immediately prior to that objection, the defendant had objected to a prior question on the basis that the question was leading and suggestive. As the county attorney merely asked Gentleman if she had had any further conversation with Jensen, the objection was properly overruled. Gentleman testified at the suppression hearing and at trial that she did not advise Jensen of her *Miranda* rights.

A failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal. *State v. Cogswell*, 237 Neb. 769, 467 N.W.2d 680 (1991). As we stated in part II of this opinion, a party is barred from asserting a different ground for his or her objection to the admission of evidence on appeal than was offered before the trier of fact. Here, Jensen failed to object on *Miranda* grounds at trial with respect to either set of statements made to Gentleman. Thus, we do not reach Jensen's contentions respecting *Miranda*.

IV. SUFFICIENCY OF THE EVIDENCE

The Nebraska Criminal Code prohibits the knowing or intentional possession with the intent to manufacture, distribute, deliver, or dispense a controlled substance and the knowing or intentional possession of a controlled substance. See Neb. Rev. Stat. § 28-416(1)(a) and (3) (Cum. Supp. 1988). As stated, Jensen was convicted of possession with intent to manufacture, distribute, deliver, or dispense cocaine and possession of methamphetamine. In her final assignment of error, Jensen contends that the evidence was insufficient to support her convictions.

In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. *State v. Lohman*, 237 Neb. 503, 466 N.W.2d 534 (1991). Those 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. *Id.*

> " ' "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." ' [Citation omitted.]"

Cogswell, supra at 771, 467 N.W.2d at 681-82.

" ' "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." ' [Citations omitted.]" *State v. Lonnecker*, 237 Neb. 207, 213, 465 N.W.2d 737, 742 (1991). " '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.' [Citations omitted.]" *Id.*

> A defendant possesses a controlled substance when the defendant knows of the nature or character of the substance and its presence and has dominion or control over the substance. [Citations omitted.]
>
> A defendant's control or dominion over premises where a controlled substance is located may establish the defendant's constructive possession of the controlled substance. [Citations omitted.]

Id.

Further insight can be gained by examining two situations in which the foregoing rules have been involved. In *State v. Britt*, 200 Neb. 601, 264 N.W.2d 670 (1978), *questioned on other grounds, State v. Harney*, 237 Neb. 512, 466 N.W.2d 540 (1991), this court held that the evidence was sufficient to permit a jury to conclude beyond a reasonable doubt that a defendant was in actual or constructive possession of cocaine which was discovered in his girl friend's house even though he spent two or three nights a week at that residence. On the other hand, mere presence at a place where a controlled substance is found is not sufficient. *State v. Klutts*, 204 Neb. 616, 284 N.W.2d 415

(1979).

As the facts hereinafter show, there is no doubt that there was evidence from which the jury could find beyond a reasonable doubt that methamphetamine was knowingly or intentionally possessed by Jensen and that cocaine was knowingly or intentionally possessed by Jensen with intent to manufacture, distribute, deliver, or dispense. The only substantive issue in this regard is whether the evidence was sufficient to demonstrate beyond a reasonable doubt Jensen's connection to the premises where the narcotics were found. As recalled, a defendant's control or dominion over premises where a controlled substance is located may establish the defendant's constructive possession of the controlled substance.

Sergeant Tucker testified that he was aware prior to the execution of the warrant that the northwest bedroom was the defendant's. Jensen informed Gentleman that the cigarettes were in *her* bedroom on a stereo or entertainment center. The cigarettes were found on the entertainment center in the northwest bedroom, which is where the cocaine and methamphetamine and evidence of cocaine distribution were found. The defendant further informed Gentleman that she had been living in Hansen's residence for a couple of weeks. Female clothing was found only in the northwest bedroom, and male clothing was discovered solely in the southeast bedroom. Correspondence bearing Jensen's name was found in the northwest bedroom. The failure to make a proper objection to the admission of Lyle's testimony regarding the address of the correspondence found in the northwest bedroom may have been a matter of trial strategy. Jensen states in her brief that "[t]he box of letters is consistent with the Defendant's theory of the case that she stored some things at Kevin Hansen's house but did not live there." Brief for appellant at 16. However, the jury could have found that the correspondence was further evidence of a nexus between Jensen and the premises where the drugs were found. While the search of the premises was underway, Jensen received a telephone call at that residence. The defendant was carrying a large amount of cash in six envelopes, with one envelope bearing the term "crank" on it.

When the evidence is viewed in the light most favorable to the State, from the circumstantial evidence outlined above, the jury could find beyond a reasonable doubt that Jensen was residing at the premises and that she, therefore, knowingly or intentionally possessed with intent to manufacture, distribute, deliver, or dispense cocaine and knowingly or intentionally possessed methamphetamine.

At trial, Jensen claimed that she lived elsewhere, that Hansen's girl friend resided in his home, that Jensen was about to use Hansen's shower when the police appeared, that she merely stored items at Hansen's residence, that the money found in her purse was obtained through legal means, that the money found in the envelope with the word "crank" written on it was obtained by selling automotive parts, and that she kept the currency on her person because of her fear of having money in a bank attached by creditors. We reiterate that this court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those questions of fact were for Jensen's jury to resolve, which it did in favor of the State.

The district court's judgment and sentences are affirmed.

AFFIRMED.

LOGAN RANCH, KARG PARTNERSHIP, A PARTNERSHIP, APPELLANT AND CROSS-APPELLEE, V. FARM CREDIT BANK OF OMAHA, APPELLEE AND CROSS-APPELLANT.

472 N.W.2d 704

Filed August 2, 1991. No. 89-338.

1. **Summary Judgment.** Summary judgment is properly granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Proof.** After the movant has shown facts entitling the movant to summary judgment as a matter of law, the opposing party has the burden of presenting evidence to show an issue of material fact which prevents a

judgment as a matter of law.

3. **Summary Judgment: Appeal and Error.** In an appellate review of a summary judgment, the court reviews the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Contracts: Intent.** A definite proposal and an unconditional and absolute acceptance thereof are necessary to establish an express contract. Furthermore, it is essential that the minds of the parties meet at every point and that nothing be left open for future arrangement for a binding contract to exist.
5. **Contracts: Offers to Buy or Sell.** An acceptance of an offer must be an unconditional acceptance of the offer as made, otherwise there is no contract formed.
6. _____: _____. Where an acceptance differs from an offer and is coupled with any condition that varies or adds to the offer, it is not an acceptance; rather, it is a counteroffer.
7. _____: _____. Where one to whom an offer has been made makes a counteroffer of different terms and conditions, the counteroffer is in reality a rejection of the original offer.
8. _____: _____. A purchase agreement with a condition connected to the acceptance is not enforceable.
9. _____: _____. A fundamental concept in the law of contracts is that there must be both an offer and an acceptance to create a binding contract.
10. **Agriculture: Federal Acts: Actions.** The Agricultural Credit Act of 1987 contains no implied private right of action to enforce its provisions.
11. **Judgments: Appeal and Error.** If a trial court arrives at a correct result even though it uses a reason different from that expressed by the Supreme Court, its judgment will still be upheld.

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

Richard E. Gee for appellant.

Tim W. Thompson, of Kelley, Scritsmier, Moore & Byrne, P.C., for appellee.

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

HASTINGS, C.J.

Logan Ranch, Karg Partnership, a partnership (Logan), appeals the granting of summary judgment to the Farm Credit Bank of Omaha (FCB). In its first cause of action, Logan brought suit for specific performance of a purchase agreement. Pursuant to 12 U.S.C. § 2219a (1988) of the Agricultural Credit Act of 1987 (Act), FCB sent Logan notice of its right of first

refusal along with a purchase agreement containing the terms which FCB would accept. Logan altered the purchase agreement and delivered it to FCB. Logan's offer was rejected. FCB attempted to sell the property, but this lawsuit intervened. FCB then leased the property to the prospective purchasers. In its second cause of action, Logan alleged it had a right of first refusal to lease under the Act. The district court granted FCB's motion for summary judgment.

Summary judgment is properly granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such facts and that the moving party is entitled to judgment as a matter of law. *Eastroads, Inc. v. City of Omaha*, 237 Neb. 837, 467 N.W.2d 888 (1991); *Tuttle & Assoc. v. Gendler*, 237 Neb. 825, 467 N.W.2d 881 (1991). After the movant has shown facts entitling the movant to summary judgment as a matter of law, the opposing party has the burden of presenting evidence to show an issue of material fact which prevents a judgment as a matter of law. *Eastroads, Inc. v. City of Omaha, supra*; *Tuttle & Assoc. v. Gendler, supra*. In an appellate review of a summary judgment, the court reviews 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. *First Nat. Bank v. Chadron Energy Corp.*, 236 Neb. 199, 459 N.W.2d 736 (1990).

The section of the Act concerning the right of first refusal states in pertinent part:

> (a) General rule
>
> *Agricultural real estate* that is *acquired by an institution of the System as a result of a loan foreclosure or a voluntary conveyance by a borrower* (hereinafter in this section referred to as the "previous owner") *who*, as determined by the institution, *does not have the financial resources to avoid foreclosure* (hereinafter in this section referred to as "acquired real estate") *shall be subject to the right of first refusal of the previous owner to repurchase or lease the property*, as provided in this section.
>
> (b) Application of right of first refusal to sale of property

(1) Election to sell and notification

Within 15 days after an institution of the System first elects to sell acquired real estate, or any portion of such real estate, *the institution shall notify the previous owner by certified mail of the owner's right—*

(A) *to purchase the property at the appraised fair market value of the property*, as established by an accredited appraiser; or

(B) *to offer to purchase the property at a price less than the appraised value.*

(2) Eligibility to purchase

To be eligible to purchase the property under paragraph (1), the *previous owner must, within 30 days after receiving the notice required* by such paragraph, *submit an offer to purchase the property.*

(3) Mandatory sale

An institution of the System receiving an offer from the previous owner to purchase the property at the appraised value shall, within 15 days after the receipt of such offer, accept such offer and sell the property to the previous owner.

. . . .

(5) Rejection of offer of previous owner

(A) Duties of institution

An institution of the System that rejects an offer from the previous owner to purchase the property at a price less than the appraised value may not sell the property to any other person—

(i) at a price equal to, or less than, that offered by the previous owner; or

(ii) on different terms and conditions than those that were extended to the previous owner,

without first affording the previous owner an opportunity to purchase the property at such price or under such terms and conditions.

(B) Notice

Notice of the opportunity in subparagraph (A) shall be provided to the previous owner by certified mail, and the previous owner shall have 15 days in which to submit an

offer to purchase the property at such price or under such terms and conditions.

(c) Application of right of first refusal to leasing of property

(1) Election to lease and notification

Within 15 days after an institution of the System first elects to lease acquired real estate, or any portion of such real estate, the *institution shall notify the previous owner by certified mail of the owner's right—*

(A) *to lease the property at a rate equivalent to the appraised rental value of the property*, as established by an accredited appraiser; *or*

(B) *to offer to lease the property at a rate that is less than the appraised rental value of the property.*

(2) Eligibility to lease

To be eligible to lease the property under paragraph (1), the *previous owner must, within 15 days after receiving the notice required by such paragraph, submit an offer to lease the property.*

(3) Mandatory lease

An institution of the System receiving an offer from the previous owner to lease the property at a rate equivalent to the appraised rental value of the property shall, *within 15 days after the receipt of such offer, accept such offer and lease the property to the previous owner* unless the institution determines that the previous owner—

(A) does not have the resources available to conduct a successful farming or ranching operation; or

(B) cannot meet all of the payments, terms, and conditions of such lease.

. . . .

(e) Term or condition

For the purposes of this section, financing by a System institution shall not be considered to be a term or condition of a sale of acquired real estate.

(f) Financing

Notwithstanding any other provision of this section, a System institution shall not be required to provide financing to the previous owner in connection with the

sale of acquired real estate.

(g) Mailing of notice

Notwithstanding any other provision of this section, each certified mail notice requirement in this section shall be fully satisfied by mailing one certified mail notice to the last known address of the previous owner.

(Emphasis supplied.) 12 U.S.C. § 2219a.

Logan is a partnership consisting of three equal partners: Gerald J. Karg, Victor W. Karg, and Albert E. Karg. In 1984, Logan deeded tracts of land to FCB, which was at that time known as The Federal Land Bank. The transfer of the real estate was part of a deed in lieu of foreclosure arrangement between FCB and Logan. FCB undertook efforts to sell the property immediately. The property was listed with a realtor for sale. In 1986, the real estate was leased on an annual basis to Gene Welsh.

In 1988, FCB and Welsh negotiated the purchase of the property. At least some negotiations for the purchase had taken place prior to March 1988. While the negotiations were taking place, the Act became law. Pursuant to the Act, FCB gave the "previous owner," Logan, notice that it could purchase the subject property at its appraised value. The notice was sent by certified mail to Logan on March 3, 1988, at Logan's standard post office address. The notice included a purchase agreement setting forth the terms and conditions that FCB would accept to sell the property back to the previous owner. The notice indicated that the offer would have to be received on the enclosed FCB purchase agreement, Form 6036, within 30 days. The certified mailing was picked up and signed for on March 15, 1988, by Karen Parish in the space provided for the agent. Parish was the secretary for the partnership as well as for Gerald Karg. Gerald Karg testified that he did not actually open the letter until March 21, 1988.

On March 8, 1988, an offer to purchase the property was presented to FCB by Gene and Ann Welsh. The offer to purchase was accepted by FCB on March 8, 1988, subject to the requirements of the Act.

Albert and Victor Karg returned the purchase agreement to FCB on April 15 at approximately 4:55 p.m. David Leggott, the

FCB officer in charge, was also requested by the Kargs to pick up a loan commitment from an outside lender, which was Telefaxed that afternoon. Only the second page of the loan commitment was received through the Telefax machine.

Leggott reviewed the purchase agreement and determined that it was untimely and contained terms and conditions which were different from those originally sought. Leggott testified that pursuant to the Act, the 30-day period would have expired on April 14. Leggott started the 30-day period on the day after the certified letter was signed for by Parish.

The terms which differed from the original offer were (1) the offer was subject to receiving financing and (2) the offer was made by three individuals, as opposed to the previous owner. The three individuals who signed the offer were the three partners of the previous owner, Logan. The individuals did not indicate that they were signing on behalf of the partnership. These same three individuals were members of several other partnerships that had previously dealt with FCB.

On April 18, 1988, Leggott sent another letter by certified mail to the same address, informing Logan that the offer was rejected. The certified letter was again picked up and signed for by Parish.

Leggott testified that if the purchase agreement submitted by Logan had complied with the terms of the notice, FCB would have sold the property to Logan. There was a clause in the purchase agreement with the Welshes to allow the sale to Logan within the confines of the Act.

After the offer had been rejected, FCB intended to complete its sale with the Welshes and also with a William and a Sara Morgan. This lawsuit intervened, and thus the property could not be sold. FCB opted to lease the property to the Welshes and Morgans because of the commitment to sell the property to the Welshes, the lateness of the season, and because the Welshes had already undertaken the ground preparation for the planting of the 1988 crop. As a result, Logan was not offered a lease on the property.

FCB moved for summary judgment in that no genuine issue of material fact existed and thus it was entitled to summary judgment as a matter of law. FCB alleged in its motion that

notice as required by the Act was given and Logan failed to timely respond and that the response when received contained terms different from those proposed by FCB. On the second cause of action, FCB contended that the property would have been sold rather than leased had Logan not initiated this lawsuit.

The district court found that as a matter of law the terms and conditions submitted by Logan were materially different from those stated in the notice, in that the offer was contingent upon financing and was not submitted by the previous owner. The district court also held that but for this lawsuit, FCB would not have leased the property and the sale of the property would have been complete. The district court further stated that it was not clear as a matter of law that Parish had actual or apparent authority to pick up certified mail. Therefore, the court did not make a finding as to whether the offer was timely made by Logan.

Plaintiff claims that the district court erred (1) in finding that the terms of the offer submitted by Logan were materially different from those stated in the notice; (2) in finding that the form offer prepared by FCB was not submitted by the "previous owner," Logan Ranch, Karg Partnership, a partnership, when the form was signed by the partners, Gerald Karg, Albert Karg, and Victor Karg, and intended by them to be an offer by the partnership; (3) in interpreting the Act to excuse FCB from giving Logan notice of its intention to lease the property because Logan filed this suit; and (4) in granting FCB's motion for summary judgment and dismissing the second amended petition.

Defendant in its cross-appeal alleges that the district court erred in concluding that it was not clear as a matter of law that the secretary for Logan had actual or apparent authority to pick up certified mail and direct it to the partnership and to sign the return receipt.

A definite proposal and an unconditional and absolute acceptance thereof are necessary to establish an express contract. Furthermore, it is essential that the minds of the parties meet at every point and that nothing be left open for future arrangement for a binding contract to exist. *Satellite*

Dev. Co. v. Bernt, 229 Neb. 778, 429 N.W.2d 334 (1988); *Rybin Investment Co., Inc. v. Wade*, 210 Neb. 707, 316 N.W.2d 744 (1982). See, also, *Hecker v. Ravenna Bank*, 237 Neb. 810, 468 N.W.2d 88 (1991).

The terms set forth by FCB in the purchase agreement pertinent to this discussion are that (1) the price of the real estate will be $988,500, with an earnest money deposit of $98,850; (2) the balance of the purchase price must be paid when the deed is delivered; and (3) closing will take place on or before April 15, 1988.

Logan returned the purchase agreement to FCB on April 15, 1988. Logan altered the agreement, adding the following conditions and terms: (1) a balance of $150,000 will be paid in cash or by certified check when the deed is delivered, conditional upon Logan's ability to obtain a loan in the amount of at least $739,650 from Nor-West Trust, and (2) the application for the loan is to be made within 30 days of acceptance of the offer, with the offer to become null and void if such loan commitment is not received within 60 days.

In determining if a valid contract exists, first the purchase agreement sent by FCB to Logan must be examined, as must the purchase agreement sent by Logan to FCB.

The Restatement (Second) of Contracts § 58 at 144 (1981) states: "An acceptance must comply with the requirements of the offer as to the promise to be made or the performance to be rendered." An acceptance that is materially different does not comply with the requirements of the offer.

In *Rybin Investment Co., Inc. v. Wade, supra*, this court found that acceptance of an offer must be an unconditional acceptance of the offer as made, otherwise there is no contract formed. Where the acceptance differs from the offer and is coupled with any condition that varies or adds to the offer, it is not an acceptance; rather, it is a counteroffer. See Restatement (Second) of Contracts § 59 (1981). (The Restatement states that "[a] reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer." *Id.* at 145.)

The court in *Rybin Investment Co.* continued, finding that

where one to whom an offer has been made makes a counteroffer of different terms and conditions, the counteroffer is in reality a rejection of the original offer. See, *Griggs v. Oak*, 164 Neb. 296, 82 N.W.2d 410 (1957); *Farmers Union Fidelity Ins. Co. v. Farmers Union Co-op. Ins. Co.*, 147 Neb. 1093, 26 N.W.2d 122 (1947).

In *Anderson v. Stewart*, 149 Neb. 660, 32 N.W.2d 140 (1948), this court found that a purchase agreement with a condition connected to the acceptance was not enforceable. The buyer sent back an acceptance of the offer which stated that the seller had to send the deed to a certain bank in order to receive the purchase price. The court held that this was not an unconditional acceptance. The court stated:

> "The acceptance of an offer to buy or sell real estate must be an unconditional acceptance of the offer as made; otherwise no contract is formed. . . . If the acceptance differs from the offer or is coupled with any condition that varies or adds to the offer, it is not an acceptance, but is a counterproposition. . . ."

Anderson, supra at 663-64, 32 N.W.2d at 142. See, also, 1 A. Corbin, Corbin on Contracts §§ 89 and 90 (1963). The court found that the acceptance was not unconditional in that it required the offeror to perform duties other than those contemplated by the offeror at the time the offer was made.

If the purchase agreement sent by FCB was an offer, the offer was never unconditionally accepted by Logan. Logan did not accept the terms of the offer and in fact added new terms to the offer. The new terms included acceptance conditional upon financing, allowing Logan up to 60 more days to attain financing. The offer was not unconditionally accepted by Logan. The new terms added by Logan were in essence a counteroffer by Logan to FCB. A counteroffer acts as a rejection of the original offer. Logan rejected the offer of FCB to purchase the property; therefore, the remedy of specific performance on the purchase agreement is not available.

If, instead, Logan is requesting specific performance of the purchase agreement as amended by Logan, the remedy of specific performance on this purchase agreement is also not available. The counteroffer made by Logan was never accepted

by FCB, as evidenced by the testimony of Leggott and the letter rejecting the offer sent to Logan on April 18, 1988. A fundamental concept in the law of contracts is that there must be both an offer and an acceptance to create a binding contract. *Joseph Heiting & Sons v. Jacks Bean Co.*, 236 Neb. 765, 463 N.W.2d 817 (1990). Since there was no acceptance of the counteroffer made by Logan, there is no legally enforceable contract.

Logan argues that FCB did not comply with the Act in rejecting its offer. Logan never asserted in its second amended petition that FCB failed to comply with the Act and it is not necessary to address this issue in resolving this case.

In Logan's second assignment of error, it alleges that the district court erred in finding that the offer was not submitted by the "previous owner," Logan. The offer was submitted by Gerald Karg, Victor Karg, and Albert Karg, the three partners of Logan. There was no indication on the face of the purchase agreement that the offer was submitted on behalf of the partnership.

Having concluded that the counteroffer, whether made by the partnership or the individual partners, was a rejection of the offer made by FCB, we find there was no contract, was no right of specific performance on the part of Logan, and is no necessity for this court to discuss this assignment of error.

Logan's third assignment of error alleges that the court erred in interpreting the Act to excuse FCB from giving Logan notice of the right of first refusal to lease the property because it filed this lawsuit. In that connection, Logan had prayed regarding its second cause of action that it have judgment against FCB in an amount equal to the lost economic benefits Logan sustained as the result of the failure to notify Logan of its right to lease said property.

FCB had entered into a purchase agreement with the Welshes to sell the real estate in question. The purchase agreement was subject to Logan's right of first refusal. When Logan's offer was rejected, the parties began to finalize the transaction. This lawsuit was filed, thereby clouding the title. The purchase was not completed because of this lawsuit; therefore, FCB leased the land to the intended purchasers. FCB at all times intended

to sell the property, not to lease the property. FCB was forced to lease the property, since the property could not be sold.

The Act requires FCB to send a notice of the right of first refusal to the previous owner when FCB decides to lease acquired real estate. 12 U.S.C. § 2219a(c). FCB did not send such a notice or provide Logan with the right of first refusal to lease the real estate.

This claim may be disposed of quite simply as a matter of law. In *Zajac v. Federal Land Bank of St. Paul*, 909 F.2d 1181 (8th Cir. 1990), the court, sitting en banc, held that the Agricultural Credit Act did not create an implied right of action on behalf of farmer borrowers. In so deciding the U.S. Court of Appeals for the Eighth Circuit joined the U.S. Courts of Appeals for the Ninth and Tenth Circuits, which had previously held that the Act does not imply a private right of action. See, *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172 (9th Cir. 1989), *cert. denied* 493 U.S. 1057, 110 S. Ct. 867, 107 L. Ed. 2d 951 (1990); *Griffin v. Federal Land Bank of Wichita*, 902 F.2d 22 (10th Cir. 1990).

The background facts in *Zajac* are to be found in the dissenting opinion of Senior Circuit Judge Heaney.

> In 1980, the Zajacs borrowed $250,000 from the Bank. By 1986, they were unable to continue making payments, and the Bank commenced foreclosure proceedings in state court. The Zajacs raised a number of defenses to the action. On December 19, 1987, the state court issued a decision in favor of the Bank.
>
> The Bank delayed entry of its state court foreclosure judgment to afford the Zajacs an opportunity to restructure their loan under sections 102 and 106 of the Agricultural Credit Act of 1987, 12 U.S.C. §§ 2202 and 2202a.
>
> The Zajacs submitted an application for restructuring, which was considered but denied by the Bank on April 15, 1988 . . . . Judgment of foreclosure was entered by the state court on May 6, 1988.
>
> The Zajacs appealed the judgment of foreclosure to the Minnesota Supreme Court and moved for a stay of judgment. The motion was denied, and the trial court was

> affirmed.
>
> At that point, the Zajacs asked the United States District Court to enjoin the Bank from conducting a sheriff's sale on their land until the Bank had complied with certain borrowers' rights provisions of the Act, including the provision mandating an independent appraisal. The district court denied the Zajacs' motion after hearing. It held that there is no express or implied private right of action for failure to comply with the borrowers' rights provisions of the Act, that the Act did not require an independent appraisal of the Zajacs' land, that the Bank's decision to deny restructuring was a commercial banking decision, and that the relief requested would violate the Federal Anti-Injunction Act, 22 U.S.C. § 2283.

909 F.2d at 1184-85 (Heaney, J., dissenting).

The majority opinion, relying on *Harper* and *Griffin* (the former leaning heavily on *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975)), concluded: " 'Congress intended administrative review to be the exclusive remedy' for violations of the Act." 909 F.2d at 1183. The majority also concluded:

> Having carefully considered all of the Zajacs' arguments, we agree "the Ninth Circuit's analysis in *Harper v. Federal Land Bank of Spokane* is correct." *Griffin*, 902 F.2d at 24. We thus join the Ninth and Tenth Circuits in holding there is no implied private right of action available to enforce the Act, and affirm the district court.

909 F.2d at 1183.

In *Euerle Farms v. Farm Credit Services of St. Paul*, 928 F.2d 274 (8th Cir. 1991), the court rejected the plaintiffs' contention that its holding in *Zajac* was limited, stating:

> Appellants, a large group of individual and corporate farmers, appeal from the district court's dismissal of their suit to force appellees to comply with the Agricultural Credit Act of 1987, 12 U.S.C. §§ 2001 to 2279aa-14 (1988).
>
> In *Zajac v. Federal Land Bank*, 990 F.2d 1181, 1182-83 (8th Cir.1990) (en banc), this court held the Act does not

> create a private cause of action. We now reject the appellants' argument that *Zajac* is limited to section 2202a of the Act. We see no reason to treat individual sections of the Act differently. Because the appellants' federal claims were dismissed, the district court also properly dismissed the pendent state-law claims.

928 F.2d at 276.

Although the trial court sustained FCB's motion for summary judgment on other grounds, we find that it should be sustained because the Act creates no private cause of action. If the trial court arrives at the correct result even though it uses a reason different from that expressed by this court, its judgment will still be upheld. See *Staman v. Yeager & Yeager, ante* p. 133, 469 N.W.2d 532 (1991).

FCB's cross-appeal asserts that the district court should have concluded as a matter of law that Parish, the secretary for Logan, had actual or apparent authority to pick up certified mail and direct it to the partnership and to sign the return receipt. In view of our disposition of Logan's appeal, it is unnecessary for us to consider the cross-appeal.

The judgment of the district court is affirmed.

AFFIRMED.

SHANAHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. ANDREW TUTTLE, APPELLANT.

472 N.W.2d 712

Filed August 2, 1991. No. 89-1148.

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. **Verdicts: Appeal and Error.** On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient

probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

3. **Intent: Words and Phrases.** The intent involved in conduct is a mental process and may be inferred from the conduct itself, the actor's language in reference to the conduct, and the circumstances surrounding an incident.
4. **Criminal Law: Intent: Proof: Circumstantial Evidence.** When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence.
5. **Circumstantial Evidence: Words and Phrases.** "Circumstantial evidence" means facts or circumstances, proved or known, from which existence or nonexistence of another fact may be logically inferred or deduced through a rational process.
6. **Criminal Law: Due Process: Pretrial Procedure.** A defendant in a criminal proceeding has no general due process right to discovery.
7. **Criminal Law: Pretrial Procedure.** Discovery in a criminal case is generally, and in the absence of a constitutional requirement, controlled by either a statute or court rule.
8. **Trial: Pretrial Procedure: Appeal and Error.** Unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion in the discovery ruling.
9. **Pretrial Procedure: Depositions.** A defendant is not entitled, as a matter of right, to a deposition pursuant to Neb. Rev. Stat. § 29-1917(1) (Reissue 1989).
10. **Criminal Law: Pretrial Procedure: Depositions.** Neb. Rev. Stat. § 29-1917 (Reissue 1989) specifies the conditions for obtaining a deposition by either the State or defendant in a criminal proceeding, namely, (1) the prospective deponent's testimony may be material or relevant to an issue in the trial or (2) the deponent's testimony may assist the parties in preparing for trial of their respective cases.
11. **Indictments and Informations: Witnesses: Pretrial Procedure.** Endorsement of a witness' name on an information does not render the prospective witness' testimony automatically available in the discovery process, because mere designation of a State's witness does not establish materiality or relevance of the witness' testimony or its helpfulness in preparation of a criminal case for trial.
12. **Criminal Law: Pretrial Procedure: Depositions: Proof.** To obtain a deposition in a criminal proceeding, a party seeking a deposition must make a factual showing to the court that the deponent's testimony alternatively satisfies the statutory conditions expressed in Neb. Rev. Stat. § 29-1917(1) (Reissue 1989).

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

Jeffrey M. Doerr for appellant.

Don Stenberg, Attorney General, Mark D. Starr, and Wynn Clemmer for appellee.

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

SHANAHAN, J.

A jury in the district court for Knox County convicted Andrew Tuttle of burglary, which is a violation of Neb. Rev. Stat. § 28-507(1) (Reissue 1989) and a Class III felony. The district court sentenced Tuttle to imprisonment for a term of 20 to 30 months, with credit for custodial time pending disposition of Tuttle's case.

In his three assignments of error, Tuttle claims that the evidence is insufficient to sustain his conviction, he was denied the due process right to a fair trial when the court rejected his motion to take depositions of all witnesses listed on the State's information, and the sentence imposed is excessive.

After Tuttle's case was argued in the Appellate Division of the District Court and subsequent to our review of the disposition recommended by the appellate division, we granted reargument on the question of objective standards for obtaining depositions as discovery authorized by Neb. Rev. Stat. § 29-1917 (Reissue 1989), a part of Nebraska procedure applicable to criminal cases.

BACKGROUND FOR BURGLARY

On Monday, January 9, 1989, Deputy Sheriff Arthur Denny received a telephone call from Kim Keeble, an employee at the Santee Sioux Tribal Building, about a computer, typewriter, and payroll disks which were missing from the building. During his investigation, Denny found several footprints in the snow at an uncommonly traveled area near a window of the tribal building. Below the window lay a damaged screen that had been fastened to the window on January 6, the Friday before the break-in. On January 13, Denny recovered the typewriter and computer from an outside toilet located a few blocks from the tribal building, but the payroll disks were never found.

According to 13-year-old Jared McBride, Tuttle, who was 21 years of age, asked him on January 7 to help Tuttle and three others, Bryan Frazier, Nathan Ferris, and Eric DeCory, "break into" the tribal building. Near midnight on January 7, when the quintet arrived at the tribal building, Tuttle "ripped a screen"

off a window, and through the open window pushed McBride and DeCory, who then opened a door for Tuttle and Frazier. Outside the building, Ferris was stationed as a lookout. After those inside had "grabbed" the computer and typewriter, Tuttle carried the computer to the outdoor toilet. None of the intruders on January 7 had permission to enter the Santee Sioux Tribal Building or remove any property from the building.

On April 14, 1989, Tuttle was charged with burglary under § 28-507(1), which states: "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."

MOTION FOR DEPOSITIONS

On May 4, Tuttle, through his lawyer, filed a "Motion for Leave to Proceed Informa Pauperis to Take Depositions" of the seven persons listed as witnesses on the information, namely, McBride, Keeble, Frazier, DeCory, Lance Brandt, and Deputy Sheriffs Don Henery and Denny. In his motion, Tuttle alleged that each of the seven witnesses was "material and relevant to the guilt or punishment of [Tuttle]."

At a May 15 hearing on the motion for depositions, Tuttle's lawyer stated that the motion was based on § 29-1917, which in pertinent part provides:

> (1) . . .[A]t any time after the filing of an indictment or information in a felony prosecution, the prosecuting attorney or the defendant may request the court to allow the taking of a deposition of any person other than the defendant who may be a witness in the trial of the offense. The court may order the taking of the deposition when it finds the testimony of the witness:
>
> (a) May be material or relevant to the issue to be determined at the trial of the offense; or
>
> (b) May be of assistance to the parties in the preparation of their respective cases.
>
> . . . .
>
> (4) A deposition taken pursuant to this section may be used at the trial by any party solely for the purpose of

> contradicting or impeaching the testimony of the deponent as a witness.

When the court inquired about necessity of the seven depositions, Tuttle's lawyer responded:

> I believe all witnesses we are requesting to depose are material to the case of the defendant . . . .
>
> . . . .
>
> . . . Kim Keeble . . . works at the [tribal building] which was the place the robbery apparently was perpetrated. [The other witnesses] either have given written statements or are apparently implicated in the offense, although apparently [have] not been charged at the present time.
>
> . . . .
>
> . . . [A]ll those individuals . . . who either have . . . [given] a written statement . . . or who . . . have not made written statements but who have been named in the written statements given by other individuals certainly are extremely material and relevant to this particular case.

When the court asked why Tuttle's lawyer could not "interview those people," the lawyer explained: "Bryan Frazier at the present time I don't know what his whereabouts would be . . . . He's unavailable. . . . [B]ut if I had an order allowing me to [take his deposition] if he is available at some later time it would save some time coming back later and requesting permission." Tuttle's lawyer told the court that he had not attempted to interview Brandt, DeCory, or McBride and that, concerning individuals who had given statements or who were implicated in those statements, "it's very important" that Tuttle "be allowed to question them under oath prior to the trial in order to get . . . their version of the statements before trial."

The State argued that Tuttle was required "to make some sort of showing . . . that there's something going to be learned in these depositions and that we're not just engaged in busy work at this point" and emphasized that the State had given Tuttle's lawyer all police reports and written statements, "everything that the State has," regarding the witnesses listed on the information.

Before ruling on Tuttle's motion, the court stated, "I'm just not going to order wholesale depositions," but sustained

Tuttle's motion for the deposition of Keeble. The court then overruled the motion for depositions of the other named witnesses and stated that the ruling was "without prejudice to your coming back and showing special need." After the May 15 hearing concerning depositions, Tuttle's lawyer did not show the court any "special need" to take the depositions of the other six witnesses listed on the information.

In Tuttle's trial, the following testified in the State's case in chief: McBride and Deputies Denny and Henery. Brandt, DeCory, Frazier, and Keeble did not testify in Tuttle's trial. Several defense witnesses testified that Tuttle was not involved in the burglary and that Tuttle's older brother, Rodney, served as a lookout during the burglary while Frazier, who could not be located by authorities, actually entered the building and carried off the equipment. A jury found Tuttle guilty of burglary.

SUFFICIENCY OF EVIDENCE

> 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. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990); *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (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. Zitterkopf, supra*; *State v. Reynolds, supra*.

"The intent involved in conduct is a mental process and may

be inferred from the conduct itself, the actor's language in reference to the conduct, and the circumstances surrounding an incident." *State v. Pierce*, 231 Neb. 966, 971, 439 N.W.2d 435, 440 (1989). Accord *State v. Swigart*, 233 Neb. 517, 446 N.W.2d 216 (1989). "When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence." *State v. Hoffman*, 227 Neb. 131, 140, 416 N.W.2d 231, 237 (1987). Accord, *State v. Pierce, supra*; *State v. Swigart, supra*. " 'Circumstantial evidence' means facts or circumstances, proved or known, from which existence or nonexistence of another fact may be logically inferred or deduced through a rational process." *State v. Jasper*, 237 Neb. 754, 763, 467 N.W.2d 855, 862 (1991). Accord, *State v. Twohig, ante* p. 92, 469 N.W.2d 344 (1991); *State v. Loveless*, 234 Neb. 463, 451 N.W.2d 692 (1990). In reference to § 28-507, the statute which defines burglary, "[i]ntent sufficient to support a conviction for burglary may be inferred from the facts and circumstances surrounding an illegal entry into improvements on real estate." *State v. Vaughn*, 225 Neb. 38, 41, 402 N.W.2d 300, 302 (1987).

Evidence established that on January 7, 1989, Tuttle "ripped a screen" from a window of the tribal building and demonstrated that he forcibly entered the building after McBride and DeCory were pushed through the window and provided entry into the building for Tuttle and Frazier. Also, Tuttle's conduct in asking McBride to help him "break into" the tribal building and the fact that Tuttle left the tribal building carrying a computer indicate that Tuttle, when he entered the tribal building, had the intent to steal property of value located inside the building. Thus, the evidence produced at Tuttle's trial, construed most favorably to the State, showed that Tuttle "willfully, maliciously, and forcibly" broke into and entered the tribal building "with intent to steal property of any value." § 28-507(1). Although defense witnesses testified that Tuttle was not involved in the burglary, this court does not reweigh or resolve such conflicts in evidence or pass upon witness credibility. Therefore, we conclude that the evidence is sufficient to sustain Tuttle's burglary conviction.

DENIAL OF MOTION TO TAKE DEPOSITIONS

Tuttle claims that the district court's refusal to permit Tuttle's obtaining depositions, authorized by § 29-1917, denied Tuttle's due process right to a fair trial.

A defendant in a criminal proceeding has no general due process right to discovery, for, as expressed by the U.S. Supreme Court in *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977):

> There is no general constitutional right to discovery in a criminal case, and *Brady* [*v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963),] did not create one; as the Court wrote recently, "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . ." *Wardius v. Oregon*, 412 U.S. 470, 474 [93 S. Ct. 2208, 37 L. Ed. 2d 82] (1973).

See, also, *State v. Blair*, 230 Neb. 775, 433 N.W.2d 518 (1988).

Consequently, discovery in a criminal case is generally, and in the absence of a constitutional requirement, controlled by either a statute or court rule. Therefore, unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion in the discovery ruling. See, *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990); *State v. Blair, supra*; *State v. Pierce and Wells*, 215 Neb. 512, 340 N.W.2d 122 (1983).

Since obtaining depositions in a criminal case is governed, generally, by law or procedural rule in a particular jurisdiction, we have examined the law in other jurisdictions, only to find that rules for discovery are as variable as there are various jurisdictions. For instance, Fed. R. Crim. P. 15 states:

> Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition . . . .

See, *United States v. Cutler*, 806 F.2d 933 (9th Cir. 1986) (Fed. R. Crim. P. 15 is unavailable for a discovery deposition, but may be used if the witness is unavailable for trial); *United States*

v. Steele, 685 F.2d 793 (3d Cir. 1982) (discovery depositions are unavailable under Fed. R. Crim. P. 15); *United States v. Adcock*, 558 F.2d 397 (8th Cir. 1977) (principal objective of Fed. R. Crim. P. 15 is preservation of evidence for trial, not pretrial discovery). Some jurisdictions have a discovery rule somewhat similar to Fed. R. Crim. P. 15; for example: Ala. Code § 12-21-260 (1986) (defendant may take deposition of a witness who, on account of infirmity or sickness, is unable to attend court; who resides out of the state or more than 100 miles from the place of trial; who is absent from the state; or when the defense, in whole or in part, depends exclusively on the testimony of the witness to be deposed); Ariz. R. Crim. P. 15.3 (depositions available by court order to preserve testimony or obtain discovery from an uncooperative witness); Colo. R. Crim. P. 15(a) (prospective deponent unable to attend trial or whose deposition is necessary to prevent injustice); and Ga. Code Ann. § 24-10-130 (1982) (court-ordered deposition of witness who is in imminent danger of death or threatened with death or great bodily harm as the result of the witness' status as a potential witness in a criminal trial or proceeding). Some jurisdictions authorize a defendant's obtaining depositions as a matter of right. See Fla. R. Crim. P. 3.220(h): "At any time after the filing of the indictment or information the defendant may take the deposition upon oral examination of any person who may have information relevant to the offense charged." See, also, Vt. R. Crim. P. 15(a): "A defendant or the state, at any time after the filing of an indictment or information, may take the deposition of a witness . . . ."

Consequently, we redirect our attention to § 29-1917(1), which contains the provision: "The court *may* order the taking of the deposition *when it finds* the testimony of the witness [meets certain statutorily specified qualifications.]" (Emphasis supplied.)

Since § 29-1917(1) uses the word "may" in reference to a court's order for a deposition, and since some basis must be shown to the court regarding the particular deposition sought, a requirement implicit in the phrase "when [the court] finds" that a witness' testimony meets certain qualifications specified in the statute, we conclude that a defendant is not entitled, as a

matter of right, to a deposition pursuant to § 29-1917(1).

In reference to general discovery in criminal cases, Neb. Rev. Stat. §§ 29-1912 et seq. (Reissue 1989), we have stated the cardinal rule: "If the information may affect the outcome of the trial, then it is a proper subject for discovery." *State v. Brown*, 214 Neb. 665, 675, 335 N.W.2d 542, 547 (1983). Section 29-1917 specifies the conditions for obtaining a deposition by either the State or defendant in a criminal proceeding, namely, (1) the prospective deponent's testimony may be material or relevant to an issue in the trial or (2) the deponent's testimony may assist the parties in preparing for trial of their respective cases. As we expressed in *State v. Brown, supra* at 674-75, 335 N.W.2d at 547: "Information is material in the preparation of a defense if there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal." Since a deposition is not a matter of right under § 29-1917(1), endorsement of a witness' name on an information does not render the prospective witness' testimony automatically available in the discovery process, because mere designation of a State's witness does not establish materiality or relevance of the witness' testimony or its helpfulness in preparation of a criminal case for trial. Hence, to obtain a deposition in a criminal proceeding, a party seeking a deposition must make a factual showing to the court that the deponent's testimony alternatively satisfies the statutory conditions expressed in § 29-1917(1). Without a factual showing presented to the trial court, as required by § 29-1917(1), there is little basis for an appellate review to determine whether the trial court's ruling on a discovery question is an abuse of discretion. We realize that a defendant's showing probably does not require full disclosure on a theory of defense. Somewhere short of full disclosure, or disclosure which may prejudice or seriously jeopardize a defense, a defendant must, nevertheless, present some showing with a factual basis for a deposition under § 29-1917(1).

In Tuttle's case, although there were general comments and conclusions regarding desirability of obtaining some testimony which was "very important" or "material," Tuttle's lawyer

made no factual showing which indicated materiality or relevance of any deponent's testimony or which suggested some assistance that might be gained in preparing Tuttle's defense. Would a deponent's testimony go to the witness' credibility, uncover admissible evidence, or aid in preparing witnesses for trial or corroborating testimony of defense witnesses? The district court noted the deficiency in Tuttle's showing and denied the discovery motion "without prejudice to [Tuttle's] coming back and showing special need." This gave Tuttle the opportunity to review the investigative material supplied by the State, interview witnesses in the light of that information, and determine exactly whether a deposition would be necessary to erode or refute the burglary charge against Tuttle. We can only assume that Tuttle's lawyer, in diligent response to the court's offer to reconsider Tuttle's request for depositions, contacted the persons mentioned in the State's investigation, interviewed them, was satisfied with their information in relation to the charge against Tuttle, and, as a matter of trial strategy, elected not to call those persons as witnesses for Tuttle lest their testimony be damaging rather than helpful to Tuttle's case. Also, Tuttle did not call Keeble, one of the witnesses designated in the information. The inference is that Tuttle found Keeble's account of the incident to be correct or at least unhelpful to Tuttle's defense. Of course, the court's ordering the deposition of Frazier, whose whereabouts were unknown, would have been pointless. Moreover, the district court extended to Tuttle the opportunity for further consideration of the deposition question when Tuttle was able to supply a factual showing of need for any deposition. Since Tuttle initially offered only conclusions as a ground for obtaining depositions and failed to supply a factual showing of any condition specified in § 29-1917(1), we find no abuse of discretion in the district court's declining to enter a discovery order for depositions of witnesses endorsed on the information.

Although we have disposed of Tuttle's appeal, and at the risk of obvious dicta, we offer some thoughts on possible factors which may be considered regarding a deposition pursuant to § 29-1917(1), but emphasize that the possible factors or considerations are not exhaustive and are only illustrative, since

a deposition under § 29-1917(1) is within a court's discretion and, therefore, by and large, involves a case-by-case examination. Nevertheless, some factors possibly bearing on availability of a deposition under § 29-1917(1) may include:

(1) A deponent's testimony is needed to establish or discredit a witness' credibility; for instance, a witness' perception, bias, prejudice, or interest;

(2) A strong indication that the deposition has an important role in

(a) investigation of the allegations,

(b) disclosure of admissible evidence,

(c) identification and preparation of witnesses for trial,

(d) corroboration of testimony, or

(e) assistance in impeachment or rebuttal;

(3) Support or establishment of a theory of defense or prosecution, although parties should not be obligated to disclose theories of their respective cases at the risk of forfeiting discovery;

(4) A deponent's testimony which may likely result in a defendant's exoneration;

(5) A prospective witness' unwillingness to be voluntarily interviewed by counsel, as evidenced by uncooperativeness or hostility in attempted interviews, or refusal to discuss the case;

(6) Evidence which is highly complex, such as intricate mechanical or chemical evidence or prospective testimony from an expert witness, when such evidence would be better understood, or eventually rebutted, by availability of information before trial; and

(7) An opposing party's refusal to furnish a requested copy of a witness' statement or grand jury testimony, if available.

See, *State v. Fuller*, 143 Ariz. 571, 694 P.2d 1185 (1985); *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983); *State v. Pecora*, 190 Mont. 115, 619 P.2d 173 (1980); *Kanuck v. Meehan*, 165 Ariz. 282, 798 P.2d 420 (1990); *Weatherford v. State*, 369 So. 2d 863 (Ala. Crim. App. 1979); *Dunkin v. State*, 44 Okla. Crim. 102, 279 P. 923 (1929); *Ennis v. State*, 13 Okla. Crim. 675, 167 P. 229 (1917); Mont. Code Ann. § 46-15-201 (1989); N.H. Rev. Stat. Ann. § 517:13 (Cum. Supp. 1990); Wash. Super. Ct.

Crim. R. 4.6.

EXCESSIVE SENTENCE

In his final assignment of error, Tuttle claims excessiveness in the sentence imposed, that is, imprisonment for 20 to 30 months, with credit for 126 days' custodial time during pendency of the final disposition of the charge against him. Tuttle also claims that the district court abused its discretion in refusing to place Tuttle on probation.

Burglary under § 28-507(1) is a Class III felony, punishable by a maximum of 20 years' imprisonment, a $25,000 fine, or both, with a minimum possible penalty of 1 year in prison. See 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. Staten, ante* p. 13, 469 N.W.2d 112 (1991); *State v. Lonnecker*, 237 Neb. 207, 465 N.W.2d 737 (1991). "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. Zitterkopf*, 236 Neb. 743, 749-50, 463 N.W.2d 616, 621 (1990). 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). Accord, *State v. Schall*, 234 Neb. 101, 449 N.W.2d 225 (1989); *State v. Goodpasture*, 215 Neb. 341, 338 N.W.2d 446 (1983).

Tuttle's sentence was clearly within the possible penalty range for a Class III felony. Further, in deciding whether Tuttle was an appropriate candidate for probation, the district court considered the presentence report on Tuttle, which showed Tuttle's age, 22 years, at the time of sentencing; his drug and

alcohol abuse; and his previous convictions for assault, contributing to the delinquency of a child, impersonating a peace officer, unauthorized use of a motor vehicle, and procuring liquor for a minor. Accordingly, we cannot say the district court abused its discretion in refusing to sentence Tuttle to probation and, instead, sentencing him to prison for 20 to 30 months, a sentence which is not excessive under the circumstances.

CONCLUSION

Since there was sufficient evidence to sustain Tuttle's conviction, the court did not abuse its discretion in refusing to grant Tuttle's request for depositions of all witnesses listed on the State's information, and Tuttle's sentence is not excessive, we affirm the district court's judgment of conviction and sentence imposed on Tuttle.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. NICKY SCOTT WHITE, APPELLANT.

472 N.W.2d 720

Filed August 2, 1991. No. 90-544.

1. **Constitutional Law: Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.
2. **Pleas: Effectiveness of Counsel: Proof.** In order to satisfy the prejudice requirement in the context of a plea, the defendant must show there is a reasonable probability that but for counsel's errors, the defendant would not have pled and would have insisted upon going to trial.
3. **Criminal Law: Due Process: Pleas.** As a matter of due process in the Nebraska criminal justice system, a defendant's guilty or nolo contendere plea must satisfy the requirements expressed in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).

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

Ronald R. Brackle for appellant.

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

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

SHANAHAN, J.

Nicky Scott White appeals from the judgment of the district court for Jefferson County, which denied White's request for postconviction relief under Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1989).

WHITE'S CONVICTIONS

Initially, White pled not guilty to five felonies charged in the State's information filed on December 18, 1984, namely, attempted second degree murder, first degree assault, attempted robbery, use of a knife to commit a felony, and burglary. On February 22, 1985, the district court granted White leave to withdraw his not guilty plea to the attempted robbery charge and, pursuant to a plea arrangement, enter nolo contendere pleas on February 22, 1985, to the charges in the amended information, namely, attempted robbery, a Class III felony, and accessory to first degree assault, a Class IV felony. See Neb. Rev. Stat. §§ 28-201 (attempt), 28-324 (robbery), 28-308 (first degree assault), and 28-204 (accessory) (Reissue 1989).

Before the court accepted White's pleas, the State offered a factual basis which established that White and Clinton Turner entered Benny AcFalle's furnished apartment at 2 a.m. After the pair pulled AcFalle out of bed and kicked him, White held a knife to AcFalle's face while Turner held a revolver to AcFalle's head and stated: "A thousand dollars or your valuables." Turner also asked AcFalle where he had parked his car and placed his car keys. Turner then shot AcFalle in the head, resulting in AcFalle's blindness. Turner and White left AcFalle's apartment, but did not remove AcFalle's possessions from his apartment or take his car. After this incident, White drove Turner back to their residence and, in a vehicle, hid the revolver which Turner had used to shoot AcFalle. White did not contest

or complain about any aspect of the factual information which the State presented as a basis for the charges against White.

Before the county attorney had rendered the preceding factual account, the district court informed White concerning the nature of the charges against him; his rights to assistance of counsel, confrontation, and a jury trial; and his privilege against self-incrimination, and the court examined White to determine his understanding of these rights. The court explained that the possible penalty for conviction of attempted robbery, a Class III felony, is "a minimum of one year imprisonment up to a maximum of 20 years or a fine of $25,000, or both," but neglected to mention possible penalties for conviction of accessory to first degree assault, a Class IV felony, which is punishable by imprisonment for a maximum term of 5 years, a $10,000 fine, or both such imprisonment and fine, with no expressed minimum term of imprisonment. See Neb. Rev. Stat. § 28-105(1) (Reissue 1985). The court accepted White's nolo contendere pleas to attempted robbery and the assault charge, found White guilty as charged, dismissed the remaining four felony counts stated in the original information, and ordered a presentence investigation.

Between entry of White's nolo contendere pleas on February 22, 1985, and his sentence hearing on March 25, 1985, Turner was tried on a six-count information which included an attempted robbery charge for the incident involving White at the AcFalle apartment. During Turner's trial, the court, on its own motion, dismissed the attempted robbery charge, but a jury convicted Turner on the remaining charges of attempted second degree murder, first degree assault, burglary, and use of a dangerous weapon to commit a felony, all of which coincided with the charges levied against White in the State's initial information filed on December 18, 1984, concerning the AcFalle incident. At White's sentence hearing, before imposition of sentences, the sentencing judge, who was the presiding judge in Turner's trial, commented to White and counsel, that is, White's lawyer and the county attorney, that "certain facts came to light with respect to the charge of attempted robbery" in Turner's trial and that "a probable defense to the charge of attempted robbery [existed] that Mr.

White could raise if he chose to do so . . . based on the statement of facts given by the county attorney, that no property was taken incident to an attempted robbery." Nevertheless, White chose to stand on his previously entered nolo contendere pleas, proceeded to sentencing, and directed that his lawyer inform the court that White declined to withdraw his pleas "notwithstanding that [White] maintains his innocence of any charges because of the risk of prosecution of charges in addition to those to which he entered a plea of no contest." The court then sentenced White to terms of imprisonment of 6 to 15 years on the attempted robbery conviction and 18 months to 5 years on the accessory to first degree assault conviction. The sentence on the assault charge was consecutive to the sentence on the attempted robbery conviction. On his direct appeal to this court alleging only excessiveness of sentence, White's convictions were summarily affirmed. See 220 Neb. xxvi (case No. 85-283, July 24, 1985).

POSTCONVICTION PROCEEDINGS

Subsequently, White filed a motion for postconviction relief on account of a constitutionally invalid conviction, see §§ 29-3001 et seq., and contended that before entry of his nolo contendere pleas, he had not been informed about the range of possible penalties for a conviction on the assault charge and that he was denied his constitutional right to effective assistance of counsel concerning the charges on which his convictions are based.

In an evidentiary hearing on White's postconviction motion, the evidence, for the most part, related to White's claim that he was never supplied with information about possible penalties which might be imposed as the result of his conviction on the assault charge. Evidence regarding the ineffective assistance of counsel claim pertained to the fact that White's lawyer, on learning about the dismissal of the attempted robbery charge in Turner's trial, did not seek a continuance to evaluate the impact of the Turner dismissal in reference to disposition of the attempted robbery charge against White. On White's claim that he had not been informed about the penalty concerning the assault charge, the State presented a letter, dated February 18,

1985, from White's lawyer to White which contained the following: "Scott, we have visited concerning the maximum possible sentences in your case, which as you know, can be up to 25 years in prison, with the additional possibility of substantial fines." On February 18, 1985, a month before his sentence hearing, White acknowledged by his signature on the letter that he received the February 18 letter, conferred with his attorney about its contents, and understood the letter. White's lawyer testified that the lawyer was "sure" that he specifically informed White that, concerning the penalty range for a conviction on the assault charge, the possible penalty was a "maximum term of imprisonment of five years or a fine of $10,000 or both." According to White, however, "[t]he only thing that we discussed as far as sentencing was an overall range of [penalties] together," as indicated in the February 18, 1985, letter from his lawyer. White denied that his lawyer specifically told him about the possible range of penalties on either the assault charge or the charge of attempted robbery.

The district court denied postconviction relief to White and expressly found that the evidence was "clear and convincing" that White knew the range of penalties on the assault charge before White entered his nolo contendere pleas.

ASSIGNMENTS OF ERROR

White contends that he had ineffective assistance of counsel for his nolo contendere plea to the charge of attempted robbery, because, notwithstanding the district court's comment that there might be a "probable defense" to the charge, White's lawyer, without further investigation into any foundation for the court's comment, allowed White to stand convicted on his nolo contendere plea.

Also, White contends that he was uninformed about the range of penalties possible for a conviction on the assault charge against him; therefore, his conviction, based on a plea which was not knowingly, intelligently, and voluntarily made, cannot be constitutionally sustained.

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. [Citation omitted.] 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. Williams, 224 Neb. 114, 116, 396 N.W.2d 114, 116 (1986). Accord, *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991); *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990).

ASSISTANCE OF COUNSEL

White contends the district court erred in finding that defense counsel competently represented White, since his counsel failed to request a continuance and advise White after the court had mentioned White's "probable defense" to the attempted robbery charge, and since his lawyer failed to inform him of possible penalties regarding the assault charge.

"In a proceeding under the Nebraska Postconviction Act, the movant, in custody under sentence, must allege facts which, if proved, constitute a denial or violation of the movant's rights under the Nebraska or federal Constitution, causing the judgment against the movant to be void or voidable." *State v. Start*, 229 Neb. 575, 577-578, 427 N.W.2d 800, 802 (1988). Accord *State v. Dixon, supra*.

> [T]o sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

State v. Hawthorne, 230 Neb. 343, 347, 431 N.W.2d 630, 633 (1988). Accord, *State v. Dixon, supra*; *State v. Clear, supra*. See, also, *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

"To determine whether counsel's performance is deficient in representation of a criminal defendant, the standard is whether

an attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the defense of a criminal case." *State v. Dixon, supra* at 634, 467 N.W.2d at 402. "In order to satisfy the prejudice requirement in the context of a plea, the defendant must show there is a reasonable probability that but for counsel's errors, the defendant would not have pled and would have insisted upon going to trial." *State v. Rehbein*, 235 Neb. 536, 538, 455 N.W.2d 821, 824 (1990). Accord *State v. Domingus*, 234 Neb. 267, 450 N.W.2d 668 (1990).

> "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. . . ."

State v. Hawthorne, supra at 347, 431 N.W.2d at 633 (quoting from *Strickland v. Washington, supra*). Accord, *State v. Dixon, supra*; *State v. Bostwick*, 233 Neb. 57, 443 N.W.2d 885 (1989).

Although the district court remarked about dismissal of the attempted robbery charge in Turner's trial and a "probable defense" to the attempted robbery charge against White, the factual basis, offered by the State, supplied adequate information to sustain White's nolo contendere plea to the charge of attempted robbery.

In construing the district court's remark about a "probable defense" to the charge of attempted robbery, White apparently interprets the court's comment to mean that there was no factual basis for the attempted robbery charge against him.

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

Section 28-201(1) provides in pertinent part:

> (1) A person shall be guilty of an attempt to commit a crime if he [or she]:

. . . .

(b) Intentionally engages in conduct which, under the circumstances as he [or she] believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his [or her] commission of the crime.

(2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he [or she] intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

In *State v. Jackson*, 225 Neb. 843, 852, 408 N.W.2d 720, 727 (1987), which was partially overruled concerning grounds irrelevant in White's case, we stated:

> To sustain a conviction for the offense of criminal attempt in violation of § 28-201(1)(a) or (b), evidence must establish beyond a reasonable doubt that the defendant intentionally engaged in conduct which (1) would constitute a particular crime, if the attendant circumstances were as the defendant believes such circumstances to be, or (2) under the circumstances as the defendant believes such circumstances to be, constitutes a substantial step in a course of conduct intended to culminate in the defendant's commission of the crime.

See, also, *State v. Swoopes*, 223 Neb. 914, 395 N.W.2d 500 (1986); *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985); *State v. Sodders*, 208 Neb. 504, 304 N.W.2d 62 (1981).

Consequently, the fact that no property was actually taken from AcFalle is inconsequential to the attempt charge inasmuch as the factual basis, presented by the State, shows that there was a substantial step in White's conduct, namely, brandishing a knife in AcFalle's face, which was intended to culminate in White's commission of the crime of robbery. Although the district court remarked about a "probable defense," no property had to be actually taken from AcFalle in reference to the attempted robbery charge against White. See

§ 28-201 (attempt) and Neb. Rev. Stat. § 28-206 (Reissue 1989) (aiding and abetting).

Further, White obviously desired to stand on his pleas to avoid risk of prosecution on additional charges, although he "maintain[ed] his innocence," which was his constitutional prerogative. "An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). See *State v. Rhodes*, 233 Neb. 373, 445 N.W.2d 622 (1989).

The record demonstrates that White conferred with counsel and voluntarily, knowingly, and understandingly chose to stand on his nolo contendere plea to the attempted robbery charge after a thorough examination and explanation by the court. Further, even if defense counsel were in some way deficient, White has not suggested, much less demonstrated, a reasonable probability that he would have forgone his nolo contendere pleas and insisted on proceeding to trial but for counsel's alleged deficient performance in White's defense. We certainly agree with White's observation that he has been prejudiced by imprisonment in the Nebraska Penal and Correctional Complex, but it is prejudice from ineffective assistance of counsel in the proceedings leading to that incarceration which White must demonstrate to sustain his ineffective assistance of counsel claim. Thus, White has failed to show prejudice, one of the requirements to sustain an ineffective assistance of counsel claim. We cannot conclude that the trial court was clearly erroneous in deciding that White was not deprived of effective assistance of counsel in accordance with the right guaranteed by the sixth amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution.

PENALTIES FOR THE ASSAULT CHARGE

White argues that the record fails to show he knew the possible penalties for the assault charge and that such lack of information rendered his nolo contendere plea involuntary.

As a matter of due process in the Nebraska criminal justice

system, a defendant's guilty or nolo contendere plea must satisfy the requirements expressed in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). See *State v. High*, 225 Neb. 690, 407 N.W.2d 776 (1987).

In *Irish*, this court stated:

> [I]n order to support a finding that a plea of guilty or nolo contendere has been entered freely, intelligently, voluntarily, and understandingly,
>
> 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.

223 Neb. at 820, 394 N.W.2d at 883. Accord *State v. Walker*, 235 Neb. 85, 453 N.W.2d 482 (1990).

> [W]hile in order for a defendant to enter a voluntary and intelligent plea of guilty, he or she must know the penalty for the crime to which he or she is pleading, and although it is preferable that such knowledge be imparted by the judge accepting the plea, it is nonetheless possible to prove the defendant's knowledge by other means.

State v. Mentzer, 233 Neb. 843, 845-46, 448 N.W.2d 409, 410-11 (1989). Accord *State v. Fischer*, 220 Neb. 664, 371 N.W.2d 316 (1985). See, also, *State v. Irish, supra.*

Because the district court, before accepting White's nolo contendere plea to the assault charge, failed to inform White concerning the penalties possible on conviction for that charge, we look elsewhere in the record to determine whether White knew the range of penalties for conviction on the assault charge.

The record clearly establishes that before White pled nolo contendere to both charges, the court informed White that the

penalty range for the attempted robbery conviction was imprisonment for a minimum term of 1 year and a maximum of 20 years, a fine of $25,000, or both such imprisonment and fine. White's lawyer told him that the total of years for imprisonment on convictions for the attempted robbery charge and the assault charge was 25 years. As a matter of simple arithmetic, if there was a total of 25 years on both charges and a maximum term of 20 years on the attempted robbery charge, the remainder, namely, 5 years, pertained to the assault charge. Apart from the arithmetic implicit in his lawyer's letter, that is, "the maximum possible sentences . . . can be up to 25 years in prison," White's lawyer supplied credible testimony which, if believed by the district court, established that the lawyer informed White concerning the range of possible penalties for a conviction on the assault charge, a "maximum term of imprisonment of five years or a fine of $10,000 or both." Although White denied receipt of that information from his lawyer, whether such information was actually imparted from the lawyer to White was a question of witness credibility and a factual determination for the district court. Consequently, there is evidence which supports a finding that White knew that the maximum term of imprisonment for a conviction on the assault charge was 5 years, as specified in § 28-105(1). Also, from the testimony of White's lawyer, there is evidence that White was supplied with information concerning a fine on the assault charge, namely, a $10,000 fine, or both the statutorily specified imprisonment and fine.

Therefore, we are unable to conclude that the district court's findings on White's motion for postconviction relief were clearly erroneous. See, *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986); *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991); *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990).

Consequently, in accordance with *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), we conclude that White is not entitled to postconviction relief; hence, the judgment of the district court is affirmed.

AFFIRMED.

DAVID R. TARVIN, APPELLANT, V. MUTUAL OF OMAHA INSURANCE COMPANY AND CIGNA PROPERTY & CASUALTY COMPANIES, APPELLEES.

472 N.W.2d 727

Filed August 2, 1991. No. 90-939.

1. **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.
2. _____: _____. An employee has the burden to show the cause-and-effect relationship involving employment, an industrial injury, and disability.
3. _____: _____. 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.
4. _____: _____. To sustain an award in a workers' compensation case involving a preexisting disease or condition, a claimant must prove that the injury which is the basis for the claim arose out of and in the course of employment and that the preexisting disease or condition combined with the work-related injury to produce disability, or that the work-related injury aggravated, accelerated, or inflamed the preexisting condition.
5. _____: _____. 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.
6. **Trial.** Determination of causation is, ordinarily, a matter for the trier of fact.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

David J. Cullan, of David J. Cullan & Associates, for appellant.

Melvin C. Hansen and Matthew J. Buckley, of Hansen, Engles & Locher, P.C., for appellees.

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

SHANAHAN, J.

David R. Tarvin brought a workers' compensation action against his employer, Mutual of Omaha Insurance Company, and against Cigna Property & Casualty Companies, which supplied workers' compensation insurance coverage for Mutual. Tarvin's action was based on his disabling depression and anxiety, which he claimed were aggravated by his "job-related mental and/or physical stresses, pressures, and activities." At rehearing, the Nebraska Workers' Compensation Court found that Tarvin failed to prove compensability of his condition and dismissed Tarvin's action.

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.

Fees v. Rivett Lumber Co., 228 Neb. 617, 620, 423 N.W.2d 483, 486 (1988). Accord, *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990); *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). See, also, Neb. Rev. Stat. § 48-185 (Reissue 1988).

BACKGROUND OF TARVIN'S CLAIM

Tarvin's History of Mental Disorder.

At age 17, Tarvin first suffered depression in 1958 after a serious gunshot injury to his leg, which resulted in chronic arthritis in the injured leg and persistent pain, causing him to limp even to the present. In 1978, Tarvin suffered recurrent major depressive episodes and an apparent schizoid personality disorder. Tarvin was hospitalized and began taking antidepressant medication regularly and received psychotherapy. In 1985, Tarvin moved to Omaha and commenced employment with Mutual as a computer programmer.

Tarvin's Job Performance at Mutual.

In June 1987, a supervisor at Mutual gave Tarvin a verbal warning concerning a disagreement. Although Tarvin experienced some subsequent depression, his work improved, and the supervisor withdrew the warning. Tarvin was eventually promoted to systems analyst. On January 12, 1989, Tarvin received a written warning regarding his performance deficiencies. On February 24, Mutual placed Tarvin on probation for 60 days and informed him that unless his performance improved, his employment would be terminated.

During these disciplinary procedures, Tarvin experienced excessive pressure and stress; for example, his supervisors began to regularly monitor his work and fellow workers excluded him from social events and coffeebreaks. Finally, on March 10, 1989, while en route to work, Tarvin became so filled with anxieties that he was unable to enter an elevator at work and proceed to his office. Tarvin has been unable to work since that incident.

Tarvin's Mental Evaluation.

Tarvin then underwent psychiatric evaluation to determine the cause of his inability to work. Dr. James Severa testified that Tarvin's job-related stress caused Tarvin's neurochemical level to become imbalanced, a condition which prevented normal transmission of messages from Tarvin's brain. However, Dr. Severa was unaware of any specific trauma to the body that caused Tarvin's disabling mental condition and that "it took [Tarvin] a while to become dysfunctional . . . ." Another psychiatrist, Dr. Stan Moore, expressed the opinions

that Tarvin suffered from a schizoid personality disorder and major depression and that Tarvin's "brain chemistry has not been altered or changed by the stress experienced at Mutual of Omaha." Dr. Moore expressly rejected Dr. Severa's opinion regarding employment at Mutual as the cause of Tarvin's present mental condition and disability. Moore concluded that there was no causal relationship between any job-related stress that Tarvin may have experienced at Mutual and Tarvin's present mental condition. Dr. Moore elaborated on the basis for his conclusion; for instance, Tarvin experienced almost identical problems before his employment with Mutual, displayed extreme reluctance to form any social relationships, and failed to interact with coemployees. Tarvin manifested those symptoms of a schizoid personality and major depression at least 10 years before he commenced his employment at Mutual.

ASSIGNMENT OF ERROR

Tarvin claims that the Workers' Compensation Court erred in finding that Tarvin's mental disability was not a compensable injury under the Nebraska Workers' Compensation Act.

CLAIMANT'S BURDEN OF PROOF

Neb. Rev. Stat. § 48-151(2) (Reissue 1988) in part 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."

"[F]or 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." *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 468-69, 461 N.W.2d 565, 572-73 (1990). See, *Grauerholz v. Cornhusker Packing Co.*, 230 Neb. 641, 432 N.W.2d 831 (1988); *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).

> [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.

Heiliger v. Walters & Heiliger Electric, Inc., supra at 467, 461 N.W.2d at 571-72.

To sustain an award in a workers' compensation case involving a preexisting disease or condition, a claimant must prove that the injury which is the basis for the claim arose out of and in the course of employment and that the preexisting disease or condition combined with the work-related injury to produce disability, or that the work-related injury aggravated, accelerated, or inflamed the preexisting condition. See, *Heiliger v. Walters & Heiliger Electric, Inc., supra*; *Spangler v. State*, 233 Neb. 790, 448 N.W.2d 145 (1989); Neb. Rev. Stat. § 48-101 (Reissue 1988).

> 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.

Heiliger v. Walters & Heiliger Electric, Inc., supra at 466, 461 N.W.2d at 571. See, also, *Fees v. Rivett Lumber Co., supra*.

> Unless the character of an injury is objective, that is, an injury's nature and effect are plainly apparent, an injury is a subjective condition, requiring an opinion by an expert to establish the causal relationship between an incident

> and the injury as well as any claimed disability consequent to such injury.

Mendoza v. Omaha Meat Processors, supra at 785, 408 N.W.2d at 289. See, also, *Fees v. Rivett Lumber Co., supra.*

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

DISCUSSION

In *Sorensen v. City of Omaha*, 230 Neb. 286, 289, 430 N.W.2d 696, 698 (1988), we stated:

> A similar case dealing with mental stimulus producing injury is *Bekelski v. Neal Co.*, [141 Neb. 657, 4 N.W.2d 741 (1942)]. There, this court, interpreting the former but substantially similar version of § 48-151, held that for a plaintiff to recover, he or she had to prove (1) an unexpected or unforeseen event, happening suddenly and violently, (2) producing at the time objective symptoms of injury and (3) violence to the physical structure of the body.

Tarvin claims that he suffered "violence to the physical structure of the body," since he suffered a biochemical alteration of his brain and because "a contributing factor [in the] exacerbation of his pre-existing anxiety and depression was increased pain in his gunshot leg caused by walking and carrying documents at work." Brief for appellant at 15-16.

Without restating all the medical evidence, we note that Dr. Moore testified that stress from Tarvin's employment at Mutual produced no chemical alteration in Tarvin's brain and that Tarvin's mental condition and resultant disability were attributable solely to Tarvin's condition before employment at Mutual. Moreover, Dr. Moore specifically expressed his medical opinion that Tarvin's employment at Mutual did not cause the condition on which Tarvin's workers' compensation claim is based. "We have repeatedly held that where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the compensation court." *Zaleski v. Farmland Foods, Inc.*, 219 Neb. 157, 161, 361 N.W.2d 523, 526 (1985). Undoubtedly,

Tarvin suffers an unfortunate and severe disability. However, in view of the medical evidence in Tarvin's case, the Workers' Compensation Court, in resolving a factual question, could reasonably have concluded, and did conclude, that Tarvin failed to prove that his condition was caused by employment at Mutual.

Since there is sufficient evidence to support the factual conclusion by the Nebraska Workers' Compensation Court, we are unable to state that the Nebraska Workers' Compensation Court was clearly erroneous in its factual determination that Tarvin failed to prove an accident resulting in a compensable injury and disability.

The award of the Nebraska Workers' Compensation Court is supported by the evidence, is not clearly erroneous, and is, therefore, affirmed.

AFFIRMED.

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

472 N.W.2d 432

Filed August 2, 1991. No. 90-1026.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, an appellate court tries factual questions de novo on the record, which requires an appellate court to reach a conclusion independent of the findings of the trial court, but, when evidence is in conflict, an appellate 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: Evidence: Proof.** Neb. Rev. Stat. § 43-292 (Reissue 1988) imposes two requirements before parental rights may be terminated. First, requisite evidence must establish existence of one or more of the circumstances described in subsections (1) to (6) of § 43-292. Second, if a circumstance designated in subsections (1) to (6) is evidentially established, there must be the additional showing that termination of parental rights is in the best interests of the child, the primary consideration in any question concerning termination of parental rights. The standard of proof for each of the two preceding requirements prescribed by § 43-292 is evidence which is "clear and convincing."
3. **Parental Rights: Proof.** Regarding parental noncompliance with a court-ordered rehabilitative plan, under Neb. Rev. Stat. § 43-292(6) (Reissue

1988) as a ground for termination of parental rights, the State must prove by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child.

4. _____: _____. 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.
5. **Evidence: Words and Phrases.** Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.

Appeal from the County Court for Hall County: RICHARD E. WEAVER, Judge. Affirmed.

Jerry J. Fogarty, Deputy Hall County Public Defender, for appellant.

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

Daniel J. Thayer, guardian ad litem.

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

SHANAHAN, J.

J.P. appeals from the judgment of the county court for Hall County, sitting as a juvenile court pursuant to Neb. Rev. Stat. § 43-245 (Cum. Supp. 1990) of the Nebraska Juvenile Code, by which J.P.'s parental rights in her 5-year-old son, M.P., were terminated as the result of J.P.'s failure to comply with a court-ordered rehabilitation plan.

STANDARD OF REVIEW

In an appeal from a judgment terminating parental rights, an appellate court tries factual questions de novo on the record, which requires an appellate court to reach a conclusion independent of the findings of the trial court, but, when evidence is in conflict, an appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147

(1987). Accord, *In re Interest of A.H.*, 237 Neb. 797, 467 N.W.2d 682 (1991); *In re Interest of T.C.*, 226 Neb. 116, 409 N.W.2d 607 (1987).

> The unequivocal language of § 43-292 imposes two requirements before parental rights may be terminated. First, requisite evidence must establish existence of one or more of the circumstances described in subsections (1) to (6) of § 43-292. Second, if a circumstance designated in subsections (1) to (6) is evidentially established, there must be the additional showing that termination of parental rights is in the best interests of the child, the primary consideration in any question concerning termination of parental rights. The standard of proof for each of the two preceding requirements prescribed by § 43-292 is evidence which is "clear and convincing."

In re Interest of J.S., A.C., and C.S., supra at 267, 417 N.W.2d at 158. See, also, *In re Interest of T.C., supra*. "[W]hen a parent fails to make reasonable efforts to comply with a court-ordered rehabilitative plan, the parent's failure presents an independent reason justifying termination of parental rights." *In re Interest of J.S., A.C., and C.S., supra* at 266, 417 N.W.2d at 158. Accord, *In re Interest of A.H., supra*; *In re Interest of L.O. and B.O.*, 229 Neb. 889, 429 N.W.2d 388 (1988).

> [R]egarding parental noncompliance with a court-ordered rehabilitative plan, under § 43-292(6) as a ground for termination of parental rights, the State must prove by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child.

In re Interest of J.S., A.C., and C.S., supra at 267, 417 N.W.2d at 158. Accord, *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990); *In re Interest of L.O. and B.O., supra*; *In re Interest of L.H.*, 227 Neb. 857, 420 N.W.2d 318 (1988).

"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." *In re Interest of T.C., supra* at 117, 409 N.W.2d at 609. Accord, *In re Interest of A.H., supra*; *In re Interest of J.S., A.C., and C.S., supra*. " '[C]lear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.' " *In re Interest of J.S., A.C., and C.S., supra* at 266, 417 N.W.2d at 157 (quoting from *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249 (1984)).

BACKGROUND FOR PARENTAL RIGHTS TERMINATION

On July 21, 1988, the county court conducted an adjudication hearing attended by J.P., who is M.P.'s biological mother; J.P.'s lawyer; the guardian ad litem for M.P.; the county attorney for Hall County; and a representative from the Nebraska Department of Social Services (DSS). The court determined that M.P., born February 19, 1985, was a juvenile within the purview of the Nebraska Juvenile Code. See Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988). All the aforementioned persons attended a hearing on September 15, 1988, at which the court, after receipt of evidence relative to J.P.'s use of controlled substances, placed M.P.'s custody with DSS and ordered a rehabilitation plan for J.P., which, without objection, included the requirement that J.P. refrain from use of alcohol and drugs. Through a series of review hearings, the court ordered continuation of the rehabilitation plan for J.P. As the result of a review hearing on October 26, 1989, J.P. obtained physical custody of M.P., but the rehabilitation plan, including the prohibition against J.P.'s use of alcohol and drugs, remained in effect.

On May 27, 1990, police and paramedics, responding to a call from an undisclosed source, found J.P. delirious in the bedroom of her home. Beneath J.P., who was clad in pajamas, a police officer found a hypodermic syringe, and he noted "fresh needle marks" on J.P.'s abdomen. M.P. was not at home, but was later taken to the home of J.P.'s brother. The paramedics transported J.P. to a Grand Island hospital where

she was admitted to the emergency room and received medical attention. On September 11 the county attorney filed a motion to terminate J.P.'s parental rights and, as grounds for termination, alleged J.P.'s habitual use of liquor or narcotic drugs to the serious detriment of M.P., see Neb. Rev. Stat. § 43-292(4) (Reissue 1988), and J.P.'s failure to comply with the rehabilitation plan, which was designed to correct the conditions leading to the adjudication that M.P. was a child within the Nebraska Juvenile Code. See § 43-292(6). M.P.'s father was not involved in the termination proceedings.

EVIDENCE FOR TERMINATION OF PARENTAL RIGHTS

Over J.P.'s objection, the court allowed a DSS caseworker assigned to J.P. and M.P. to testify in an opinion that M.P.'s best interests necessitated termination of J.P.'s parental rights. Also over J.P.'s objection, the court received a Grand Island police officer's testimony that J.P. was arrested in August 1990 for drunk driving. Although J.P., through her assignments of error, complains about the testimony from the DSS caseworker and the police officer, in our de novo review we disregard that particular testimony and direct our attention to other probative evidence on the question whether J.P.'s parental rights in M.P. should be terminated.

In connection with a physical injury and anxiety, J.P. received various medications during 1988 through her physician, including Valium, a tranquilizer, and Bancap, an addictive painkiller issued in capsule form. In a meticulous itemization of the medications which he prescribed for J.P., the physician designated the various medications by name and individual prescription or refill. According to J.P.'s physician, Dilaudid and Talwin were not among the medications prescribed for J.P. In any event, J.P. frequently obtained refills for the Bancap and, in May 1990, unbeknown to her physician, was "grinding up" Bancap capsules, which were then mixed with water to "hit" or "shoot" the liquid composition, that is, inject the concoction intravenously. Concerning the intravenous administration of Bancap, J.P. explained: "Because being a drug abuser through the past, I was suffering

such severe pain that I thought in my mind that the pain would go away faster."

When J.P. arrived at the emergency room, a physician with a specialty in internal medicine examined her and diagnosed her condition as an "[e]pidural abscess . . . a . . . staph infection in the area of L4, L5 . . . which had impinged upon her spinal cord. A pocket of pus on her spinal cord." According to the internist, J.P. was "malnourished," and her lumbar problem existed because J.P. "had multiple skin infection sites from, obviously, intravenous injections with staph abscesses on the skin in multiple locations." Thus, the staph infection resulted from J.P.'s "intravenous drug use" and accounted for her delirious condition observed by police and paramedics on their arrival at J.P.'s home. Also, the physician noted that there were "multiple injection sites about [J.P.'s] body" and that J.P.'s intravenous drug use had "almost killed her." As a result of his conversations with J.P., the physician learned that in addition to Bancap, J.P. had intravenously taken Dilaudid, an opiate and narcotic analgesic which is "a close cousin to morphine," and Talwin, a potent synthetic narcotic analgesic. Both Dilaudid and Talwin are "controlled substances," but neither had been prescribed by J.P.'s physician.

Two psychologists with several years' experience testified. One testified that J.P. understood the "seriousness of drug addiction" and that J.P. was "very well aware of jeopardizing herself and her son if she went back to that kind of living." The other testified that an illicit controlled substance in the home "would be detrimental to — to any child's well-being."

In view of all the foregoing, the court concluded that the evidence clearly and convincingly established that J.P. had failed to rehabilitate herself regarding her drug abuse and that the best interests of M.P. required termination of J.P.'s parental rights concerning M.P.

In unequivocal language, the court-ordered plan for J.P.'s rehabilitation forbade unauthorized use of a controlled substance. Apart from her unusual administration of Bancap, a narcotic obtained by her physician's prescription, J.P. acknowledged her intravenous injection of two controlled substances, Dilaudid and Talwin, narcotic analgesics which she

undoubtedly obtained without her physician's prescription, since neither Dilaudid nor Talwin was mentioned among the narcotics prescribed. Testimony from the psychologists established that J.P. recognized the danger to herself and her child in a lifestyle involving illicit drug addiction. Implicit in the psychologists' testimony is the premise that the home must be a child's refuge from today's widespread abuse and misuse of controlled substances as counterfeit passports from the reality of life. In J.P.'s situation, the home was a stage for a play with one inevitable sorry ending, a tragedy for which a child might have been a spectator, but need not become a player. See, *In re Interest of H.P.A.*, 237 Neb. 410, 466 N.W.2d 90 (1991); *In re Interest of Q.R. and D.R.*, 231 Neb. 791, 438 N.W.2d 146 (1989).

Hence, from our de novo review, we conclude that the evidence clearly and convincingly establishes that J.P. willfully failed to comply with the court-ordered plan of rehabilitation and that, under the circumstances, the best interests of M.P. require termination of J.P.'s parental rights in her child. Consequently, we affirm the judgment of the county court for Hall County.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

STATE OF NEBRASKA, APPELLANT, V. LAUREEN L. WOJCIK, APPELLEE.

472 N.W.2d 732

Filed August 2, 1991. No. 91-127.

Sentences: Appeal and Error. When the State, pursuant to Neb. Rev. Stat. §§ 29-2320 et seq. (Reissue 1989), appeals and claims that a sentence imposed on a defendant is excessively lenient, the standard of review is whether the sentencing court abused its discretion in the sentence imposed.

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

James S. Jansen, Douglas County Attorney, and Maria R. Leslie for appellant.

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns for appellee.

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

SHANAHAN, J.

Without a plea agreement with the State and on her nolo contendere plea entered while represented by counsel, Laureen L. Wojcik was convicted of knowingly and intentionally abusing her 3-month-old son, David, a crime under Neb. Rev. Stat. § 28-707(1) (Reissue 1989) of the Nebraska Criminal Code which, pertinent to Wojcik's case, provides:

> A person commits child abuse if he or she knowingly [or] intentionally . . . causes or permits a minor child to be:
>
> (a) Placed in a situation that endangers his or her life or health; or
>
> (b) Cruelly confined or cruelly punished; or
>
> (c) Deprived of necessary food, clothing, shelter, or care.

Intentional child abuse is a Class IV felony. See § 28-707(4). After Wojcik's nolo contendere plea on November 26, 1990, and a presentence report, the district court for Douglas County sentenced Wojcik to probation for 3 years. Pursuant to Neb. Rev. Stat. § 29-2320 (Reissue 1989), the State has appealed, claims that the sentence of probation is too lenient, and requests this court to set aside Wojcik's sentence and impose an appropriate sentence under the circumstances. See Neb. Rev. Stat. § 29-2323 (Reissue 1989) (sentencing alternatives available to the Nebraska Supreme Court when a sentence imposed is too lenient).

STANDARD OF REVIEW

When the State, pursuant to Neb. Rev. Stat. §§ 29-2320 et seq. (Reissue 1989), appeals and claims that a sentence imposed on a defendant is excessively lenient, the standard of review is whether the sentencing court abused its discretion in the sentence imposed. *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d

405 (1990); *State v. Stastny*, 227 Neb. 748, 419 N.W.2d 873 (1988).

BACKGROUND FOR CHARGE

At the time of the charged child abuse, Wojcik, an admitted alcoholic since she was 19 years of age, was 33 years old with a ninth grade education and was divorced. In addition to David, Wojcik had three other children at home: a 17-year-old son; one daughter, age 10; and another daughter, who was 6 years old. In 1976, rather than "going through the hassle" of a child abuse charge, Wojcik relinquished her then 3-year-old son for adoption. David is hydrocephalic.

In 1979, in the district court for Sarpy County, Wojcik was convicted of conspiracy to commit first degree murder and was sentenced to imprisonment for 5 to 15 years in the Nebraska Penal and Correctional Complex. However, Wojcik was paroled in 1983, but violated her parole by becoming intoxicated and in 1984 was returned to confinement in the women's penal facility at York, from which she was discharged in 1987.

In December 1989, police investigated a child abuse complaint against Wojcik concerning her younger daughter, who was then 5 years of age. A member of Wojcik's family observed Wojcik hit the little girl with a "2x4" and, with a clinched fist, strike the child in the eye, resulting in the child's swollen eye. In a later interview with a psychologist, the daughter stated that Wojcik "threw me against the wall." A child abuse charge was filed, but was later dismissed by the State in April 1990.

On the evening of June 10, 1990, Wojcik brought David to the emergency room at the University of Nebraska Medical Center, where he was admitted to the pediatric intensive care unit. Physicians who admitted David at UNMC readily noted David's hydrocephalus and, additionally, observed severe swelling of David's head. On inquiry from a physician, Wojcik denied that David had sustained any recent injury. One of the physicians asked when the extraordinary swelling of David's head had begun. Wojcik at first said that the swelling started 2 days earlier, but then changed the time to approximately a week

and, finally, to 10 days before bringing David to the hospital. Without any clarifying explanation, Wojcik had failed to keep a medical appointment for David on May 21, 1990. David was placed on oxygen with constant surveillance. Hospital records contained the remark that Wojcik was intoxicated at the time of David's admission.

Hydrocephalus is a condition which may occur in infants and is marked by an abnormal increase in the cerebrospinal fluid normally present in small amounts in and around the brain. Normally, the human brain contains approximately 2 ounces of cerebral fluid, but in hydrocephalus the brain may contain several pints of fluid. Presence of the fluid is accompanied by an enlargement of the skull and cerebral ventricles, which are small chambers or cavities within the brain, and increased pressure of fluid between the brain and skull and within the ventricles. The increased pressure causes brain tissue to become thinner, even shrivel, and atrophy, while the head enlarges, with the result that mental deterioration follows and fatal convulsions may ensue.

A pediatrician at UNMC rendered the following diagnosis:

> David Wojcik is a 3 month old admitted to UNMC Intensive Care Unit on June 10, 1990. David has massive bilateral chronic subdural hematomas [a localized collection of clotted blood beneath the outer of the three membranes covering the brain and spinal cord] and communicating hydrocephalus [nothing obstructs the flow of cerebral fluid, but the fluid accumulates because it is not systemically absorbed in an individual]. He is severely neurologically compromised at this time related to these problems, and the increased intercranial pressure resulting from them.
>
> From the clinical presentation and the medical evaluations performed since admission, it is evident to me that David's chronic subdural hematomas are the direct result of abuse and most consistent with "shaken baby" syndrome. As mentioned, the subdural hematomas are chronic [existing for a long duration], and have been developing and no doubt symptomatic for some time.
>
> Mother's history regarding David's health status is

inconsistent and changeable. Evidence of medical neglect is apparent in mother's failure to seek medical attention for David's injury until such time as the problems were extreme.

Hospital records prepared by David's attending and examining physicians included comments such as "marked megalocephaly probably secondary to trauma" and "[b]ilateral subdural hematomas secondary to shaken baby syndrome." A "Diagnostic Radiology Consultation Report" for David contained: "There are massive bilateral extra axial fluid collections, consistent with subdural hematomas, probably subacute. There are several small areas of increased density in the left subdural, which probably represents more recent hemorrhage. The brain is compressed symmetrically from both sides. The etiology is most likely secondary to trauma."

To relieve the accentuated hydrocephalus, surgeons drilled into David's skull at a cranial horizontal midline just behind his right ear and, through the cranial opening, made a "small hole . . . in the dura using electrocautery." After making an incision in David's abdomen, surgeons used a catheter as a ventriculoperitoneal shunt for passage of cerebral fluid from David's brain to his abdomen for systemic absorption.

Under the circumstances, David's physicians notified the Omaha Police Division, which commenced an investigation into possible child abuse. In the course of the investigation on June 12, after police officers obtained a "Rights Advisory" form, that is, Wojcik's acknowledgment that she had received the *Miranda* warning or admonition from the police officers, and after Wojcik's waiver of the rights expressed in *Miranda*, Wojcik told officers that on an afternoon between May 7 and 11, 1990, David was lying on his back in his crib and crying, while Wojcik's other children were downstairs. According to Wojcik, she went over to the crib, leaned over, picked up David, and "shook him a couple of times and then told him to be quiet so I could think." When an officer asked how long Wojcik had shaken David, Wojcik answered: "Just for a few minutes. Tryin' to get him to be quiet, because I was upset; I was tryin' to think. I couldn't think when he cried." Shortly thereafter, Wojcik's mother appeared on the scene, and Wojcik handed

David to her mother, left the house, and went for a walk.

Wojcik was charged under § 28-707(1) and convicted by her nolo contendere plea to the charge of intentional child abuse concerning David. Wojcik's children, except the 17-year-old son, are in temporary foster homes under jurisdiction of the separate juvenile court of Douglas County.

WOJCIK'S SENTENCE

As a Class IV felony, intentional child abuse is punishable by 5 years' imprisonment, a $10,000 fine, or both such imprisonment and fine, with no specified minimum penalty on conviction.

Another possible sentence statutorily available to the sentencing court was probation pursuant to Neb. Rev. Stat. § 29-2260 (Reissue 1989), which provides in part:

> (2) . . . [T]he 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.

(4) When an offender who has been convicted of a crime is not sentenced to imprisonment, the court may sentence him or her to probation.

After the court sentenced Wojcik to probation for 3 years, the State appealed, claiming that the sentence imposed was too lenient.

CLAIM OF EXCESSIVELY LENIENT SENTENCE

Section 29-2322 provides that when the State has appealed and claims that a sentence is excessively lenient,

the Supreme Court, upon a review of the record, shall determine whether the sentence imposed is excessively lenient, having 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.

Regarding possible dispositions of the State's appeal based on a claim of excessively lenient sentence, § 29-2323 provides:

Upon consideration of the criteria enumerated in section 29-2322, the Supreme Court shall:

(1) If it determines that the sentence imposed is excessively lenient, 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; or

(2) If it determines that the sentence imposed is not excessively lenient, affirm the sentence.

The crime of child abuse frequently includes not only physical injury inflicted on a child, but mental trauma as well. Until experience teaches otherwise, a child looks to a parent for love, help, and a relationship of unlimited trust. At least in a child's early years, the child needs a nurturing parent for the very continuation of life itself. This is especially true in the case of David, who was both dependent and defenseless in his crib within his home, which ordinarily should be a child's sanctuary or refuge from the hurt waiting outside. David's mother, however, betrayed parental trust by making risk a very real part of David's life. Violence became not only a part of life, but a way of life taught and learned in the Wojcik home. What is learned today will be taught tomorrow. Child abuse cannot be a part of that education. We will not attempt a complete itemization of all the qualities of a good parent, but parental indifference, even apathy, to a child's injury inflicted by a parent would not be on that list anywhere. While violence has been a persistent part of Wojcik's life, inside and outside her home, that is not the type of force which ought to drive her children, or anyone's children, in their lives.

Therefore, having considered the nature of the offense and

its circumstances, Wojcik's character and history of violence, the seriousness of child abuse as a crime against those least able to protect themselves, and the need to deter Wojcik from future harm to her family, we conclude that a sentence to probation is inadequate punishment for the crime committed. Hence, we conclude that the district court abused its discretion by sentencing Wojcik to probation and, therefore, set aside the district court's sentence imposed on Wojcik. Under the circumstances, we find that a sentence to imprisonment is appropriate. Consequently, we sentence Wojcik to imprisonment at hard labor in a facility under the direction and jurisdiction of the Nebraska Department of Correctional Services for a term of 20 months to 5 years, with credit for Wojcik's custodial time, if any, spent during pendency of the final disposition of this cause.

The State has convinced us that Wojcik's sentence is too lenient, which it was; therefore, we have corrected the sentence imposed on Wojcik. Much of the information which we have examined concerning Wojcik's sentence is contained in the presentence report. One might reasonably expect that a court will consider relevant information contained in the presentence report, whether a matter for the sentencing court or an appellate court reviewing the sentence imposed. In Wojcik's case, the presentence report consists of photographs and 350 pages offered in a looseleaf edition of unnumbered pages. The "PSR" was secured only by a thin rubberband, which broke, causing a cascade of papers and no small uncertainty regarding the proper sequence of the material reassembled for future use. In any event, perhaps some of the facts, buried in the presentence report, escaped the district court's detection, which is understandable in view of the disarray in which the presentence report came before the district court and us.

In preparing its brief, the State is required to observe the rule:

> The statement of facts shall be made in narrative form, and shall consist of so much of the substance of the record as is necessary to present the case. Each and every recitation of fact, whether in the statement of facts or elsewhere in the brief, shall be annotated to the record . . . .

Neb. Ct. R. of Prac. 9D(1)f (rev. 1991). The State has

disregarded the preceding rule. Although we are not required to search through the record to locate recitations of fact unannotated to the record, see *State v. Biernacki*, 237 Neb. 215, 465 N.W.2d 732 (1991), nevertheless, we have examined the record in Wojcik's case to ascertain the circumstances bearing on the claim that Wojcik's sentence is too lenient. Also, we point out that on November 1, 1990, at instruction from this court, Nebraska probation officers were directed that every presentence report shall consist of pagination numbered consecutively to facilitate examination and use of the report by a sentencing court and an appellate court as well. The presentence report in Wojcik's case was submitted on February 4, 1991, 3 months after issuance of the directive concerning pagination of every presentence report. Nevertheless, it is counsel's responsibility to prepare a brief in conformity with the rules of this court. If carrying out that responsibility requires some communication between counsel and those who prepare the record, including a PSR, for appellate review, then, as an admonition to be taken seriously, we suggest such communication. A word to the wise is sufficient.

SENTENCE MODIFIED.

STATE OF NEBRASKA, APPELLANT, V. KENT H. PIERSON, APPELLEE.

472 N.W.2d 898

Filed August 9, 1991. No. 91-446.

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

James S. Jansen, Douglas County Attorney, and Donald L. Schense for appellant.

Bill Bracker for appellee.

WHITE, J.

The State has requested summary review of the trial court's order which granted the defendant's motion to suppress evidence obtained in a search. The State's request, filed pursuant to Neb. Rev. Stat. § 29-824 (Reissue 1989), argues

that the trial court's finding that the evidence should be suppressed is clearly erroneous.

On October 17, 1990, members of the Omaha Police Division's emergency response unit (ERU), which assists in serving search warrants in suspected high-risk situations, entered the backyard of a home at 1906 Military Avenue in Omaha, Nebraska. The ERU team leader, Sgt. Timothy Conahan, stated that he did not see or handle the warrant, but he believed the ERU was assisting the Federal Bureau of Investigation in serving a warrant for a video poker game or slot machine. The FBI's information was allegedly based on electronic surveillance of a residence in Waterloo, Nebraska, in connection with an ongoing narcotics investigation.

The warrant was served at 7 a.m. The ERU chose to gain entry to the house, believed to be a clubhouse for Hell's Angels, through the rear. This required the team to climb a 6-foot chain link fence because they were unable to cut the padlock on the gate. After climbing the fence, the members were allegedly threatened by three barking Rottweiler guard dogs. The team members shot and killed one dog to prevent it from attacking an officer. When Conahan and the team reached the back door, Conahan said, he heard voices inside the residence and announced, "Omaha Police, search warrant, everybody down." In a matter of seconds, the officers then kicked in the door and the ERU entered the residence.

A second search warrant was issued, on October 17, 1990, for the Military Avenue house, except that the references to the gambling device were deleted and information obtained during the first search was added. Apparently, appellee Kent H. Pierson's home, at 3811 South 35th Street in Omaha, was also searched.

The defendant was charged by information on October 31, 1990, with unlawful possession with intent to deliver a controlled substance (methamphetamine), use of a firearm to commit a felony, and possession of a firearm by a felon. His motion to suppress alleged that the evidence was obtained based on an improperly executed search warrant and that the application for the warrant lacked sufficient, reliable information for the issuing magistrate to have found probable

cause of criminal activity. Pierson asserted that the information upon which the warrant was obtained was based on an illegal wiretap and upon information which was sealed and should not have been disclosed. He also alleged that the search warrant for a gambling machine was a pretext to search the residence in connection with the ongoing narcotics investigation.

The district court granted the motion to suppress, finding that there was no evidence that any officers attempted to request entry through the front door of the house, that anyone in the house refused a request to enter, or that anyone in the house was given an opportunity to refuse entry. The court held that the task force violated the express provisions of both state and federal statutes governing the serving of search warrants. The exigent circumstances claimed by the officers were created by the officers' own actions in scaling the fence and entering a private yard where they knew they would be confronted by three large guard dogs. The trial court stated, "Any emergency could have been avoided by walking up to the front door, knocking, and asking permission to enter." The trial court did not accept the State's argument that the officers were acting in good faith, thus bringing the search under the "good faith" exception to the exclusionary rule. Noting that the record failed to support this contention, the court stated, "Ignorance, for which there is no excuse, does not give rise to good faith." The motion to suppress was granted and the evidence suppressed.

In this review, the State assigns as error the trial court's suppression of evidence seized pursuant to a federal warrant which was served in a no-knock fashion due to exigent circumstances.

In reviewing a trial court's ruling on a motion to suppress, this court will uphold the trial court's ruling, absent a finding that the ruling was clearly erroneous. *State v. Patterson*, 237 Neb. 198, 465 N.W.2d 743 (1991).

It is first noted that search warrants may be issued by an impartial magistrate, upon a showing of "probable cause," which has been defined as

> " '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).

It has also been held that in determining the validity of a search warrant, the reviewing court may consider only information brought to the attention of the issuing magistrate. *State v. Hodge and Carpenter*, 225 Neb. 94, 402 N.W.2d 867 (1987).

Unreasonable searches and seizures are proscribed by the 4th amendment to the U.S. Constitution, and this prohibition is enforceable against the states through the 14th amendment. *Ker v. California*, 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963), citing *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). As noted in *State v. Vrtiska*, 225 Neb. 454, 460, 406 N.W.2d 114, 119 (1987), *cert. denied* 484 U.S. 863, 108 S. Ct. 180, 98 L. Ed. 2d 133, "Generally, seizure of property is permissible under a validly authorized search warrant, under exigent circumstances, or under some other recognized exception to the warrant requirement."

Searches must be reasonable, which has been interpreted to mean that "absent exigent circumstances, law enforcement officers executing a search warrant must first announce their presence and purpose and then give those within the premises to be searched sufficient time to voluntarily permit the officers to enter." *State v. Watkinson*, ____ Wis. 2d ____, ____, 468 N.W.2d 763, 764 (1991), citing *Ker v. California, supra*.

In *Ker*, the U.S. Supreme Court outlined examples of exigent circumstances which may relieve law enforcement officers of the announcement requirement before executing a warrant: imminent destruction of vital evidence, the need to rescue a victim in peril, or an increase in peril to the officer.

Both Nebraska and federal law define the circumstances under which a search warrant is to be served. Neb. Rev. Stat. § 29-411 (Reissue 1989) states:

> In executing a . . . search warrant . . . the officer may break open any outer or inner door or window of a dwelling house or other building, if, after notice of his office and purpose, he is refused admittance; or without giving notice of his authority and purpose, if the judge or magistrate issuing a search warrant has inserted a direction therein that the officer executing it shall not be required to give such notice . . . . The judge or magistrate may so direct only upon proof under oath, to his satisfaction that the property sought may be easily or quickly destroyed or disposed of, or that danger to the life or limb of the officer or another may result, if such notice be given . . . .

Federal law, 18 U.S.C. § 3109 (1988), provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Under these statutes, two kinds of search warrants may be executed: "knock-and-announce" and "no-knock." In order to obtain a warrant which may be served without knocking, the magistrate must be provided with information to support the need for entry without announcement.

North Dakota has a similar statute governing the execution of a search warrant, and the North Dakota Supreme Court stated that the statute is a "codification of the common law rule that police may break into a home only after announcing their presence and purpose in seeking entry." *State v. Sakellson*, 379 N.W.2d 779, 781-82 (N.D. 1985). The court wrote:

> The primary policies underlying the knock-and-announce rule are the protection of privacy in the home and the prevention of violent confrontations. [Citations omitted.]
>
> . . . .
>
> . . . [A]n unannounced entry by officers increases the potential for violence by provoking defensive measures a surprised occupant would otherwise not have taken had he known that the officers possessed a warrant to search his

home.

Sakellson, supra at 782.

The court wrote that compliance with the knock-and-announce requirement does not hinder law enforcement, because a no-knock warrant may be issued under certain circumstances, and "even without a no-knock warrant, announcement prior to entry may be excused under certain exigent circumstances." *Sakellson, supra* at 783.

I agree with a Minnesota court which held that "[a]n officer's belief that exigent circumstances exist must be based on fact." *State v. Whelan*, 350 N.W.2d 414, 417 (Minn. App. 1984).

As the California Supreme Court has noted, noncompliance with the knock-and-announce rule may be excused

> when the officer acts on a reasonable and good faith belief that compliance would increase his peril, frustrate an arrest, or permit the destruction of evidence. Such a belief, however, must be based on the facts of the particular case. It cannot be justified by a general assumption that certain classes of persons subject to arrest are more likely than others to resist arrest, attempt to escape, or destroy evidence.

People v. Rosales, 68 Cal. 2d 299, 305, 437 P.2d 489, 493, 66 Cal. Rptr. 1, 5 (1968).

The *Sakellson* court adopted similar standards which may excuse officers from the usual notice requirements: "when (1) reasonably acting to prevent destruction or disposal of evidence; (2) when notice would 'increase the peril of the officers or others;' and (3) when notice would be a useless gesture." *Sakellson, supra* at 783 n.3.

In the present case, the warrant did not include an authorization for a no-knock entry. The affidavit in support of the warrant did not seek or provide any justification for a no-knock entry. Richard J. Heideman, a special agent for the FBI, wrote the affidavit, which sought authority to search the Military Avenue home for a gambling machine which was being brought to Omaha from California. Heideman stated that surveillance indicated that the machine was sighted in a pickup owned by Gary Apker and that Apker was observed meeting with another individual and unloading the device into the

building.

In *State v. Waits*, 185 Neb. 780, 786-87, 178 N.W.2d 774, 779 (1970), it is stated: " 'The search much [sic] be one directed in good faith toward the objects specified in the warrant or for other means and instrumentalities by which the crime charged had been committed. It must not be a general exploratory search through which the officers merely hope to discover evidence of wrongdoing.' "

Craig Molek, a member of the ERU team, testified that he did not read the search warrant and that he was not sure if it was a no-knock warrant, but that that is the kind normally served by the team. Kurt Sorys, another ERU member, also stated that the team normally executes no-knock warrants. He testified that no one asked that the door be opened and that he did not hear anyone destroying evidence. Gary Hammer, a team leader, stated that the ERU team normally enters unannounced and that he did not hear anyone trying to flush or destroy evidence. Anthony Infantino, who was in charge of the ERU team, did not take part in the actual search, but testified that he did reconnaissance of the address to determine how to enter. Conahan testified that no one refused the team entry and that he did not check to see if the door was locked before ordering it kicked in.

Adopting the elements named in *Sakellson*, *Whelan*, and *Rosales*, I do not find that the Omaha ERU team met any of the requirements which may excuse officers from first announcing their presence. The evidence sought and named in the warrant, a gambling machine, could not be destroyed or disposed of easily. There was no evidence that notice would increase the peril to officers or others. Indeed, testimony was presented that the law enforcement officers' surveillance had indicated that only one person was expected to be in the clubhouse at the time of the execution of the warrant. The mere fact that the home was asserted to be a Hell's Angels clubhouse does not indicate that any weapons would be present. Evidence was presented that no prior disturbances had been reported at the house in the past 4 1/2 years. Neither is there evidence that the notice would have been a useless gesture. If only one person was expected to be at the house, the numerous officers sent to execute the

warrant should have been able to serve it after announcing their presence.

The State argues that the officers had a reasonable belief that exigent circumstances existed. In *State v. Watkinson*, ____ Wis. 2d ____, 468 N.W.2d 763 (1991), citing *State v. Cleveland*, 118 Wis. 2d 615, 348 N.W.2d 512 (1984), the Wisconsin court held that announcement prior to entry is not required where there is a reasonable belief that the announcement would endanger the safety of the police or others or where there is a reasonable belief that unannounced entry is required to prevent the destruction of evidence. Wisconsin does not have a state statute similar to Nebraska's regulating the execution of search warrants, but the officers in *Cleveland* argued that they needed to serve the warrant as a no-knock warrant because they were seeking drugs, and "drug dealers are often armed." *Cleveland, supra* at 631 n.16, 348 N.W.2d at 521 n.16. The Wisconsin court rejected that argument, and I agree in this case, in which a member of the ERU team testified that it is common knowledge that persons at the Hell's Angels clubhouse normally are armed. The Wisconsin court wrote:

> The fact that a person is a member of a class of persons more likely to resist search is not sufficient to justify unannounced entry. The officer must have knowledge of specific facts that indicate that this particular person will conduct himself or herself in this manner when confronted by police.

Id.

I agree with the trial court in finding that the officers here violated both state and federal law. The search warrant was issued to look for a gambling machine, and there is nothing in the record to indicate that the occupants of the home could have disposed of the machine if the officers had first knocked at the front door and announced their intention to execute the warrant. It is true that exigent circumstances may apply where it is believed that narcotics may be inside a residence and the narcotics could be disposed of prior to entry after announcing the warrant. That does not apply to a gambling machine which was described as being about 5 feet high and 2 feet wide. As the affidavit indicated, it required two individuals to move the

machine when it was unloaded from a pickup truck and taken into the house. Unlike narcotics, which can easily be disposed of by flushing down a toilet, this gambling machine could not have been removed from the residence after the officers announced their presence and prior to their entry.

Nor is there evidence that the officers were in danger in attempting to retrieve the machine. None of the occupants were attempting to flee the residence. Conahan stated that he heard people talking, but that does not mean that these people were dangerous or that they would not have opened the door if requested to do so. The evidence is clear that the ERU did not request entry. A tactical decision was made to attempt entry from the rear, but no explanation has been provided for the decision not to attempt entry from the front, which was not fenced or guarded by dogs. When Conahan notified the residents of the ERU's presence, he did not say, "Omaha Police, search warrant, open up," but instead ordered "everybody down." Within seconds, the door was kicked down.

The Nebraska Supreme Court has not previously ruled on any case differentiating between knock-and-announce and no-knock warrants. However, in *State v. Holman*, 229 Neb. 57, 424 N.W.2d 627 (1988), the court held that a warrant which was issued for service in the daytime but which was served at 8 p.m. was not properly served. The case at bar is analogous—the knock-and-announce warrant was served as a no-knock warrant. In *Holman*, the court held that the improper service of the warrant required that the seized evidence should have been suppressed. The same rule applies to the evidence here.

Nothing in the record indicates that the ERU encountered any exigent circumstances, other than those of their own creation, which would have allowed them to serve a knock-and-announce warrant as a no-knock warrant. Nor am I persuaded that they had a good faith belief that they would be in danger in serving the warrant, since none of the ERU members ever saw the warrant. The remedy for the illegal seizure of evidence is that such evidence must be suppressed, and the trial court was correct in granting the defendant's motion.

AFFIRMED.

MICHAEL McCORMACK, APPELLANT, V. FIRST WESTROADS BANK, A CORPORATION, APPELLEE.

473 N.W.2d 102

Filed August 16, 1991. No. 89-002.

1. **Summary Judgment.** A summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and that the moving party is entitled to judgment as a matter of law.
2. _____. In a court's consideration of a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may reasonably be drawn from the evidence.
3. **Summary Judgment: Proof.** Since the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must produce enough evidence to demonstrate his entitlement to a judgment if the evidence were to remain uncontroverted at a trial, after which the burden of producing contrary evidence shifts to the party opposing the motion.
4. **Promissory Notes: Debtors and Creditors.** The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt.
5. **Contracts: Principal and Surety: Debtors and Creditors.** Where the surety makes no inquiry on the subject, the duty of disclosure as to facts increasing the risks of the undertaking depends upon the circumstances of the case. Generally, the creditor may assume that the surety has obtained information from other sources or has chosen to assume whatever risks may be involved. A duty of disclosure may arise when the creditor knows or has good grounds for believing (1) the surety is being deceived or misled or (2) the surety has been induced to enter the contract in ignorance of facts materially increasing his risks, of which the creditor has knowledge and which the creditor has the opportunity to disclose prior to the surety's acceptance of the undertaking.
6. **Contracts: Debtors and Creditors.** Collateral proceeds are to be applied in the manner provided in the agreement between the parties or in the absence of such agreement in such order as the creditor determines.
7. **Contracts: Parol Evidence.** The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts the terms of a written agreement.

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

James P. Fitzgerald, of McGrath, North, Mullin & Kratz, P.C., for appellant.

Thomas F. Flaherty, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

PER CURIAM.

Plaintiff-appellant, Michael McCormack, signed a pledge agreement guaranteeing a debt of Acoustical Engineering, Inc., and pledging certain shares of stock as collateral. After Acoustical defaulted on its promissory note to defendant-appellee, First Westroads Bank (hereinafter Bank), the Bank sold the stock and applied the proceeds to the debt. In his second amended petition, McCormack set out four "causes of action," alleging generally that the Bank converted the pledged shares of stock, as shown by certain alleged conduct of the Bank. The district court for Douglas County granted summary judgment in favor of the Bank and dismissed McCormack's petition.

McCormack appeals from that order, assigning as error the actions of the trial court "in entering summary judgment for the [Bank] because there were genuine issues of material fact and the evidence was susceptible of different interpretations." McCormack then assigns as error the actions of the court in seven specific instances: (1) in determining that the evidence was not sufficient to show that a later promissory note between Acoustical and the Bank did not discharge Acoustical's prior indebtedness secured by McCormack's pledge of collateral, or that there was not a material fact issue as to a conversion; (2) in determining that the refinancing of the earlier note was an extension of the underlying debt that McCormack had agreed to; (3) in determining that the Bank acted in good faith; (4) in finding that the Bank's promise to set up a "lock box" agreement to collect Acoustical's receivables was not enforceable by McCormack; (5) in failing to find that "the Bank's disclaimer of its duty to protect and preserve the collateral was unenforceable"; (6) in failing to resolve the issue "whether the Bank's disposition of Acoustical's assets was commercially reasonable"; and (7) in dismissing the case without ruling on McCormack's contention that the Bank had

improperly applied Acoustical's collateral to debts other than the debt guaranteed by McCormack. We affirm.

A summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and that the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1989); *Millard v. Hyplains Dressed Beef*, 237 Neb. 907, 468 N.W.2d 124 (1991). In a court's consideration of a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may reasonably be drawn from the evidence. *J. J. Schaefer Livestock Hauling v. Gretna St. Bank*, 229 Neb. 580, 428 N.W.2d 185 (1988). Since the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must produce enough evidence to demonstrate his entitlement to a judgment if the evidence were to remain uncontroverted at a trial, after which the burden of producing contrary evidence shifts to the party opposing the motion. *Deutsche Credit Corp. v. Hi-Bo Farms, Inc.*, 224 Neb. 463, 398 N.W.2d 693 (1987).

In this appeal, we must view the evidence in a light most favorable to McCormack and give him the benefit of all reasonable inferences deducible from the evidence. See *Millard v. Hyplains Dressed Beef, supra*.

The record presents the following facts in the form of affidavits, depositions, and exhibits: Acoustical was incorporated in 1963 by McCormack, acting as its attorney. Gerald Carlson and Darlene Carlson, husband and wife, were the sole stockholders of Acoustical and were two of the three directors of the company. McCormack was the other director. McCormack continued to serve as Acoustical's primary attorney until sometime after Acoustical ceased active business operations on December 31, 1986.

Acoustical and the Bank had a banking relationship which predated 1981. In 1981, Acoustical was involved in a construction contract in Saudi Arabia. Under that contract, Acoustical was obligated to provide a performance bank

guaranty in the sum of 545,287.50 Saudi riyals (approximately $168,000). Acoustical requested the assistance of the Bank in the issuance of this performance guaranty. The Bank required as a condition to the issuance of the performance guaranty that Acoustical provide negotiable collateral of a value of $180,000. Acoustical was not financially able to provide the collateral.

McCormack, as trustee for himself; his father, John McCormack; and Michael Hagge, agreed with Acoustical to provide the $180,000 of collateral to support the performance guaranty in exchange for a fee of $150,000. McCormack, his father, and Hagge pledged various municipal bonds owned by McCormack's father and a $65,000 Bank of Millard certificate of deposit owned by Hagge to the Bank to collateralize the Acoustical performance guaranty. None of the pledged collateral was owned by McCormack.

The date for Acoustical's payment of the $150,000 fee to McCormack under the Acoustical-McCormack agreement came and went, and Acoustical was unable to pay it. In the meantime, under the Saudi Arabian contract, Acoustical was obligated to replace the previously issued performance guaranty with a maintenance guaranty in approximately the same dollar amount. On or about March 21, 1983, the maintenance guaranty was issued by the Bank. The Bank at that time was still in possession of the collateral provided to it by McCormack in connection with the previously issued performance guaranty.

In early July 1983, McCormack met with Gerald Carlson, Acoustical's president, to discuss how Acoustical could collateralize the new maintenance guaranty in order that McCormack's group's collateral could be released and at the same time pay McCormack his $150,000 fee. They agreed that Acoustical should pay the $150,000 fee to McCormack and that McCormack would buy a $150,000 certificate of deposit and pledge it as collateral for the maintenance guaranty. The collateral owned by the others would be released.

This agreement was carried out. McCormack bought a $150,000 certificate of deposit with the $150,000 paid to him by Acoustical and pledged it to the Bank to collateralize the maintenance guaranty. The collateral owned by McCormack's

father and Hagge was released and returned to them.

Peter Zandbergen, a vice president of the Bank, prepared an assignment of money market certificate and sent it to McCormack. McCormack did not like the form, and he redrafted it and signed it. Under this agreement, McCormack pledged the $150,000 certificate of deposit purchased with the $150,000 paid to him by Acoustical to the Bank as collateral for the guaranty.

In January 1984, the existing $150,000 certificate of deposit matured, and McCormack purchased three certificates of deposit of the Bank totaling $150,000 and pledged them to the Bank as the collateral for the maintenance guaranty.

On May 21, 1984, Acoustical secured a $300,000 loan through the Small Business Administration (SBA) guaranteed loan program. The SBA guaranteed the Bank repayment of 80 percent of the loan and required as collateral a first priority security interest in all of Acoustical's equipment, inventory, and accounts, subject to a $100,000 subordination in favor of the Bank with respect to Acoustical's inventory and accounts receivable. The SBA also required a lien on the Carlsons' personal residence.

On March 1, 1985, McCormack advised the bank that he wanted to use some of the money represented by the pledged certificates of deposit to invest in 2,000 shares of First Data Resources, Inc., stock and to substitute the First Data Resources stock as collateral. The Bank agreed to this substitution. By assignment of stock dated May 6, 1985, McCormack pledged the 2,000 shares of First Data Resources stock to the Bank as collateral for the existing maintenance guaranty.

In June 1985, McCormack purchased an additional 1,500 shares of First Data Resources stock. He requested the Bank to cash some of the pledged certificates of deposit to pay the $41,337.72 price and instructed his broker to forward the stock to the Bank. The Bank complied with his request.

By a third-party pledge agreement dated September 1985, McCormack pledged the 3,500 shares of First Data Resources stock and two certificates of deposit as collateral for Acoustical's obligations under the maintenance guaranty. On

October 21, 1985, the beneficiary of the guaranty drew on it, and the banks involved were obligated to fund the draw.

Also on October 21, 1985, Acoustical signed a new promissory note to the Bank in the sum of $160,009, representing the $153,786.54 paid out on the guaranty and an estimate of the amount of legal fees and expenses incurred in connection with a lawsuit involving that transaction. Acoustical signed a security agreement in favor of the Bank under which it pledged two certificates of deposit totaling $35,000. McCormack authorized and directed his stockbroker to dispose of the First Data Resources stock and purchase as many shares of Berkshire Hathaway stock as could be purchased with the proceeds, and directed his broker to deliver the Berkshire Hathaway stock certificates to the Bank. McCormack signed a third-party pledge agreement under which he pledged the two certificates of deposit then still being held by the Bank and the Berkshire Hathaway stock as collateral for the new October 21, 1985, Acoustical $160,009 promissory note.

Acoustical's October 21, 1985, $160,009 note matured in 1986, and another Acoustical note, representing advances made for general working capital, with an outstanding balance of $63,135.61, matured on April 26, 1986. By a promissory note dated June 20, 1986, the outstanding balances of both of these notes were combined into one $228,647.90 note from Acoustical to the Bank.

By a third-party pledge agreement dated July 11, 1986, which was identical to the other third-party pledge agreements that McCormack had previously signed in favor of the Bank, McCormack reaffirmed the pledge of the 52 shares of Berkshire Hathaway stock, which were then being held by the Bank as security for Acoustical's earlier notes and as security for the June 20, 1986, note and all extensions and renewals of it. The pledge agreement is the subject of this action. This pledge agreement stated it was executed

> [t]o secure . . . the debt liability or obligation of Acoustical Engineering, Inc. ("Debtor") to Secured Party [the Bank] evidenced by or arising under the following: March 14, 1983 Letter of Credit Agreement, September 15, 1985,

> Reaffirmation & Indemnity Agreement, October 21, 1985, $160,009.00 Promissory Note June 20, 1986 $228,647.90 Promissory Note and *any extensions, renewals or replacements thereof*. . . .

(Emphasis supplied.)

On July 11, 1986, Acoustical signed a "Lock Box Processing Agreement," under which the Bank agreed to provide a post office box for Acoustical's remittances, to process the items remitted to the post office box, and to deposit the proceeds in Acoustical's checking account. This agreement did not require the Bank to collect Acoustical's accounts receivable and apply any part of the collections to Acoustical's obligations at the Bank.

By November 19, 1986, Acoustical thought it had an agreement with outside investors under which the investors would provide a $1,500,000 line of credit to pay off the Bank debt and provide working capital in exchange for 50 percent of the Acoustical stock. By this time, two of Acoustical's notes had matured. An October 10, 1985, note for $117,085.55 was due and payable on October 31, 1986, and the June 20, 1986, note for $228,647.90 was due and payable on November 10, 1986. Evidence showed that because it appeared that Acoustical's outside investor plans were nearing consummation, the Bank decided to renew both notes.

By letter to Acoustical dated November 28, 1986, the Bank enclosed "two loan renewals" and requested that they be signed and returned. One of the renewal notes, in the sum of $237,095.62, evidenced the renewal of the unpaid balance of the June 20, 1986, $228,647.90 note plus accrued interest. Both notes were signed by Acoustical and returned to the Bank.

By December 31, 1986, Acoustical learned that the investors had withdrawn their investment offer. Acoustical immediately discontinued its business operations.

On March 18, 1987, pursuant to the terms of the SBA loan guaranty agreement, the Bank assigned, transferred, and endorsed all of its rights and interests in the Acoustical May 21, 1984, $300,000 promissory note and in all of the collateral documents and guaranties to the SBA. Thereafter, the SBA conducted all phases of the sale and disposition of Acoustical's

assets except for the collection of Acoustical's accounts receivable.

On March 25, 1987, after appropriate written notification, the Bank sold McCormack's Berkshire Hathaway stock at a private sale for the total sum of $183,040. No one attended the sale except the Bank's representatives. The Bank was the buyer and tendered the stock certificates to Dain Bosworth, Inc., for registration in the Bank's name.

All of the remaining Acoustical assets, including all inventory, equipment, machinery, etc., were sold by the SBA, and the proceeds thereof were applied to the unpaid balance of the May 21, 1984, $300,000 note.

Notices of the sales of the Acoustical assets were sent to McCormack by the SBA, and McCormack corresponded with the SBA concerning such sales.

After a hearing on the Bank's motion for summary judgment, the district court granted the motion and dismissed the case. In doing so, the district court found that there had not been a novation of the June 20, 1986, note and that it had not been materially modified by the November 26, 1986, note; that the Bank had not breached any duty of good faith and fair dealing to McCormack; that the Bank disposed of McCormack's collateral in a commercially reasonable manner, and as to any other collateral securing Acoustical's debts, the manner in which it was disposed of had no relevance to McCormack's pledge because under the third-party pledge agreement, the Bank had no obligation to resort to any other collateral pledged by Acoustical; and that although there was evidence that employees of the Bank promised McCormack that the Bank would set up a lock box in order to collect Acoustical's accounts receivable and apply a percentage of those to reduce Acoustical's debts, this promise was in conflict with express written provisions in the third-party pledge agreement between McCormack and the Bank and was therefore ineffective.

McCormack first contends that he is not responsible under the third-party pledge agreement because the November 26, 1986, note that Acoustical signed was a novation of the June 20, 1986, note which is referred to in the July 11, 1986,

McCormack pledge agreement. In support of this argument, McCormack relies on testimony by the Carlsons that they thought the November 26, 1986, note was a new note; his allegation that the Bank approached him in November 1986 to sign a new pledge agreement; evidence of some bank procedures regarding trust documents on the Carlsons' residence; computer reports of the Bank that show the June 20, 1986, obligation as "paid"; and the fact that the amount of the obligation increased and the rate of interest decreased.

The July 11, 1986, third-party pledge agreement provided that McCormack pledged 52 shares of Berkshire Hathaway stock to secure the debt of Acoustical arising under various notes set out above "and any extensions, renewals or replacements thereof." The agreement also provides in paragraph 6, captioned "Waivers by Pledgor":

> Pledgor waives notice of Secured Party's acceptance hereof and notice of the creation, existence and payment or nonpayment of the Obligations. None of the following acts or things (which Secured Party is authorized to do or not to do with or without notice to Pledgor) shall in any way affect or impair the Security Interest or Pledgor's liabilities and obligations hereunder: (a) any extension or renewal (whether or not for longer than the original period) of any or all of the Obligations; (b) any change in the terms of payment or other terms of any or all of the obligations or any Collateral therefor, or any substitution or exchange of any evidence of any or all of the Obligations or collateral therefor, or any release of any collateral for any or all of the obligations; (c) any waiver or forbearance granted to Debtor or any other person liable with respect to any or all of the obligations or any release of, compromise with, or failure to assert rights against Debtor or any such other person; (d) the procurement or failure to procure any other collateral for or guarantors or sureties of any or all of the Obligations; (e) the transfer to any person, at any time, of any interest in any of the obligations or any collateral therefor; (f) any arrangement, composition, extension, moratoria or other relief granted to Debtor pursuant to any statute now in

> force or hereafter enacted; (g) any interruption in business relations between Secured Party and Debtor; (h) the failure or neglect to protect or preserve any Obligation or any collateral therefor, or to exercise any right which may be available to Secured Party by law or agreement prior to or after an Event of Default or a default under any other agreement, or any delay in doing any of the foregoing; (i) the failure or neglect to ascertain or assure that the proceeds of any loan to Debtor are used in any particular manner; and (j) the application or failure to apply in any particular manner any payments or credits upon the Obligations.

On November 26, 1986, Gerald and Darlene Carlson executed another promissory note to the Bank. McCormack contends that this note was a new note and, therefore, constitutes a novation. The Bank contends the note was merely a renewal of an existing obligation. Gerald and Darlene Carlson both testified that they thought the note was a new note. Neither testified that they had a specific agreement with the Bank that their prior obligations with the Bank were extinguished. Darlene Carlson testified that she knew Acoustical remained responsible for the debt under the June 20, 1986, note.

McCormack claims that the Bank requested him to sign a new third-party pledge agreement and that he refused because nothing had been paid on the obligation secured by his stock. There is nothing in the evidence to support this assertion other than his statement and Gerald Carlson's stated belief that the Bank approached McCormack about a new pledge agreement. Zandbergen testified that McCormack was not asked to sign a new pledge agreement because under the terms of the July 11, 1986, document, McCormack's pledge was good for any renewals or extensions of Acoustical's obligations.

Documentary evidence on this point is conclusive. As reflected in the affidavit of Robert Anderson, the Bank's president, the computer report McCormack points to is a report used internally by the Bank to show a loan history. The computer software which generated the report cannot distinguish between the payment of a note by renewal or the

payment of a note. In each instance of actual payment or renewal, the computer report shows the transaction as a "payoff."

The entries on the reverse side of the June 20, 1986, note have the same bookkeeping implications. As reflected in Anderson's affidavit, these are the customary entries made by Bank personnel to reflect either a renewal or an actual payment. The physical disposition of the original of the note and what is placed on the front side are the true indicators of what occurred. If the note is actually paid, the front is stamped "paid" and the original note is delivered to the borrower. If the note is renewed, it is stamped "renewed" and the Bank keeps the original.

As to the procedures regarding trust documents on the Carlsons' residence, the Bank's policy was to provide all of the real estate titleholders notice of right of rescission whenever residential real estate is taken as collateral and any of the makers of the promissory note own an interest in the real estate. The Bank had advised its personnel that they are not to attempt to make a determination of whether a federal regulation requiring this procedure is technically applicable or not to the transaction. This procedure is to be followed whether the loan is a new loan or the renewal of an existing loan.

The increase in the amount of the obligation under the November 26, 1986, note is due to unpaid interest that had accrued. The change in the interest rate was because of an extended period for repayment. The Bank was authorized to make these changes without any effect on its agreement with McCormack, according to paragraph 6 of the July 11, 1986, pledge agreement.

The evidence regarding the November 26, 1986, note is clear that it was a renewal note. The note is identified as a renewal of the June 20, 1986, note and was retained by the Bank. The note was not marked "paid" and was not returned to Acoustical. The obligation under the June 20, 1986, note was never paid.

" 'The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt.' " *First West Side Bank*

v. Herzog, 204 Neb. 356, 360-61, 282 N.W.2d 38, 41 (1979). There is nothing in the evidence to establish that the parties had a specific agreement to extinguish the debt under the June 20, 1986, note. McCormack's evidence fails to controvert the fact that the November 26, 1986, note was a renewal of the June 20, 1986, note. The third-party pledge agreement that he signed provided that McCormack was liable for the amount of the June 20, 1986, note and all renewals and extensions thereof. "[T]here is a strong presumption that a written instrument correctly expresses the intention of the parties to it. . . . [P]arties are bound by the terms of the contract even though their intent may be different from that expressed in the agreement." *Bedrosky v. Hiner*, 230 Neb. 200, 205, 430 N.W.2d 535, 539 (1988).

The trial court did not err in its determination that there was no material fact question before it as to the fact that McCormack's pledge agreement was applicable to the Acoustical November 26, 1986, note.

McCormack then contends that even if there was not a novation of the June 20, 1986, note, the November 26, 1986, note is a material modification of the prior obligation because he did not consent to the increase in the obligation. As stated above, the increase is due to interest. There is nothing in the evidence to suggest the November 26, 1986, note materially modified the terms of the June 20, 1986, note. Nothing changed except the amount of the obligation and some payment terms and interest. All of this was authorized under paragraph 6 of the July 11, 1986, third-party pledge agreement signed by McCormack. The trial court did not err in its determination in this regard.

McCormack then contends that the Bank breached a duty of good faith and fair dealing to him because it failed to adequately disclose adverse financial information concerning Acoustical to him. While the Bank might have suspected that Acoustical was going to be unable to repay its obligations to it, there was also evidence to indicate that Acoustical's situation was improving. Furthermore, McCormack never asked the Bank about Acoustical's ability to pay.

Where the surety makes no inquiry on the subject, the

> duty of disclosure as to facts increasing the risks of the undertaking depends upon the circumstances of the case. Generally, the creditor may assume that the surety has obtained information from other sources or has chosen to assume whatever risks may be involved. A duty of disclosure may arise when the creditor knows or has good grounds for believing (1) the surety is being deceived or misled or (2) the surety has been induced to enter the contract in ignorance of facts materially increasing his risks, of which the creditor has knowledge and the opportunity to disclose prior to the surety's acceptance of the undertaking.

Bock v. Bank of Bellevue, 230 Neb. 908, 917, 434 N.W.2d 310, 316 (1989).

There is nothing in the evidence to suggest that McCormack was deceived or misled or that he had been induced to enter the third-party pledge in ignorance of facts materially increasing his risks. He was Acoustical's attorney and heavily involved in negotiating the guaranty from the beginning. If he never saw any of Acoustical's financial information, it was not because of any lack of access to it. The trial court did not err in this connection.

McCormack then claims that the Bank should have applied $35,000 of Acoustical-owned certificates of deposit proceeds to the Acoustical debt secured by his stock. The basis for this claim is the Carlsons' testimony that they pledged those certificates of deposit to help reduce McCormack's liability under the third-party pledge agreement and their understanding that when the Bank cashed the certificates, the proceeds would reduce the loan that McCormack's pledge secured.

The October 21, 1985, security agreement between Acoustical and the Bank provides that the certificates of deposit are pledged as security for all debts owed by the debtor to the secured party, that the secured party may apply collateral proceeds to the payment of obligations in such order of application as the secured party may determine, and that the secured party is not obligated to apply cash proceeds of collateral in any particular order of application.

McCormack, under the express terms of paragraph 6(j) of

the pledge agreement, acknowledged that the application or failure to apply in any particular manner payments or credits upon the obligations would have no effect on his liability under the pledge agreement. He may not be heard to contend to the contrary now.

Collateral proceeds are to be applied in the manner provided in the agreement between the parties or, in the absence of such agreement, in such order as the creditor determines. *First Nat. Bank v. Benedict Consol. Indus.*, 224 Neb. 860, 402 N.W.2d 259 (1987). The Bank's application of Acoustical's certificates of deposit proceeds to debt not secured by McCormack's pledge was not a breach of a duty of good faith, and McCormack's claim in this regard is without merit.

McCormack then asserts that the Bank disposed of Acoustical's collateral in a commercially unreasonable manner. The evidence regarding this issue is Carlson's testimony as to the value of Acoustical's equipment and inventory and what was offered for it prior to the SBA's taking over the loan and disposing of the collateral.

Paragraph 7 of the July 11, 1986, third-party pledge agreement signed by McCormack provides:

> Whether or not Pledgor requests or demands that Secured Party do so, Secured Party shall not be required before exercising and enforcing its rights under this Agreement first to resort for payment of the Obligations to Debtor or to any guarantor or surety or other person obligated with respect to any Obligation, or to their properties or estates, or to any security interest or other collateral securing payment of any or all of the Obligations, or to any other interests, properties, liens, rights or remedies whatsoever. Pledgor agrees to defer exercising, and hereby waives, any and all rights which Pledgor might otherwise have to obtain reimbursement or payment from Debtor or other persons obligated with respect to any or all of the obligations or out of the property of Debtor or of such other persons (whether such rights to obtain reimbursement or payment are rights of recourse, rights of subrogation, rights of contribution, or otherwise) until all the Obligations shall have been fully paid to Secured

Party.

There is nothing in the evidence to suggest that the Bank's disposition of the Berkshire Hathaway stock was not done in a commercially reasonable manner. As to the disposition of the other collateral securing Acoustical's obligations, all of it except the collection of the accounts receivable was turned over to the SBA, pursuant to the SBA loan authorization and guaranty agreement. McCormack was fully aware of all these transactions. The Bank did not dispose of collateral, other than the shares of stock in question. The SBA did.

Neb. U.C.C. § 9-504(5) (1980) provides as follows:

> A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this article.

After the collateral was transferred to it under the SBA loan authorization and guaranty agreement, the SBA was the "secured party" for purposes of disposing of the collateral in a commercially reasonable manner under § 9-504(5). See *Reeves v. Associates Financial Services Co., Inc.*, 197 Neb. 107, 247 N.W.2d 434 (1976).

McCormack does not contend that the Bank's collection of Acoustical's accounts receivable was done in a commercially unreasonable manner, and as to the collateral transferred to the SBA, if any commercially unreasonable disposition occurred, the SBA is the party responsible, not the Bank.

Finally, McCormack argues that the Bank breached a duty of good faith in not implementing a lock box agreement. The evidence shows that Zandbergen did represent at the time McCormack signed the July 11, 1986, third-party pledge agreement that the Bank would use the lock box to collect Acoustical's accounts receivable and apply a part of the accounts collected to reduce all of Acoustical's obligations at the Bank. The Bank did not begin doing this until sometime in November 1986.

The third-party pledge agreement signed by McCormack on July 11, 1986, states in paragraph 7 that the Bank did not have

to resort to any other collateral to satisfy the obligation. The trial court found that Zandbergen's representations on behalf of the Bank conflicted with the express terms of the pledge agreement and were therefore ineffective. "The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts the terms of a written agreement." *Five Points Bank v. White*, 231 Neb. 568, 571, 437 N.W.2d 460, 462 (1989). The Bank did not violate any duty of good faith by disposing of McCormack's pledged stock, pursuant to the terms of the third-party pledge agreement. McCormack's argument is without merit.

The underlying controlling fact is the written pledge agreement. As the trial court said in its memorandum order, "It is a very ordinary pledge agreement where the pledgee [Bank] took the pains to have the pledgor [McCormack] renounce all right the law might otherwise have given him." McCormack was an experienced businessman and attorney. He voluntarily and knowingly signed a strict pledge agreement. The Bank produced enough evidence to sustain its motion for summary judgment on McCormack's suit to vary the terms of that agreement or set it aside. McCormack failed to controvert the Bank's evidence. The district court was correct in granting the Bank's motion and dismissing the case.

The judgment is affirmed.

AFFIRMED.

VIVIAN MILLER, PERSONAL REPRESENTATIVE OF THE ESTATE OF ERVIN FOSTER GETTY, DECEASED, APPELLANT, V. JEFFREY LEE WESTWOOD ET AL., APPELLEES.

472 N.W.2d 903

Filed August 16, 1991. No. 89-228.

1. **Equity: Appeal and Error.** In an appeal of an equity action, this court reviews the record de novo, subject to the rule that where credible evidence is in conflict on material issues of fact, this court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.

2. **Contracts: Mental Competency: Undue Influence: Proof.** In an action to set aside a contract on the basis of incapacity or undue influence, the plaintiff has the burden of establishing the elements of those theories by clear and convincing evidence.
3. **Contracts: Mental Competency: Proof.** In order to set aside an instrument or instruments for want of mental capacity on the part of the person executing such instruments, the burden of proof is upon the party so asserting to establish that the mind of the person executing such instruments was so weak or unbalanced when the instruments were executed that he could not understand and comprehend the purport and effect of what he was doing.
4. **Actions: Pleadings: Proof.** The burden of proof in any cause rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative of an issue, and it remains there until termination of the action.
5. **Actions: Proof.** The burden of proof in its proper sense rests, throughout the case, as to each issue, on the party originally having the burden as to such issue.
6. **Proof: Words and Phrases.** The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to his recovery. In this sense the burden of proof never shifts or changes but remains from the first to the last where it is placed by the pleadings or the substantive law of the case.
7. **Contracts: Undue Influence: Proof.** The elements necessary to be established to warrant the rejection of a written instrument on the ground of undue influence are (1) that the person who executed the instrument was subject to undue influence, (2) that there was opportunity to exercise undue influence, (3) that there was a disposition to exercise undue influence for an improper purpose, and (4) that the result was clearly the effect of such undue influence.

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

Rodney P. Cathcart, of Erickson & Sederstrom, P.C., and Gordon B. Fillman, of Fillman & Brugh, for appellant.

Steven E. Guenzel, of Barlow, Johnson, DeMars & Flodman, for appellees.

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

GRANT, J.

Plaintiff, Vivian Miller, the guardian and conservator of Ervin Foster Getty, appeals the judgment of the district court denying her request to set aside an installment contract for the sale of farmland executed by Getty on December 9, 1986, prior to Miller's appointment as guardian and conservator. Getty died on November 1, 1990, during the pendency of this appeal,

and the action was revived by Miller as personal representative of Getty's estate.

This action was filed on July 20, 1987. In her amended petition filed September 2, 1988, Miller prayed that the land contract be declared void because (1) Getty lacked the mental capacity to handle his business affairs and had been defrauded by the defendants-appellees, Jeffrey Lee Westwood, Don Westwood, and Donna Westwood, and (2) the contract was the product of undue influence exerted by the defendants upon Getty. Miller asked that the court declare a constructive trust upon the farm proceeds for the year 1987 for the benefit of Getty.

This action is one in equity. In an appeal of an equity action, this court reviews the record de novo, subject to the rule that where credible evidence is in conflict on material issues of fact, this court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Southern Lumber & Coal v. M. P. Olson Real Est.*, 229 Neb. 249, 426 N.W.2d 504 (1988). See Neb. Rev. Stat. § 25-1925 (Reissue 1990).

The record shows that Getty was born on August 16, 1907, grew up on the farm that was the subject of the contract in this case, served in the military, earned a master's degree, and taught school in Detroit, Michigan, for over 30 years. He never married. His closest relatives at the time of the execution of the contract in this case were an older brother, an older sister, a niece, and four nephews. Getty purchased the farm from his father's estate in 1946 and returned to the farm in 1965, when he retired from teaching in Michigan. Getty worked as a substitute teacher in Nebraska until 1970.

The farm in question is legally described as the northwest quarter of Section 21, Township 11 North, Range 1 West of the 6th P.M., in York County, Nebraska, and is located 1 mile east and one-half mile north of Waco, Nebraska. It is a full quarter section consisting of 160 acres, including 133.9 acres of cropland irrigated with a 75-horsepower electric motor and approximately one-half mile of 8-inch gated irrigation pipe.

Defendants Don and Donna Westwood are husband and wife and are the parents of defendant Jeffrey Westwood. Don

Westwood started farming a few acres of Getty's land in 1954. The Westwoods have farmed the entire quarter section since 1963, leasing the land on a crop share basis. Jeffrey Westwood participated in the farming operation on the Getty land from the time he was a child. Getty helped the Westwoods with the irrigation work on the farm until 1984.

Prior to December 9, 1986, Don Westwood (hereinafter Westwood) and Getty engaged in several conversations regarding the sale and purchase of the Getty farm. Westwood testified that he first thought about buying the farm from Getty 10 to 15 years ago, but that Getty "put [him] off" until 1986. In 1986, Getty received an award commemorating the fact that the farm had been owned by the Getty family for 100 years.

In the summer of 1986, while Getty and Westwood were irrigating on the farm, Getty told Westwood that he had received his 100-year plaque. During this conversation, Westwood asked if Getty would be interested in selling the farm on a contract. According to Westwood, Getty "set there for a while" and asked what it included. Westwood said he did not know and that he had never seen a land contract. According to Westwood, Getty finally said he would like to see a contract and that he did not care who prepared the contract.

As a result of this conversation, Westwood asked his attorney, John Hahn, to draft a contract. Hahn testified that Westwood asked him to prepare the contract shortly before December 9, 1986. Westwood did not know the purchase price or interest rate, but told Hahn that the seller wanted to retain a life use on the building site. Hahn prepared a "Real Estate Purchase Agreement." Hahn had the agreement typewritten before he first met Getty. From directions given by Westwood, Hahn prepared the instrument with Getty as the seller and Jeffrey Westwood as the buyer. Blanks for the various terms were left in the agreement. Apparently from information furnished by Westwood, Hahn used a form that did not provide for any downpayment. Donna Westwood testified that the Getty farm was to be purchased in Jeffrey Westwood's name to keep it "out of the hands of the FHA."

On December 9, 1986, Hahn, Jeffrey Westwood, Westwood, and Donna Westwood met with Getty, who was then 79 years

old, at Getty's farm to discuss the terms of the agreement. Donna Westwood secretly tape-recorded the December 9 meeting "for historical purposes."

Hahn testified that he, Getty, and the Westwoods gathered around Getty's kitchen table and developed the terms of the contract as follows: Westwood and Getty first discussed what would be a fair price. Getty asked Westwood what he was willing to pay, and Westwood said he could not tell Getty that price. The discussions continued, and Westwood basically emphasized the amount of the rental payments made by him to Getty during previous years. That figure was approximately $6,000 per year, and the parties arrived at a purchase price based on the $6,000 figure. Westwood testified that in negotiating the contract payments, he told Getty he basically wanted to make the rent, at the level he had paid over the years, pay for the farm and that Getty was satisfied with that arrangement.

The record shows that the interest rate was negotiated during the December 9 meeting as follows:

> [Hahn]: What interest rate do you want to charge?
>
> [Getty]: (laughing) What are some of the interest rates.
>
> Don [Westwood]: I can't, I can't do that, Ervin.
>
> [Getty]: I ask 'em at the bank often enough.
>
> Donna [Westwood]: Four, four and three-quarters, I thought . . .
>
> [Getty]: Oh, let's make it come out even. Four. Let's don't go for three-quarters.
>
> . . . .
>
> . . . Teachers like numbers to come out even . . . .

Getty was not represented by an attorney at the December 9 meeting. He was given a copy of the contract, but did not read through it at any time during the meeting. Hahn testified that he asked Getty if he wanted to read the contract before he signed it, and Getty said he did not. Hahn also asked Getty whether he wanted his attorney to review the documents before execution. Again, Getty said he did not.

Hahn testified that he calculated the $60,000 purchase price based on the figures proposed at the December 9 meeting. The resulting purchase agreement provided that the sale price of the

farm and certain irrigation equipment was $60,000, at interest of 4 percent, with level principal payments of $2,000 for 30 years. Westwood agreed to pay the property taxes on the farm, which were approximately $2,200 per year. Getty retained a life estate in the buildings on the farm. Westwood testified that the contract did not provide for a downpayment because Getty would have had "double income" for 1986 in that Westwood had paid Getty for his share of the 1986 corn crop about 2 weeks prior to December 9, 1986.

The tape recording of the December 9 meeting corroborates the above testimony.

The record shows that the fair market value of the farm and irrigation equipment on December 9, 1986, was between $147,000 and $176,000. Hahn testified that under the terms of the contract, the Westwoods would pay basically the same amount (approximately $6,000—$2,000 applied toward principal and $4,000 in taxes and interest) that they had paid in rent the previous year for the next 30 years and then they would own the farm. Hahn "thought the interest rate was probably pretty low" and acknowledged that land contracts were running between 8 and 9 percent, and possibly at 10 percent interest.

On January 15, 1987, Getty met the Westwoods and Hahn in Hahn's York office to close the deal. During this meeting, a memorandum of sale, escrow agreement, and deed were executed, and the abstract was delivered by Getty. Getty was not represented by an attorney at this meeting.

The record shows that prior to December 9, 1986, and January 15, 1987, Getty was, in the words of the trial court, "an intelligent, energetic, enthusiastic, garrulous, domineering, opinionated, independent, eccentric person." We agree with that assessment.

Getty's older brother, Hayward Getty, testified that some time in 1986, Getty mentioned the subject of the Westwoods' renting the farm. Specifically, Getty told Hayward Getty he did not think he was getting proper rental income from the farm and said that "Don Westwood was a crook." Hayward Getty then testified that his brother was not particularly upset, and observed that Getty was not "noted for his business acumen and loosing [sic] a few dollars here and there never bothered

him." In a conversation regarding the sale of the farm, Getty told Hayward Getty that the people in Waco thought he sold it too cheaply. In the spring of 1987, referring to the land contract, Getty repeated the statement he made a year before about Westwood being a crook. As to why he sold the farm at that price, Getty "did say that that was the only way that Jeffrey would ever get a farm."

On December 10, 1986, while in the bank at Waco, Nebraska, Getty told Frederick Scheele, a longtime friend, that he had sold his farm to Jeffrey Westwood because he wanted him to have it.

Marion "Spike" Sjolander, manager of the Waco branch of the First National Bank of York, where Getty did most of his banking, testified that Getty had discussed the sale of his farm to the Westwoods for a number of years. According to Sjolander, Getty did not discuss the price of the farm but said he hoped the Westwoods could buy it. Westwood's brother, Lynn Westwood, testified that Getty told him many times that he wanted Jeffrey Westwood to be a farmer and own the Getty farm.

William Heine, a neighbor and friend of Getty's, testified that he reviewed the contract with Getty in December 1986 at Getty's request. Heine did not recall that the contract was signed, but noted that the blanks had been filled in. Getty asked Heine if "people in town would think he was crazy for doing this" and Heine asked him "if he cared and he said no." Heine assumed Getty was talking about the price and the interest rate. Getty told Heine that if Getty were to put the farm up for auction it would probably bring $1,000 per acre. The two men also discussed the fact that Jeffrey Westwood was the buyer. According to Heine, Getty said he wanted Jeffrey Westwood to have the farm because he was young and Getty did not want the farm to change hands again for a while. Getty also approved of the way the Westwood family had farmed the land. Heine testified that Getty stated on that day and on previous occasions that he had no one in his family who he wanted to have the farm. Getty also said he was selling the farm partly because he did not want to manage his own financial affairs any more.

Several witnesses testified to the fact that in recent years

Getty allowed young people to live with him on the farm, and the record shows that Getty provided substantial financial assistance to two of these persons, Shannon Hamilton and Carla Smith, during the first half of 1987. Miller testified that when she talked to Getty about these people, he told her they were his friends. Heine testified that he did not approve of Hamilton's living at the farm because he "and the rest of the crew out there" were taking advantage of Getty. Heine expressed his concerns to Getty about a year before Getty sold the farm. According to Heine, "He just flat out told me it was none of my business how much money he gave them or that he had them live there." Getty told Heine he could afford it and went into some detail about how he hoped he was doing those people some good. He thought he could possibly change their lives, and if he did improve their lives, it was worth it.

The medical evidence shows that Getty was in poor physical health at the time he sold the farm. Dr. Darroll Loschen, Getty's physician, testified that he had treated Getty since 1965. In 1979, Loschen diagnosed Getty as being diabetic. The diabetes was controlled with insulin until August 17, 1985, when Getty was admitted to the York hospital for problems related to diabetes. He was released 2 days later, having improved significantly.

Dr. Loschen next saw Getty in February 1987, when Getty's diabetes was "under extremely poor control." Getty had a dry mouth, increased urinary frequency, and blurred vision. He had gained 25 pounds in 18 months and was not in very good condition.

On April 3, 1987, Getty was once again admitted to the York hospital with his diabetes out of control. He was discharged from the hospital on April 6. Getty returned to the clinic on April 20 with similar symptoms. On this occasion, Getty appeared confused, and Dr. Loschen diagnosed an acute organic brain syndrome. A diagnosis of organic brain syndrome means that due to his disease processes, Getty was not relating to either time, place, person, or all three. Dr. Loschen referred Getty to Dr. George Hachiya, a consulting psychiatrist, who examined Getty on April 20.

Dr. Hachiya's report of April 20, 1987, states:

> Mr. Getty is a 79 year old gentleman seen for psychiatric evaluation at the York community hospital on April 20th.
>
> Mr. Getty has several physical illnesses. . . .
>
> In this interview session Mr. Getty presents himself as a robust energetic man who does not appear to be of his chronological age. He verbalizes with good use of language. There is definite pressure of speech. There is, however, no indication of loose association or flight of ideation.
>
> . . . .
>
> Assessment of his sensorium and mental capacity reveals him to be remarkably alert in view of his chronological age. There is, however, significant impairment of insight and judgment.

Dr. Hachiya recommended that Getty be transferred to the geriatric unit of the St. Joseph Center for Mental Health in Omaha. Getty agreed to the transfer and was admitted on April 21, 1987, under the care of Dr. Subhash Bhatia.

The results of Dr. Bhatia's mental status examination are as follows:

> ATTENTION, APPEARANCE, ATTITUDE & ACTIVITY: The patient was alert, he appears appropriately dressed, tall, overweight and younger than his stated age. He maintained good eye contact and was cheerful, friendly and cooperative throughout the interview. He exhibited a normal amount of motor activity with no evidence of retardation, posturing, mannerisms or ticks. . . . THOUGHT PROCESSES: The patient was coherent, spontaneous but overproductive. His speech was somewhat pressured and tangential. . . . EMOTIONAL STATE: The patient appeared moderately elated on a seven point depression-elation scale. He was freindly [sic] and very animated throughout the examination. His affect was within normal range and appropriate to his thought content throughout the interview. SENSORIUM AND INTELLIGENCE: The patient was oriented to person, place and time. He had excellent recall of up to six digits forward. He had adequate simple mathematical ability but was unable to

> name the last five presidents in order, but he did name five presidents from this century. He then asked the examiner which four presidents had been assasinated [sic] and was able to name these.

Getty was then referred to Dr. Jerrad Hertzler for a neurological examination. After examining Getty on May 7, 1987, Dr. Hertzler described him as a normally developed elderly man who was "quite alert" and "perfectly well oriented."

Getty was discharged from the St. Joseph Center for Mental Health on May 21, 1987, and was admitted to Hearthstone, a care facility in York. Soon thereafter, Hayward Getty filed a petition in the county court for York County, seeking to have Miller appointed guardian and conservator for the protection of the person and the estate of Getty. Hayward Getty testified that he filed the petition to comply with Hearthstone's requirement that a guardian be appointed for Getty. Miller was so appointed on June 15, 1987.

Dr. Loschen acknowledged that he had not seen Getty between August 1985 and February 1987. Based on what Getty was like in August 1985 and his condition in February 1987, however, Dr. Loschen was of the opinion that Getty's ability to enter into a contract on December 9, 1986, "would be an open question." He also noted that Getty's various health problems could have triggered or exacerbated organic brain syndrome during the period in question, but did not testify that Getty was incompetent in December 1986.

Dr. Eli Chesen, a psychiatrist, did not personally examine Getty, but reviewed the medical records of Dr. Loschen, the medical records of the St. Joseph Center for Mental Health, the York hospital records, and the tape recording of the December 9, 1986, meeting. In his deposition, taken October 5, 1988, Dr. Chesen expressed the opinion, based on a lack of medical evidence to the contrary, that Getty was able to understand the events that took place on December 9, 1986. Dr. Chesen believed that Getty did not suffer an impairment to the degree that he would have been incompetent to protect his own interests on December 9, 1986, and that he comprehended the meaning, effect, and design of his actions on that date.

After reviewing the same materials and a copy of Dr. Chesen's deposition, Dr. John Baldwin, a psychiatrist, concluded that Getty suffered from organic affective disorder, which is similar to organic brain syndrome. Dr. Baldwin was of the opinion that on December 9, 1986, Getty was competent to know that he was selling his farm, but was not competent, or did not have a sufficient understanding of his own best interests, to properly attend to the details of the transaction. In other words, Getty did not understand or was not competent to understand the financial implications of the sale and the impact of those implications upon him.

In his deposition, taken November 14, 1988, Getty himself recalled that the Westwoods "showed up with a contract," that the Westwoods wanted to buy just the land, and that he wanted to keep the house and buildings. Getty had "no idea" of how they determined the contract price or the interest rate. He stated that he did not know what the farm was worth, but did not think his farm could sell for $1,000 per acre "unless somebody wanted to get rid of their money and put it into something safely." He believed the farm had to be sold sometime "because I am 81 years old, and something had to be done with it sooner or later. I didn't want to die and just leave it all up in the air . . . ." He described Jeffrey Westwood as a "good boy" and said he "sort of" wanted the Westwoods to have the farm because they had farmed it for a long time.

Getty denied being mentally incompetent when he signed the contract. He did not inquire into the real estate values around York County, but was willing to sell the farm without knowing what it was worth. He was satisfied with the price because he did not really need the money due to his pension payments.

Getty believed the Westwoods took advantage of him because they thought he did not need the money, but that the Westwoods did not force or urge him to do something he did not want to do. He said it did bother him at the time that there were four of them and only one of him at the house. He was suspicious that the Westwoods hired a Lincoln lawyer when there were good lawyers in York. Nevertheless, Getty said he did not feel any need to discuss the matter with his own attorney.

Regarding Getty's mental capacity, the district court found that Getty understood on December 9, 1986, and on January 15, 1987, he was selling the farm to Jeffrey Westwood; that Getty did not know, but did not care, what the value of the farm was; and that all amounts of fair market value over $60,000 were intended as a gift to Jeffrey Westwood. The district court also found that Miller failed to prove by clear and convincing evidence that Getty completed the sale as the result of undue influence. Accordingly, Miller's petition was dismissed.

In summary, Miller's assignments of error allege that the trial court erred (1) in finding the evidence did not establish that Getty was mentally incompetent to enter into the real estate transactions of December 9, 1986, and January 15, 1987, (2) in finding that the execution of documents on those dates was not the product of undue influence exercised upon him by the defendants, and (3) in finding that Miller did not meet the burden of proof to set aside a gift.

In an action to set aside a contract on the basis of incapacity or undue influence, the plaintiff has the burden of establishing the elements of those theories by clear and convincing evidence. See *Craig v. Kile*, 213 Neb. 340, 329 N.W.2d 340 (1983).

We have said that

> "[i]n order to set aside an instrument or instruments . . . for want of mental capacity on the part of the person executing such instruments, the burden of proof is upon the party so asserting to establish that the mind of the person executing such instruments was so weak or unbalanced when the instruments were executed that he could not understand and comprehend the purport and effect of what he was doing."

Craig v. Kile, supra at 346, 329 N.W.2d at 344. See, also, *Kucaba v. Kucaba*, 146 Neb. 116, 18 N.W.2d 645 (1945); *Conry v. Langdon*, 181 Neb. 53, 146 N.W.2d 782 (1966).

Citing *Kucaba v. Kucaba, supra*, Miller contends the district court erred in requiring that she prove by clear and convincing evidence that Getty was mentally incompetent to execute the documents in question. In *Kucaba v. Kucaba, supra* at 125, 127, 18 N.W.2d at 650-52, we said:

> "The fundamental principle is that the burden of proof

> in any cause rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative of an issue and remains there until termination of the action." [Citation omitted.]
>
> "The burden of proof in its proper sense rests, throughout the case, as to each issue, on the party originally having the burden as to such issue." [Citation omitted.]
>
> . . . .
>
> ". . . [A]t the beginning of every trial the burden of proof and the burden of evidence as to any particular issue are generally on the same party. This burden of evidence is so continued until the party having the burden of proof establishes a *prima facie* case; nothing less will shift the burden of evidence. When such a *prima facie* case is established, the burden of evidence is shifted to the adverse party; the adverse party may, by the production of evidence destroying the *prima facie* case against him, satisfy the burden and restore it to the original party." [Citation omitted.]
>
> "The burden of evidence at any particular time rests on the party who would be defeated if no further evidence were introduced; when a *prima facie* case is established, the burden of evidence is shifted to the adverse party, and the burden may shift from side to side during the course of the trial." [Citation omitted.]
>
> The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to his recovery. In this sense the burden of proof never shifts nor changes but remains from the first to the last where it is placed by the pleadings or the substantive law of the case.

Based on the foregoing, Miller contends that she established a prima facie case that Getty was mentally incompetent when he sold his farm to the Westwoods and that the Westwoods failed to produce sufficient evidence to "destroy" Miller's prima facie case, satisfy the Westwoods' burden to go forward with the evidence, and restore the burden of evidence to Miller. We disagree.

Although Miller did establish a prima facie case on the issue of Getty's competency, the evidence presented by the Westwoods was sufficient to overcome the prima facie evidence that Getty was mentally incompetent when he sold his farm to Jeffrey Westwood. As the trial court observed, the medical evidence on this issue is an open question. The other evidence shows that Getty understood that he was selling his farm to Jeffrey Westwood. It also shows that Getty did not know, *but did not care*, what his farmland was worth, because he intended to sell the farm to Jeffrey Westwood at a price the Westwoods said they could afford. Accordingly, we find that Miller failed to prove by clear and convincing evidence that Getty was mentally incompetent when he sold his farm to the Westwoods.

The various factors and elements necessary to establish a case of undue influence are set out in *Craig v. Kile*, 213 Neb. 340, 345-46, 329 N.W.2d 340, 344 (1983):

> " ' "The elements necessary to be established to warrant the rejection of a written instrument on the ground of undue influence are: (1) That the person who executed the instrument was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of such undue influence." ' "

It is not mere influence that makes a conveyance unlawful, but undue influence as established in the law. *Craig v. Kile, supra*. For example, the undue influence which will void a gift is an unlawful and fraudulent influence which controls the will of the donor. *Id.*

> " 'The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only with determining whether it was the voluntary act of the grantor. The fact that the grantor has others who are proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance.' " [Citation omitted.] The mere fact that there are living relatives who are denied property in favor of friends is not sufficient to set aside a conveyance. . . . [M]ere suspicion, surmise, or

> conjecture does not warrant a finding of undue influence, but there must be a solid foundation of established facts on which to rest the inference of its existence. This is particularly true where the parties are well aware of the existence of the contested deed shortly after its execution.

Id. at 346-47, 329 N.W.2d at 344-45.

As the trial court observed, the evidence shows that the defendants had the opportunity and "had some profit motive for 33 years" to influence Getty. As discussed above, Getty was an intelligent man and had always been independent in his thinking. The medical evidence is inconclusive as to whether he was susceptible to influence by the Westwoods and others because of his medical problems. Getty himself believed the Westwoods took advantage of him, but said that the Westwoods did not force or urge him to do something he did not want to do. Reviewing the record de novo, we find that any influence exercised by the Westwoods did not rise to the level of undue influence and that the sale of the farm at those terms was Getty's voluntary action. Miller's assignments of error in this regard are without merit.

Finally, Miller contests the trial court's finding that "[a]ll amounts of fair market value over $60,000 . . . were intended as a gift to Jeffrey Westwood because Mr. Getty thought that his estate, after the sale, [was] more than ample to provide for his needs for the rest of his life and there is no evidence to the contrary." This case was tried on the premise that the sale of the farm was an arm's-length transaction. At no time in the Westwoods' case or in the pleadings was the concept of a gift ever mentioned. Although the trial court's finding in this regard might explain Getty's motive in selling the farm as he did, it was unnecessary to make such a finding in order to dispose of the issues presented in the case. Accordingly, we modify the trial court's order to delete the language quoted above.

In closing, we note that although he was present at the meetings on December 9, 1986, and January 15, 1987, Jeffrey Westwood, the actual buyer, essentially took no part in the negotiation of this purchase. Although Don and Donna Westwood appear to be the parties most interested in buying Getty's farm, the land actually belongs to their son, Jeffrey

Westwood, as Getty wished.

The decision of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.

RONALD PATTERSON AND CAROL PATTERSON, APPELLANTS AND CROSS-APPELLEES, V. SWARR, MAY, SMITH & ANDERSON, A PROFESSIONAL CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS.

473 N.W.2d 94

Filed August 16, 1991. No. 89-436.

1. **Trial: Motions for Mistrial.** No antecedent objection is necessary in order to move for a mistrial.
2. **Motions for New Trial: Appeal and Error.** The standard of review of an order granting a new trial is whether the trial court abused its discretion.
3. **Rules of Evidence: Insurance: Liability: Negligence.** Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.
4. **Motions for New Trial.** A motion for new trial should be granted only where there is error prejudicial to the rights of the unsuccessful party.
5. **Directed Verdict.** On a motion for directed verdict or judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom.
6. _____. In order to sustain a motion for a directed verdict or for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
7. **Directed Verdict: Evidence: Negligence.** In a negligence case, a trial court should sustain a motion for directed verdict or for judgment notwithstanding the verdict only when the evidence, viewed in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence.
8. **Actions: Negligence: Proof: Damages.** As an element of a negligence cause of action, a plaintiff must prove damages with reasonable certainty.
9. **Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** There are

three elements a plaintiff alleging attorney negligence must prove: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client.

10. **Attorney and Client.** An attorney-client relationship is created when a person seeks advice or assistance from an attorney, the advice or assistance sought pertains to matters within the attorney's professional competence, and the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.
11. **Negligence: Damages.** In a negligence case, the proper measure of damages is that which will place the aggrieved party in the position in which he or she would have been had there been no negligence.
12. **Trial: Expert Witnesses.** When an expert opinion is given which is not in accordance with the actual facts, it lacks probative value.
13. **Trial: Rules of Evidence: Expert Witnesses.** If the assumption for an opinion advanced by an expert witness is not true, such opinion lacks probative value and should be rejected as irrelevant.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed in part, and in part reversed and remanded with directions to dismiss.

Michael A. Patrick and David W. Griffith, of Williams, Trine, Greenstein & Griffith, P.C., for appellants.

John W. Wilke and Clark J. Vanskiver, of Sodoro, Daly & Sodoro, for appellees.

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

FAHRNBRUCH, J.

Complaining that the trial court erred in granting the defendant lawyers a new trial, the appellants, Ronald Patterson and his wife, Carol Patterson, request that this court reinstate a $1,114,600 legal malpractice jury verdict in their favor.

In their petition, the Pattersons alleged that the defendant attorneys negligently represented them in their chapter 11 bankruptcy reorganization.

After the jury verdict was returned, the district court for Douglas County granted a new trial because of Ronald Patterson's testimonial reference to the defendants' having insurance.

By cross-appeal, the defendants, consisting of Swarr, May,

Smith & Anderson, a professional corporation, and lawyers Thomas D. Stalnaker and James T. Gleason, as individuals, claim that the trial court erred in overruling their motions for a directed verdict and for judgment notwithstanding the verdict.

The trial court correctly determined that Ronald Patterson's testimony regarding the defendants' insurance was prejudicial error, but because of the plaintiffs' failure of proof on the element of damages, the defendants' motions for directed verdict and for judgment notwithstanding the verdict should have been sustained. Therefore, the cause is remanded to the district court with directions to dismiss the case.

Near Gretna, Nebraska, the Pattersons engaged in farming, ranching, and land development operations. The Pattersons began breeding purebred Brangus cattle in approximately 1978. Ronald Patterson (hereinafter Patterson) testified that at that time, he understood that it would take 5 to 7 years before the cattle operation would be productive. To finance their cattle business, the Pattersons borrowed money from the Bank of Papillion (hereinafter bank). Patterson testified that by the end of 1983, the Pattersons' loan with the bank was in excess of $700,000. A note for that amount was secured by livestock, machinery, and crops. The record further reflects that the Pattersons gave the bank another note for the sum of $100,000 on September 16, 1983, which was payable on March 14, 1984. The $100,000 note was secured by certain parcels of the Pattersons' real property. Although the Pattersons had a number of other secured and unsecured creditors, the Pattersons owed the bank nearly 10 times the amount owed any other one creditor. In late 1983, the bank's larger note came due. In January 1984, the bank demanded that the note be fully paid. Apparently, it was the bank's position that the value of its security was less than the amount of the debt owed to it by the Pattersons. In that same month, the bank filed a replevin action to take possession of the personal property which secured the Pattersons' bank debt.

During all relevant times, Stalnaker and Gleason were practicing attorneys in Omaha, and they were associated with the law firm of Swarr, May, Smith & Anderson. Stalnaker and Gleason were employed by the Pattersons to represent them in

their bankruptcy action. On February 9, 1984, the Pattersons filed a voluntary petition for reorganization under chapter 11 of the U.S. Bankruptcy Code. Stalnaker and Gleason explained at the malpractice trial that the purpose of a chapter 11 bankruptcy is to allow a debtor with financial difficulties to accommodate the debtor's creditors and be able to reorganize and continue to operate the debtor's business. Upon the filing of the bankruptcy petition, the bank's replevin action was automatically stayed by the bankruptcy code. See 11 U.S.C. § 362 (1982).

Patterson testified that from the commencement of the bankruptcy action, he and his wife were instructed by Stalnaker to establish a separate checking account, to sell crops and cattle, and to use the proceeds therefrom for anything in the ordinary course of their business. "Cash collateral" is defined in the U.S. Bankruptcy Code as "cash equivalents in which the estate and an entity other than the estate have an interest." 11 U.S.C. § 363(a) (1982). There was testimony that in the context of a farm bankruptcy, cash collateral is the proceeds obtained from the sale of secured crops and secured livestock, which in this case was pledged to the bank. The Pattersons used the bank's cash collateral for cattle, farm, and miscellaneous expenses. Both Stalnaker and Gleason testified they told Patterson that the proceeds could be used to keep the cows alive during the winter. Stalnaker testified that because the bank acknowledged the necessity of keeping the Pattersons' cattle alive, it tacitly agreed to their use of cash collateral to do so.

On May 9, 1984, Gleason informed the Pattersons of the need to devise a reorganization plan or, as an alternative, to reach an agreement with the bank. A reorganization plan was formulated and filed with the bankruptcy court on June 8, 1984. At the malpractice trial, there was expert testimony that the plan "was really pretty good" and that there were no impediments to its confirmation. The reorganization plan provided a method by which the Pattersons' secured and unsecured creditors, including the bank, would be repaid. The terms of the plan will be more fully discussed in part II of this opinion.

On October 18, 1984, the bank moved to have the automatic

bankruptcy stay lifted. The bankruptcy court lifted the stay on November 15, 1984, after finding that the Pattersons "in this proceeding [have] spent $70,000 of cash collateral in direct violation of the [bankruptcy] statute." The U.S. Bankruptcy Code in relevant part prohibits the spending of cash collateral without a creditor's consent or a bankruptcy court's authorization. See § 363(c)(2). Because the Pattersons' chapter 11 reorganization bankruptcy remained pending even though the stay had been lifted, the Pattersons were still subject to § 363(c)(2) and therefore continued to be legally barred from using cash collateral without creditor consent or bankruptcy court approval. The Pattersons were not represented by the defendants in any bankruptcy proceedings after the lift-of-stay hearing.

With the lifting of the stay, the bank was free to pursue a creditor's remedies, such as replevin and foreclosure. On November 19, 1984, the bank's lawyer wrote to the defendants, asserting that the bank would forbear from immediate replevin and foreclosure actions if the Pattersons, among other actions, would release the cattle to the bank for a disbursal sale. The Pattersons' herd consisted of 485 head in November 1984.

The bank subsequently obtained a replevin order. Thereafter, the bank and the Pattersons entered into negotiations, and the Pattersons began liquidating their herd of cattle in May 1985, with the bank's consent. In September of that same year, the Pattersons and the bank reached an agreement and stipulation whereby the Pattersons executed releases to the bank, made cash payments to the bank, conveyed to the bank by warranty deed certain real estate, and gave two notes to the bank, one in the amount of $275,000 and the other in the amount of $65,000. Upon the Pattersons' compliance with the agreement and stipulation, the bank agreed in substance that the Pattersons would be deemed released and discharged from all debt obligations to the bank.

After the stay was lifted, a different reorganization plan was confirmed. That plan incorporated the 1985 Patterson-bank agreement. The agreement provided that if the Pattersons defaulted on their obligations under the agreement, the bank could proceed with foreclosure or replevin.

After the Patterson-bank agreement was executed, the Pattersons continued to liquidate their herd of cattle to meet their obligations under that agreement. A payment required by the agreement came due on December 1, 1987. The Pattersons were unable to make that payment. Two weeks later, the bank filed a replevin action. In July 1988, the bank seized the Pattersons' remaining cattle and equipment. The Pattersons were able to repurchase six head of cattle, which they still possessed at the time of the malpractice trial. With respect to several parcels of real estate, the bank either foreclosed or exercised its rights under a trust deed. Patterson testified that at the time of trial, he owned the following real estate parcels: 160 acres, 77 acres, and a one-third interest in 280 acres. There was evidence that the real estate owned by the Pattersons at the time of trial had a net worth of $375,000 to $400,000. There was further evidence that at the time of trial, the Pattersons were not indebted to the bank.

On February 4, 1986, the Pattersons filed this action against the defendants. They alleged that because of the negligent advice they received regarding the disposition of the proceeds received from the sale of the bank's collateral, they were deprived of their ability to effectively reorganize under chapter 11 and, thereby, directly suffered losses.

The defendants' motion for directed verdict made at the conclusion of the Pattersons' case in chief was overruled. At the close of all the evidence, the defendants renewed their motion for directed verdict, which motion was also overruled. On February 17, 1989, the jury returned a verdict in the sum of $1,114,600 in favor of the Pattersons. The defendants, on February 23, 1989, filed a motion for judgment notwithstanding the verdict and a motion for a new trial. On April 11, 1989, the trial court overruled the defendants' motion for judgment notwithstanding the verdict, but vacated the judgment in favor of the Pattersons and granted a new trial. A timely notice of appeal was filed in the district court on May 9, 1989, and the defendants cross-appealed.

I. INSURANCE

The defendants made a motion in limine to prevent

Patterson from referring to the defendants' having insurance. The court overruled the motion, but cautioned Pattersons' counsel that "getting into that may affect the case."

Patterson testified that immediately after the bankruptcy court lifted the stay, Gleason stated to him: "Ron, we have really screwed this thing up. . . . Sue the 'h' out of us and we got insurance and get yourself a lawyer." The defendants moved for a mistrial on the ground that Patterson "advised in his . . . answer to the Court that the defendants had insurance."

In one of their propositions of law, the Pattersons suggest that the defendants failed to object to the insurance reference. However, no antecedent objection is necessary in order to move for a mistrial. See, *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984); *Motis v. Manning*, 200 Neb. 593, 264 N.W.2d 844 (1978).

The trial court overruled the motion for a mistrial and stated that the issue could be raised after a verdict was entered. During the defendants' case in chief, Gleason denied that he told Patterson to "sue the 'h' out of [him.]" After the judgment was entered, the defendants' timely motion for a new trial was sustained on the basis of Patterson's reference to insurance.

The plaintiffs contend that the trial court erred in granting a new trial. "The standard of review of an order granting a new trial is whether the trial court abused its discretion." *Kumar v. Douglas County*, 234 Neb. 511, 516, 452 N.W.2d 21, 24 (1990).

Over 50 years ago, this court announced the following rule:

> [W]here the plaintiff shows that defendant carries liability insurance, when it is not relevant to some issue in the case, we have come to the conclusion that it is inadmissible. . . . [I]f the evidence is properly admissible for any purpose, it cannot be excluded for the reason that it tends to prejudice the defendant because it shows or tends to show that he carries liability insurance.

Fielding v. Publix Cars, Inc., 130 Neb. 576, 579-80, 265 N.W. 726, 728 (1936).

The essence of that rule has been codified at Neb. Rev. Stat. § 27-411 (Reissue 1989). Section 27-411 provides:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted

> negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

The Pattersons argue that the statement concerning insurance was a necessary part of Gleason's admission. Severing the statement that the defendants had insurance, Gleason's statement reads: "Ron, we have really screwed this thing up. . . . Sue the 'h' out of us . . . and get yourself a lawyer." The fact that the defendants had insurance adds nothing to Gleason's admission of fault. Therefore, its only purpose was to inject into the trial the prejudicial fact that the defendants had insurance.

The Pattersons also claim that Gleason's statement regarding insurance made his admission more credible and was, therefore, relevant for that purpose. Gleason's statement was elicited during the Pattersons' case in chief. It was not until the defendants' case in chief that Gleason denied that he told Patterson to sue him and Stalnaker. Credibility of the admission was not put in issue until that later point in time. Therefore, it was not proper for the plaintiffs to bolster Gleason's admission with the statement regarding insurance when credibility of the admission was not yet in issue.

Finally, the Pattersons claim that if any error was committed in admitting the evidence of Gleason's insurance, it was not prejudicial. "A motion for new trial should be granted only where there is error prejudicial to the rights of the unsuccessful party." *Kumar, supra* at 516, 452 N.W.2d at 24. In view of the balanced evidence presented on the issues of proximate cause and damages and the clear reference to the defendants' liability insurance, it cannot be said that the trial court abused its discretion in granting a new trial on the basis of the evidence of the defendants' insurance. This assignment of error complaining that the trial court erred in granting a new trial is without merit.

II. ATTORNEY MALPRACTICE

In their cross-appeal, the defendants claim that the trial

court erred in overruling their motions for directed verdict and for judgment notwithstanding the verdict.

> On a motion for directed verdict or judgment notwithstanding the verdict, "the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom." [Citations omitted.]

McCune v. Neitzel, 235 Neb. 754, 762, 457 N.W.2d 803, 809-10 (1990). "[I]n order to sustain a motion for a directed verdict or for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion." *Shibata v. College View Properties*, 234 Neb. 134, 136, 449 N.W.2d 544, 546 (1989). In a negligence case, a trial court should sustain a motion for directed verdict or for judgment notwithstanding the verdict only when the evidence, viewed in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence. *Griess v. Borchers*, 161 Neb. 217, 72 N.W.2d 820 (1955). As an element of a negligence cause of action, a plaintiff must prove damages, *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991), with reasonable certainty, *Uryasz v. Archbishop Bergan Mercy Hosp.*, 230 Neb. 323, 431 N.W.2d 617 (1988).

"There are three elements a plaintiff alleging attorney negligence must prove: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss [damages] to the client. [Citation omitted.]" *McVaney, supra* at 458, 466 N.W.2d at 506.

An attorney-client relationship is created when a person seeks advice or assistance from an attorney, the advice or assistance sought pertains to matters within the attorney's professional competence, and the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance. *Id.* It is uncontroverted that the Pattersons sought

professional assistance from Stalnaker and Gleason and that the defendants in fact represented the Pattersons in their bankruptcy action.

The Pattersons adduced evidence that the defendants breached their duty of care. A bankruptcy attorney, testifying as an expert, said that the defendants' advice to the Pattersons to use cash collateral from the onset of the filing of the Pattersons' bankruptcy continuing through the lifting of the stay did not meet the applicable standard of care for a bankruptcy attorney.

Upon the determination that there was evidence of the defendant attorneys' employment and their neglect of a reasonable duty, the sole remaining issue is whether there was evidence that such negligence resulted in and was the proximate cause of damage to the Pattersons. The defendants contend that the Pattersons failed to make a prima facie showing of damage because in adducing evidence in regard to their alleged loss the Pattersons departed from the reorganization plan proposed by the defendants.

"In a negligence case . . . the proper measure of damages is that which will place the aggrieved party in the position in which he or she would have been had there been no negligence. [Citations omitted.]" *Stansbery v. Schroeder*, 226 Neb. 492, 496, 412 N.W.2d 447, 450 (1987) (attorney malpractice case). In the instant case, it was necessary for the Pattersons (1) to show that the reorganization plan proposed by the defendants would have been confirmed by the bankruptcy court and (2) then to show their damages with reasonable certainty by comparing their expected financial position upon the completion of the reorganization plan proposed by the defendants with their actual financial condition at that same point in time. The Pattersons do not argue on appeal that the defendants should have proposed a different plan.

A bankruptcy lawyer who testified as an expert opined that the plan proposed by the defendants was feasible and would have been confirmed. The defendants' proposed plan provided in relevant part that "[d]uring a five year period beginning with the effective date of the Plan, the Debtors [Pattersons] shall liquidate, in an orderly manner, all livestock owned by them,

provided, however, that Debtors shall have the option to retain a maximum of 40 head of cattle."

The Pattersons' evidence on the issue of damages was presented through the expert testimony of Patricia Pacey, an economist. Pacey calculated a method allegedly allowed by the plan by which the Pattersons could generate revenue from the sale of some of the cattle and crops, offset by their expenses. Pacey admitted that in calculating revenue from the sale of cattle, she determined that the Pattersons would retain most of their herd and that maintenance of a number of head of cattle was necessary in order to meet expenses and the obligations under the proposed plan. She testified that she assumed that the Pattersons, starting in 1986 or 1987, would have a minimum of 238 heifers. During direct examination, Pacey admitted that she departed from the proposed plan in that the defendants' reorganization plan provided for a substantially larger percentage of cattle to be sold. She further stated that the projected revenue would be decreased by a reduction in the size of the herd. At the termination of the proposed plan, Pacey projected a cattle herd of 430 head, as opposed to the retention of not more than 40 head of cattle as set forth in the defendants' plan. Pacey testified that if the Pattersons had been able to proceed under the proposed plan as she interpreted it, they would have been able to completely repay their indebtedness to their creditors, including interest. Pacey further testified that under her reading of the proposed plan, the Pattersons incurred damages of $1,114,600 because they were unable to proceed under the plan as she interpreted it. Although Patterson himself testified as to the damages suffered by the failure to implement the proposed plan, his testimony was based on Pacey's projections.

The defendants unsuccessfully made a motion in limine to Pacey's testimony on the ground that it was speculative, and the court granted a continuing objection to her testimony. The court further overruled the defendants' motion to strike Pacey's testimony. With respect to Pacey's testimony, the defendants' motions for directed verdict and for judgment notwithstanding the verdict were also overruled.

In calculating damages, Pacey departed substantially from

the defendants' proposed reorganization plan. In doing so, she failed to show that the Pattersons' damages were the proximate result of the defendants' negligence. Pacey candidly admitted that she did not follow the plan in determining the size of the Pattersons' cattle herd. In changing that crucial factor, revenue was increased, which would have allowed the plaintiffs to meet their expenses, repay their creditors, and retain their assets. In essence, Pacey devised a new plan whereby the Pattersons would have retained their cattle herd, real estate, and equipment. However, there was no expert testimony that such a plan was ever confirmed, nor was there expert testimony that the plan would be confirmed by the bankruptcy court or that such a plan was even proposed. "When an expert opinion is given which is not in accordance with the actual facts, it lacks probative value. [Citations omitted.]" *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 468, 466 N.W.2d 499, 511 (1991). "If the assumption for an opinion advanced by an expert witness is not true, such opinion lacks probative value and should be rejected as irrelevant. [Citation omitted.]" *Turner v. Welliver*, 226 Neb. 275, 284, 411 N.W.2d 298, 305 (1987).

In support of Pacey's testimony, the Pattersons point to the testimony of Harry Sterling, who was one of the Pattersons' expert bankruptcy witnesses. Sterling testified that in terms of the assumptions used and the economic model constructed, Pacey's projections were *substantially* identical to the plan proposed by Stalnaker in June 1984. He further testified:

> If the economics of this plan would have been such that the creditors would be paid off and retention of more than forty head was possible or likely under the economics of the way the business went, you don't have to liquidate all the way down, and if things go better you can modify the plan, but assuming that things go well and you pay the creditors off under the plan's provisions like that, which is contained in the means of execution, are not strictly enforced.

First, Sterling's testimony lacks the requisite certainty required of expert testimony, as it speaks to purely hypothetical possibilities. Second, the Pattersons in effect contend that

Pacey did not depart from the defendants' proposed reorganization plan because Sterling says she did not. A reading of the proposed plan clearly reveals that Pacey did not comply with the plan in arriving at her proposed damages, regardless of Sterling's testimony. It would be a strange proposition indeed if a court were required to assume an expert witness' testimony was based on facts in evidence for the sole reason that another expert said it was.

The Pattersons further contend that Pacey did not amend the plan because the plan was open-ended and did not provide an exact timeframe for liquidation of the cattle herd. Although the proposed plan did not provide the exact method by which the Pattersons were required to reduce their herd, it did mandate that at the end of the 5-year period, the herd was to be liquidated, with the Pattersons having the option of retaining 40 head of cattle. As discussed, Pacey projected a cattle herd of 430 head upon the completion of the plan, not 40 head of cattle as required by the plan. This, in turn, allowed her to project sufficient revenue over the life of the plan to satisfy the Pattersons' indebtedness and preserve their assets. Pacey's estimate of damages was improperly based upon guess, speculation, conjecture, or choice of possibilities. See *McVaney, supra*. In departing from the proposed reorganization plan, the Pattersons' evidence failed to show the position in which they would have been had there been no negligence. Disposition of this issue makes it unnecessary to reach the defendants' other contentions.

The Pattersons failed as a matter of law to show with reasonable certainty what damages proximately resulted from the defendants' negligence. Thus, the cause must be remanded to the district court with directions to dismiss.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. ARDEN MESSERSMITH, APPELLANT.

473 N.W.2d 83

Filed August 16, 1991. No. 89-1398.

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. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1989).
2. _____: _____. 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. Thus, Rule 404(2) permits evidence of other acts if such acts are relevant for any purpose other than to show a defendant's propensity or disposition to commit the crime charged.
3. _____: _____. Rule 404(2) is subject to the overriding protection of Neb. Evid. R. 403, which provides for exclusion of otherwise relevant evidence 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.
4. **Rules of Evidence: Words and Phrases.** In the context of Neb. Evid. R. 403, "unfair prejudice" means an undue tendency to suggest a decision on an improper basis.
5. _____: _____. 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. Neb. Evid. R. 401.
6. **Trial: Rules of Evidence.** Evidence which is not relevant is not admissible. Neb. Evid. R. 402.
7. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
8. **Trial: Rules of Evidence: Appeal and Error.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. Neb. Evid. R. 103(1).
9. **Trial: Proof: Appeal and Error.** With the exception of an erroneous admission or exclusion of evidence, a defendant, as the appellant claiming reversible error in a criminal case, must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant.
10. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the

questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.

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

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

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

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

SHANAHAN, J.

A jury in the district court for Lancaster County convicted Arden Messersmith of two felonies: theft by receiving stolen property valued at more than $300 but less than $1000, which is a violation of Neb. Rev. Stat. § 28-517 (Reissue 1989) and a Class IV felony, and intent to distribute or deliver amphetamine which was in Messersmith's possession, a Class III felony under Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1988).

APPLICABLE STATUTES

Pertinent to Messersmith's prosecution is § 28-517, which provides: "A person commits theft if he receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, unless the property is received, retained, or disposed with intention to restore it to the owner." Under § 28-416(1), it is unlawful for "any person knowingly or intentionally: (a) To manufacture, distribute, deliver, dispense, or possess with intent to manufacture, distribute, deliver, or dispense a controlled substance."

BASIS FOR MESSERSMITH'S CONVICTIONS

On January 18, 1989, Harold Strayer and Toby Stroh burglarized John Ballou's shed and stole numerous automobile parts from Ballou. Strayer and Stroh delivered most of the stolen auto parts to Messersmith in exchange for money and drugs packaged in small plastic baggies. Before Strayer and Stroh handed over the auto parts to Messersmith, they

informed him that the parts were stolen from Ballou. The next day, January 19, Strayer and Stroh returned to Messersmith's residence to install the stolen auto parts in Messersmith's car. On January 20, Stroh again returned to Messersmith's, where Stroh purchased amphetamine from him.

On January 22, police executed a search warrant at Messersmith's residence and found in Messersmith's bedroom closet a toolbox that contained a vial and five small plastic bags of a substance which, by later chemical analysis, was identified as amphetamine. Contents of another bag tested positive for methamphetamine. The officers also discovered a large plastic bag filled with many small self-sealing plastic bags, another plastic bag containing syringes, a sifter, and a metal funnel and scoop. A triple-beam balance scale and a box of powdered sugar were also found in Messersmith's closet, with a shotgun and a box of shotgun shells.

Police found other items in Messersmith's home, including a candy box containing two bags which had a later-identified amphetamine residue, $1,255 in cash located in Messersmith's wallet, lists of several individuals' names with dollar amounts written after the names, and a table of metric measurements for converting gram weight into ounces and pounds. From the home of Stroh's girl friend, police also retrieved the amphetamine that Stroh had purchased from Messersmith on January 20. Police arrested Messersmith on January 22, 1989. Among the charges filed against Messersmith were counts for the previously mentioned drug and theft offenses.

MESSERSMITH'S MOTION IN LIMINE AND TRIAL

Before introduction of evidence at trial, Messersmith filed a motion in limine, based on Neb. Evid. R. 404(2) (admissibility of "other acts" evidence), Neb. Rev. Stat. § 27-404(2) (Reissue 1989), to preclude testimony from Strayer and Stroh concerning transactions and events involving Messersmith before January 22, 1989, when police found the controlled substances at Messersmith's residence. After an evidential hearing on Messersmith's motion outside the jury's presence, the trial court, pursuant to Neb. Evid. R. 104(1) (preliminary question of admissibility), Neb. Rev. Stat. § 27-104(1) (Reissue

1989), determined that testimony from Strayer and Stroh was admissible under Rule 404(2), but was subject to a cautionary instruction regarding the limited use of "other acts" evidence admitted under Rule 404(2).

At Messersmith's trial, Det. Sgt. Michael Garnett, a witness with special training and experience in investigating narcotics cases, testified that possession of controlled substances, with the presence of many small self-sealing plastic bags, indicates that the drugs were "probably being maintained for resale." According to Garnett, other items commonly used for repackaging and sale of controlled substances include accurate scales of the type found in Messersmith's closet; powdered sugar or other substances used to dilute the controlled substance "to make the quantity of drug that they have larger"; sifters, which are often used to mix the dilutant with the drug; and funnels and scoops that aid in transferring the drug into small plastic bags.

Over Messersmith's objection, Strayer and Stroh testified that they purchased controlled substances from Messersmith numerous times during January 1989 and that some of these transactions involved their delivery of stolen property to Messersmith in exchange for drugs. When Strayer and Stroh brought stolen property to Messersmith for the drugs, they told Messersmith that the articles delivered in the exchange were stolen. Immediately after conclusion of Strayer's testimony, the court instructed the jury that Strayer's testimony concerning prior drug transactions with Messersmith was "not admissible to prove the character of a person in order to show that that person acted in conformity with that character," but was received

> for the limited purpose of helping you to decide whether [Messersmith] had the knowledge required by Count I of the Information [theft charge] and in helping you . . . decide whether [Messersmith] had the intent required by Count II of the Information [drug charge]. You must consider that evidence for that limited purpose and for no other purpose.

The foregoing cautionary and restrictive instruction was repeated immediately after Stroh's testimony and, in a

substantially similar version, was included among the general instructions given to the jury at the conclusion of all evidence.

Over Messersmith's relevance objections, the district court admitted into evidence the shotgun and box of shells which were found in Messersmith's closet and photographs which showed myriad auto parts in the kitchen, dining, and living room areas of Messersmith's home, although none of the depicted items were claimed to be the stolen property which Messersmith received in exchange for drugs delivered to Strayer and Stroh. For instance, the depicted items included: a motorcycle in some state of assembly or disassembly, as the case may be, in Messersmith's dining room, with several motorcycle seats, a fire extinguisher, and a deer's head wearing a straw hat; vehicle wheels with spokes, lying on the dining room floor, which was covered with several boxes of nondescript items; a large air compressor in the living room; assorted metal sanders, drills, gauges, and socket wrenches in Messersmith's kitchen; a mechanic's metal tool chest located in the kitchen; and a cutting torch with its tanks of oxygen and acetylene, also located in the kitchen. In conjunction with admission of the photographs, the court refused to give a limiting instruction, requested by Messersmith, that the photographs showed only the condition of the premises and did not tend to establish that the depicted items were stolen property. Ballou identified his various auto parts which had been incorporated into Messersmith's car and pointed out the distinctive features and approximate value of those parts, which were itemized on a handwritten list prepared by Ballou and received in evidence. Also, under court supervision, the jury collectively viewed Messersmith's car in conjunction with the evidence from Ballou.

During his case in chief, Messersmith disclaimed owning the toolbox which contained the amphetamine, methamphetamine, plastic bags, syringes, sifter, and metal funnel and scoop. Also, Messersmith denied that he knew the auto parts were stolen when he received those articles from Strayer and Stroh and further denied trading the auto parts for drugs received by Strayer and Stroh. Messersmith claimed the gun and shells found in his closet were owned by a coworker who left them in Messersmith's home while Messersmith

contemplated buying them.

During the instruction conference just before summation, Messersmith objected to instructions Nos. 2 and 4, which described the crime of theft by receiving stolen property, namely, "Arden Messersmith . . . did receive, retain, or dispose of stolen movable property of John Ballou, valued at more than $300 but less than $1,000, knowing or believing that it had been stolen." Messersmith contended that, because the State had been required to file a bill of particulars before trial for designation of stolen auto parts as the property involved in the theft charge, jury instructions, describing theft by receipt of stolen property, should specifically identify the property stolen. The court declined to specify the property included within "stolen movable property" used in its instructions. The jury returned a guilty verdict on both charges of drug possession and theft by receipt of stolen property.

ASSIGNMENTS OF ERROR

Messersmith alleges 12 assignments of error which may be distilled into 4, namely, the district court erred in (1) admitting "uncharged misconduct" evidence consisting of Messersmith's previous drug transactions and exchanges of stolen property with Strayer and Stroh; (2) overruling Messersmith's relevance objections to the shotgun, shells, and photographs depicting auto parts which were not the subject of the theft charge; (3) refusing to give a limiting instruction regarding the photographic exhibits; and (4) failing to give an instruction which specified the items within "stolen movable property" used in instructions Nos. 2 and 4.

"OTHER ACTS" 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. Evid. R. 404(2), § 27-404(2).

> "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. Thus, Rule 404(2) permits evidence of other acts if such acts are relevant for any purpose other than to show a defendant's propensity or disposition to commit the crime charged."

State v. Clancy, 224 Neb. 492, 497, 398 N.W.2d 710, 714-15 (1987). Accord, *State v. Stewart*, 219 Neb. 347, 363 N.W.2d 368 (1985); *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985).

However, Rule 404(2) is subject to the overriding protection of Neb. Evid. R. 403, which provides for exclusion of otherwise relevant evidence 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). See, *State v. Clancy, supra*; *State v. Craig, supra*.

Messersmith's knowledge that the auto parts received from Strayer and Stroh were stolen and Messersmith's intent to deliver amphetamine were among elements which the State was required to prove beyond a reasonable doubt for Messersmith's convictions on the charged offenses. See §§ 28-517 and 28-416.

Strayer's and Stroh's testimony that they had stolen Ballou's auto parts and delivered those articles to Messersmith, after Strayer and Stroh had informed Messersmith that the parts were stolen, was relevant to show that Messersmith received property which he knew was stolen and to prove an element of the theft offense, namely, receipt of property known to have been stolen. Therefore, prior transactions involving Messersmith's acceptance of stolen property from Strayer and Stroh in an exchange for drugs were relevant and admissible under Rule 404(2) to establish Messersmith's knowledge that the property which was the subject of the present prosecution was, in fact, stolen.

Also, Messersmith's prior drug transactions with Strayer and Stroh were relevant and admissible under Rule 404(2). While Messersmith's possession of drugs is clearly shown, his prospective disposition of those drugs became quite important, since Messersmith was charged with the intent to deliver or

distribute drugs in his possession. Consequently, the manner in which Strayer and Stroh obtained drugs was important in the case against Messersmith. The prior drug transactions tended to show that Strayer and Stroh had obtained drugs from Messersmith with his knowledge and intentional transfer of drugs to Strayer and Stroh, a mutually deliberate transaction, rather than Strayer's and Stroh's obtaining the drugs without Messersmith's knowledge or without his voluntarily transferring the drugs into the possession of Strayer and Stroh as drug customers. Messersmith's presently intended and prospective distribution of drugs, through delivery in accord with a prior established format, might be inferred from the circumstances of his prior transactions. " 'Circumstantial evidence' means facts or circumstances, proved or known, from which existence or nonexistence of another fact may be logically inferred or deduced through a rational process." *State v. Jasper*, 237 Neb. 754, 763, 467 N.W.2d 855, 862 (1991). Accord, *State v. Twohig, ante* p. 92, 469 N.W.2d 344 (1991); *State v. Loveless*, 234 Neb. 463, 451 N.W.2d 692 (1990). "[C]ircumstantial evidence may support a finding that a defendant intended to distribute, deliver, or dispense a controlled substance in the defendant's possession." *State v. Zitterkopf*, 236 Neb. 743, 748, 463 N.W.2d 616, 620 (1990). Therefore, the prior transactions, as an indication of Messersmith's present intent, were relevant and admissible under Rule 404(2).

Because "other acts" evidence under Rule 404(2) is subject to overriding protection from Rule 403, we must examine whether the probative value of Strayer's and Stroh's testimony is substantially outweighed by the danger of unfair prejudice or any other factors designated in Rule 403, such as confusion of issues, misleading the jury, or undue delay. " '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. 220 (1976)). Accord *State v.*

Baltimore, 236 Neb. 736, 463 N.W.2d 808 (1990). "In the context of Neb. Evid. R. 403, 'unfair prejudice' means an undue tendency to suggest a decision on an improper basis." *State v. Lonnecker*, 237 Neb. 207, 210-11, 465 N.W.2d 737, 741 (1991).

Strayer's and Stroh's involvement in stolen property transactions with Messersmith, and their telling him that the property in the exchange was stolen, was closely related to one of the ultimate issues in the case—Messersmith's knowledge that the auto parts received from Strayer and Stroh on January 18 were, in fact, stolen property. Therefore, prior property exchanges, as related by Strayer and Stroh, were highly probative on the question of Messersmith's knowledge. In a similar manner, Messersmith's prior delivery of drugs to Strayer and Stroh on several occasions was probative of Messersmith's intent to deliver drugs found in his possession on January 22, 1989.

Also, the highly probative value of Messersmith's prior transactions with Strayer and Stroh was not outweighed by a danger of unfair prejudice or any other factor designated in Rule 403. There was no undue tendency to suggest a decision on an improper basis, especially in light of the district court's repeated instruction that expressly restricted the use of the "other acts" evidence to the jury's deciding whether Messersmith had the requisite knowledge and intent concerning the stolen property and controlled substance charges. See, Neb. Evid. R. 105, Neb. Rev. Stat. § 27-105 (Reissue 1989) (restrictive instruction on proper use of evidence which is admissible for one purpose, but not another). The limiting instruction in Messersmith's case minimized possible prejudice from Strayer's and Stroh's testimony.

Therefore, Strayer's and Stroh's testimony about prior stolen property and drug transactions involving Messersmith during January 1989 was properly admitted in Messersmith's trial.

RELEVANCE OF SHOTGUN, SHELLS, AND PHOTOGRAPHS

Messersmith next argues that the shotgun and shells found in his bedroom closet, and the photographs depicting numerous

tools and auto parts which were not included in the theft charge against him, were irrelevant and, therefore, improperly admitted.

"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." Neb. Evid. R. 401. "Evidence which is not relevant is not admissible." Neb. Evid. R. 402.

> "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. . . ."

State v. Baltimore, supra at 740, 463 N.W.2d at 812 (quoting McCormick on Evidence § 185 (E. Cleary 3d ed. 1984)). "To be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving an issue to be decided." *State v. Lonnecker, supra* at 210, 465 N.W.2d at 740-41. Accord *State v. Baltimore, supra*.

As previously mentioned, the main issues in Messersmith's case were his knowledge that the auto parts were stolen and his intent to deliver controlled substances found in his home. We cannot see how the shotgun and shells found in Messersmith's closet relate to, or tend to prove, essential elements of the charges against him. Cf. *State v. Lonnecker, supra*. Hence, the shotgun and shells lacked probative value, were irrelevant, and, therefore, were inadmissible. See Neb. Evid. R. 401 and 402.

Similarly, the photographs depicting auto parts which were not the subject of the theft charge against Messersmith were irrelevant to any element in either the theft or drug charge against Messersmith. Regarding the photographs, no witness

designated the depicted items as stolen property. The condition of the premises was not an issue and provided no information to help the jury to resolve any question placed before them. Consequently, the photographs were irrelevant and should have been excluded.

"In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt." *State v. Cox*, 231 Neb. 495, 504, 437 N.W.2d 134, 140 (1989). Accord, *State v. Lonnecker, supra*; *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988). "Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the finding by the trier of fact." *State v. Cox, supra* at 504, 437 N.W.2d at 140. Accord *State v. Twohig, ante* p. 92, 469 N.W.2d 344 (1991). See, also, Neb. Evid. R. 103(1), Neb. Rev. Stat. § 27-103(1) (Reissue 1989) ("[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected"); Neb. Rev. Stat. § 29-2308 (Reissue 1989).

After a review of the record, we find that although the shotgun, shells, and photographs were irrelevant and should have been excluded, other evidence negatived prejudice from error in admitting that irrelevant evidence; for instance, the stolen auto parts identified in Messersmith's car; Strayer's and Stroh's testimony that they informed Messersmith that the parts, incorporated into Messersmith's car, were stolen from Ballou; items found in Messersmith's bedroom closet, such as several containers of methamphetamine and amphetamine, small self-sealing plastic bags, a triple-beam balance scale, sifter, funnel, scoop, and powdered sugar, all items commonly used for repackaging and sale of controlled substances; $1,255 cash in Messersmith's wallet; a list of names and monetary amounts related to those names; and a metric conversion chart. The shotgun and shells, more or less, were swallowed by all the other admissible evidence. The photographs of the interior of

the Messersmith residence, including what can best be characterized as a curious collection of household bric-a-brac and novel knickknacks, although irrelevant, were rendered harmless error by Ballou's meticulous testimony accompanied by a laundry list of auto parts stolen from Ballou. When we keep in mind that "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. Zitterkopf*, 236 Neb. 743, 748, 463 N.W.2d 616, 620 (1990), and that circumstantial evidence may include " ' "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," ' " *id.* and *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990), relevant evidence, properly admitted in Messersmith's case, dispels prejudice and supports the convictions on the charges against Messersmith.

We note that the State has expressed the proposition "The admission or exclusion of evidence is a matter within the discretion of the trial court." Brief for appellee at 20. The preceding proposition, although previously expressed by this court, is, nonetheless, an admittedly and recognized incorrect expression in reference to the Nebraska Evidence Rules. In *State v. Juhl*, 234 Neb. 33, 42, 449 N.W.2d 202, 209 (1989), we stated:

> [R]elevancy of offered evidence and exclusion of relevant evidence involve a trial court's discretion. Thus, whether a particular item of evidence has probative value and is, therefore, relevant, see Neb. Evid. R. 401 (Neb. Rev. Stat. § 27-401 (Reissue 1985)), or whether an item of evidence, although relevant, is excludable on account of the danger of unfair prejudice, confusion of issues, misleading the jury, undue delay in the proceedings, waste of time, or needless presentation of cumulative evidence, see Neb. Evid. R. 403 (Neb. Rev. Stat. § 27-403 (Reissue 1985)), may depend on a trial court's exercise of judicial discretion.

See, also, *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990) (relevance of offered evidence, otherwise admissible,

involves the discretion of a trial court, whose ruling on relevance will be upheld on appeal unless the trial court abused its discretion); *State v. Baltimore*, 236 Neb. 736, 463 N.W.2d 808 (1990) (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).

Hence, in all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence; for example, see, Rule 106(2) (remainder of related writings or recorded statements), Rule 201 (judicial notice of adjudicative facts), Rule 608(2) (cross-examination on specific instances of conduct), Rule 611(2) (scope of cross-examination), and Rule 706(3) (court-appointed expert disclosed to jury). Although the word "discretion," in one form or another, does not appear in either Rule 401 or Rule 403, nevertheless, judicial discretion, as a factor in admissibility, is implicit in Rule 401, concerning the admission of relevant evidence, and Rule 403, regarding exclusion of relevant evidence. Consequently, one might correctly conclude that we expressly disapprove of the all-inclusive and categorically unrestricted evidential proposition "The admission or exclusion of evidence is a matter within the discretion of the trial court," notwithstanding this court's previous use of that expression.

REJECTION OF LIMITING INSTRUCTION

Messersmith claims that reversible error occurred when the district court refused to give a limiting instruction, requested by Messersmith, that the interior photographs of the Messersmith house showed only the condition of the premises and did not tend to establish that the depicted items were stolen. See Rule 105: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury

accordingly."

> With the exception of an erroneous admission or exclusion of evidence, a defendant, as the appellant claiming reversible error in a criminal case, must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant.

State v. Juhl, supra at 45-46, 449 N.W.2d at 211. Accord *State v. Harney*, 237 Neb. 512, 466 N.W.2d 540 (1991). Cf. *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989) (if evidence is erroneously admitted or excluded, the State has the burden to show that such error was harmless beyond a reasonable doubt).

While we have already concluded that the photographs were irrelevant and, therefore, inadmissible, but have also concluded that admission of the photographs was only harmless error, see "relevance of shotgun, shells, and photographs," above in this opinion, Messersmith does not refer to Rule 105 as a basis for the limiting instruction and, as far as we are able to ascertain, does not indicate how he was prejudiced by the absence of the restrictive instruction. For that reason, we find that Messersmith's assignment of error based on the district court's refusal to give a restrictive instruction authorized under Rule 105 has no merit.

INSTRUCTIONS NOS. 2 AND 4

In his last assignment of error, Messersmith claims that the court erred in giving instructions Nos. 2 and 4, which stated the elements of theft by receiving stolen property, without designating by instruction the property stolen from Ballou, namely, auto parts.

"In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant." *Rose v. City of Lincoln*, 234 Neb. 67, 74, 449 N.W.2d 522, 528 (1989). Accord, *State v. Jasper*, 237 Neb. 754, 467 N.W.2d 855 (1991); *State v. Harney, supra*. "All instructions, read conjunctively, must correctly state the law, adequately state the issues, and not mislead the jury." *State v. Pierce*, 231 Neb. 966, 975, 439 N.W.2d 435, 443

(1989). Accord, *State v. Jasper, supra*; *State v. Harney, supra*.

Because the automobile parts found in Messersmith's car were the only property shown to be stolen from Ballou and received by Messersmith, and since Ballou itemized all the property stolen from him, that is, testified to and prepared a list of auto parts stolen, which list was received in evidence and considered by the jury, we find no prejudicial error in the district court's refusal to itemize by instruction the property stolen from Ballou. Messersmith's assignment of error directed to instructions Nos. 2 and 4 given by the court is without merit.

CONCLUSION

Before concluding this opinion, we take the opportunity to commend the trial court and lawyers in this case regarding their refreshing familiarity with the use of Neb. Evid. R. 104(1) in reference to the motion in limine directed to "other acts" evidence under Rule 404(2). Although we have determined that the "other acts" evidence was admissible in Messersmith's case, nevertheless, court and counsel recognized the distinct problem, and possibility of a mistrial, in offering "other acts" evidence in the jury's presence and then discovering that the "other acts" evidence was inadmissible but, unfortunately, had already been heard by the jury. In *State v. Olsan*, 231 Neb. 214, 436 N.W.2d 128 (1989), we encouraged use of a hearing under Rule 104(1) to determine admissibility of a defendant's prior conviction offered pursuant to Rule 609 for impeachment of the defendant's credibility. As demonstrated in Messersmith's case, appropriate use of Rule 104(1) to resolve preliminary questions of admissibility, such as "other acts" evidence or other troublesome situations which may be sticky wickets for introduction of evidence, avoids evidential problems which need never occur in a trial. For that foresight, we gratefully acknowledge the proficiency of the district court and lawyers in handling the question about "other acts" evidence in Messersmith's case.

However, since none of Messersmith's assignments of error have merit, we affirm Messersmith's convictions and sentences.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JEFF A. WEST, APPELLANT.

473 N.W.2d 81

Filed August 16, 1991. No. 90-512.

1. **Constitutional Law: Appeal and Error.** This court will not consider constitutional issues, or other issues, raised for the first time in this court.
2. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of this court to resolve conflicts in the evidence, to pass on the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence.
3. **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.
4. **Convictions: Circumstantial Evidence.** A conviction may be based on circumstantial evidence as long as that evidence, taken as a whole, establishes guilt beyond a reasonable doubt.

Appeal from the District Court for Lancaster County, BERNARD J. MCGINN, Judge, on appeal thereto from the County Court for Lancaster County, JAMES L. FOSTER, Judge. Judgment of District Court affirmed.

James R. Mowbray, of Mowbray & Walker, P.C., for appellant.

William F. Austin, Lincoln City Attorney, and Gerald F. Fisher for appellee.

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

GRANT, J.

Defendant-appellant, Jeff A. West, was charged in the county court for Lancaster County, Nebraska, with two misdemeanor offenses in violation of the Lincoln Municipal Code: (1) indecent exposure and (2) "[t]respass upon the property of another without the permission of the owner or tenant thereof." After trial to the county court, sitting without a jury, the court found the defendant not guilty of the first count, stating, "While the court finds that the evidence is clear that the defendant was in a private area (not his own) without pants, the ordinance doesn't cover this particular factual situation." The trial court found defendant guilty of trespassing and fined him

$500 plus costs. Defendant appealed to the district court, which affirmed the sentence.

We note the appeal herein from the county court to the district court was filed on February 16, 1990. Therefore, the procedural rule in such appeals set out in *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990), effective March 23, 1990, does not apply.

Defendant then timely appealed to this court, assigning a single error: "The trial court and District Court erred in failing to find that the evidence at trial was insufficient as a matter of law to sustain a conviction beyond a reasonable doubt." We affirm.

The record shows the following: A witness, Bert Smith, testified that when he awoke to get a glass of water at approximately 2:15 a.m. on August 2, 1989, he heard his dog barking outside. He looked out his window and saw a figure moving along the side of his next door neighbors' house. Smith saw the figure go around the front of that house and go toward the west toward the Tussing house, two doors west of the Smith house. Smith got dressed and went outside to investigate. Smith testified that as he neared the Tussing home, where Wendy Tussing resided, he saw a man in a crouched position on the Tussings' east side porch, peering into the bottom row of windows on the side door. Smith came up behind the man and said, "All right, cowboy, what are you doing here?"

Smith testified that the startled man jumped up, ran past Smith within a few feet, and continued to run away from the house. Smith testified that he recognized the man as another of his neighbors, defendant West, who lived across the street from the Smith and Tussing homes. At this time Smith saw that West had no clothes on from the waist down. Smith testified that he shouted, "[R]unning's not going to do you any good," but that West kept running.

Smith returned to his home and kept watch from inside his doorway. He testified that 3 or 4 minutes later, he saw a figure that he could not identify jump over the railing of the Wests' front porch and disappear into the West home. Smith then called the police. Officers arrested defendant at his home at about 3 a.m. The officers testified that West answered his door

wearing "gym shorts" and that he had an odor of alcohol on his breath. Both defendant and his wife testified that defendant was still out watering the lawn when his wife went to bed at a little after 1:30. Defendant testified that he drank four or five beers that evening and specifically testified that he had not been on the Tussing premises on August 2, 1989.

Lincoln Mun. Code § 9.52.220 (1984) stated:

> It shall be unlawful for anyone to loiter about or trespass upon the property of another without the consent of the owner or tenant thereof; provided, that windowpeeping in the windows of a private dwelling house, apartment or residence of another after sunset shall be prima facie evidence of trespass. (Ord. 3489 §21-222; July 6, 1936).

Defendant contends that the State failed to satisfy its burden of proof because "[t]here was no testimony by Wendy Tussing whether or not Mr. West, or anyone else, did not have permission to be on the property." Brief for appellant at 6. Tussing testified that she had still been awake watching television at 2:30 a.m. and had heard noises and shouting outside, but that she did not investigate.

Defendant argues that because there is no direct evidence on the issue of consent, the court must have found him guilty based upon a mandatory presumption which he alleges can be derived from the second part of the ordinance. Defendant then contends that the second half of the ordinance does create a mandatory presumption which denies him his constitutional right to due process, citing *Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985), and *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990). There is nothing in the record showing that the issue of constitutionality of the statute was presented to either the county court or the district court, by motion or otherwise. We will not consider a constitutional issue, or other issues, raised for the first time in this court. *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991); *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990).

The State argues that lack of consent can be established through sufficient circumstantial evidence, without the necessity of utilizing any presumptions. We agree. In reviewing

a criminal conviction, it is not the province of this court to resolve conflicts in the evidence, to pass on the credibility of witnesses, to determine the plausibility of explanations, or to 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. On a defendant's claim of insufficiency of the evidence, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor. *State v. Grantzinger*, 235 Neb. 974, 458 N.W.2d 461 (1990). 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.*

We have held that a conviction may be based on circumstantial evidence as long as that evidence, taken as a whole, establishes guilt beyond a reasonable doubt. *State v. Buckman*, 237 Neb. 936, 468 N.W.2d 589 (1991); *State v. Cortis*, 237 Neb. 97, 465 N.W.2d 132 (1991). Evidence in this case shows that a half-naked man crept onto the side porch of the Tussing residence, peeped into a window in the middle of the night, and fled when he was unexpectedly discovered. He was identified by a neighbor. This is not a case of a stranger approaching a house by way of the front door and seeking entry or information. It was certainly not unreasonable for the court to find under these circumstances that no one consented to this activity. This is especially true in light of Tussing's testimony that she feared to investigate when she heard noises and shouting and that she worried that it might be somebody with a gun.

The evidence is sufficient to support defendant's conviction. The order of the district court, affirming the verdict of the county court, is affirmed.

AFFIRMED.

FRED E. WILES, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARK A. WILES, DECEASED, APPELLANT, V. WILLIAM R. METZGER, TRUSTEE OF THE WILLIAM A. METZGER TRUST ESTATE AND PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM A. METZGER, DECEASED, APPELLEE.

FRED E. WILES, PERSONAL REPRESENTATIVE OF THE ESTATE OF MICHAEL W. WILES, DECEASED, APPELLANT, V. WILLIAM R. METZGER, TRUSTEE OF THE WILLIAM A. METZGER TRUST ESTATE AND PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM A. METZGER, DECEASED, APPELLEE.

473 N.W.2d 113

Filed August 23, 1991. Nos. 89-165, 89-166.

1. **Summary Judgment: Appeal and Error.** 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 the party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment, as a matter of law, if the evidence presented for summary judgment remains uncontroverted.
3. _____: _____. After the movant for a summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.
4. **Negligence: Liability: Minors: Nuisances.** In Nebraska, the attractive nuisance doctrine has developed to mitigate the severity of common-law liability based on possession of real estate insofar as premises liability applies to young children.
5. **Negligence: Minors: Nuisances.** Underlying the attractive nuisance doctrine is recognition of a young child's inability to protect himself in a situation encountered through a child's attraction to a dangerous condition and the child's immaturity and lack of judgment for appreciation of danger involved in the condition encountered.
6. **Negligence: Liability: Minors: Nuisances.** Under the attractive nuisance doctrine, a possessor of premises may be liable for a young child's injury or death if the possessor fails to exercise reasonable care to eliminate the danger from the premises or otherwise protect young children from the dangerous condition of the premises.
7. **Negligence: Minors: Nuisances: Proof.** For applicability of the attractive

nuisance doctrine to a negligence action, a plaintiff has the burden to show that as the result of the child's youth, the child involved in the action failed to discover a dangerous condition on the possessor's land or realize the risk from the dangerous condition.

8. **Negligence: Minors: Nuisances.** If a child understood and appreciated the dangerous condition of or on the possessor's land, the attractive nuisance doctrine is inapplicable to a negligence action for a child's bodily injury or death.
9. **Negligence: Minors: Proof.** A child's realization of the risk from a dangerous condition, in or on a possessor's land, may be established by circumstantial evidence.
10. **Circumstantial Evidence: Words and Phrases.** "Circumstantial evidence" means facts or circumstances, proved or known, from which existence or nonexistence of another fact may be logically inferred or deduced through a rational process.
11. **Negligence: Minors: Nuisances.** A child's age in connection with applicability of the attractive nuisance doctrine is important only as a factor in determining whether a child discovers the condition which proves to be dangerous and realizes, or can be expected to realize, the risk from the dangerous condition on another's land.
12. _____: _____: _____. Applicability of the attractive nuisance doctrine depends on various factors, such as a child's age, intelligence, knowledge, experience, and ability or capacity to discover, observe, understand, or appreciate the nature of the danger or condition of or on a possessor's land and avoid the danger in the condition which causes the child's injury or death.
13. **Licensee: Words and Phrases.** A licensee may be defined as a person who is privileged to enter or remain upon the premises of another by virtue of the possessor's express or implied consent, but who is not a business visitor.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

David V. Chebatoris, of Clements, Svoboda & Chebatoris, for appellant.

Thomas A. Otepka and John W. Iliff, of Gross & Welch, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

Mark A. and Michael W. Wiles died when the ceiling of a cave in which they were camping collapsed on the boys. Fred E. Wiles, personal representative of the estates of Mark and Michael Wiles, filed wrongful death actions against the estates of William A. Metzger, the owner who possessed the real estate

where the cave was located. The district court for Cass County granted summary judgments for Metzger, and Wiles appeals.

FACTUAL BACKGROUND

The cave on the Metzger property was located in the side of a sandstone hill situated in a remote wooded area. Trees grew on the hill above the cave's entrance and on the slope of the hill leading to the cave's entrance, an opening approximately 12 feet wide and 18 feet high in the concave side of the hill. One approaching the cave's entrance would climb a gentle slope at the base of the hill. From the mouth of the cave there was a slight incline descending to an interior plateau in the cave's main chamber several feet within the hill, although part of the chamber was still visible from the cave's opening. From the main chamber, tunnels, some as much as 100 yards long, led further into the hill. These tunnels were apparently used in a former quarrying operation for extraction of quartz pebble conglomerate from the "Cretaceous Age Dakota Sandstone" composition of the earth. Mining operations inside the hill had ceased very many years ago. There were no braces or shoring evident from the prior mining operations, and there were no present braces or shoring for any aspect of the cave or tunnels.

As early as 1983, Mark Wiles and his friends camped in the cave on the Metzger property and enjoyed exploring the cave. On one trip to the cave, Mark took his brother, Michael, and showed Michael around the cave. Other people had also visited the cave and left their "writings on the wall." Metzgers were aware that in some areas of the cave, the ceiling collapsed from time to time. One of the Metzgers had even considered sealing the cave. However, the cave remained open, since Metzgers' horses used the cave to keep cool in the summer. There was some fencing on the perimeter of the premises where the cave was located.

On the evening of August 16, 1985, Mark, who had visited the Metzger cave at least three times since 1983, decided to take his brother and some friends, Douglas Miller, David Terry, and David Funkhouser, on an overnight camping trip to the cave. Mark, 18 years of age, had been an average student and was a high school graduate who was undecided about his future. He

went hunting and fishing and "enjoyed the outdoors." Mark was interested in mechanics, worked on his car, and had summer farm jobs while he was trying to decide whether he would enter the military service or pursue some type of vocational training. Michael, who was 12 years of age and had previously visited the Metzger cave, had just completed seventh grade and was scheduled to return to school in the fall. Michael participated in athletics and, like Mark, was an average student who enjoyed the outdoors. Neither Mark nor Michael had any disability and each had the average intelligence and general life experiences of boys their own age.

Mark, Michael, and their friends collected their camping gear and drove on a gravel road along the north side of the Metzger property. After parking the car, the boys walked south across a field toward the wooded area where the cave was located. On arrival at the cave, the boys built a small fire in the main chamber of the cave, ate, and bedded down for the night. Ten minutes later, the cave ceiling collapsed, crushing and killing Mark, Michael, and David Funkhouser. Miller and Terry dashed from the cave and ran approximately a mile to the Omaha Fish and Wildlife Reserve headquarters north of the Metzger property and from there notified authorities about the cave-in.

Responding to the summons for assistance shortly after midnight, Deputy Sheriff Joseph Baldassano drove his cruiser to the wildlife headquarters, picked up Miller, and proceeded west on the gravel road between the wildlife station and the Metzger property. Baldassano drove to the end of the road, parked his cruiser, and, with Miller, crossed some railroad tracks, crawled over a barbed wire fence, and began running toward the Metzger cave, where Baldassano found the bodies of the three boys buried in the cave-in. Although Baldassano never saw the boys' car on his arrival at the scene, he had parked his cruiser at a location different from the site where the boys had parked their car, or, as Baldassano described the locations, the boys had parked their car in "a different location than where I entered" the field leading to the Metzger cave. That night, Baldassano, in the course of moving from his cruiser to the cave, never noticed any "keep out" or "no trespassing"

signs, although one of the Metzgers later told Baldassano that people ignored the signs posted at the Metzger property. Later, Baldassano recalled a newspaper photograph depicting an automobile tire with the inscription "keep out," which was positioned near a gate entrance into the Metzger property, but Baldassano could not correlate that gate with the point at which he and Miller had entered the Metzger field en route to the cave.

SUMMARY JUDGMENT

Fred Wiles had filed amended petitions and alleged that Mark and Michael had died as a result of Metzger's negligence:

> (a) In failing to close the caves when [Metzger] knew, or should have known, that portions of the ceiling had fallen in the past prior to the accident;
>
> (b) In failing to fence off or barricade said sandstone caves;
>
> (c) In failing to place any sign or other warning of danger on or near said sandstone caves warning of the dangerous condition existing in the caves;
>
> (d) In failing to warn of the dangerous condition then existing, namely, that portions of the ceiling in the caves had fallen in the past.

Wiles further alleged that the attractive nuisance doctrine applied, and, therefore, Metzger owed a duty of reasonable care to the boys.

Metzger moved for summary judgments and offered depositions containing the information found in the "factual background" part of this opinion. Also, Metzger introduced an affidavit of Stephen White, a geologist who conducted an investigation of the Metzger cave and observed several characteristics about the cave, including an opening in a hillside, tunnels which run in various directions throughout and become narrower at the ends, cool, underground, dark, no man-made structural support for ceilings or walls, no evidence of mining, rock walls and ceiling, and a deep entrance. Based on his observations, White concluded that the Metzger cave "simulates or is a duplicate of a natural condition." Wiles offered no evidence.

The district court decided that the attractive nuisance

doctrine applies to "situations where physical harm to trespassing children is caused by an artificial condition upon the land and not to things or conditions which were similar to or a reproduction of nature"; hence, the attractive nuisance doctrine was inapplicable in the Wiles cases, since "the sandstone caves were duplicates of a natural condition." Also, assuming that Mark and Michael were, at most, licensees on the Metzger property, the court concluded that Metzger owed only a duty to refrain from injuring the boys "by willful or wanton negligence or a designed injury or by failure to warn of a hidden danger or peril known to [Metzger] but unknown or unobservable by [Mark and Michael] in the exercise of ordinary care." The district court sustained the Metzger motions for summary judgments and dismissed Wiles' wrongful death actions, since, in the court's view, there was no evidence which might establish Metzger's liability to a licensee.

ASSIGNMENTS OF ERROR

Wiles contends that the district court erred (1) by determining that the Metzger cave was akin to a natural condition and, therefore, outside the scope of the attractive nuisance doctrine and (2) in concluding that Metzger "owed [Mark and Michael] a duty to refrain from injuring [them] by willful or wanton negligence or a designed injury or by failure to warn of a hidden danger or peril known to [Metzger] but unknown or unobservable by the [boys] in the exercise [of] ordinary care," and dismissing the wrongful death actions.

STANDARD OF REVIEW

> 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). Accord, *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990); *DeCamp v. Lewis*, 231 Neb. 191, 435 N.W.2d 883 (1989). See, also, Neb. Rev. Stat. § 25-1332 (Reissue 1989) (sources of information for a summary judgment).

> The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. . . . After the movant for a summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.

Wilson v. F & H Constr. Co., 229 Neb. 815, 819, 428 N.W.2d 914, 917 (1988). Also, "as a procedural equivalent to a trial, a summary judgment is an extreme remedy because a summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed." *Wachtel v. Beer*, 229 Neb. 392, 399, 427 N.W.2d 56, 61 (1988).

ATTRACTIVE NUISANCE DOCTRINE

In *Gubalke v. Estate of Anthes*, 189 Neb. 385, 390-91, 202 N.W.2d 836, 840 (1972), this court, quoting from and adopting Restatement (Second) of Torts § 339 (1965), defined the "attractive nuisance" doctrine as:

> "A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
>
> "(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
>
> "(b) 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, and

"(c) 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, and

"(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to the children involved, and

"(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children."

See, also, *Davis v. Cunningham*, 196 Neb. 8, 241 N.W.2d 343 (1976).

In Nebraska, therefore, the attractive nuisance doctrine has developed to mitigate the severity of common-law liability based on possession of real estate insofar as premises liability applies to young children. Underlying the attractive nuisance doctrine is recognition of a young child's inability to protect himself in a situation encountered through a child's attraction to a dangerous condition and the child's immaturity and lack of judgment for appreciation of danger involved in the condition encountered. *Barnhizer v. Paradise Valley Unified Sch. Dist.*, 123 Ariz. 253, 599 P.2d 209 (1979); *O'Keefe v. South End Rowing Club*, 64 Cal. 2d 729, 414 P.2d 830, 51 Cal. Rptr. 534 (1966); *Moseley v. City of Kansas City*, 170 Kan. 585, 228 P.2d 699 (1951); *Lister v. Campbell*, 371 So. 2d 133 (Fla. App. 1979). Consequently, under the attractive nuisance doctrine, a possessor of premises may be liable for a young child's injury or death if the possessor fails to exercise reasonable care to eliminate danger from the premises or otherwise protect young children from the dangerous condition of the premises. *Gubalke v. Estate of Anthes, supra*; *Davis v. Cunningham, supra*.

Wiles suggests that the attractive nuisance doctrine should not be restricted to artificial conditions, but should be extended to include liability for a natural condition which is dangerous to young children. Most courts have refused to apply the attractive nuisance doctrine to natural conditions or conditions which are similar to or replicate nature; for example, see,

Gagnier v. Curran Const. Co., 151 Mont. 468, 443 P.2d 894 (1968) (cave-in of a ditch used for waterline construction); *Fitch v. Selwyn Village*, 234 N.C. 632, 68 S.E.2d 255 (1951) (drowning in a deep creek adjacent to a residential development); and *Anderson v. Reith-Riley Const. Co.*, 112 Ind. App. 170, 44 N.E.2d 184 (1942) (cave-in of a hole or tunnel being dug by a child in a perpendicular wall of a pit excavated for sand). Although § 339 of the Restatement fashions an attractive nuisance doctrine in reference to artificial conditions only, the American Law Institute inserted a "Caveat" immediately below § 339: "The Institute expresses no opinion as to whether the rule [stated in § 339] may not apply to natural conditions of the land." The Restatement, *supra* at 197.

However, a well-known commentator has observed and believes that origin of a condition may be a factor in determining whether a child appreciates a risk, but should not be dispositive on applicability of the attractive nuisance doctrine; consequently, the distinction between natural and artificial conditions should be abandoned. See Prosser and Keeton on the Law of Torts, *Owners and Occupiers of Land* § 59 at 403 (5th ed. 1984): "It is difficult to see why the origin of the condition should in itself be dispositive on liability, if the possessor could easily remove it or protect against it, and fails to do so." See, also, Note, *Torts: Attractive Nuisance Doctrine: Applicability to Natural Conditions*, 2 Okla. L. Rev. 537 (1949); Note, *Trespassing Children: A Study in Expanding Liability*, 20 Vand. L. Rev. 139 (1966). Cf. *King v. Lennen*, 53 Cal. 2d 340, 348 P.2d 98, 1 Cal. Rptr. 665 (1959) (attractive nuisance doctrine applies notwithstanding the common nature of a danger, if the child is too young to realize the danger).

For applicability of the attractive nuisance doctrine to a negligence action, a plaintiff has the burden to show that as the result of a child's youth, the child involved in the action failed to discover a dangerous condition on the possessor's land or realize the risk from the dangerous condition. *O'Keefe v. South End Rowing Club*, 64 Cal. 2d 729, 414 P.2d 830, 51 Cal. Rptr. 534 (1966); *Hocking v. Duluth, Missabe & Iron Range Ry. Co.*, 263 Minn. 483, 117 N.W.2d 304 (1962); *Dragonjac v. McGaffin Con. & Sup. Co.*, 409 Pa. 276, 186 A.2d 241 (1962).

Thus, if a child understood and appreciated the dangerous condition of or on the possessor's land, the attractive nuisance doctrine is inapplicable to a negligence action for a child's bodily injury or death. See, *Hughes v. Union Pacific R. Co.*, 114 Idaho 466, 757 P.2d 1185 (1988); *Barnhizer v. Paradise Valley Unified Sch. Dist., supra*; *McGill v. City of Laurel*, 252 Miss. 740, 173 So. 2d 892 (1965); *City of Dothan v. Gulledge*, 276 Ala. 433, 163 So. 2d 217 (1964); *Dean v. Construction Co.*, 251 N.C. 581, 111 S.E.2d 827 (1960); *Moseley v. City of Kansas City, supra*; *Brannon v. Harmon*, 56 Wash. 2d 826, 355 P.2d 792 (1960).

Recently, in *Sikyta v. Arrow Stage Lines, ante* p. 289, 304, 470 N.W.2d 724, 733 (1991), we stated: "[A] plaintiff's knowledge of danger, as an element in assumption of risk, may be proved by circumstantial evidence, since knowledge is a state of mind or a mental process." Similarly, a child's realization of the risk from a dangerous condition, in or on a possessor's land, may be established by circumstantial evidence. See *O'Keefe v. South End Rowing Club, supra* at 743 n.8, 414 P.2d at 839 n.8, 51 Cal. Rptr. at 543 n.8: "Such realization will ordinarily be shown by circumstantial evidence, and among that evidence falls the fact that the age, intelligence, and experience of the individual plaintiff are such that anyone similarly endowed would have realized the danger." " 'Circumstantial evidence' means facts or circumstances, proved or known, from which existence or nonexistence of another fact may be logically inferred or deduced through a rational process." *State v. Jasper*, 237 Neb. 754, 763, 467 N.W.2d 855, 862 (1991). Accord *State v. Twohig, ante* p. 92, 469 N.W.2d 344 (1991).

Several courts have found that the doctrine of attractive nuisance is inapplicable in a negligence action for a child's bodily injury or death resulting from a cave-in on a child who has the capacity, experience, and judgment of normal young children to realize the danger of earth collapsing into a cave or tunnel. In *Anderson v. Reith-Riley Const. Co.*, 112 Ind. App. 170, 44 N.E.2d 184 (1942), the court considered the trial court's dismissal of a wrongful death action involving a 9-year-old boy who was killed when he tunneled into a bank of a sandpile which collapsed and killed the child. In affirming the dismissal

of the plaintiff's action, the court commented:

> [A] common danger in cliffs and embankments is that of cave-ins from excavation below the surface. And it is common for children in play to make such excavations in the sides of cliffs and embankments for the purpose of creating caves, tunnels, etc. So they are early instructed as to the danger of cave-ins and are sufficiently presumed to know the danger that if the owner of private property by excavating on his own property, creates an artificial cliff or embankment, merely duplicating the work of nature without adding any new dangers, and a child, without invitation, ventures on the private property, excavates below the surface and is injured or killed by a resultant cave-in, the owner is not liable because of having created an "attractive nuisance." Nor does the rule change with the varying texture of the earth. The danger is the same danger, real and obvious, with only the percentage of probability of the occurrance [sic] increased or decreased with the earth's fineness or firmness.

112 Ind. App. at 173, 44 N.E.2d at 185.

Summary judgment for a landowner was also sustained in *Sparks v. Casselberry Gardens, Inc.*, 227 So. 2d 686 (Fla. App. 1969), where a 14-year-old boy appreciated and realized the danger of a cave-in while he was in an unsupported cave. See, also, *Coleman v. Associated Pipeline Contractors, Inc.*, 444 F.2d 737 (5th Cir. 1971) (under ordinary conditions, any child old enough to be allowed at large may reasonably be expected to have understood and appreciated the dangers in digging a cave in a 12-foot-high embankment). Cf. *McDermott v. Kaczmaret*, 2 Wash. App. 643, 654, 469 P.2d 191, 198 (1970), where the court, confronted with a 7-year-old child's fall from a cliff above a quarry, affirmed a summary judgment for a landowner and stated: "In one of life's earliest lessons, a child learns that the law of gravity applies indiscriminately. Even before his first step, a toddler begins his lifelong accommodation to nature's pervading and inexorable force."

We keep in mind that the attractive nuisance doctrine has developed from recognition of a young child's inability to provide self-protection when the child has been attracted to a

dangerous condition, but immaturity and lack of judgment prevent the child's realization of the danger involved in the condition encountered. In reference to the attractive nuisance doctrine, the older and more experienced and intelligent a child, the less reason for application of the doctrine.

Mark was 18 years of age, Michael 12. Both boys had average intelligence, were involved in various outdoor activities, and, generally, had the normal life experiences which might be reasonably expected in the lives of boys their own age. As a result of Mark's and Michael's age and intelligence, and in accordance with the general life experiences of boys the same age, Mark and Michael were aware of gravity and other forces of nature pertaining to the cave. Therefore, both Mark and Michael were old enough, and had the mental capacity, to realize the distinct danger involved in their presence within the Metzger cave, namely, the surrounding earth might collapse to fill the void of the cave. The peril of a cave-in was open and obvious to the unfortunate young men. Thus, under the circumstances existing in Wiles' cases, Mark Wiles and Michael Wiles each had the experience and judgment to realize the danger inherent in the cave, that is, they understood and appreciated the risk of their entering a cave such as that on the Metzger property; hence, Wiles failed to establish a necessary condition for application of the attractive nuisance doctrine—a young child's inability to realize or appreciate danger encountered on a possessor's premises.

We are not stating, expressly or impliedly, that the age of the boys, in and of itself, is the determinant for application of the attractive nuisance doctrine. A child's age in connection with applicability of the attractive nuisance doctrine is important only as a factor in determining whether a child discovers the condition which proves to be dangerous and realizes, or can be expected to realize, the risk from the dangerous condition on another's land. Consequently, a child's age supplies no bright line for application of the doctrine in a negligence action. Rather, applicability of the attractive nuisance doctrine depends on various factors, such as a child's age, intelligence, knowledge, experience, and ability or capacity to discover, observe, understand, or appreciate the nature of the danger or

condition of or on a possessor's land and avoid the danger in the condition which causes the child's injury or death. See, *Schorah v. Carey*, 331 A.2d 383 (Del. 1975); *O'Keefe v. South End Rowing Club*, 64 Cal. 2d 729, 414 P.2d 830, 51 Cal. Rptr. 534 (1966); *Ekdahl v. Minnesota Utilities Co.*, 203 Minn. 374, 281 N.W. 517 (1938); *Fouraker v. Mullis*, 120 So. 2d 808 (Fla. App. 1960); *Lister v. Campbell*, 371 So. 2d 133 (Fla. App. 1979). Concerning the preceding illustrative factors, no factor is weighted, that is, there is no prescribed method by which more or less weight is assigned to any of the illustrative factors bearing upon applicability of the attractive nuisance doctrine.

Consequently, when the several illustrative factors are considered, we conclude that as a matter of law the attractive nuisance doctrine is inapplicable in Wiles' cases. For that reason, we affirm the summary judgments that the attractive nuisance doctrine is inapplicable in Wiles' actions. Although the district court based its conclusion on the condition of the premises, the condition of Mark and Michael Wiles, namely, their appreciation of the danger involved, is the reason for inapplicability of the attractive nuisance doctrine. See *Sommerfeld v. City of Seward*, 221 Neb. 76, 80, 375 N.W.2d 129, 132 (1985): "Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, the Supreme Court will affirm." Accord, *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990); *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 417 N.W.2d 757 (1988).

METZGER'S DUTY TO A LICENSEE

Although the attractive nuisance doctrine is inapplicable in Wiles' actions, we must examine the dismissal of the actions as a result of the summary judgments that the undisputed facts, and inferences from those facts, preclude Metzger's liability as a matter of law.

From the undisputed evidence presented to the district court, it was an established fact that Mark and Michael Wiles had been to the Metzger cave on occasions before the fatal night. Persons other than the Wiles boys had also ventured into the cave in the

past. Although the trial court and counsel seemed relatively sure about the location of some landmarks on the Metzger property, we are not quite as certain about those important features in Wiles' cases. While there is some mention of "keep out" and "no trespassing" signs regarding the Metzger land, nothing locates those signs in relation to the boys' route to the cave. In fact, the path taken by the boys en route to the cave is unknown. Deputy Baldassano offered no testimony on the location of the boys' car. Without the specific location of the boys' parked car, we cannot begin to ascertain the boys' route from their car to the Metzger cave. Did the boys follow the same route taken by Baldassano in his course to the cave? If so, there were no signs for exclusion of the boys from the Metzger property. Moreover, the record fails to disclose whether the fence mentioned by Baldassano was a complete perimeter fence notwithstanding Baldassano's testimony that he crawled over a fence and later recalled a fence gate somewhere on the Metzger land. Perhaps counsel's thorough familiarity with the setting contains the locative information, but the record does not. In the state of the record, it is a reasonable inference that the boys parked their car somewhere on the gravel road north of the cave and simply walked south across the adjacent Metzger tract without encountering a fence or observing any sign of the type mentioned in Baldassano's testimony. For that matter, while Metzgers may have posted signs on the premises before the night of the accident, nothing indicates that the signs were actually posted at the time when the boys entered the Metzger premises. We derive no certainty from testimony about signs which were possibly nonexistent when the boys entered the premises and testimony about fences which may not serve as a barrier for anyone seeking to enter the Metzger land.

Mark and Michael Wiles, who were repeat visitors to the Metzger cave, may be characterized and legally classified as licensees in view of the record presented. "A licensee may be defined as a person who is privileged to enter or remain upon the premises of another by virtue of the possessor's express or implied consent, but who is not a business visitor." *Roan v. Bruckner*, 180 Neb. 399, 403, 143 N.W.2d 108, 111 (1966).

In *Guenther v. Allgire*, 228 Neb. 425, 428-29, 422 N.W.2d

782, 785 (1988), this court stated:

> The duty of [a licensor is] only to refrain from injuring . . . a licensee by willful or wanton negligence or designed injury, or to warn him as a licensee of a hidden danger or peril *known* to the owner but unknown or unobservable by the licensee, who is required to exercise ordinary care. . . . In order for an action to be willful or wanton, the evidence must prove that a defendant had *actual* knowledge that a danger existed and that the defendant *intentionally* failed to act to prevent harm which was reasonably likely to result. The term imparts knowledge and consciousness that injury is likely to result from the act done or the omission to act, and a constructive intention as to the consequences. . . .
>
> To constitute willful negligence the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith. Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury.

(Emphasis in original.) See, also, *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984).

Considering the evidence in a light most favorable to Wiles, especially the absence of any evidence concerning the boys' route to the cave and existence of warning signs, we may reasonably infer that there was no fence or warning sign on the path taken by the boys. Also, Metzger had actual knowledge that people entered his cave and that the cave's ceiling had occasionally collapsed. Under the circumstances, we cannot state as a matter of law that failure to erect a barrier or warning sign would not support a finding of willful or wanton negligence on the part of Metzger. Consequently, there were material issues of fact, so that Metzger was not entitled to judgments as a matter of law regarding Wiles' claims based on premises liability.

Therefore, we affirm the district court's summary judgments that the doctrine of attractive nuisance is inapplicable in Wiles' actions, but we reverse the summary judgments of the district

court on the question of the liability concerning the Metzger premises.

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

STEWART TRUCKING, INC., A NEBRASKA CORPORATION, APPELLANT, V. PBX, INC., A NEBRASKA AND DELAWARE CORPORATION, APPELLEE.

EUGENE WENZEL, DOING BUSINESS AS WENZEL TRUCKING, AN INDIVIDUAL, APPELLANT, V. PBX, INC., A NEBRASKA AND DELAWARE CORPORATION, APPELLEE.

473 N.W.2d 123

Filed August 23, 1991. Nos. 89-427, 89-428.

1. **Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
2. **Constitutional Law: Federal Acts.** The Interstate Commerce Act was enacted pursuant to the power granted to Congress for regulation of interstate commerce under the commerce clause of U.S. Const. art. I, § 8.
3. **Constitutional Law: Federal Acts: States.** A legislative act or statute of the United States enacted pursuant to the U.S. Constitution is a part of "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. The supremacy clause of the U.S. Constitution binds the several states, subordinates state law, including legislation, to a congressional enactment, and constitutionally provides that federal law supersedes conflicting state law.
4. **Federal Acts: Motor Carriers: Leases: States.** Regulations of the Interstate Commerce Commission governing leases of interstate motor carriers have the same effect as statutory federal law and, therefore, preempt conflicting state law.
5. **Constitutional Law: Statutes: States.** Consideration of state law under the supremacy clause starts with the basic assumption that Congress did not intend to displace state law.
6. **Federal Acts: Motor Carriers: States.** Although Congress has heavily regulated the field of interstate motor carriers, it has not excluded all state regulation.
7. **Federal Acts: Motor Carriers: Leases: Contracts.** Federal law governing interstate motor carrier leases does not preempt Nebraska law in determining whether a lease, as a contract, has come into existence and subsists for enforcement in a Nebraska court.
8. **Reformation: Intent.** If incorrect language or wording is inserted by mistake,

including a scrivener's mistake, into an instrument intended to reflect the agreement of the parties, such mistake is mutual and contrary to the real intention and agreement of the parties.

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

Tim Engler and Gregory D. Barton, of Heron, Burchette, Ruckert & Rothwell, and Stewart B. Mills for appellants.

John M. Guthery, of Perry, Guthery, Haase & Gessford, P.C., and, on brief, Michael O. Johanns and Richard A. Peterson, of Peterson Nelson Johanns Morris & Holdeman, for appellee.

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

SHANAHAN, J.

Stewart Trucking, Inc., and Eugene Wenzel, doing business as Wenzel Trucking, each brought a breach of contract action against PBX, Inc., for payment of additional "revenues generated by trip leasing" of equipment which PBX had leased from Stewart and Wenzel.

All parties stipulated that after negotiations preliminary to signing the equipment leases, Stewart and Wenzel agreed to a "compensation" rate at 90 percent of the gross revenues generated under the leases with PBX, but that the drafted leases, in their compensation provisions, unnoticed by the parties, stated that the compensation rate was 100 percent of all revenue from the leases. The parties mutually and mistakenly believed that the drafted leases, which they signed, correctly reflected their agreements. None of the parties discovered the mistake before concluding the use of equipment under the leases. A dispute arose concerning the amounts due as compensation prescribed by the leases. When the parties were unable to agree on the amounts, Stewart and Wenzel each filed a breach of contract action in the district court for Dakota County, where PBX, alleging the mutually mistaken compensation rate, namely, 90 percent vis-a-vis 100 percent, counterclaimed and requested reformation of the leases to reflect the agreed rate of compensation, that is, 90 percent.

Title 49 U.S.C. § 11107(a)(1) (1988) provides that the Interstate Commerce Commission may require that a motor carrier, when leasing motor vehicles for transportation of property, "make the arrangement in writing signed by the parties specifying its duration and the compensation to be paid by the motor carrier."

Regulations of the Interstate Commerce Commission apply to the leases in question, especially 49 C.F.R. §§ 1057.11 and 1057.12 (1990).

Section 1057.11 of the Interstate Commerce Commission regulations provides:

> [T]he authorized carrier may perform authorized transportation in equipment it does not own only under the following conditions:
>
> (a) *Lease*—There shall be a written lease granting the use of the equipment and meeting the requirements contained in § 1057.12.

Section 1057.12 of the Interstate Commerce Commission regulations states:

> [T]he written lease required under § 1057.11(a) shall contain the following provisions. The required lease provisions shall be adhered to and performed by the authorized carrier.
>
> . . . .
>
> (d) *Compensation to be specified*—The amount to be paid by the authorized carrier for equipment and driver's services shall be clearly stated on the face of the lease or in an addendum which is attached to the lease.

In addition to the factual background regarding the leases, the parties stipulated that if 90 percent were determined to be the correct compensation rate for the leases, PBX had fully paid Stewart and Wenzel on the basis of the 90-percent rate; hence, PBX would not be required to make additional payments to Stewart and Wenzel concerning the leases.

The district court concluded that as a result of the mutual mistake in the compensation rate expressed in the leases in contrast with the actually agreed rate, PBX was entitled to reformation of the leases, relief which the court ordered. Consequently, the court dismissed the breach of contract

actions inasmuch as both Stewart and Wenzel had been fully paid under their court-reformed leases with PBX.

ASSIGNMENT OF ERROR

Stewart and Wenzel contend:

> The District Court erred in reforming the motor carrier leases on the basis of mutual mistake. The District Court erroneously elevated conflicting state law over the ICC motor carrier leasing regulations which pre-empt the field. These regulations require the interstate leases to be in writing, require the leases to contain a written compensation term, and require specific performance of all required terms in the written lease.

Brief for appellants at 4.

STANDARD OF REVIEW

"Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review." *Huffman v. Huffman*, 232 Neb. 742, 748, 441 N.W.2d 899, 904 (1989). Accord, *State ex rel. Gaddis v. Gaddis*, 237 Neb. 264, 465 N.W.2d 773 (1991); *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989); *Lutheran Medical Center v. City of Omaha*, 229 Neb. 802, 429 N.W.2d 347 (1988); *In re Estate of Walker*, 224 Neb. 812, 402 N.W.2d 251 (1987).

ICC MOTOR CARRIER LEASING REGULATIONS

The Interstate Commerce Act was enacted pursuant to the power granted to Congress for regulation of interstate commerce under the commerce clause of U.S. Const. art. I, § 8. See *Interstate Com. Commiss. v. B. & O. Railroad*, 145 U.S. 263, 12 S. Ct. 844, 36 L. Ed. 699 (1892).

A legislative act or statute of the United States enacted pursuant to the U.S. Constitution is a part of "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. The supremacy clause of the U.S. Constitution binds the several states, subordinates state law, including legislation, to a congressional enactment, and constitutionally provides that federal law supersedes conflicting state law. See, *Chapman v. Union Pacific Railroad*, 237 Neb. 617, 467 N.W.2d 388 (1991) (Federal Employers'

Liability Act); *State ex rel. Douglas v. Karnes*, 216 Neb. 750, 346 N.W.2d 231 (1984) (federal tax reform act).

> The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights.

Interstate Com. Commiss. v. B. & O. Railroad, supra at 145 U.S. at 276.

As a result of the general rulemaking authority contained in the Interstate Commerce Act, the Interstate Commerce Commission promulgates regulations which govern leasing by interstate motor carriers. See *American Trucking Assns. v. U. S.*, 344 U.S. 298, 73 S. Ct. 307, 97 L. Ed. 337 (1953). Regulations of the Interstate Commerce Commission governing leases of interstate motor carriers have the same effect as statutory federal law and, therefore, preempt conflicting state law. See *Simmons v. King*, 478 F.2d 857 (5th Cir. 1973) (regulations of the Interstate Commerce Commission preempt conflicting state law regarding vicarious liability). Cf. *A., T. & S. F. Ry. v. Scarlett*, 300 U.S. 471, 57 S. Ct. 541, 81 L. Ed. 748 (1937) (regulations of the Interstate Commerce Commission promulgated pursuant to the Federal Safety Appliance Act have the same force as federal statutes). Cf., also, *Free v. Bland*, 369 U.S. 663, 82 S. Ct. 1089, 8 L. Ed. 2d 180 (1962) (U.S. Treasury regulations specifying ownership of a savings bond are federal law which prevails over conflicting state law on ownership).

Generally, regulations of the Interstate Commerce Commission require that interstate motor carrier leases be in writing, receipts be issued and identify leased equipment, records be maintained pertaining to use of leased equipment, terms for compensation be clearly specified, and public liability insurance coverage be obtained. See 49 C.F.R. part 1057 (1990). The Interstate Commerce Commission has declared that an

objective of leasing regulations is truth-in-leasing through disclosure. See *Lease and Interchange of Vehicles*, 129 M.C.C. 700 (1978).

Wenzel and Stewart argue that since § 1057.12(d) requires that compensation be "clearly stated on the face of the lease" and since § 1057.12 requires that the lease "shall be adhered to and performed by the authorized carrier," PBX must perform the lease as written irrespective of the undisputed mutual mistake in the compensation rate. Furthermore, Stewart and Wenzel argue that since federal law mandates "specific performance" of an interstate motor carrier lease, PBX cannot modify its obligation under the lease because federal law, pursuant to the supremacy clause, subordinates conflicting state law on questions concerning the leases.

"Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981). See, also, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947) (historic police powers of the states are not superseded by a federal act unless Congress clearly intends that the federal law preempt state law).

In *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-69, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986), the Supreme Court stated:

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.*, 430 U. S. 519 [97 S. Ct. 1305, 51 L. Ed. 2d 604] (1977), when there is outright or actual conflict between federal and state law, *e.g.*, *Free v. Bland*, 369 U. S. 663 [82 S. Ct. 1089, 8 L. Ed. 2d 180] (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132 [83 S. Ct. 1210, 10 L. Ed. 2d 248] (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U. S. 85 [103 S. Ct. 2890, 77 L. Ed. 2d 490] (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no

> room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218 [67 S. Ct. 1146, 91 L. Ed. 1447] (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz*, 312 U. S. 52 [61 S. Ct. 399, 85 L. Ed. 581] (1941). Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation. *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U. S. 141 [102 S. Ct. 3014, 73 L. Ed. 2d 664] (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U. S. 691 [104 S. Ct. 2694, 81 L. Ed. 2d 580] (1984).

"Although Congress has heavily regulated the field of interstate motor carriers, it has not excluded all state regulation." *Parten v. Consolidated Freightways Corp.*, 923 F.2d 580, 583 (8th Cir. 1991). For that reason, state law has been held applicable to determine an agent's authority to bind a principal to a contract. See *Laux v. Juillerat*, 680 F. Supp. 1131 (S.D. Ohio 1987), *aff'd* 860 F.2d 1079 (6th Cir. 1988).

In our review of the Interstate Commerce Act and the regulations of the Interstate Commerce Commission regarding leases involving interstate motor carriers, we have found no federal requirements or standards for a determination whether a lease exists. While the interstate commerce regulations controlling interstate motor carrier leases refer to a carrier's adherence to and performance of a lease, federal law supplies no requisite principles of contract law to determine whether a lease, as a contract, has come into existence and subsists for enforcement through judicial action. Thus, Congress has not comprehensively and exclusively legislated on the subject of interstate motor carrier leases and thereby occupied the entire field of law for leases involving interstate motor carriers, nor has Congress expressed a clear intent that states are excluded from controlling remedies in causes of action arising out of interstate motor carrier leases. In the absence of exclusive federal law, there is no conflict between Nebraska law and federal law on the subject of interstate motor carrier leases. Hence, we find nothing in federal law which precludes

application of Nebraska law to causes of action and remedies regarding a lease of equipment involved in interstate commerce. Moreover, enforcement of the real agreement between lessor and lessee will tend toward truth-in-leasing, an expressed objective of the federal law. Accordingly, we hold that federal law governing interstate motor carrier leases does not preempt Nebraska law in determining whether a lease, as a contract, has come into existence and subsists for enforcement in a Nebraska court.

Although not directly related to the question presented in this appeal, 49 U.S.C. § 10761(a) (1988) and its interpretative federal decisions provide an analog. Section 10761(a), which has come to be known as the "filed rate" doctrine, in part states that an

> [interstate motor] carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

However, the Interstate Commerce Commission has already recognized equitable defenses to eliminate unfair application of the filed rate doctrine, for example, a contract formed by mutual mistake. See *Buckeye Cellulose Corp. v. L&N R.R. Co.*, 1 I.C.C.2d 767 (1985), *aff'd sub nom., Seaboard System R.R., Inc. v. United States*, 794 F.2d 635 (11th Cir. 1986). See, also, *Maislin Industries v. Primary Steel, Inc.*, 879 F.2d 400 (8th Cir. 1989) (application of the equitable defense may be proper when the published rate in a filed tariff is greater than the rate agreed upon by the parties); *ACF Industries, Inc.—Petition for Exemption*, No. 40194 at 4 (I.C.C. May 1, 1989) (WESTLAW No. 238488) ("[r]igid insistance [sic] upon payment of the applicable tariff rate has given way where evidence showed a mutual misunderstanding or that both shipper and carrier intended a different rate to apply").

MUTUAL MISTAKE

Under the circumstances, federal law does not prohibit application of Nebraska law, which includes reformation of a

contract containing a mutual mistake by parties to the contract. As we expressed in *Newton v. Brown*, 222 Neb. 605, 613, 386 N.W.2d 424, 430 (1986): "If incorrect language or wording is inserted by mistake, including a scrivener's mistake, into an instrument intended to reflect the agreement of the parties, such mistake is mutual and contrary to the real intention and agreement of the parties." The stipulated and, therefore, undisputed facts establish that all parties to the leases in question intended that the rate of compensation be 90 percent of revenue derived from each lease. However, through a mistake in drafting, the compensation rate was designated at 100 percent notwithstanding the 90 percent compensation rate agreed by the parties. For that reason, the mistake was mutual and contrary to the intention and real agreement of the parties. Under Nebraska law, PBX was entitled to reformation of the leases, the relief ordered by the district court. From our independent examination of the record and application of appropriate law, we reach the same conclusion as that reached by the district court and, consequently, affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY A. KEITHLEY, APPELLANT.

473 N.W.2d 129

Filed August 23, 1991. No. 90-991.

1. **Postconviction: Proof: Appeal and Error.** A defendant seeking postconviction relief has the burden of establishing the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
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.
3. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal or which were known to the defendant and counsel at the time of trial and which

were capable of being raised, but were not raised, in the defendant's direct appeal.

4. **Postconviction.** An evidentiary hearing may properly be denied on a motion for postconviction relief when the records and files of the case affirmatively establish that the defendant is entitled to no relief.
5. **Postconviction: Right to Counsel.** Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.
6. **Postconviction: Right to Counsel: Appeal and Error.** In the absence of a showing of an abuse of discretion, the failure to provide court-appointed counsel in postconviction proceedings is not error.
7. **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.
8. **Appeal and Error.** To be considered by the Supreme Court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred.

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

Gary A. Keithley, pro se.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

Mark Andersen, amicus curiae.

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

PER CURIAM.

The defendant, Gary A. Keithley, has appealed from the order of the trial court which denied his motion for postconviction relief filed on July 5, 1990.

On February 28, 1984, the defendant was convicted of first degree sexual assault and was sentenced to imprisonment for 15 to 25 years. The judgment was affirmed in *State v. Keithley*, 218 Neb. 707, 358 N.W.2d 761 (1984).

The defendant's 15-year-old daughter testified that the defendant had forced her to perform oral sex with him as a form of punishment. The victim's sister testified that when she herself was about 13 years old, the defendant began to approach her almost weekly to engage in oral sex. The sister further testified that this activity led to sexual intercourse

within 6 to 8 months. When the sister was 17, she filed charges against the defendant which resulted in his conviction in 1980 for incest.

On August 21, 1985, the defendant filed a motion for new trial on the basis of newly discovered evidence, alleging that the victim had committed perjury during the trial. On November 21, 1985, the public defender filed a petition for a writ of error coram nobis on the same ground. Hearings were held on November 22 and December 30, 1985. The motion and petition were dismissed on January 14, 1986. That judgment was affirmed in *State v. Keithley*, 223 Neb. xxiii (case No. 86-080, May 21, 1986).

On July 5, 1990, Keithley filed a pro se motion to vacate or set aside his conviction pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1989). The motion alleged the State prosecutor failed to (1) endorse the names of two witnesses and (2) provide Keithley with unspecified reports from the Omaha Police Division and Child Protective Services. Keithley asserts that as a result of this alleged prosecutorial misconduct, he was denied the "right to confrontation and/or effective cross-examination," the right to a fair and impartial trial, and the right to due process under the U.S. Constitution and the Nebraska Constitution. See, U.S. Const. amends. VI and XIV; Neb. Const. art. I, §§ 3 and 11.

The trial court, on examination of the motion of Keithley and a review of the files and records in the case, determined that the State's witnesses had been properly endorsed and that the prosecutor was not required to provide Keithley and his counsel with unspecified reports from the police and Child Protective Services. On September 21, 1990, the trial court denied an evidentiary hearing on the motion, denied the motion for appointment of counsel, and denied the motion for postconviction relief.

A defendant seeking postconviction relief has the burden of establishing the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Whitmore, ante* p. 125, 469 N.W.2d 527 (1991); *State v. Salas*, 237 Neb. 546, 466 N.W.2d 790 (1991); *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991). 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. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991); *State v. Otey, supra*; *State v. Thomas*, 236 Neb. 553, 462 N.W.2d 862 (1990).

The defendant claims the trial court erred in (1) finding that the prosecutor was not required to provide unspecified reports from the police and Child Protective Services, (2) denying an evidentiary hearing, (3) refusing to appoint counsel for him, (4) refusing to allow him to amend his postconviction motion, (5) refusing to liberally construe the facts and allegations in the motion so as to find a claim for ineffective assistance of counsel, and (6) not granting postconviction relief.

The defendant's first claimed error alleges the trial court erred in finding that the prosecutor was not required to provide unspecified reports from the police and Child Protective Services. The record does not show that the defendant or his counsel ever requested the prosecutor or the trial court, either prior to trial or since, to produce the unspecified reports. See Neb. Rev. Stat. § 29-1912 (Reissue 1989). The record does not identify the reports in question or why they would have been of any benefit to the defendant.

At the time of trial the defendant and his counsel knew of the alleged reports, but they did not raise the issue on the direct appeal.

> A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal, or which were known to the defendant and counsel at the time of trial and which were capable of being raised, but were not raised, in the defendant's direct appeal.

State v. Dillon, 224 Neb. 503, 507, 398 N.W.2d 718, 720-21 (1987). Accord, *State v. Otey, supra*; *State v. Nearhood*, 233 Neb. 767, 448 N.W.2d 399 (1989); *State v. Kern*, 232 Neb. 799, 442 N.W.2d 381 (1989). See *State v. Keithley*, 218 Neb. 707, 358 N.W.2d 761 (1984).

The defendant next contends that the trial court erred in denying the postconviction motion without an evidentiary

hearing. The applicable rule is that an evidentiary hearing may properly be denied on a motion for postconviction relief when the records and files of the case affirmatively establish that the defendant is entitled to no relief. *State v. Marshall*, 233 Neb. 567, 446 N.W.2d 733 (1989); *State v. Luna*, 230 Neb. 966, 434 N.W.2d 526 (1989); *State v. Reddick*, 230 Neb. 218, 430 N.W.2d 542 (1988). In this case, all of the relevant facts are found in the defendant's motion and the files and records of the case. The files and records affirmatively disclose that the defendant was not entitled to relief, and the trial court did not err in refusing an evidentiary hearing.

The defendant's third assigned error contends the district court erred in refusing to appoint counsel for him on his motion for postconviction relief. This contention is also without merit. Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant. See § 29-3004. In the absence of a showing of an abuse of discretion, the failure to provide court-appointed counsel in postconviction proceedings is not error. *State v. Rehbein*, 235 Neb. 536, 455 N.W.2d 821 (1990); *State v. Wiley*, 228 Neb. 608, 423 N.W.2d 477 (1988); *State v. Paulson*, 211 Neb. 711, 320 N.W.2d 115 (1982). Furthermore, "[w]here 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 . . . ." *State v. Rehbein, supra* at 545, 455 N.W.2d at 827. Accord *State v. Wiley, supra*. Since the defendant's claims are procedurally barred and are without merit, there was no justiciable issue of law or fact and no abuse of discretion by the trial court.

The defendant's fourth assigned error contends that the trial court erred in failing to allow him the opportunity to amend his postconviction motion. This issue is not addressed in the defendant's brief. See Neb. Ct. R. of Prac. 9D(1)d (rev. 1991). To be considered by the Supreme Court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred. *City of Lincoln v. ABC Books, Inc., ante* p. 378, 470 N.W.2d 760 (1991). Therefore, this alleged error will not be considered.

The defendant next contends that the trial court erred in

refusing to liberally construe the facts and allegations in the postconviction motion so as to find a claim for ineffective assistance of counsel. This contention is without merit. The entire 18-page postconviction motion revolves around how alleged prosecutorial misconduct prejudiced his right to confront and cross-examine the witnesses. Although the defendant contends the alleged failure to provide him with reports from the police and Child Protective Services prejudiced his right to confront and cross-examine witnesses as guaranteed by the U.S. Constitution and the Nebraska Constitution, the defendant fails to identify the reports or show how they would have been of benefit to the defense.

Since the defendant has not shown that his rights under the U.S. Constitution and the Nebraska Constitution were either denied or infringed so as to render his conviction void or voidable, there is no merit to this alleged error.

Finally, the defendant alleges that the trial court erred in failing to grant postconviction relief. Since the record shows that the findings of the trial court were not clearly erroneous, it was not error to refuse postconviction relief.

The judgment of the district court is affirmed.

AFFIRMED.

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