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RONALD J. MARESH, PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN MICHAEL MARESH, DECEASED, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

489 N.W.2d 298

Filed September 18, 1992. No. S-89-762.

1. **Tort Claims Act: Appeal and Error.** In a review of a proceeding under the State Tort Claims Act, the findings of fact of the trial court will not be set aside unless such findings are clearly incorrect.
2. **Pleadings: Proof.** The burden of proving an affirmative defense rests upon the defendant.
3. **Rules of Evidence: Hearsay.** Neb. Rev. Stat. § 27-802 (Reissue 1989) prohibits hearsay "except as provided by [the Nebraska Evidence Rules] or by other rules adopted by the statutes of the State of Nebraska."
4. **Rules of Evidence: Rules of the Supreme Court: Constitutional Law: Hearsay.** The Nebraska hearsay rule, Neb. Rev. Stat. § 27-802 (Reissue 1989), does not provide for exceptions created by rules of court. This is consistent with Neb. Const. art. V, § 25, which states that "the supreme court may promulgate rules of practice and procedure for all courts . . . not in conflict with laws governing such matters."
5. **Rules of the Supreme Court.** The Nebraska Supreme Court shall promulgate rules of procedure for discovery in civil cases, which rules shall not be in conflict with laws governing such matters. Neb. Rev. Stat. § 25-1273.01 (Reissue 1989).
6. **Rules of Evidence: Rules of the Supreme Court: Depositions.** The admission of deposition testimony under Neb. Ct. R. of Discovery 32 (rev. 1992) may be barred by Neb. Rev. Stat. § 27-804(1)(e) (Reissue 1989) where "other reasonable means" are available to secure the attendance at trial of the proposed deponent.
7. **Witnesses: Depositions.** In determining whether "other reasonable means" are available to secure the appearance of a witness so as to admit or not admit the deposition testimony of the witness, the court may consider the stakes in the litigation, the relative resources of the parties, the importance of the declarant's statement in the suit, the foreseeability of need for the statement, the relative expense and difficulties which would be encountered in securing the declarant's trial or deposition testimony, the financial hardship on the proponent to secure the witness' personal appearance, and the hostility or animosity of the witness whose testimony is sought.
8. **Rules of Evidence: Depositions: Proof.** The burden to establish the declarant's unavailability is on the party seeking to introduce evidence by deposition testimony, pursuant to Neb. Rev. Stat. § 27-804 (Reissue 1989).
9. **Trial: Witnesses: Depositions: Appeal and Error.** Whether "other reasonable means" to obtain the appearance of a witness at trial are available so as to permit the use of the witness' deposition is within the discretion of the trial court, whose ruling normally will be upheld on appeal in the absence of an abuse of that discretion.
10. **Trial: Evidence: Appeal and Error.** In a civil case, to constitute reversible error,

admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about such evidence admitted or excluded.

11. _____: _____: _____. Generally, erroneous admission of evidence provides no prejudice in a bench trial if there is sufficient competent and relevant evidence in the record to sustain the judgment.
12. **Highways: States.** The duty of a county or a state to warn against dangerous places or hazards beyond the limits of the highway extends to such places as substantially join the highway, or are in such close proximity thereto as to be in themselves dangerous, under ordinary circumstances.
13. **Highways: Motor Vehicles.** A sharp edge dropoff on a highway generally is a condition of which the State has a duty to warn the traveling public.
14. **Negligence: Evidence.** Ordinarily, a violation of a statute or regulation is not negligence per se, but is only evidence of negligence.
15. **Negligence: Proximate Cause: Proof.** There are three basic requirements in establishing proximate cause. The first requirement is that the negligence be such that "without which the injury would not have occurred," commonly known as the "but for" rule. The second requirement is that the injury be the natural and probable result of the negligence. The third requirement is that there be no efficient intervening cause.
16. **Negligence: Trial.** Determination of causation is, ordinarily, a matter for the trier of fact.
17. **Negligence: Proximate Cause: Words and Phrases.** An efficient intervening cause is new and independent conduct of a third person, which itself is the proximate cause of the injury in question and breaks the causal connection between the original conduct and the injury.
18. **Negligence: Proximate Cause.** Where the defendant's action is itself a cause of the injury and the third party's negligent act is reasonably foreseeable, the third party's negligence is not an efficient intervening cause as a matter of law.
19. **Tort Claims Act: Negligence: Liability.** Any claim based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not that discretion be abused, is exempt from the State Tort Claims Act, pursuant to Neb. Rev. Stat. § 81-8,219(1)(a) (Reissue 1987).
20. _____: _____: _____. The discretionary function exception is inapplicable to a claim under the State Tort Claims Act if a statute, regulation, or policy specifically prescribes a course of governmental action or conduct. In other words, generally, the State is liable for negligence of its employees at the operational level, where there is no room for policy judgment.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

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

J. Michael Fitzgerald, of Carpenter, Rowen & Fitzgerald, and R. Collin Mangrum for appellee.

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

HASTINGS, C.J.

The defendant, the State of Nebraska, appeals a judgment in favor of the plaintiff, Ronald J. Maresh, personal representative of the estate of John Michael Maresh, deceased. This was an action for damages alleged to have been suffered by reason of an automobile accident which occurred when the driver of the automobile in which decedent was riding drove off the shoulder of U.S. Highway 30 while it was under construction. The action was brought under the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 1987). The district court, sitting without a jury as required by § 81-8,214, awarded damages of $124,273.

The State on appeal assigns and argues as error the actions of the trial court in (1) failing to find that the State's discretionary function immunity, § 81-8,219(1)(a), precluded this lawsuit; (2) admitting into evidence the deposition testimony of plaintiff's expert witness William Berg, Ph.D.; and (3) determining that the manner in which the State attempted to mark the edge of the highway during the construction project constituted a breach of duty which was a proximate cause of the decedent's death.

In our review of a proceeding under the State Tort Claims Act, the findings of fact of the trial court will not be set aside unless such findings are clearly incorrect. *Koncaba v. Scotts Bluff County*, 237 Neb. 37, 464 N.W.2d 764 (1991). We affirm.

On May 16, 1987, at about 11:30 p.m., there was a four-vehicle accident on Highway 30, approximately seven-tenths of a mile west of Ames, Nebraska. The plaintiff's decedent was a passenger in one of the involved automobiles, which was driven by Sean Oelkers. The decedent was thrown from the automobile during the accident and died of the injuries which he sustained.

Sgt. Gurney K. Pittenger of the Nebraska State Patrol testified from his investigation notes of this accident, without objection, that the automobile in which the plaintiff's decedent

was riding was westbound on the highway. The vehicle veered and appeared to go off the road onto the north shoulder, and following an attempt to steer hard to the left to pull back onto the highway, the driver overcorrected and lost control of the vehicle. The vehicle veered across the highway into the path of an oncoming pickup truck, which struck Oelkers' car broadside on the passenger side, spinning the car around. The spin ejected Oelkers' passengers, including the plaintiff's decedent. The skid marks left on the pavement indicated that at the time Oelkers reentered the highway from the shoulder, he was traveling at 66 miles per hour.

Oelkers was unable to recall the accident or the events immediately preceding it without the aid of hypnosis. However, without hypnosis, he testified that on the day of the accident and on previous occasions he had driven through the Highway 30 construction area during daylight hours. Oelkers also testified that he "assumed" there was a dropoff at the edge of the pavement. He was aware of the danger of veering into the lane of oncoming traffic when reentering the roadway after dropping off a pavement edge. Oelkers' driver's education instructor testified that he had taught his students, including Oelkers, techniques for safely reentering the roadway after a pavement edge dropoff.

At the time of the accident, a private contractor engaged by the State was resurfacing Highway 30. At the site of the accident, the road surface was fresh asphaltic concrete, totaling 29 feet in width. Each traffic lane was 12 feet wide, with a 2 1/2-foot paved shoulder. There was a 4- to 5-inch dropoff from the edge of the pavement shoulder to the unpaved dirt shoulder. Raised plastic markers delineated the centerline of the highway, but there were no markings setting out the edge of the highway or the edge of the paved shoulder. However, there were 6- by 12-inch reflective yellow panels, raised on posts, mounted 6 to 18 inches outside the edge of the pavement—every 300 feet. Additionally, there were large yellow-orange signs stating, "Sharp Drop-off at Pavement Edge," placed at intervals alongside the construction project area. A driver traveling west from the eastern end of the construction area to the site of the accident would have passed no fewer than six of these signs.

The plaintiff offered the deposition of Berg, primarily on the issue of the standard of care to which the State was to be held in planning, directing, and executing a highway construction project such as the project on Highway 30. The State objected to the admission of the deposition on the grounds that the deposition was hearsay and that there had been no showing of unavailability as required by Neb. Rev. Stat. § 27-804(2)(a) (Reissue 1989). The State did stipulate that Berg lived more than 100 miles from the place of trial. The district court admitted the deposition over the State's objection. However, because we find the trial court was in error in admitting this deposition testimony, as will be explained later, we make no further reference to Berg's testimony.

Offered and received in evidence without objection were exhibit 10, the U.S. Department of Transportation's Manual on Uniform Traffic Control Devices for Streets and Highways (1978) (manual), and exhibit 34, the U.S. Department of Transportation's Traffic Control Devices Handbook (1983) (handbook), to which reference will be made later.

The manual has been adopted by the Department of Roads as the State's rules and regulations "to provide a uniform system of traffic-control devices on all highways within this state." Neb. Rev. Stat. § 39-698 (Reissue 1988); 411 Neb. Admin. Code, ch. 1, § 001.01 (1989). See *Raben v. Dittenber*, 230 Neb. 822, 434 N.W.2d 11 (1989). At trial, the court received both the manual and the handbook into evidence without objection by the State, independent of Berg's deposition. The court also received portions of the Department of Roads' Standard Specifications for Highway Construction (1985) (standard specifications) and the Highway 30 project plans.

Section 507.05(2)(b) of the standard specifications provides as follows:

> When shown in the plans, temporary yellow Type II *object markers* shall be installed at the time of placement of the bottom layer of asphaltic concrete. These markers shall be placed at 300' intervals on both sides of the roadway either opposite each other or at staggered one-half (1/2) intervals on both sides. . . . The markers shall be firmly installed twelve inches plus or minus six

> inches from the pavement edge at a minimum height of three feet from ground elevation to the base of the object marker. The object markers shall consist of six inch wide by twelve inch high base material with yellow reflective flat sheeting adhered firmly on both sides.

(Emphasis supplied.) Section 937.01(2) of the standard specifications provides that "[a]ll barricades, warning signs, lights, temporary signals, and other protective devices must conform with the latest edition of the Manual of Uniform Traffic Control Devices for Streets and Highways."

The project plans, in conformity to § 507.05(2)(b), state:

> [W]hen an existing pavement is to be resurfaced and surfaced shoulders are not [in]cluded as part of the work, temporary yellow Type II markers shall be installed [at] the time of placement of the bottom [la]yer of asphaltic concrete. These markers [sh]all be placed at 300' intervals on both [si]des of the roadway, either opposite each [ot]her or at staggered one-half (1/2) [in]tervals on both sides.
>
> [Th]ey shall be installed and maintained in [go]od condition and position until removal is [di]rected by the engineer.

The actual markings were in conformity to the standard specifications and the project plans.

The amended petition upon which the case was tried alleged that the State was negligent in failing to maintain Highway 30 in a reasonably safe condition, in failing to inspect the Highway 30 construction project, in failing to discover the unreasonably dangerous condition at the edge of Highway 30, in failing to adequately warn of the dropoff, and in failing to delineate the pavement edge. The State generally denied the allegations of the amended petition and asserted both its immunity from suit and the allegation that Oelkers' negligence was "the sole proximate cause of the accident or a contributing cause of the accident." The district court, on the evidence outlined herein, found that "the Defendant, the State of Nebraska, was negligent in failing to provide adequate warnings of the drop-off between the blacktop road and the shoulder at or near Milepost 491 on U.S. Highway 30." While the district court did not explicitly find

that the State was not immune, nor that the State's negligence was a proximate cause of the plaintiff's decedent's death, it implicitly resolved these issues against the State in ordering judgment in favor of the plaintiff.

The immunity issues raised by the State's first assignment of error would, if resolved in the State's favor, eliminate the need to consider the other two assignments. However, the posture in which this case comes before this court necessitates that the immunity question be answered last.

The State chose to raise the immunity issue as an affirmative defense to the amended petition. "The burden of proving an affirmative defense rests upon the defendant." *Spittler v. Nicola*, 239 Neb. 972, 977, 479 N.W.2d 803, 807 (1992). Thus, the immunity issue must be evaluated in light of the proof at trial, rather than upon the pleadings, as would be the case had the issue been raised by demurrer. See *Security Inv. Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989).

The question of the admissibility of the Berg deposition must be answered before the immunity issue can be considered, so that we may properly consider, or not consider, the deposition in evaluating the immunity issue. Likewise, the existence of any breach of duty must also be considered before immunity, because the theory upon which the plaintiff recovered in the district court was based, at least in part, upon the State's employees' failure to "exercis[e] due care, in the execution of a statute or regulation." § 81-8,219(1)(a). Therefore, we consider first the admissibility of the Berg deposition, and second, the sufficiency of the admissible evidence to sustain the judgment, and last, the claim of immunity.

As to the admission of the deposition of Berg, the State claims the court erred in this respect because the plaintiff made no preliminary showing of unavailability of the deponent. Unavailability, as is relevant here, requires that the deponent be "absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means." § 27-804(1)(e). The Nebraska Evidence Rules provide that a deposition may be admitted only if it was taken subject to cross-examination by the party opponent, and only if the witness is unavailable. § 27-804(2)(a).

On the other hand, plaintiff argues that the deposition was properly admitted under Neb. Ct. R. of Discovery 32(a)(3) (rev. 1992). That rule, as applicable here, allows the admission of a deposition where the party opponent was either present at the deposition or properly notified thereof and where the deponent is either more than 100 miles from the site of the trial or beyond the trial court's subpoena power at the time of trial. The plaintiff further argues that since the State stipulated that Berg resided more than 100 miles from the district court site, his deposition is admissible without further inquiry.

The requirements for admissibility of a deposition under § 27-804 and under rule 32 are clearly in conflict. The 100-mile limit and the area within which process may be served are not necessarily congruent. The district court may issue a subpoena to any person within the state, regardless of their remoteness from the place of trial, where the party desiring the subpoena shows good cause and pays the expenses the witness incurs in attending to the subpoena. Neb. Rev. Stat. § 25-1227(2) (Reissue 1989). Moreover, the disjunctive language of rule 32 allows the admission of the deposition where the deponent is more than 100 miles away from the place of trial, regardless of the use of "process or other reasonable means" to secure the deponent's appearance. Thus, application of rule 32 alone would allow the use of the deposition of a person amenable to process, or whose attendance might be obtained through other reasonable means. This would not comply with § 27-804(2)(a).

The plaintiff's position, then, implicitly requires that this court ignore § 27-804 and treat rule 32 as an independent basis for the admissibility of the deposition. This mirrors the majority position of the federal courts in applying the federal counterparts to § 27-804 and rule 32. 8 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil § 2143, 452-53 (1970) ("[federal] Rule 32 . . . creates of its own force an exception to the hearsay rule"); *Schneider v. TRW, Inc.*, 938 F.2d 986 (9th Cir. 1991) (O'Scannlain, J., dissenting); *Carey v. Bahama Cruise Lines*, 864 F.2d 201 (1st Cir. 1988); *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033 (7th Cir. 1977); *U. S. v. Intern. Business Machines Corp.*, 90 F.R.D. 377 (S.D.N.Y. 1981). However, a minority of federal courts have held that

both the federal hearsay rule and the federal discovery rule must be complied with in order that a deposition be admissible. *Schneider v. TRW, Inc., supra*; *Henkel v. XIM Products, Inc.*, 133 F.R.D. 556 (D. Minn. 1991); *Budden v. U.S.*, 748 F. Supp. 1374 (D. Neb. 1990); *In re Air Crash Disaster at Stapleton Intern.*, 720 F. Supp. 1493 (D. Colo. 1989). Implicit in each of the two federal positions is the fact that a deposition, offered at trial as substantive evidence, is hearsay, inadmissible without either the independent hearsay exception created by Fed. R. Civ. P. 32(a)(3) or the hearsay exception created by Fed. R. Evid. 804(b)(1).

Moreover, the resolution of the conflict in rules reached by the majority of federal authorities is not helpful in resolving the conflict in the Nebraska rules. This court has previously looked to the federal rules for guidance in applying both the Nebraska Evidence Rules and this court's rules of discovery. *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991). In this instance, however, the federal majority position is a result of the relationship between the Federal Rules of Evidence and the Federal Rules of Civil Procedure, and the same relationship does not exist between the corresponding Nebraska rules. Therefore, the same result does not obtain.

Fed. R. Evid. 802 prohibits hearsay "except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." The committee comment to Fed. R. Evid. 802 cites Fed. R. Civ. P. 32 as an example of a hearsay exception outside the rules of evidence. Likewise, Fed. R. Civ. P. 32, in its committee comment, states in part:

> A change is made in new Rule 32(a), whereby it is made clear that the rules of evidence are to be applied to depositions offered at trial as though the deponent were then present and testifying at trial. This eliminates the possibility of certain technical hearsay objections which are based, not on the contents of deponent's testimony, but on his absence from court.

The intent of Congress, then, expressed in both the federal hearsay prohibition and the federal discovery rule, is that the discovery rule creates an independent hearsay exception for

depositions.

In contrast, Neb. Rev. Stat. § 27-802 (Reissue 1989), prohibits hearsay "except as provided by these rules or by other rules *adopted by the statutes of the State of Nebraska*." (Emphasis supplied.) The Nebraska hearsay rule does not provide for exceptions created by rules of court. This is consistent with the Nebraska Constitution, which states that "the supreme court may promulgate rules of practice and procedure for all courts . . . not in conflict with laws governing such matters." Neb. Const. art. V, § 25. It is further consistent with Neb. Rev. Stat. § 25-1273.01 (Reissue 1989), which states, "The Supreme Court shall promulgate rules of procedure for discovery in civil cases, which rules shall not be in conflict with laws governing such matters."

Fed. R. Civ. P. 32, then, creates an exception to the federal hearsay rule because that is what Congress, in enacting and amending the rule, intended. It is irrelevant whether this court intended a similar exception in promulgating Neb. Ct. R. of Discovery 32. Under the Nebraska Constitution, and under the enabling legislation, this court had no power to create in the Nebraska discovery rules an independent exception to the hearsay prohibition of § 27-802. Therefore, in order to be admissible, a deposition must satisfy the requirements of § 27-804(2)(a).

In most cases, the application of § 27-804 will not create different conditions for admissibility than does Nebraska discovery rule 32. The occurrence witness, whose appearance is obtainable only through process, is not required to travel more than 100 miles to attend to subpoena, absent a showing of cause. See § 25-1227. Any such witness residing more that 100 miles from the court may thus testify by deposition. It is only in the extraordinary case where a witness can be compelled to attend subpoena anywhere in the state, see § 25-1227(2), or in the case where the proponent of the witness' deposition has some other reasonable means of obtaining the witness' attendance—for example, the paid expert or the party employee witness—that § 27-804 will bar a deposition admissible under rule 32 in the absence of the hearsay rule.

However, in this case, § 27-804(1)(e) bars the admission of

the deposition because the plaintiff, the proponent of the deposition testimony, did not show that he was unable to procure the attendance of the witness by "other reasonable means." Berg was, on the stipulated facts, beyond the court's subpoena power, as he resided outside of the state. See § 25-1227. However, Maresh designated Berg as his expert witness. At a pretrial conference, Maresh indicated that he intended to call Berg as his expert witness, even after Oelkers—who had originally retained Berg—had settled and was no longer a defendant. At trial, Maresh indicated that he had paid a third of Berg's costs. Accordingly, Berg was Maresh's paid witness, so clearly, in the absence of a further showing to the contrary by the plaintiff, there were "other reasonable means" available to secure Berg's appearance.

The only showing made prior to the admission of the Berg deposition was the stipulation that Berg resided more than 100 miles from the place of trial and also resided outside the state. This, by itself, is inadequate under § 27-804 to show unavailability.

Indeed, it would seem unreasonable not to require the party calling an expert—which party can secure the expert's presence by paying him or her—to make an effort to have the witness in court. The unavailability requirement of § 27-804 reflects the strong policy favoring live testimony, with full cross-examination and the opportunity to view the demeanor of the witness. 2 McCormick on Evidence, ch. 31, § 301 (John W. Strong 4th ed. 1992), citing *United States v. Inadi*, 475 U.S. 387, 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1986).

This is not to say, however, that an expert witness' deposition testimony is never admissible under § 27-804. In determining whether to admit such evidence, the trial court may consider

> "the stakes in the litigation, the relative resources of the parties, the importance of the declarant's statement in the suit, the foreseeability of need for the statement, and the relative expense and difficulties which would be encountered in securing the declarant's trial or deposition testimony . . . ." 4 Louisell and Mueller, [Federal Evidence] § 486, pp. 1066-1068 [1980].

Williams v. Collins Communications, Inc., 720 P.2d 880, 888

(Wyo. 1986). See, also, *Carter-Wallace, Inc. v. Otte*, 474 F.2d 529 (2d Cir. 1972) (admission of prior testimony not an abuse of discretion because the proponent's insolvency made any attempt to secure the voluntary appearance of his expert futile). Other examples of unavailability might be that the witness' attendance is obtainable only through financial hardship on the proponent, that the expense to produce the witness may be prohibitive, that hostility or animosity on the part of the witness may prevent attendance at trial, or that other circumstances may demonstrate that the proponent lacks "reasonable means" to produce or compel the witness' attendance at trial.

The burden to establish the declarant's unavailability is on the party seeking to introduce evidence, pursuant to § 27-804. See, *Muilenberg v Upjohn Co.*, 169 Mich. App. 636, 426 N.W.2d 767 (1988); McCormick on Evidence, *supra*, ch. 24, § 253. See, also, *State v. Bothwell*, 218 Neb. 395, 355 N.W.2d 506 (1984). Whether the effort to obtain the presence of the witness would have been successful or practicable, and therefore whether Berg truly was unavailable as a witness, was within the discretion of the trial court, whose ruling normally will be upheld on appeal in the absence of an abuse of that discretion. *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991).

Since § 27-804(1)(e) was not involved in *Sikyta* and, therefore, *Sikyta* did not examine any conflict between it and rule 32(a)(3)(E) (exceptional circumstances may make the use of a deposition desirable), *Sikyta* should not be misinterpreted as a suggestion that rule 32 takes precedence over § 27-804(1)(e) regarding introduction of a deposition on the basis of a witness' unavailability. However, our holding here today is not necessarily antagonistic to *Sikyta*, as this issue was never directly addressed there.

> Arrow would be hard pressed to show deprivation of a substantial right or prejudice in light of the verdict favorable to Arrow. For that reason, we decline to delve further into the question about a proper procedure for showing that a witness is unavailable within the purview of Rule 32(a)(3)(E).

Sikyta, 238 Neb. at 309, 470 N.W.2d at 736. Therefore, construing *Sikyta* to mean that rule 32(a)(3)(E) takes precedence over § 27-804(1)(e) is a misreading of *Sikyta* and would be disapproved as contrary to our holding today.

Because of our holding that the deposition was inadmissible, we need not address the State's other contention that the deposition was inadmissible because it was taken for discovery only, except to note that the federal courts, whether applying Fed. R. Civ. P. 32 alone or that rule in conjunction with Fed. R. Evid. 804(b)(1), have universally rejected a "discovery-use" dichotomy as a criterion for the admissibility of a deposition. *Tatman v. Collins*, 938 F.2d 509 (4th Cir. 1991); *Polys v. Trans-Colorado Airlines, Inc.*, 941 F.2d 1404 (10th Cir. 1991); *Henkel v. XIM Products, Inc.*, 133 F.R.D. 556 (D. Minn. 1991); *U. S. v. Intern. Business Machines Corp.*, 90 F.R.D. 377 (S.D.N.Y. 1981).

However, the erroneous admission of the Berg deposition does not necessarily require reversal. "In a civil case, to constitute reversible error . . . admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about such evidence admitted or excluded." *Rose v. City of Lincoln*, 234 Neb. 67, 76, 449 N.W.2d 522, 529 (1989). Generally, erroneous admission of evidence provides no prejudice in a bench trial " 'if there is sufficient competent and relevant evidence in the record to sustain the judgment.' " *Jeffres v. Countryside Homes*, 220 Neb. 26, 29, 367 N.W.2d 728, 731 (1985). We therefore examine the remaining record to determine whether the admissible evidence was sufficient to support the judgment of the district court.

The State's duty to warn travelers of hazards adjacent to the traveled roadway was established by *Clouse v. County of Dawson*, 161 Neb. 544, 74 N.W.2d 67 (1955). In that case, the plaintiff sued after he drove his car off a county road and into a canyon 10 feet beyond the road's edge. This court denied the plaintiff recovery on the basis that the canyon was not a foreseeable hazard, assuming that drivers exercised due care. In so holding, this court stated,

> The duty of a county to warn against dangerous places or hazards beyond the limits of the highway exists only where

> such places are substantially joining the highway, or in such close proximity thereto as to be in themselves dangerous, under ordinary circumstances, to travelers thereon who are using reasonable care.

Id. at 552, 74 N.W.2d at 73.

Clouse establishes the duty of the State, since the liability of the State for failure to maintain highways is the same as comparable liability of counties. See § 81-8,219(2). Additionally, it cannot be denied that a sharp shoulder drop-off is one of the "dangerous places or hazards" which "substantially [join] the highway," *Clouse*, 161 Neb. at 552, 74 N.W.2d at 73. It is by definition immediately adjacent to the highway. Moreover, this court has recognized that highway "travelers . . . who are using reasonable care," *id.*, may stray onto the shoulder. In *Koncaba v. Scotts Bluff County*, 237 Neb. 37, 464 N.W.2d 764 (1991), and *Oldenburg v. State*, 221 Neb. 1, 374 N.W.2d 341 (1985), drivers were injured after driving their vehicles off sharp shoulder dropoffs. This court denied recovery in each case based upon the contributory negligence of the driver. In both cases, the court analyzed the individual negligent acts of the driver; it did not assume that any driver who strayed onto the shoulder was negligent. If it is not negligence per se to stray onto the shoulder, then by definition, at least some drivers "who are using reasonable care," *Clouse*, 161 Neb. at 552, 74 N.W.2d at 73, may find themselves on the shoulder. A sharp edge dropoff is, therefore, a condition of which, under *Clouse*, the State has a duty to warn.

The State undertook two measures to warn drivers traveling over the Highway 30 project of the edge dropoff. First, the State erected large yellow-orange signs stating, "Sharp Drop-off at Pavement Edge." Oelkers would have passed no fewer than six of these signs in driving westward over the project to the site of the accident. Second, the State erected "Type 2" object markers—6- by 12-inch reflective yellow panels, raised on posts, mounted 6 to 18 inches outside the edge of the pavement—every 300 feet. It therefore becomes necessary to analyze the adequacy of these measures to determine negligence, if any, on the part of the State under the rules and regulations embodied by the manual. See, § 39-698;

411 Neb. Admin. Code, ch. 1, § 001.01; *Raben v. Dittenber*, 230 Neb. 822, 434 N.W.2d 11 (1989).

Several sections of the manual deal with the particular situation presented in this case. Part VI deals with "Traffic Controls for Street and Highway Construction and Maintenance Operations." Subsection (1)(a) under § 6A-5, headed "Fundamental Principles," states:

> The basic safety principles governing the design of permanent roadways and roadsides should also govern the design of construction and maintenance sites. The goal should be to route traffic through such areas with geometrics and traffic control devices as nearly as possible comparable to those for normal highway situations.

Section 3A-5 of the manual provides that, on finished roads, an unbroken white line should be used to "mark the right edge of the pavement." In the same manner, Section 3B-6, headed "Pavement Edge Lines," states:

> Pavement edge line markings provide an edge of pavement guide for drivers. They have a unique value as a visual reference for the guidance of drivers during adverse weather and visibility conditions. They also may be used where edge delineation is desirable to reduce driving on paved shoulders or refuge areas of lesser structural strength than adjacent pavement. . . .
>
> Edge lines *shall* be provided on all Interstate highways, on rural multilane divided highways, and *may* be used on other classes of roads.

(Emphasis supplied.)

The manual, then, provides that highways under construction be marked the same as completed highways, at least as nearly as is practicable. Completed highways may have white lines marking the right edge of the traffic lane, and in fact Highway 30 was to have such lines upon completion. The State reasonably could have required the contractor to provide a temporary white edge line. Temporarily marking both outside edges of the highway with a white line would have cost $12 per 100 feet of highway. However, the State failed to take this precaution.

The manual also provides specifically for markers to protect

drivers from pavement edge dropoffs on completed highways. Section 3C-3 states:

> Objects not actually in the roadway may be so close to the edge of the road that they need a marker. . . . In some cases there may not be a physical object involved, but other roadside conditions such as *narrow shoulder drop-offs*, gores, small islands and abrupt changes in the roadway alignment may make it undesirable for a driver to leave the roadway. Type 2 or 3 object markers are intended for use at such locations. *The inside edge of the marker shall be in line with the inner edge of the obstruction.*

(Emphasis supplied.) A Type 2 object marker is defined in § 3C-1 as "an all yellow reflective panel, 6" x 12"."

The State did indeed require the contractor to erect Type 2 object markers, and the contractor did in fact erect them. However, the State's standard specifications, and the project plans drawn from them, provide that the markers be placed not at the edge of the dropoff, but 6 to 18 inches outside of the edge. In fact, it appears from the evidence that most of the markers actually in place were nearer to 18 inches from the edge than to 6 inches from the edge.

In addition to these standards for completed highways, the manual specifically provides measures to protect highway users from hazards during construction. Section 6C deals with "Barricades and Channelizing Devices." Section 6C-1 states:

> The function of channelizing devices are [sic] to warn and alert drivers of hazards created by construction or maintenance activities in or near the traveled way, and to guide and direct drivers safely past the hazards. Channelizing devices as used herein includes [sic] but is [sic] not limited to cones, vertical panels, drums, barricades, and barriers.

The manual depicts and specifies the proper channelizing devices. Plastic cones, plastic drums, and barricades may all be set on the surface of a roadway to delineate the proper path and to mark a hazard.

The Traffic Control Devices Handbook (1983), another Federal Highway Administration publication, which is

"primarily intended to augment," handbook at 1-1, the manual, specifically addresses "Pavement Dropoffs." The handbook prescribes that "[d]ropoffs should be kept to a minimum in frequency, duration, and depth." Handbook at 6-20. The handbook further states, "Where excessive dropoffs are necessary it may be possible to close the adjacent lane with appropriate channelizing devices." Handbook at 6-21.

The handbook makes it clear that a shoulder dropoff is a hazard "created by construction or maintenance activities in or near the traveled way," as contemplated by § 6C-1 of the manual. The manual prescribes that channelizing devices be used to guide drivers away from such hazards. In this case, the design of the Highway 30 project would have facilitated the use of channelizing devices to mark the edge dropoff. The pavement throughout the project, including at the site of the accident, was 29 feet wide. Each traffic lane was 12 feet wide, leaving a paved shoulder of 2 1/2 feet, upon which the State could have required that channelizing devices be erected. The record does not indicate that any such devices were either required by the State or used by the contractor, nor did the State require the use of edge lines which, although not required by the manual on this particular class of highway, nevertheless are suggested precautions.

The evidence shows that the State did not comply with the manual, which constitutes its own regulations. Ordinarily, a violation of a statute or regulation is not negligence per se, but is only evidence of negligence. *Vanek v. Prohaska*, 233 Neb. 848, 448 N.W.2d 573 (1989). The measures the State did undertake, however, further indicate its negligence. The State attempted to delineate the dropoff with the Type 2 object markers. The manner in which the Type 2 object markers were used is deficient in two ways.

First, by marking a line 1 1/2 feet from the actual edge of the pavement, the markers create the impression that the inside edge of the hazard they mark, the dropoff, is further from the lane of traffic and the driver who is using it than it actually is. It is common sense that if one is marking a hazard, the only effective way to do so is to place the marker between the hazard and those one is seeking to protect. The State's actions here,

however, ignore this conclusion.

Second, the location of the markers makes more likely the precise type of accident which occurred here. The parties have throughout this case been in substantial agreement as to the proper procedure when one drives inadvertently off the edge of the pavement—slow the vehicle down and attempt reentry when the highway is clear. Locating markers on steel posts so near the highway that an auto traveling with its right wheels on the shoulder may strike them—neither so near as to provide positive guidance as to the location of the highway edge, nor so far as not to themselves constitute a hazard—urges the driver to try immediately to reenter the highway, with the possibility of dire consequences such as those that ensued here. Indeed, there was an object marker directly adjacent to the westbound lane at the scene of the accident.

The State's failure to comply with its own manual as to channelizing device, edge markers, or placement of the object markers "in line with the inner edge of the obstruction," in light of the circumstances presented in this case, is sufficient evidence of breach of duty that it cannot be said the district court was clearly incorrect. See *Koncaba v. Scotts Bluff County*, 237 Neb. 37, 464 N.W.2d 764 (1991).

We turn next to the issue of proximate cause.

> " 'There are three basic requirements in establishing proximate cause. The first requirement is that the negligence be such that "without which the injury would not have occurred," commonly known as the "but for" rule. . . .
>
> " 'The second requirement is that the injury be the natural and probable result of the negligence. . . .
>
> . . . .
>
> " 'The third requirement is that there be no efficient intervening cause.' "

Zeller v. County of Howard, 227 Neb. 667, 672, 419 N.W.2d 654, 658 (1988).

The State's first causation argument is aimed at the first prong of the proximate cause test set out above—the "but for" causation. The State argues that since Oelkers' testimony about the occurrence of the accident was excluded, there is no

evidence to show how the accident occurred and, consequently, whether the State's failure to warn of the dropoff was in fact a cause of the accident. This argument is unsupported by the evidence. The record makes it clear that the accident occurred when Oelkers dropped the two right tires of his car off the edge of the pavement onto the unpaved shoulder. Oelkers, in attempting to reenter the highway, oversteered and veered across the highway into oncoming traffic. The decedent, along with the other deceased passengers, was ejected from Oelkers' car in the ensuing crash. This account of the accident is largely based upon the evidence provided by the State Patrol officers who investigated the accident.

" 'Determination of causation is, ordinarily, a matter for the trier of fact.' " *Id.* In this case, the district court could find that any of the reasonable precautions the State failed to take—providing an edge line, placing the object markers nearer to the dropoff, putting up barricades or drums—would have in some measure reduced the likelihood of this accident. Therefore, the district court could find that the failure to take these precautions contributed to the accident. Based upon the evidence as to how the accident took place, the district court's determination that the State's failure to warn was a contributing "but for" cause is not clearly incorrect. See *Koncaba v. Scotts Bluff County, supra.*

The State's other argument with regard to causation is aimed at the " ' "requirement . . . that there be no efficient intervening cause." ' " *Zeller v. County of Howard*, 227 Neb. at 672, 419 N.W.2d at 658. The State argues that Oelkers' own negligence was the sole proximate cause of the accident. While Oelkers' negligence may have been greater than slight in comparison to the State's negligence (a question we do not answer)—whereby it may have defeated his own right to recover—this fact would be irrelevant to the right of recovery of his passengers. See *Richardson & Gillispie v. State*, 200 Neb. 225, 263 N.W.2d 442 (1978) (even if driver was contributorily negligent in driving off edge dropoff, his passengers might still recover). Therefore, the only issue presented by Oelkers' negligence is whether it was an efficient intervening cause.

" ' "[A]n efficient intervening cause is new and independent

conduct of a third person, which itself is the proximate cause of the injury in question and breaks the causal connection between original conduct and the injury. . . ." ' " *Looney v. Pickering*, 232 Neb. 32, 37, 439 N.W.2d 467, 471 (1989). Where the defendant's action is itself a cause of the injury and the third party's negligent act is reasonably foreseeable, the third party's negligence is not an efficient intervening cause as a matter of law. See *id.* However, if the defendant's conduct constitutes merely passive negligence, which creates a condition which facilitates injury through subsequent third-party negligence, the third-party negligence is an efficient intervening cause. *Delaware v. Valls*, 226 Neb. 140, 409 N.W.2d 621 (1987).

Zeller v. County of Howard resolves the "cause or condition" issue here. In *Zeller*, the plaintiff and her decedent were involved in an auto accident on a county road. The accident occurred at an intersection where the decedent driver's view was blocked by a knoll, and a stop sign at which the decedent would have been obligated to stop had been knocked down. The plaintiff passenger and her decedent were struck, while in the intersection, by a car which came from behind the knoll. This court denied recovery because the decedent driver, had he been exercising due care, would have entered the intersection with appropriate caution because of the knoll, regardless of the presence or absence of the stop sign. The court held that the driver's negligence was unforeseeable, and thus, recovery was barred.

In contrast to *Zeller*, there is nothing in this case to indicate that Oelkers' negligence was not foreseeable. Inadvertent straying onto the shoulder is a foreseeable activity. *Koncaba v. Scotts Bluff County*, 237 Neb. 37, 464 N.W.2d 764 (1991); *Oldenburg v. State*, 221 Neb. 1, 374 N.W.2d 341 (1985); *Clouse v. County of Dawson*, 161 Neb. 544, 74 N.W.2d 67 (1955). Oelkers' excessive speed, which the State emphasizes, does not in and of itself serve to render his negligence in running off the road not foreseeable. See *Koncaba v. Scotts Bluff County, supra* (in highway dropoff case, plaintiff's decedent's excessive speed served to render him contributorily negligent as a matter of law, but not to make State's negligence not a proximate cause of accident). Therefore, even assuming Oelkers' contributory

negligence, the district court did not err in finding negligence on the part of the State which was a proximate cause of the accident.

Finally, we consider the State's claim that its alleged negligent acts or omissions were discretionary functions for which it is shielded from liability by § 81-8,219(1)(a). That section exempts from the State Tort Claims Act

> [a]ny claim based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion be abused.

The plaintiff argues that the State's discretionary function argument is neutralized by § 81-8,219(2), which states:

> With respect to any tort claim based on the alleged insufficiency or want of repair of any highway or bridge on the state highway system, it is the intent of the Legislature to waive the state's immunity from suit and liability . . . . It is the further intent of the Legislature that the words insufficiency or want of repair shall refer to a spot or localized highway defect and shall not . . . refer to the general or overall condition of a highway.

We address that argument.

Section 81-8,219(2) waives the State's immunity to suit "[w]ith respect to any tort claim based on the alleged insufficiency or want of repair of any highway or bridge on the state highway system." *Richardson & Gillispie v. State*, 200 Neb. 225, 263 N.W.2d 442 (1978), was a suit under the State Tort Claims Act for the State's failure to adequately maintain the highway shoulder. In *Richardson & Gillispie*, the plaintiffs' truck overturned after dropping its right front wheel off a 4- to 6-inch shoulder dropoff. This court held that § 81-8,219(2)—and previous court decisions regarding the liability of counties for shoulder maintenance, which the section incorporates—created in the State a duty to adequately maintain the highway shoulder. This court further rejected the

State's contention that the condition of the shoulder was part of the "general or overall condition of the highway." *Richardson & Gillispie*, 200 Neb. at 231-32, 263 N.W.2d at 446.

Richardson & Gillispie establishes that suits for failure to properly maintain the shoulder are within § 81-8,219(2). Liability in this case, however, was based on the State's failure to adequately warn of an unsafe shoulder. The question is whether failure to warn of an edge dropoff is an "insufficiency . . . of any highway" for which § 81-8,219(2) allows a claim.

As noted above, *Clouse v. County of Dawson, supra*, held that a county maintaining a road has a duty to warn of hazards immediately adjacent to the road. The Legislature, in subjecting the State to liability under the terms of § 81-8,219(2), explicitly directed courts to the jurisprudence of claims in existence against the counties at the time the State Tort Claims Act went into effect. Section 81-8,219(2) states that "[t]he Legislature further declares that judicial interpretations . . . governing the liability of counties on December 25, 1969, also shall be controlling on the liability of the state for the alleged insufficiency or want of repair of any highway or bridge." *Clouse* notes that the only liability of the county in that case was statutory. Therefore, if *Clouse* allows suits against a county for hazards adjacent to the roadway, § 81-8,219(2) allows a similar suit against the State.

However, we need not decide whether the facts of this case are within the immunity waiver of § 81-8,219(2). The discretionary function exception to the State Tort Claims Act clearly does not apply here.

"The discretionary function exception is inapplicable to a claim under the State Tort Claims Act if a statute, regulation, or policy specifically prescribes a course of governmental action or conduct." *Security Inv. Co. v. State*, 231 Neb. 536, 546, 437 N.W.2d 439, 446 (1989) (exception applied where state officials made policy decisions not to investigate failing savings institution). "In other words, the State is liable for negligence of its employees at the operational level, where there is no room for policy judgment." *Wickersham v. State*, 218 Neb. 175, 180, 354 N.W.2d 134, 139 (1984) (exception did not apply where state employees failed to follow state regulations regarding

brucellosis testing).

The manual is a set of state regulations that prescribes specific courses of action to be taken in marking a pavement edge dropoff. Those state employees who planned and executed the Highway 30 project were not at liberty to exercise their own policy judgment and deviate from the manual. There can therefore be no discretionary function immunity in this case. Having adopted rules and regulations, the State is not free to disregard them and then hide from liability behind discretionary function immunity.

This court has previously addressed the limits of discretionary immunity in the context presented here. In *Richardson & Gillispie, supra*, the court held that the plaintiff could not recover for negligence in the design of the highway, as the State's design decisions were discretionary functions. In that case, the court allowed recovery for failure to maintain the highway shoulder. This indicates that design is not actionable, as it involves discretionary decisions, but maintenance is actionable, as it does not. Properly warning drivers of a dangerous condition seems more akin to maintenance, where decisions are made at the operational level without policy implications, than to design, where policy considerations are more prevalent. Therefore, failure to warn would be actionable, as it embodies no discretionary functions, and the doctrine of state immunity does not apply.

The judgment of the district court is affirmed.

AFFIRMED.

GRANT, J., not participating.

PAT BROCHTRUP, SPECIAL ADMINISTRATOR OF THE ESTATE OF PAUL WILLIAM BROCHTRUP, DECEASED, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.
489 N.W.2d 314

Filed September 18, 1992. No. S-89-828.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

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

R. Collin Mangrum for appellee.

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

HASTINGS, C.J.

This is a companion case of, arose out of the same accident as, was based on the evidence submitted in, and is controlled by *Maresh v. State, ante* p. 496, 489 N.W.2d 298 (1992), decided this date. The State of Nebraska has appealed the judgment order of the district court entered on July 25, 1989, sustaining the motion for summary judgment filed by the plaintiff, Brochtrup, which judgment is affirmed.

AFFIRMED.

GRANT, J., not participating.

DARRELL K. ARMSTRONG, PERSONAL REPRESENTATIVE OF THE ESTATE OF KLAY A. ARMSTRONG, DECEASED, AND DARRELL K. ARMSTRONG AND MARJORIE A. ARMSTRONG, NATURAL PARENTS OF DECEASED, APPELLEES, V. STATE OF NEBRASKA, APPELLANT.
489 N.W.2d 315

Filed September 18, 1992. No. S-89-1302

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

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

Hal W. Anderson, of Berry, Anderson, Creager & Wittstruck, and R. Collin Mangrum for appellees.

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

HASTINGS, C.J.

This is a companion case of, arose out of the same accident as, was based on the evidence submitted in, and is controlled by *Maresh v. State, ante* p. 496, 489 N.W.2d 298 (1992), decided this date. The State of Nebraska has appealed the judgment order of the district court entered on July 27, 1989, sustaining the motion for summary judgment filed by the plaintiffs Armstrong, which judgment is affirmed.

AFFIRMED.

GRANT, J., not participating.

JOHN BLANKENAU, SPECIAL ADMINISTRATOR OF THE ESTATE OF MICHAEL JOHN BLANKENAU, DECEASED, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

489 N.W.2d 315

Filed September 18, 1992. No. S-89-1366.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

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

James R. Welsh, of Welsh & Sibbernsen, for appellee.

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

HASTINGS, C.J.

This is a companion case of, arose out of the same accident

as, was based on the evidence submitted in, and is controlled by *Maresh v. State, ante* p. 496, 489 N.W.2d 298 (1992), decided this date. The State of Nebraska has appealed the judgment order of the district court entered on November 6, 1989, sustaining the motion for summary judgment filed by the plaintiff, Blankenau, which judgment is affirmed.

AFFIRMED.

GRANT, J., not participating.

LOIS LAUENSTEIN, APPELLEE AND CROSS-APPELLANT, V. KENNETH F. LAUENSTEIN, APPELLANT AND CROSS-APPELLEE.

489 N.W.2d 828

Filed September 25, 1992. No. S-89-151.

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

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

Edward F. Carter, Jr., of Barney, Carter, Johnson & Baker, P.C., on brief for appellee.

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

PER CURIAM.

Kenneth F. Lauenstein appeals from the 1988 judgment of the district court for Lancaster County, Nebraska, which modified the 1981 divorce decree dissolving his marriage with Lois Lauenstein. In such modification, based on a change of circumstances, the district court increased the monthly child support for the Lauenstein children.

Kenneth Lauenstein contends that there was no change of circumstances and that the district court erred in its finding that he had failed to pay certain medical expenses pursuant to the 1981 decree. Lois Lauenstein has cross-appealed and claims

that the trial court should have granted an attorney fee in the proceedings.

STANDARD OF REVIEW

> The standard of review for modification of a child support order is de novo on the record, and the decision of the trial court will be affirmed absent an abuse of discretion. *Sanchez v. Sanchez*, 231 Neb. 963, 439 N.W.2d 82 (1989). When the evidence is conflicting in a child support modification hearing, this court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. See, *Dobbins v. Dobbins*, 226 Neb. 465, 411 N.W.2d 644 (1987); *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985).

Schmitt v. Schmitt, 239 Neb. 632, 635, 477 N.W.2d 563, 564-65 (1991).

From our de novo review, and based upon the Nebraska Child Support Guidelines applied in the Lauenstein case as a change of circumstances, we find no abuse of discretion by the district court regarding modification of the 1981 decree and the increase in child support. See *Schmitt v. Schmitt, supra.* Also, we find no error in the district court's finding that Kenneth Lauenstein failed to pay certain medical expenses pertaining to the Lauenstein children. Finally, we find no abuse of discretion by the trial court in its disallowing an attorney fee to Lois Lauenstein.

No attorney fee is allowed regarding proceedings in this court regarding the Lauenstein appeal.

As a result of our de novo review of the record, we find no abuse of discretion by the district court and, therefore, affirm the district court's judgment.

AFFIRMED.

LLOYD F. GARBER, DOING BUSINESS AS GARBER'S HONDA, FAIRBURY, NEBRASKA, APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLEES.

489 N.W.2d 550

Filed September 25, 1992. No. S-89-1338.

1. **Jurisdiction: Appeal and Error.** Where the court from which an appeal was taken lacked jurisdiction, an appellate court acquires no jurisdiction.
2. **Judgments: Final Orders: Appeal and Error.** Because a conditional order does not perform in praesenti, and thus leaves to speculation and conjecture what its final effect may be, it is not a final order and is therefore not appealable.
3. _____: _____: _____. An order made in a special proceeding which affects a substantial right of a party is final and appealable.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Appeal dismissed.

Lloyd F. Garber, pro se, and, on brief, Donald H. Bowman and Mark J. Krieger for appellant.

John R. Doyle, of Doyle & Doyle Law Offices, for appellee State.

Robert W. Dickerson, Karol M. Pessin, and Lawrence R. LaPorte, of Lyon & Lyon, and Charles D. Humble, of Erickson & Sederstrom, P.C., for appellee American Honda Motor Co.

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

CAPORALE, J.

The district court affirmed the order of the Nebraska Motor Vehicle Industry Licensing Board, which terminated the franchise agreements between the respondent-appellant franchisee, Lloyd F. Garber, doing business as Garber's Honda, Fairbury, Nebraska, and the applicant-appellee franchisor, American Honda Motor Company, Inc., "effective when a replacement dealer is found and the Board is notified" by American Honda. We dismiss.

Neb. Rev. Stat. § 60-1420(1) (Reissue 1988) provides that, except under conditions not present in this case,

> no franchisor shall terminate or refuse to continue any

> franchise unless the franchisor has first established, in a hearing . . . that:
>
> (a) The franchisor has good cause for termination or noncontinuance; and
>
> (b) Upon termination or noncontinuance, another franchise in the same line-make will become effective in the same community, without diminution of the franchisee's service formerly provided, or that the community cannot be reasonably expected to support such a dealership.

Garber questions the district court's determination that the board's order is not, as he contends, arbitrary or capricious, but, on the contrary, is supported by competent, material, and substantial evidence. However, because the district court lacked jurisdiction to review the board's order, we lack jurisdiction to review the district court's judgment. See *In re Estate of Krueger*, 235 Neb. 518, 455 N.W.2d 809 (1990) (where court from which appeal was taken lacked jurisdiction, appellate court acquires no jurisdiction).

The board's order is clearly conditional; it is to operate only in the event that American Honda finds another franchisee and notifies the board of the fact that it has done so. Because a conditional order does not perform in praesenti, and thus leaves to speculation and conjecture what its final effect may be, it is not a final order and is therefore not appealable. See, *Schaad v. Simms*, 240 Neb. 758, 484 N.W.2d 474 (1992); *Lemburg v. Adams County*, 225 Neb. 289, 404 N.W.2d 429 (1987); *Fritch v. Fritch*, 191 Neb. 29, 213 N.W.2d 445 (1973).

Nonetheless, American Honda calls our attention to *American Motors Sales Corp. v. Perkins*, 198 Neb. 97, 251 N.W.2d 727 (1977), and suggests that we therein approved a bifurcated appeal procedure in cases arising under § 60-1420(1). The manufacturer in *American Motors Sales Corp.* applied for an order permitting it to terminate its relationship with the dealer. After finding that good cause had not been established, the board denied the application. The district court affirmed. On appeal, we ruled that good cause had indeed been established, and thus remanded the proceeding with the direction that the dealership arrangement be

terminated "upon the establishment of another franchise in the" relevant area. *Id.* at 103, 251 N.W.2d at 730.

The obvious distinction between the situation presented here and that presented in *American Motors Sales Corp.* is that in the latter case, the board's order, without leaving anything for further consideration, disposed of the whole merits of the case; it foreclosed the manufacturer from terminating its relationship with the dealer under the conditions as they then existed. Because the order was made in a "special proceeding," that is, in a proceeding arising under a civil statute not encompassed in chapter 25 of the Nebraska statutes, see, *In re Applications A-14137, A-14138A, A-14138B, and A-14139*, 240 Neb. 117, 480 N.W.2d 709 (1992), and *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), and it affected a substantial right of the manufacturer, it was final and thus appealable, see Neb. Rev. Stat. § 25-1902 (Reissue 1989).

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES T. HOUSER, APPELLANT.
490 N.W.2d 168

Filed September 25, 1992. No. S-90-373.

1. **Motions to Suppress: Appeal and Error.** When reviewing a motion to suppress, an appellate court will not reweigh or resolve conflicts in the evidence, but will uphold the trial court's findings unless they are clearly erroneous.
2. _____: _____. In determining the facts at a hearing on a motion to suppress, a trial court is the trier of fact, and an appellate court takes into consideration that the trial court has observed the witnesses.
3. **Miranda Rights: Right to Counsel.** The purpose of giving a person in custody his rights under *Miranda* is to inform the individual in custody that he may refuse further interrogation and obtain counsel.
4. **Miranda Rights: Right to Counsel: Search and Seizure.** Requests made to a defendant by one seeking consent to search the defendant's residence do not constitute further questioning, or the functional equivalent of further questioning, after counsel has been requested by the defendant.
5. **Trial: Identification Procedures.** In determining the admissibility of

identification evidence, the trial court should consider the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

6. **Trial: Rules of Evidence: Expert Witnesses.** In admitting novel scientific evidence, while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.
7. _____: _____: _____. The *Frye* test, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), is recognized in Nebraska.
8. _____: _____: _____. The *Frye* test is not totally controlling as to the admissibility of novel expert testimony, but is only the first of several criteria that a trial court determines are satisfied before such testimony may be admitted.
9. _____: _____: _____. DNA testing results can be admissible only if the protocol followed is established according to principles generally accepted in the relevant scientific fields.
10. _____: _____: _____. In connection with DNA evidence, the trial court is to preliminarily decide, outside the presence of the jury, on the basis of evidence before it: (1) whether the witnesses on the DNA issue are experts in the relevant scientific fields, (2) whether DNA profile testing used in the case under consideration is generally accepted by the relevant scientific communities, (3) whether the method of testing used in the case under consideration is generally accepted as reliable if performed properly, (4) whether the test conducted properly followed the method, (5) whether restriction fragment length polymorphism (RFLP) analysis evidence is more probative than prejudicial under Neb. Rev. Stat. § 27-403 (Reissue 1989), and (6) whether statistical probability evidence interpreting RFLP analysis results is more probative than prejudicial.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded.

Michael Poepsel and, on brief, Donald W. Kleine, of Kleine Law Office, for appellant.

Don Stenberg, Attorney General, and Marie C. Pawol for appellee.

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

GRANT, J.

Defendant, Charles T. Houser, was charged with first degree

murder in the death of Janice Ross Patterson. After a jury trial, defendant was found guilty of second degree murder. He was sentenced to serve 27 years in prison, with credit given for 497 days served in jail prior to sentencing.

Defendant timely appealed and in this court assigns six errors. In view of the fact that we determine that the cause must be remanded for a new trial in connection with the reception of deoxyribonucleic acid (DNA) evidence, we will discuss only the assignments of error which present problems that will arise on the retrial. Other assignments, concerning matters which will not arise on retrial, will not be discussed herein. In the assignments of error with which we are concerned, defendant alleges that the trial court erred (1) in overruling his motion to suppress evidence obtained in a search of defendant's residence, (2) in admitting identification evidence based on a suggestive photographic array, (3) in overruling defendant's motion in limine concerning "evidence of DNA fingerprinting that has not been found sufficiently acceptable or reliable to the scientific community," and (4) in later permitting that evidence to be submitted to the jury at trial.

Viewed in the light most favorable to the State, as required by *State v. Davis*, 240 Neb. 631, 483 N.W.2d 554 (1992), the record shows the following facts:

At approximately 6 p.m. on Tuesday, September 27, 1988, Omaha police officers were summoned to the house of Charles and Willie Ross to investigate a report that their daughter, 34-year-old Janice Ross Patterson, was missing and had not been seen since the evening of September 26.

At approximately 7 p.m. on September 26, Patterson left the Ross house, where she and her 15-year-old son resided, to visit her boyfriend, defendant Charles T. Houser, who lived in an apartment at 2706 North 75th Street in Omaha. At approximately 10 p.m. on the night of the 26th, defendant called the Ross home and asked to speak with Patterson. Willie Ross told defendant that Patterson was not home. Defendant told Willie Ross that Patterson had left his apartment about 2 hours earlier to go to the grocery store and to the post office downtown.

Police investigation showed that Patterson had not reported

to work on the morning of September 27 and that Patterson had not taken her son to a dental appointment on that afternoon.

On September 27, after talking to the Rosses, police went to defendant's apartment to question him. Defendant stated that Patterson had come to his apartment on September 26, that they had had dinner, and that she had left at approximately 10:30 p.m. to go to the grocery store and the post office and to return to her home.

As the officers were leaving defendant's apartment, at approximately 8:45 p.m., they were informed by other officers that Patterson's car had been discovered by Patterson's family in the No Frills grocery store parking lot at 80th and Blondo Streets in Omaha. That location is approximately four blocks from defendant's apartment. At about the same time, defendant received a phone call from Patterson's brother, who stated that Patterson's car had been found. The exterior of the car showed pieces of underbrush in the grille and in the passenger-side door. The front license plate was missing. Patterson's purse and shoes were in the car. There was a pool of blood in the trunk, which also contained an envelope, a large sheet of plastic, and a hammer, all stained with blood.

Defendant drove to the parking lot, and when he arrived police asked if they could question him. During a brief interview at the scene, defendant signed a consent form permitting police to search his car and his apartment. The search of his car revealed nothing of evidentiary value. During the search of defendant's apartment, police took into evidence a receipt from Kentucky Fried Chicken, dated September 26, 1988, at 8:45 p.m.

After the search, defendant agreed to go to the police station with the officers for further questioning. He was not given *Miranda* warnings at this time. The initial interview at the station lasted approximately 1 hour and was briefly interrupted so that the interrogating detectives, Foxall and Sklenar, could confer with their commander. The interview was resumed shortly, and the officers began by reading defendant his *Miranda* rights. In this second interview, defendant basically repeated his earlier statements that Patterson had arrived at his

apartment between 7:30 and 8 p.m., that they had bought dinner, and that she had left between 10 and 11 p.m. to go to the post office and the grocery store. He denied any involvement in Patterson's disappearance.

At that time defendant had not been advised that he was under arrest. The questioning became more direct. Interrogating officers asked if defendant had killed Patterson. At 2:17 a.m. on September 28, defendant requested an attorney. Police terminated the interview and allowed defendant to use a phone book and an office telephone. Defendant testified that he did not call an attorney because of the late hour.

Defendant was then escorted to the police criminalistics lab, where hair samples and fingernail scrapings were taken. Officer Paul Briese, who was escorting defendant, then asked defendant if he would sign a consent form authorizing a search of defendant's apartment. Briese testified he asked defendant no questions beyond requesting that defendant sign the consent-to-search form. At that time a search warrant was being prepared, and Briese so told defendant. At 4:17 a.m. defendant signed a second consent-to-search form permitting police to search his apartment, on condition that defendant be present during the search.

Defendant then accompanied police to his apartment early on the morning of September 28, but remained in the car while police conducted a 3-hour search of his apartment. There were no signs of a struggle in the apartment, which was neat and clean. Items of clothing and linen were taken into evidence, as well as two couch cushions. Upon conclusion of the search, defendant was released.

On the evening of September 28, Kelly Black, who lived on an acreage near Neola, Iowa, which is approximately 40 miles from Omaha, watched an Omaha news broadcast which reported the disappearance of Patterson. The news report pictured Patterson's car and detailed the information of her disappearance. Black recognized the car as one which he had helped pull out of a drainage ditch near his home early on Tuesday morning, September 27. Black called the Omaha police and informed them that at approximately 5 a.m. on the

27th, he had been awakened by a knock at his front door and that when he answered the door he found a black man requesting help in pulling his car from a nearby ditch. Black agreed and then spent 45 minutes assisting the man. Black stated that the man was wearing a red T-shirt and red jogging shorts.

Upon request of the police, Black went to Omaha and viewed a photo lineup of six black men. Black immediately identified a picture of defendant. Police then accompanied Black back to the location where the car had been stuck. The front license plate of Patterson's car was found there, but a search of the area did not disclose the victim's body. Later searches in the area by law enforcement officials, volunteers, and friends of the victim's family during the ensuing weeks found nothing.

The police investigation uncovered several witnesses. Several motorists traveling in Iowa on Highway 191 near Black's house on the morning of September 27 reported seeing a black man in red shorts and a red T-shirt on the highway trying to wave down cars. One witness testified that she stopped for the man, who asked for help pulling his car out of a ditch. She testified that the man looked into the backseat of her car at the driver's child, and she drove off because she was concerned. This witness, however, could not positively identify defendant as the man she saw.

Several people living in defendant's neighborhood reported seeing a black man in red shorts and a red T-shirt, between 7 and 7:15 a.m., walking north toward defendant's apartment building. This was shown to be along the most direct route from the parking lot where the car was found to defendant's apartment. Two of the witnesses identified the defendant as the man they saw that morning.

Defendant was also seen by a neighbor in the early hours of the 27th. This man told police that at approximately 4:30 a.m. he had seen the defendant in a red long-sleeved jacket entering the apartment area. He told police that later that day, defendant came up to his apartment and asked if the police had questioned the neighbor and what the neighbor remembered. The defendant then tried to convince the neighbor that they saw each other around 1 or 2 o'clock that morning and that when

the witness had seen him, defendant was wearing a blue jumpsuit. Defendant then tried to convince the neighbor that defendant was wearing camouflage clothing at the time.

On October 14, police obtained a search warrant for defendant's apartment and at this time recovered carpeting from the floor beneath the couch from which the cushions had been seized during the second search to which defendant had consented. Police later learned that the couch had been purchased new and delivered only a few days prior to Patterson's disappearance.

Testing by a Nebraska State Patrol forensic serologist of the blood from the trunk of the car and from the cushions and carpeting taken from defendant's apartment showed that the blood was type A blood, which was Patterson's blood type. Defendant has type O blood. The remainder of the bloodstained evidence, together with four teeth later removed from the victim's body, was forwarded to Lifecodes, Inc., a privately operated forensic laboratory in Westchester, New York. That company analyzes evidence for traces of DNA. DNA is a nucleic acid, found in the nuclei of living cells, that constitutes the genetic material of all cellular organisms. Dorland's Illustrated Medical Dictionary 447 (27th ed. 1988).

On November 5, 1988, approximately 6 weeks after Patterson's disappearance, volunteer searchers discovered her unclothed, mud-covered body partially concealed with brush and sticks. The body was found on the edge of a drainage ditch, near Neola, about 200 feet from the point where the license plate from Patterson's car had been found. An autopsy was performed. Dental records positively identified the victim as Patterson. The condition of the body was such that no blood or other bodily fluids remained in the body. The four teeth removed from the body were found by Lifecodes to be in such condition that they did not furnish material for effective DNA testing.

Dr. Jerry Jones, who performed the autopsy, testified that the state of decomposition suggested that the body had been there for approximately 6 weeks. He further testified that Patterson had a fractured metacarpal of the left hand, which he characterized as a "defensive injury." Patterson had a fracture

of the bone around the right eye and cheekbone. The doctor was of the opinion that this had been caused by a strong blow from a blunt instrument. He ruled out the use of a fist or a fall as the cause of the fracture. Dr. Jones also discovered two lacerations on the back of the head. These, too, evidenced blunt-force trauma. He testified, however, that due to the amount of bleeding which took place after the wounds were inflicted, none of these injuries was the cause of death.

Dr. Jones testified that hemorrhages in the neck muscles, a fractured hyoid bone in the neck, and fractured thyroid cartilage all suggested the cause of death to be manual strangulation inflicted after the injuries with the blunt object.

Blood samples from Patterson's parents were forwarded to Lifecodes for DNA testing and comparison with the blood on the carpeting removed from defendant's apartment and with the blood found in the trunk of Patterson's car. The testing by Lifecodes revealed that the DNA from the blood in the trunk and the blood found on the carpeting was consistent with DNA from a child of Charles and Willie Ross. A witness from Lifecodes testified that there was a 99.9999995 percent probability that this DNA was from a child of Charles and Willie Ross. Other evidence showed that no child of Charles and Willie Ross had deposited blood in the trunk of the car or in defendant's apartment. At trial, the defendant testified, but offered no explanation as to how his carpeting and new couch had both been stained by the blood.

In his first assignment of error, defendant asserts that the trial court erred in overruling defendant's motion to suppress evidence obtained in the search of defendant's apartment on September 28, 1988.

When reviewing a motion to suppress, an appellate court will not reweigh or resolve conflicts in the evidence, but will uphold the trial court's findings unless they are clearly erroneous. *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992); *State v. Bowen*, 232 Neb. 725, 442 N.W.2d 209 (1989); *State v. Kimminau*, 240 Neb. 176, 481 N.W.2d 183 (1992). In determining the facts at a hearing on a motion to suppress, the trial court is the trier of fact, and this court takes into consideration that the trial court has observed the witnesses.

State v. Kimminau, supra; *State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202 (1989).

In support of his position, defendant states that while he was in custody of police, after he had been informed of his *Miranda* rights and had invoked his Sixth Amendment right to counsel, he was requested to consent to a search of his apartment. He contends that this request to search was in violation of his Fifth Amendment rights and that, as a result, evidence recovered after this consent was inadmissible. Defendant further contends that the evidence recovered in subsequent searches is also inadmissible as "fruit of the poisonous tree." See *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Defendant states that "once a defendant has invoked his right to counsel he is 'not subject to further interrogation by the authorities until counsel has been made available to him'." Brief for appellant at 15, quoting *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). Defendant further argues that the purpose of giving a person in custody his rights under the *Miranda* warning is to inform the individual in custody that he may refuse further interrogation until counsel is present.

With this latter statement we agree. In *Edwards v. Arizona*, 451 U.S. at 485, the Supreme Court stated, "[I]t is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel."

The question before this court on that issue is whether requesting defendant to execute a consent-to-search form after defendant has requested counsel constituted further interrogation in violation of defendant's rights. Defendant cites *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980), where the Court held, "*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." It is defendant's position that requesting defendant to sign a consent-to-search form is the functional equivalent of further questioning. We do not agree.

Rhode Island v. Innis, supra, addressed the question whether police practices which were not literally questioning initiated by

law enforcement officers would endanger the *Miranda* protections nonetheless, because of the coercive atmosphere surrounding the interrogation environment. In *Rhode Island v. Innis*, the defendant was in a police car with three police officers and was being transported to the police station. The officers did not question the defendant, but in a conversation among themselves, in the hearing of defendant, commented on how necessary it was to find the shotgun being searched for, in order to avoid its falling into the hands of children in the area. There was no express questioning of defendant, but the *Innis* Court noted: "The concern of the Court in *Miranda* was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." 446 U.S. at 299.

The *Innis* Court then developed the concept of the "functional equivalent of questioning" test and stated:

> [T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

446 U.S. at 301.

The *Innis* Court determined that the conversation among the police officers did not constitute questioning of the defendant in violation of *Miranda*.

In the *Innis* case, both the majority and dissenting opinions concentrate on the right of a defendant not to be required to make *statements* of any kind—thus recognizing a person's right under the Fifth Amendment to the U.S. Constitution not to be "compelled in any criminal case to be a witness against himself." That same right is protected by article I, § 12, of the Nebraska Constitution.

The situation present in this case has nothing to do with pursuing an interrogation seeking to have defendant make statements contrary to his interest. The right of defendant in the case before us is the right guaranteed to him by the Fourth Amendment to the U.S. Constitution, concerning "[t]he right

of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." That same right is the subject of article I, § 7, of the Nebraska Constitution.

A potential issue in the question before us is defendant's right to counsel as guaranteed to a defendant by the Sixth Amendment to the U.S. Constitution and by article I, § 11, of the Nebraska Constitution. That right generally does not become effective until some adversary court proceedings are begun against a defendant. Defendant makes no allegations of any violation of his Sixth Amendment rights. The record shows that defendant was released from custody after he had executed the consent to search, and while we do not know the date of the formal charges against defendant, the record shows that a preliminary hearing was not held until December 2, 1988, and an information was filed that same day.

We determine that requests made to a defendant by one seeking consent to search the defendant's residence do not constitute further questioning, or the functional equivalent of further questioning, after counsel has been requested by the defendant. As stated by the Supreme Court of Wisconsin in holding that it is improper to frame a consent-to-search issue in *Miranda* and Fifth Amendment terms, "Those authorities do not control because consent to search is not testimonial or communicative in nature, even if the consent leads to the discovery of incriminating evidence." *State v. Turner*, 136 Wis. 2d 333, 351, 401 N.W.2d 827, 836 (1987).

In *Cody v. Solem*, 755 F.2d 1323 (8th Cir. 1985), the U.S. Court of Appeals for the Eighth Circuit, on a petition for habeas corpus, reviewed the conviction of a defendant convicted in South Dakota of murder, *State v. Cody*, 293 N.W.2d 440 (S.D. 1980). Among the issues raised was defendant's contention that his right to counsel had been violated by the state's request for consent to search after defendant had requested counsel. The federal court held that the defendant's rights had not been violated, stating:

> Nor can the *Miranda* violations under the fifth amendment support invalidation of the consent. As stated, the South Dakota Supreme Court suppressed the

> incriminating statements Cody made during the course of the interrogations because the police did not cease questioning after Cody's request for counsel. *Cody* I, 293 N.W.2d at 443-49. Assuming the correctness of this holding, it does not follow that Cody's consent must similarly be suppressed. This is because "the fifth amendment right to counsel is not an independent right; rather, it stems from the privilege against self-incrimination." *Hall v. State*, 705 F.2d 283, 289 n. 4 (8th Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 339, 78 L.Ed.2d 307 (1983). Simply put, a consent to search is not an incriminating statement. *Id.*; *Smith v. Wainright* [sic], 581 F.2d 1149, 1152 (5th Cir.1978); *United States v. Lemon*, 550 F.2d 467, 472 (9th Cir.1977). Cody's consent, in and of itself, is not evidence which tends to incriminate him. While the search taken pursuant to that consent disclosed incriminating evidence, this evidence is real and physical, not testimonial. *United States v. Garcia*, 496 F.2d 670, 675 (5th Cir.1974), *cert. denied*, 420 U.S. 960, 95 S.Ct. 1347, 43 L.Ed.2d 768 (1975); *see also Schmerber v. California*, 384 U.S. 757, 761-64, 86 S.Ct. 1826, 1830-32, 16 L.Ed.2d 908 (1966). Any violation of Cody's fifth amendment rights with regard to the suppressed incriminating statements is thus only relevant to the voluntariness of the consent in view of the totality of the circumstances. *Smith*, 581 F.2d at 1152.

755 F.2d at 1330.

Similarly, in *United States v. Cherry*, 794 F.2d 201 (5th Cir. 1986), the court examined the validity of a consent to search given by the defendant after invoking his right to counsel. The consent resulted in discovery of evidence used in the defendant's conviction. The court specifically directed that the focus of the analysis with respect to the consent should be upon voluntariness. The court affirmed the defendant's conviction, concluding that the consent was not tainted by the fact that defendant had requested counsel before agreeing to the consent.

In *Tukes v. Dugger*, 911 F.2d 508, 513 (11th Cir. 1990), the court quoted with approval from *Smith v. Wainwright*, 581

F.2d 1149 (5th Cir. 1978), as follows: " '[T]he failure of the police to halt questioning once Smith [the defendant] mentioned his attorney, then is relevant only with regard to the Fourth Amendment issue of whether Smith's consent to search was voluntarily given.' "

We have indirectly determined that the fruits of a search are not testimonial evidence and that *Miranda* warnings need not be given before obtaining a consent to search. In *State v. Packett*, 207 Neb. 202, 204, 297 N.W.2d 762, 764 (1980), we stated, "The Miranda rules are not applicable to consent searches."

We hold that defendant's consent to search his residence was not invalidated by the fact that defendant had invoked his right to counsel during a police interrogation before his consent was given. In determining that *Miranda* is not applicable to consent searches, we are not saying that defendant has no rights in connection with consent searches. A defendant's consent must be voluntary. In this case, the trial court determined that defendant's consent was voluntary. Defendant does not contend to the contrary.

There is, of course, another reason why the fruits of the search were properly admitted. At the time of defendant's consent to the search, defendant was informed that an affidavit for a search warrant was being prepared. If defendant had not consented to the search, there is no doubt that the affidavit would have been completed and a search warrant obtained to perform the same search. The evidence would have been discovered inevitably. *Nix v. Williams*, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984).

Defendant's first assignment of error is without merit.

Defendant next contends that the trial court erred in allowing in-court identification of the defendant which was based on "photo identification of six individuals in which only one was similar to that of the Defendant."

Whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures. *State v. Gibbs*, 238 Neb. 268, 470 N.W.2d 558 (1991).

Defendant asserts that the identification process used to identify the defendant by State's witness Kelly Black was "so impermissibl[y] suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Brief for appellant at 25.

The facts show to the contrary. On the evening of September 28, Black positively identified defendant's picture from a group of six photographs. Defendant asserts that because this pretrial identification process was so suggestive, in addition to the unreliability of Black's basis for initial identification, any subsequent identification, including that at trial, based on this first identification must not be allowed into evidence.

In connection with the admissibility of identification evidence, we said in *State v. Richard*, 228 Neb. 872, 878, 424 N.W.2d 859, 864 (1988):

> "[In determining the admissibility of identification evidence, the trial court should consider] the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

The trial court gave proper weight to all those factors. Black testified that he saw the man's face under the lights of Black's "well lit" back porch. Black testified that he spent 45 minutes helping defendant get the car out of the ditch. In those 45 minutes, Black had the opportunity to view the defendant in the headlights of his pickup truck while defendant was hooking the tow chains to the mired car. He testified that he was "fairly close" to the man during this entire time.

Finally, although Black had seen "lots of photographs of [defendant] on TV" since the victim's disappearance and had seen defendant in jail clothes at the suppression hearing, Black testified that his in-court identification of defendant was not affected by any of these subsequent events. Black had more than ample time and occasion to observe the man on September 27 and made an admissible identification of defendant. The trial court did not err in admitting the identification evidence

about which defendant complains. Defendant's second assignment of error is without merit.

Defendant's third assignment of error contends specifically that the trial court erred in denying defendant's motion in limine because "evidence of DNA fingerprinting . . . has not been found sufficiently acceptable or reliable to the scientific community."

Defendant presents the position that the trial court erred in that the court violated the "*Frye* test." The *Frye* test stems from the decision in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), in which the court held in connection with the admitting of novel scientific evidence that "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."

In the case before us, since the trial court made no formal determinations as to the *Frye* test, the record does not disclose the basis used by the trial court in admitting the DNA evidence. Therefore, we do not know what the trial court used as the relevant scientific field for DNA admissibility. Some considerations as to that question may be found in *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992); *People v. Mohit*, 579 N.Y.S.2d 990 (1992); *U.S. v. Yee*, 134 F.R.D. 161 (N.D. Ohio 1991); and William C. Thompson & Simon Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 Va. L. Rev. 45 (1989).

The *Frye* test has been used in Nebraska, but until *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990), was not formally recognized. The *Frye* test, however, is not totally controlling as to the admissibility of novel expert testimony, but is only the first of several criteria that a trial court determines are satisfied before such testimony may be admitted. See, generally, *State v. Reynolds, supra*.

Defendant's brief goes beyond that specific issue to discuss other pertinent and important issues concerning DNA evidence. In view of the fact that forensic DNA evidence is relatively new and has not been discussed by appellate courts in

Nebraska, we set out herein general procedural and substantive rules with regard to DNA evidence in Nebraska.

A general summary of DNA theory and practice, as presented in this case, is necessary before the specifics of this case are discussed. The State called two witnesses on this issue: Lorah McNally, the laboratory supervisor in Lifecodes' forensic laboratory, and Kevin McElfresh, the director of the forensic laboratory at Lifecodes.

McNally performed the tests on the evidence in this case. As to her qualifications, she testified that she received a B.S. degree in biology from Cornell University and then received a master's degree in forensic science from John Jay College. She stated she had testified with respect to DNA testing about 30 times in 10 states and had been accepted as an expert witness on DNA in those cases.

As to DNA generally, McNally testified that DNA is the biological matter found within the center of nucleated cells. One DNA molecule is composed of a group of chromosomes. Humans have 46 of these chromosomes. The majority of DNA is similar from one person to the next. This explains the innumerable similarities among all humans. There are segments or "genes," however, along the DNA molecule which differ from one person to the next. Genes which have more than one variation are called alleles. Alleles are the segments of DNA which are used in identity testing.

McNally further testified that DNA was first described in 1953 by two researchers named James Watson and Francis Crick. They proposed the "double-helix" model often used today to represent the DNA molecule. The term refers to the fact that DNA consists of repeating chemical sequences between two strands (double) of material which are twisted (helix). The result of this combination is a ladderlike structure, with the "rungs" made up of complementary chemical bases which hold the two "sides" of the ladder together.

These chemical bases are adenine (A), thymine (T), guanine (G), and cytosine (C). The nature of these chemicals is such that A will bond only with T, and C will bond only with G. Therefore, if one side or strand of the ladder has an A on it, the other strand connecting to it must have a T in that same

location. The combination of these two bases is called a "base pair."

An individual's DNA pattern is inherited from his or her mother and father, each of whom contributes 23 chromosomes. However, even in a family with many children each will have a unique DNA code. This is true except for identical twins, who have identical DNA.

This is the basic theory of DNA as presented by the prosecution. Although McNally did not offer any opinion as to the general acceptance of this theory, McElfresh testified that the principle regarding diagnostic DNA testing has existed for a long period of time and is an accepted scientific principle. The State in its brief contends that this theory has been widely adopted by a vast majority of the jurisdictions which have addressed the issue. The State cites numerous cases, including *Vickers v. State*, 801 S.W.2d 214 (Tex. App. 1990); *U.S. v. Jakobetz*, 747 F. Supp. 250 (D. Vt. 1990); *State v. Pennington*, 327 N.C. 89, 393 S.E.2d 847 (1990); *Caldwell v. State*, 260 Ga. 278, 393 S.E.2d 436 (1990); *Spencer v. Com.*, 240 Va. 78, 393 S.E.2d 609 (1990); and others.

Defendant does not take issue with this part of the State's case. In fact, even the case to which defendant turns for support agrees that this theory is generally accepted. See *People v. Castro*, 144 Misc. 2d 956, 545 N.Y.S.2d 985 (1989). It would appear that the basic theory regarding DNA—that segments of DNA are different among individuals—is generally accepted among the relevant scientific communities. That finding, however, is one for the trial court to make, if the court determines the evidence before it supports such a finding. No such finding was made in this case, although it might be said that by holding that the DNA evidence was admissible, the trial court, by necessary implication, found that the theory was generally accepted.

Although the results of tests performed on DNA are sometimes called a DNA fingerprint, the term suggests an infallibility and certainty which the results do not have at this time. We, therefore, discuss the process and results as a DNA profile, and recognize that DNA results are expressed only as probabilities.

McNally testified that the DNA profile test is performed on various biological samples, including blood, semen, and dental pulp or any material with nucleated cells. In this case, the general process is called restriction fragment length polymorphism (RFLP) and consists of seven steps followed by the Lifecodes laboratory.

In the testing process, first the DNA material is isolated. Lifecodes isolates the evidence to be sampled and extracts the cells from it. The cells are broken open and the DNA within a cell's nucleus is released.

McNally testified that when released, the DNA molecule is in a long, complete strand. The strand, when stretched full length, is over 6 feet long and is still small enough to be contained within a cell, which itself is invisible to the unaided eye. Lori L. Swafford, Note, *Admissibility of DNA Genetic Profiling Evidence in Criminal Proceedings: The Case for Caution*, 18 Pepp. L. Rev. 123 (1990). In the second step, the DNA is cut up in order to make the strands smaller. This allows Lifecodes to identify segments which contain the unique codes. This process is accomplished by adding a cutting agent, called an enzyme, to the DNA. McNally likened the enzyme to a "scissors" which "reads down" the DNA molecule and cuts the strand at specific sites.

The third step is to separate the strands by size. The sample of DNA is placed in a gel, and then an electrical current is run through the gel. This process is called electrophoresis. Because DNA has a natural negative charge, the fragments in the electrical current will move away from the negative charge and toward the positive one. The larger, heavier fragments move more slowly and thus a shorter distance than the smaller, lighter fragments. After a fixed period of time of electrophoresis, the fragments are sorted by size, from the largest to the smallest.

The next step is to "denature" the sorted fragments. McNally explained:

> [W]hat denature means is when you look at this model and you have the T's and the A's, the bases are together, they're complementary and this is called double stranded because there is one strand that's complementary to the other strand and they're together. And what we want to do in

> this next step of the process is to actually separate those strands. So what we do is we add something that will actually just unzip the molecule so that the T's — everything on the right side is going to split apart . . . basically what you are doing is you are just unhooking this base from this base, but these two being in the same strand are not going to become unattached. So that process, the reason we do that is when we add — what we're going to do is we have those fragments in the gel, we want to make those fragments separate from each other because what we're going to do later is visualize a difference based upon a certain region of DNA. And in order to visualize that, we need those fragments separate from each other. . . . So that after this denaturing process, the DNA fragments in that gel are now separate from each other.

In the fifth step, the fragments are transferred from the gel to a nylon membrane. The membrane receives the fragments in exactly the same position which they occupied in the gel.

In the sixth step, pieces of laboratory DNA, called probes, are washed over the membrane. The probes have a radioactive marker attached to them so that as a probe washes over the fragments and finds a complementary location, the probe bonds with the fragment and the marker allows it to be located by the testing scientists.

Actual visualization, however, is still impossible with the naked eye. In the seventh and last step, therefore, a sheet of x-ray film is placed over the membrane, and the radioactive markers then show up on the film as dark bands. This x-ray photograph is called an autoradiograph, or autorad. The autorad gives scientists a photographic representation of the migration of the fragments.

McNally testified that RFLP analysis has existed since the 1970's and has been commonly used for identifying genetic diseases. McNally has published articles in the Journal of Forensic Sciences regarding RFLP analysis, and she states that the process has been used in the United States and in other countries for genetic testing. McNally testified that RFLP analysis is generally accepted in the scientific community.

On cross-examination, McNally clarified that the original

RFLP analysis used in the 1970's was diagnostic and not forensic. She explained that diagnostic analysis uses fresh, whole, liquid blood, which is "a different type of sample" than used in forensic analysis. McNally testified that forensic analysis must use dried blood or semen stains or other material found in a criminal investigation. Such types of samples are exposed to natural elements of weather and decay. McNally testified, however, that forensic RFLP analysis has been used only since 1986.

With that truncated, overly simplified explanation of DNA, one can see the basis for our determination that the trial court erred in plunging into this extremely technical evidence for the first time in the jury's presence. It would have been an appropriate procedure to grant a hearing on defendant's motion in limine, and we later herein set out the matters which a trial court should determine preliminarily before submitting DNA evidence to a jury.

It might be said that if the trial court properly admitted the DNA evidence, the failure to grant a hearing outside the jury's presence as to the admissibility of the evidence would be harmless error. The fact is, however, that there may have been flaws in the evidence as presented, and the failure to conduct a proper hearing permitted improper evidence to go before the jury. This holding is the basis for the reversal of the judgment herein.

In summary, the trial court, in determining admissibility of DNA evidence, must first be satisfied, and find, as to the general acceptance of relevant DNA theories in the scientific community, and must be satisfied as to the acceptance and validity of the methodology of testing DNA used. The trial court then determines if specific procedures were properly followed in the case before the court. *U.S. v. Two Bulls*, 918 F.2d 56 (8th Cir. 1990); *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429 (1991). *Ex Parte Perry*, 586 So. 2d 242 (Ala. 1991); *Smith v. Deppish*, 248 Kan. 217, 807 P.2d 144 (1991). But cf. *Hopkins v. State*, 579 N.E.2d 1297 (Ind. 1991).

In the present case, the facts regarding Lifecodes' procedure are the following:

As stated above, two witnesses testified for the State

regarding the DNA profile test, McNally and McElfresh. McNally testified that Lifecodes has a number of quality controls to assure accuracy and reliability of the results. She stated that Lifecodes has a protocol. Protocol is defined as an explicit, detailed plan of an experiment. Dorland's Illustrated Medical Dictionary 1373 (27th ed. 1988). McNally testified that the Lifecodes protocol outlines the RFLP process in detail and is to be followed to ensure that all of the laboratory scientists perform the test in the same manner. The protocol is detailed in a manual and, McNally said,

> [t]he purpose of the protocol would be to outline each one of the steps from the point at which you receive the evidence to the isolation to the cutting up of the enzyme. It tells you how much [of] each component or reagent to add, how long to let the probes soak, and it really gives you a step-by-step description of the entire procedure.

The critical question regarding the procedure on the protocol used in this case is, Who prepared the manual containing the protocol which witness McNally testified she followed? The McNally DNA testing results can be admissible only if the protocol followed was established according to principles generally accepted in the relevant scientific fields. There is a complete void in the evidence before the court on this issue.

Lifecodes employs personnel to test all variable components of the RFLP test. This controls consistency and quality. In addition, Lifecodes has laboratory supervisors and directors whose responsibility is to be available to assist any laboratory scientists with questions on their work.

Defendant contends that until all laboratories form unified standards the tests will be unreliable. We do not agree with that contention. The fact that each laboratory has a written protocol for testing, made available to both parties and their experts, and that witnesses from these laboratories will subject themselves to cross-examination may be adequate proof of reliable standards and results. In this case, on cross-examination, defense counsel asked:

> Q. And was the protocol followed in this particular testing process?
>
> A. Yes it was.

> Q. Well, we don't — you didn't bring a copy of the protocol with you here today?
>
> A. It was not requested. You can call them and they can send you one if you would like.

The State rejoined, on redirect: "Q. Miss McNally, the protocol that Mr. Klein asked you about, did he ask that you bring a copy of that with you to court today? . . . A. No, he didn't."

Although defendant had access at some time to the Lifecodes protocol and defendant did not request that the State present that protocol at trial, proving that Lifecodes followed its own protocol when testing the samples in this case is part of the State's burden for foundation of the test results. The State did not establish what the protocol was or that this protocol was followed. McNally testified generally that the Lifecodes protocol was followed. The State did not produce evidence that the protocol was followed in this case.

Before either McNally or McElfresh offered their testimony regarding the results of the Lifecodes tests, defense counsel objected as to foundation. The objections were timely and should have been sustained. The State failed to establish that the opinion testimony of the experts was based on accurate information and test results. The DNA evidence should not have been admitted.

Defendant also contends that *United States v. Williams*, 583 F.2d 1194 (2d Cir. 1978), *cert. denied* 439 U.S. 1117, 99 S. Ct. 1025, 59 L. Ed. 2d 77 (1979), requires that the RFLP test be analogized to other scientific techniques the results of which are admissible. McNally testified as to the longstanding and widespread use of the DNA theory and RFLP testing in the diagnostic setting (as opposed to a forensic setting). This comparison and differentiation is important in considering Nebraska statutes that allow for the use of genetic testing in cases of paternity disputes. See Neb. Rev. Stat. § 43-1414 (Reissue 1988). The State correctly points out that Nebraska's Legislature has approved such uses of diagnostic genetic analysis. Without determining how such evidence should be admitted in those cases, we recognize the statute permitting this evidence. We distinguish this statutory endorsement from the present case, only insofar as we here deal with forensic samples.

Section 43-1414 is clearly aimed at diagnostic uses of DNA profiling. Defendant offered no opposition to McNally's comparison between forensic and diagnostic RFLP testing and in fact relied on it in cross-examination. Any questions which arise because of the fact that samples are forensic rather than diagnostic are addressed by cross-examination of the expert witnesses testifying for the proponents.

An entirely separate issue, apart from the testing techniques, must also be addressed. There is a question regarding the reliability of the probability calculations. When a match is declared, the essence of the conclusion is that the band patterns of one autorad match those of the other. The strength of the RFLP testimony is based in the statistical probability which experts attach to the likelihood of such a match's occurring coincidentally. All things being equal, the likelihood of a coincidental match decreases as the number of matching bands and the rarity of those bands increase.

The expression of a statistical probability is based on an assumption that when one RFLP test x ray is compared to another, the likelihood of coincidental matching of marker locations decreases as the number of markers used increases. The assumption in its base form is that all genetic traits occur independently of each other, and thus the presence of one trait does not cause, affect, or relate to the presence of another.

In 1908, two scientists, G.H. Hardy and W. Weinberg, theorized that in a population at equilibrium, the frequencies of all genetic traits remain constant from generation to generation. This is known as the Hardy-Weinberg equilibrium principle. McElfresh testified as an expert on this subject. McElfresh received a B.S. degree in biological sciences, a master's degree in molecular cellular developmental biology, and a doctorate in molecular and population genetics. McElfresh has published numerous articles and given a number of lectures and presentations on subjects relating to DNA print testing. McElfresh testified that to be valid, Hardy-Weinberg equilibrium requires that the population be large and that mating within the entire population must be random.

A necessary component of this principle is that as the number of alleles detected by any one probe increases, so should the size

of the population studied for that probe. This would verify Hardy-Weinberg equilibrium, at least with respect to those alleles. As an example, a study of 50 people which uncovers 50 different alleles for the same gene would indicate nothing about frequency of the alleles in the general population. However, a study of 500 people uncovering the same 50 alleles might suggest the frequency of occurrence of those alleles in the general population.

From a large enough sample group, a population geneticist could estimate the frequency of each allele in the population as a whole. This estimate is based on the validity of the Hardy-Weinberg equilibrium principle.

These estimates are also only as reliable as the data bases upon which they are based. McElfresh testified that Lifecodes' data base for the North American black population is "between 900 and 1,600" different alleles. For Caucasians the data base "is roughly 1,500 to 2,500." These estimates are quite broad, and a question to be determined is whether the data represent a sufficient number of people sampled from which geneticists can make accurate extrapolations. A trial judge should make appropriate findings in this area also.

McElfresh stated that based on observations made within the Lifecodes data base, it is possible to make predictions as to allele frequencies in the general population. These predictions by nature are generalizations made based on known facts.

The use of statistics by Lifecodes scientists is based on theories which are generally accepted, but a hearing before a trial judge should address the question whether a lack of adequate sampling may leave their probability conclusions too speculative. There may be insufficient testing of other racial and ethnic populations, which raises questions regarding to which population group a suspect would be compared if she or he were from a nontested group (e.g., Asian or Native American). The question of possible interbreeding among the groups should be addressed or explained. Here, we agree with defendant that the record before us does not contain evidence which resolves the question of the potential rate of error, if any, in these calculations.

Another possible problem associated with the DNA profile

test relates to the use of these statistics in testimony by the expert. When forensic analysis is reported, it is described in terms of probabilities. DNA profiling does not compare every base pair of the two fragments of DNA being compared. Probabilities are expressions of the likelihood of results if sufficient population could be sampled. All the estimate of probability does is narrow the field of prospective sources of DNA. Such testimony does not result in a specific identification.

The concern expressed by other jurisdictions and the defendant and shared by this court is that juries may receive probability testimony as infallible evidence. At oral argument, counsel for the State advanced the position that if this court determined that the DNA evidence was inadmissible, the admission of that evidence was harmless error, because the remainder of the evidence was overwhelming as to defendant's guilt. While we agree that the other evidence is sufficient to support defendant's conviction, we cannot say the DNA evidence was harmless. When the DNA evidence showed to a 99.9999995 percentage of probability that the blood in the trunk of Patterson's car was Patterson's blood, it is probable that the jury considered that factual matter no longer open to question. Reception of the DNA evidence cannot be said to be harmless error. *Ex Parte Perry*, 586 So. 2d 242 (Ala. 1991); *Commonwealth v. Curnin*, 409 Mass. 218, 565 N.E.2d 440 (1991); *State v. Pennell*, 584 A.2d 513 (Del. Super. 1989); *People v. Mohit*, 579 N.Y.S.2d 990 (1992).

We conclude that although it appears that the results of the DNA profile test are generally accepted in the relevant scientific communities and that such tests are reliable if performed in conformity with appropriate laboratory protocols, the probative value of population genetics probability testimony, at this time, must also be considered. Among the preliminary considerations which must be resolved by the trial judge is to determine if the potentially prejudicial effect upon the jury exceeds the probative value of the evidence. See Neb. Rev. Stat. § 27-403 (Reissue 1989).

We therefore reverse the conviction of defendant and remand the cause for further proceedings. In those proceedings in

connection with DNA evidence, the trial court is to preliminarily decide, outside the presence of the jury, on the basis of evidence before it: (1) whether the witnesses on the DNA issue are experts in the relevant scientific fields, (2) whether DNA profile testing used in the case under consideration is generally accepted by the relevant scientific communities, (3) whether the method of testing used in the case under consideration is generally accepted as reliable if performed properly, (4) whether the test conducted properly followed the method, (5) whether RFLP analysis evidence is more probative than prejudicial under § 27-403, and (6) whether statistical probability evidence interpreting RFLP analysis results is more probative than prejudicial. See, *People v. Castro*, 144 Misc. 2d 956, 545 N.Y.S.2d 985 (1989); *U.S. v. Two Bulls*, 918 F.2d 56 (8th Cir. 1990). Upon determination by the court that each of these conditions is satisfied, the evidence would be submitted to the jury, under appropriate instructions, for ultimate determination.

We recognize that with the passage of time, particularly in this fast-exploding field, some of the requirements set out above may become unnecessary. In the state of the art at this time, however, it does not seem appropriate to us to surrender important factual determinations solely to expert witnesses.

REVERSED AND REMANDED.

GRANT, J., participating on briefs.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. LEROY J. STURGEON, RESPONDENT.

489 N.W.2d 551

Filed September 25, 1992. No. S-91-241.

Original action. Judgment of disbarment.

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

PER CURIAM.

Respondent, LeRoy J. Sturgeon, was a licensed attorney in both Nebraska and Iowa. On March 15, 1992, this court temporarily suspended Sturgeon from practicing law in Nebraska. On July 22, the Supreme Court of Iowa disbarred Sturgeon for violating Iowa's DR 1-102(A)(1), DR 1-102(A)(3), DR 1-102(A)(5), and DR 1-102(A)(6). Subsequently, a motion for reciprocal discipline was filed in this court.

Pursuant to Neb. Ct. R. of Discipline 21 (rev. 1992), after giving notice to a Nebraska bar member, this court will reciprocate the disciplinary measures of another state on the Nebraska bar member. Respondent Sturgeon was notified of the motion for reciprocal discipline and was given 14 days to show cause why he should not be disbarred. Respondent did not comply with the show-cause order.

Accordingly, the respondent is hereby disbarred from the practice of law in Nebraska.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. JOHNNY L. RAY, APPELLANT.

489 N.W.2d 558

Filed September 25, 1992. No. S-91-478.

1. **Confessions: Police Officers and Sheriffs.** Whether a defendant's statements resulted from an officer's promise is a question of fact.
2. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous. In determining whether the trial court's findings on a motion to suppress are clearly erroneous, the appellate court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress.
3. **Confessions: Appeal and Error.** A determination by the trial court that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong.
4. **Confessions.** Determinations of voluntariness are based upon an assessment of all of the circumstances and factors surrounding the making of a statement. This

rule is in harmony with the totality of the circumstances standard applied to such cases by the U.S. Supreme Court.

5. **Confessions: Police Officers and Sheriffs: Due Process.** Coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the 14th Amendment.
6. **Confessions: Police Officers and Sheriffs.** Mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or a promise, does not make a subsequent confession involuntary.
7. **Confessions.** Inducements by prosecuting authorities may vitiate the voluntariness of a defendant's statement. The totality of circumstances must be examined in order to evaluate the voluntariness of an induced confession.
8. **Confessions: Police Officers and Sheriffs.** Generally, a defendant's statement is inadmissible only if the totality of the circumstances shows that the police offered the defendant a benefit in exchange for the statement.
9. **Confessions.** If a benefit is offered in exchange for testimony, and the offer is definite, then a confession is involuntary and must be suppressed.

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

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

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

HASTINGS, C.J.

Johnny L. Ray appeals jury convictions of one count of first degree murder, one count of attempted first degree murder, and two counts of use of a firearm in the commission of a felony. He was sentenced to life imprisonment for murder, $16^2/_3$ to 50 years' imprisonment for attempted murder, and $6^2/_3$ to 20 years' imprisonment for each firearm count. His sole assignment of error is that the trial court failed to suppress his inculpatory statement given to the police and admitted that statement into evidence at the trial as having been voluntarily given. We affirm.

According to the testimony of Valentine Marrufo, one of the victims of these crimes, he and Mathew Mallory left Sioux City, Iowa, on September 18, 1990, to attend a concert at the Omaha

Civic Auditorium. Neither of them was familiar with Omaha, and they stopped at a gas station to get directions. They asked a man for directions, and he told them he would get in the car and show them the way. This man talked to them about getting some drugs and directed them to stop at a place where there were some apartment buildings. That person left, and they never saw him again. Some other people came out from around the buildings. Both Marrufo and Mallory got out of the car. Two males from the group came up to them, and one of them "patted down" Marrufo. After that, those two men backed off, and the people were talking "in a group." Marrufo then told his companion that there was something wrong and they had better leave. About that time, someone from the group that had gathered started shooting. Marrufo yelled at Mallory to get in the car, Marrufo started running around the car, and he felt "like a pinch in" his leg. However, he later discovered that he had been shot in the left leg. Marrufo heard a lot of shots, and just as he sat down in the driver's seat, Mallory fell into the passenger seat. The two of them drove off down the road and stopped at a gas station. Marrufo noticed that there was a lot of blood coming out of Mallory's nose and chest. The police came, and Mallory was taken away in an ambulance. Marrufo was not able to identify the person or persons who did the shootings.

A Dr. Roffman, a pathologist, did an autopsy on the body of Mallory at 10 a.m., September 19, 1990. He testified as to gunshot wounds in the victim's body and pointed out four which were the cause of Mallory's death.

Calvin Scott, who had been living in the same house as Ray, had seen the rifle, the murder weapon, in the house "about a couple of days before he shot it, about three days." He also testified that on the evening of the shootings, he saw Raymond Martin, the coassailant, come into the house, get the rifle out of the closet, and leave. Martin said to Scott they were going to do a "jack-move [robbery] on two white guys" who were outside.

After Martin left, Scott went outside and saw the two victims, Martin, Ray, and others standing around. Shortly afterward, he heard gunshots, about 12 or 13, with a break between the first four and the remaining shots. Scott stated that he was not in a position to see who fired the shots. He heard one

of the two victims say, "I'm hit." He then saw them drive off. Scott, Martin, Ray, and others went in the house about 5 minutes later, where there were conversations. Ray was heard to say that Martin had shot four times and missed three out of four times, and everyone laughed about that. Ray was also heard to say that "he was tracking one of the Indians with the rifle." Marrufo is a Native American.

Brett Whitaker, another acquaintance of Ray, testified for the State. He said that on the night of the shooting he was standing around with Ray, Martin, and some other people. He saw the two victims drive up and stop. There was discussion about drugs. Martin left and returned a short time later with a rifle. Whitaker heard Martin say, "Give it up." The two victims said they did not want any trouble and started backing up. It was then, according to Whitaker's testimony, that Martin started shooting. He shot four or five times, then Ray ran over to Martin and grabbed the gun. Whitaker then saw Ray start shooting at the two victims and continue shooting until the gun was empty. The victims got in the car and drove off. Whitaker said that he and Scott were talking about what happened right afterward, and Ray was laughing.

Det. Paul Briese testified at the suppression hearing that he had interviewed Whitaker, and the essence of Whitaker's statement was that he had seen Ray and Martin shoot the two victims. He then interviewed Ray and did not advise Ray of his rights immediately, as he did not consider him a suspect initially. After hearing Ray's first story that he had been asleep in the upstairs bedroom at the time of the shootings and was awakened by the gunfire, Briese told Ray that his account did not jibe with Whitaker's story.

Briese told Ray that he was a suspect in the shootings and advised him of his *Miranda* rights. Ray waived those rights and, after continuing to deny involvement for a time, admitted responsibility for the shootings. Briese then taped Ray's formal statement, and that tape was played for the jury at trial. Ray's description of the shootings and his involvement in them followed closely the description given by Whitaker. Ray also stated that he and Martin had planned to rob the two victims. His only explanation for the shootings was that he did not think

a .22 rifle would kill anyone.

Ray challenged the admissibility of his confession as "involuntary and the product of threats, coercion and inducements of leniency made by members of the Omaha Police Division." However, Ray did not testify at the suppression hearing.

After testifying at the suppression hearing at which Briese said he had told Ray he did not think he was telling the truth, Briese testified as follows:

> Q. You said something that it would be best if he told you the truth. What do you mean by that? What did you tell him?
>
> A. Well, his cooperation in telling me the truthful scenario of what happened, that—rather than to deny and lie that he was involved when in fact I had a witness that I just finished interviewing, had told me that it was his involvement and his use of the gun that had shot one of the victims.
>
> . . . .
>
> Q. What did you say to him?
>
> A. That it would be best for him to be truthful with me at this point so we can get this matter resolved and find out exactly what happened.
>
> Q. Did you tell him his cooperation would be noted and brought to the attention of anyone?
>
> A. Yes, sir.
>
> Q. What did you tell him?
>
> A. I told him that his cooperation and his truthfulness in this matter would be taken to the county attorney's office.
>
> Q. Anything else?
>
> A. No.
>
> Q. Did he inquire about this?
>
> A. No.

On the tape itself, Ray denied having been made any promises or having been threatened in exchange for his statement. Ray also stated on the tape that he was freely and voluntarily giving the statement. He told of his involvement mostly in the narrative, with no prompting and little

interruption or questioning by Briese.

The motion to suppress was overruled, and the tape of the recorded statement by Ray was received in evidence over objection.

After the tape was admitted and played for the jury, Ray's counsel cross-examined Briese. Counsel repeatedly asked Briese whether he told Ray "it would be better for him if he confessed." Briese denied on cross-examination that he told Ray his confession would positively affect the outcome of his case. Briese denied telling Ray that his cooperation would be made known to any judge, or specifically promising him any better treatment. When asked by defense counsel if he did not tell Ray it would be better for him if he cooperated, Briese replied, "No, I just told him it was necessary that he tell me the truth." In Briese's words: "I make no promises or any suggestions or anything like that. I just told him what I would do: I would take his story to the prosecutor." However, in response to continued questioning by defense counsel, the following was stated:

> Q. Okay. And you told him it would be better for him if he told you what happened?
>
> A. Told him it would be better for him if he told the truth.
>
> Q. You told him it would be better if he cooperated?
>
> A. Right.
>
> . . . .
>
> Q. You told him, again, that if he cooperated it would be better for him?
>
> A. Right.

Defendant renewed his motion to suppress the tape after cross-examining Briese, and it was denied.

Ray testified in his own behalf. He freely admitted his involvement in the attempted robberies and the shootings. He was then examined as to the circumstances leading up to the giving of the taped statement. He testified that Briese told him "it would be better for me to cooperate with him." He was asked by his counsel, "Did he tell you how it would be better for you if you cooperated with him?" Ray replied, "No." He then testified that in his mind, "cooperate" meant to tell what

happened. Ray admitted that he was not threatened in any way and that Briese never used the word "promise."

"[W]hether a defendant's statements resulted from an officer's promise is a question of fact." *State v. Haynie*, 239 Neb. 478, 487, 476 N.W.2d 905, 912 (1991). In general, the following standard applies to review of factual determinations regarding the suppression of evidence or testimony:

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

(Citations omitted.) *State v. Coleman*, 239 Neb. 800, 806, 478 N.W.2d 349, 354 (1992) (quoting *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989)). Thus, "a determination by the trial court that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong." *State v. Haynie*, 239 Neb. at 488, 476 N.W.2d at 912.

Ray's only contention on this appeal is that his confession was admitted into evidence against him in violation of his right to due process because it was involuntary. In Nebraska, "Determinations of voluntariness are based upon an assessment of all of the circumstances and factors surrounding the making of a statement." *State v. Melton*, 239 Neb. 790, 796, 478 N.W.2d 341, 347 (1992). This rule is in harmony with the "totality of the circumstances" standard applied to such cases by the U.S. Supreme Court. See *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

In *Arizona v. Fulminante*, the U.S. Supreme Court made clear that the totality of the circumstances test, and not the "however slight" test of *Bram v. United States*, 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568 (1897), is the standard for evaluating involuntariness claims brought under the U.S. Constitution. Moreover, while the circumstances surrounding the statement and the characteristics of the individual

defendant at the time of the statement are "potentially material considerations," *State v. Haynie*, 239 Neb. at 487, 476 N.W.2d at 912, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment," *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986), and *State v. Haynie, supra*. See, also, *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989). Thus, the inquiry is whether the trial court was clearly wrong in finding that police conduct, in the context of the totality of the circumstances, did not render Ray's confession involuntary.

Ray contends that *State v. Porter*, 235 Neb. 476, 455 N.W.2d 787 (1990), compels the reversal of his conviction. In *Porter*, this court reversed the defendant's conviction and remanded the cause for a new trial based upon the erroneous admission of the defendant's incriminating statement. The error was based upon the following testimony of the police officer who took the statement:

> "[Defense counsel:] You did tell him that it would help him if he would confess, didn't you?
>
> "A. It could help him.
>
> "Q. You did tell him that?
>
> "A. I said it could help him, yes.
>
> "Q. In fact, you mentioned at one point in the tape, '*I am sure the judge will take that into consideration*'?
>
> "A. Yes, sir.
>
> "Q. So basically you told him that it could help him if he confessed and if he told you what he did that you would be a lot easier on him?
>
> "A. That it would look better for him.
>
> "Q. That it would look better for him?
>
> "A. Right.
>
> "Q. And you were telling him that even before he admitted doing anything on either of these robberies?
>
> "A. I was probably telling that all the way through in talking about all of the robberies."

(Emphasis supplied.) 235 Neb. at 479-80, 455 N.W.2d at 792.

In short, Ray urges this court to hold his confession involuntary because Briese told him it would be better if he

confessed. At trial, Ray's counsel repeatedly asked Briese whether he told Ray "it would be better for him if he confessed," as follows:

> Q. All right. You told him it would be better for him if he cooperated, too, didn't you?
>
> A. No, I just told him it was necessary that he tell me the truth.
>
> Q. All right. Isn't it true that you told him it would be better for him if he cooperated?
>
> A. Of course.
>
> . . . .
>
> Q. Okay. And you told him it would be better for him if he told you what happened?
>
> A. Told him it would be better for him if he told the truth.
>
> Q. You told him it would be better if he cooperated?
>
> A. Right.
>
> . . . .
>
> Q. You told him, again, that if he cooperated it would be better for him?
>
> A. Right.

"Mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or a promise, does not . . . make a subsequent confession involuntary." *People v. Boyde*, 46 Cal. 3d 212, 238, 758 P.2d 25, 39, 250 Cal. Rptr. 83, 97 (1988), *aff'd* 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990). Accord, *State v. Amaya-Ruiz*, 166 Ariz. 152, 165, 800 P.2d 1260, 1273 (1990) ("[m]ere advice from the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary"), *cert. denied* ____ U.S. ____, 111 S. Ct. 2044, 114 L. Ed. 2d 129 (1991); *Castro v. State*, 745 P.2d 394, 403 (Okla. Crim. App. 1987) ("[m]ere advice or exhortation by the police that it would be better for the accused to tell the truth, unaccompanied by either a threat or a promise, does not render a subsequent confession involuntary"), *cert. denied* 485 U.S. 971, 108 S. Ct. 1248, 99 L. Ed. 2d 446 (1988); *People v. Howard*, 139 Ill. App. 3d 755, 758, 487 N.E.2d 656, 659 (1985)

("mere exhortations to tell the truth or to make a statement do not, without more, render a subsequent confession inadmissible"); *Ready v. State*, 574 So. 2d 894 (Ala. Crim. App. 1990) (police officer's statement to defendant that codefendant had implicated him, "so that he had better tell the truth," *id.* at 898, was "an exhortation to an accused to tell the truth [which] does not imply a promise or inducement," *id.* at 899); *Willie v. State*, 585 So. 2d 660 (Miss. 1991) (sheriff's statements to defendant that " 'it was always best to tell the truth' " and " 'if he said anything it would be better for him to tell the truth,' " *id.* at 668, were "mere exhortations to tell the truth," *id.* at 669, which did not invalidate his confession). See *State v. Haynie*, 239 Neb. at 498, 476 N.W.2d at 918 (Shanahan, J., concurring) (" 'we wish to emphasize that mere adjurations or exhortations to tell the truth, without more, are insufficient to vitiate the voluntariness of a confession,' " quoting *People v Conte*, 421 Mich. 704, 365 N.W.2d 648 (1985)). Any statement by Briese to Ray to the effect that it would be better if Ray cooperated was a permissible exhortation to tell the truth.

Ray mischaracterizes *State v. Porter, supra*, inasmuch as he suggests that it holds otherwise. In *State v. Porter*, the determinative testimony was not the officer's statement to the defendant that "it would look better for him" if he confessed, but the officer's statement, " ' "I am *sure* the judge will take that into consideration." ' " (Emphasis supplied.) 235 Neb. at 479, 455 N.W.2d at 792. See *State v. Haynie, supra* (distinguishing *State v. Porter* because the officer therein offered the certainty of judicial consideration of the defendant's cooperation).

The remainder of Briese's testimony regarding what he told Ray only buttresses the conclusion that his statements to Ray were mere exhortations to tell the truth. Briese denied on cross-examination that he told Ray his confession would positively affect the outcome of his case, as follows:

> Q. Okay. You told him that it could help him if he told you what happened?
>
> A. Told him it was important that he tell me the truth.
>
> Q. Okay. And you told him that it could help him if in fact he told you what happened. True?

A. Didn't tell him it would help him, I said it would take—I would take that story to the prosecutor.

. . . .

Q. And you told him basically then that it could help him if he confessed and if he told you what he did it would be easier on him. Isn't that true?

A. No, I just said that his cooperation was necessary so we could get to the bottom of this. I made no promises

. . . .

Q. Didn't ask you if you made—said the word "promise."

A. Okay. I made no deals.

Q. But you did tell him it would look better for him if he cooperated. True?

A. His cooperation was necessary. That is correct, sir.

. . . .

Q. My specific question is, during this second interview, you told him that it would look better for him if he cooperated. Didn't you?

A. No, I told him that his cooperation was necessary.

. . . .

Q. . . . You deny saying that you told him it would be better for him if he cooperated?

A. No, no. I told him it would be necessary for him to cooperate and that is the proper thing to do.

Q. And it would be better for him?

A. If you construe that as being in the affirmative, that's the way you construe it. I don't. I told him that it was necessary and that he needed to be truthful.

Briese denied telling Ray that his cooperation would be made known to any judge, or specifically promising him any better treatment. In Briese's words: "I make no promises or any suggestions or anything like that. I just told him what I would do: I would take his story to the prosecutor."

As previously stated, Ray never, in his testimony, made any claim that Briese promised him anything. He stated that Briese told him he knew that Martin shot first and that Ray took the gun from him. He testified that Briese said, "Just go ahead and tell the story, tell me the story." Ray said Briese said that "it

would be better for me to cooperate with him."

The position Ray urges on this court would ignore the question of whether police inducements caused the defendant to confess, evaluated in light of the totality of the circumstances, and instead focus upon whether certain "magic words" were uttered by the investigating officer, or were placed in his mouth on cross-examination at trial. To narrow the inquiry to include only the question whether the police told the defendant it would be "better" if he gave a statement, and to end the inquiry and require the suppression of the confession should the answer to that question be yes, would be to ignore the U.S. Supreme Court's mandate that courts considering the voluntariness of confessions analyze the totality of the circumstances. See *Arizona v. Fulminante, supra*. This result would also ignore those decisions which hold that such a statement, standing alone, is a permissible exhortation to tell the truth. See, *People v. Boyde, supra*; *State v. Amaya-Ruiz, supra*; *Castro v. State, supra*; *People v. Howard, supra*; *Ready v. State, supra*; *Willie v. State, supra*.

The proper inquiry here is whether all statements made to Ray by Briese at the time of Ray's confession, considered along with the other circumstances surrounding the confession, " 'coerce[d] or overb[ore] [Ray's] free will.' " *State v. Haynie*, 239 Neb. at 487, 476 N.W.2d at 912 (quoting *Tippitt v. Lockhart*, 859 F.2d 595 (8th Cir. 1988)). Thus, while "inducements by prosecuting authorities" may vitiate the voluntariness of a defendant's statement, "the totality of circumstances must be examined in order to evaluate the voluntariness of an induced confession and . . . adherence to a per se suppression doctrine is unsatisfactory." *State v. Haynie*, 239 Neb. at 487, 476 N.W.2d at 912.

A defendant's statement is inadmissible only if the totality of the circumstances shows that the police offered the defendant a benefit in exchange for the statement. In *State v. Hall*, 237 Neb. 169, 465 N.W.2d 150 (1991), the defendant was arrested on suspicion of sexual assault. During questioning, the defendant told the police officer that he needed help, and had needed help since he was a child. The police officer told the defendant that " 'we would, if he needed help, try to see that he got it.' " *Id.* at

172, 465 N.W.2d at 152. The defendant then confessed. This court held the confession was properly admitted because the police officer "did not indicate or imply to defendant that help would be forthcoming only in exchange for a confession." *Id.* at 174, 465 N.W.2d at 154. We applied similar analyses and obtained the same result in *State v. Crisp*, 219 Neb. 265, 361 N.W.2d 544 (1985), where the police officer told the defendant he would try to get the defendant help through the county attorney, but never conditioned his offer of help on obtaining the statement, and in *State v. Ellefson*, 214 Neb. 747, 336 N.W.2d 88 (1983), where the police told the defendant he would be evaluated as a mentally disordered sex offender if he was tried for the crime in question.

The benefit offered to a defendant must be definite in order to render his statement involuntary. In *State v. Haynie, supra*, the defendant was suspected of several robberies. The police officer who took the defendant's confession "told the defendant during the questioning that he would make a report and indicate that the defendant talked freely, without any hesitation, and that would probably be taken into consideration on how many cases were filed against him." *Id.* at 481-82, 476 N.W.2d at 909. This court held the confession was properly admitted, stating, "the officer's rather innocuous statement that his report would indicate that defendant talked freely, which *probably* would be taken into consideration on how many cases were filed against him, did not coerce or overbear the defendant's free will." (Emphasis in original.) *Id.* at 490, 476 N.W.2d at 913. A similar analysis which culminated in the same result was applied in *State v. Robertson*, 219 Neb. 782, 784, 366 N.W.2d 429, 431 (1985) (police officer told the defendant her statement would not entitle her to release on bail, but that he would tell city prosecutor's office, and the prosecutor *might* " 'take care of' " defendant's case), and *State v. Thomas*, 232 Neb. 490, 441 N.W.2d 186 (1989) (police statement to the defendant that revealing his drug source could help him in court was insufficient as a matter of law to render his confession involuntary).

If the benefit is offered in exchange for testimony, and the offer is definite, then the confession is involuntary and must be

suppressed. In *State v. Mayhew*, 216 Neb. 761, 346 N.W.2d 236 (1984), the county attorney told the defendant that if the defendant told the truth, the county attorney would recommend that the defendant be sentenced on the instant crime concurrently with the unrelated sentence the defendant was then serving. In *State v. Smith*, 203 Neb. 64, 277 N.W.2d 441 (1979), the police officer interrogating the 15-year-old defendant told the defendant that if he confessed, the officer would try to get the case transferred to juvenile court. In both cases, this court held the confessions thereby obtained were involuntary and improperly admitted.

Briese never offered Ray any advantage if he confessed. Even were it not clear that Briese's statements to Ray were a general exhortation to tell the truth, they might properly be considered an attempt to befriend Ray, which is also permissible investigative technique. See *State v. Norfolk*, 221 Neb. 810, 819, 381 N.W.2d 120, 127 (1986) (police officer's statement to defendant that defendant would " 'feel better' " if he would " 'tell us everything' " constitutes a permissible attempt to befriend the defendant and does not invalidate the defendant's statement).

The record does not reveal that Briese told Ray that his confession would help him, that it would "*look* better" if he cooperated, or that his cooperation would be pointed out to a judge.

The decision as to the character of Briese's statements is initially committed to the trial court, and this court reviews it only to ensure that it is not clearly wrong. *State v. Haynie, supra*. The trial judge's decisions in this regard are not clearly wrong, based upon the record presented. See, *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986) (where evidence conflicted as to what statements police made to the defendant, trial court's resolution of conflict in favor of admissibility was not clearly wrong); *State v. Ellefson*, 214 Neb. 747, 336 N.W.2d 88 (1983) (where defendant claimed that the police promised him treatment as a mentally disordered sex offender if he confessed, and police officers testified that they merely told defendant he would be evaluated as such if he was tried, trial court's resolution of conflict in favor of admissibility was not

clearly wrong); *State v. Hayes*, 229 Neb. 53, 424 N.W.2d 624 (1988) (trial court's determination of voluntariness not clearly wrong).

The determination by the district court that the statement was voluntary was not clearly wrong, and the judgment of that court is affirmed.

AFFIRMED.

WHITE, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. ANDREW H. COZZENS ET AL., APPELLANTS.

490 N.W.2d 184

Filed September 25, 1992. Nos. S-91-494 through S-91-502.

1. **Constitutional Law: Criminal Law: Jury Trials.** There is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of 6 months or less.
2. _____: _____: _____. The right to a jury trial, protected by the Nebraska Constitution, is the right to a jury trial for a serious offense, that is, an offense punishable by incarceration for more than 6 months.
3. **Jury Trials: Ordinances.** Under existing law, a court has no discretion to grant a jury trial in a prosecution for violation of a municipal ordinance, notwithstanding a defendant's demand for a jury trial.
4. **Criminal Law: Choice of Evils Defense.** The justification or "choice of evils" defense, authorized by Neb. Rev. Stat. § 28-1407 (Reissue 1989), operates to legally excuse conduct that would otherwise subject a person to criminal sanctions.
5. **Choice of Evils Defense.** The justification or "choice of evils" defense requires that a defendant (1) acts to avoid a greater harm; (2) reasonably believes that the particular action is necessary to avoid a specific and immediately imminent harm; and (3) reasonably believes that the selected action is the least harmful alternative to avoid the harm, actual or reasonably believed by the defendant to be certain to occur.
6. **Criminal Law: Choice of Evils Defense.** Availability and applicability of the justification or "choice of evils" defense require that a defendant's conduct be responsive to a legally recognized harm, and the defense may not be used to justify or excuse criminal activity as an expression of disagreement with decisions by a branch of government.
7. **Constitutional law: Criminal Law: Choice of Evils Defense.** The justification or "choice of evils" defense, authorized by Neb. Rev. Stat. § 28-1407 (Reissue 1989), is unavailable in a prosecution for an offense, based on conduct as an

expression of a defendant's moral belief or judgment, committed to prevent another's exercising a constitutional right or committed to deny another's constitutionally protected right.

Appeal from the District Court for Douglas County, JAMES M. MURPHY, Judge, on appeal thereto from the County Court for Douglas County, THOMAS G. MCQUADE, Judge. Judgment of District Court affirmed.

Peter C. Bataillon, of Sodoro, Daly & Sodoro, for appellants.

Herbert M. Fitle, Omaha City Attorney, and Gary P. Bucchino, Omaha City Prosecutor, and Richard L. Dunning for appellee.

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

SHANAHAN, J.

The crucial question presented in these appeals is whether a defendant, prosecuted in a state court for an offense committed as an expression of the defendant's moral belief or judgment, can invoke a statutory defense which, if allowed, prevents another's exercising a right recognized under the U.S. Constitution as interpreted by the U.S. Supreme Court.

Mary C. Adam, Patricia A. Beninato, Andrew H. Cozzens, Lawrence J. Donlan, Winifred I. Kaipust, Sharon T. McKee, Gerald V. Rush, Joseph C. Taphorn, and Andrew W. Watson appeal from their convictions for criminal trespass, in violation of Omaha Mun. Code, ch. 20, art. VI, § 20-155 (1990) (OMC § 20-155): "**Request to leave.** It shall be unlawful for any person to fail or refuse to leave the property of another person after being notified to do so by the owner, occupant or person in control thereof, or by his agent." A copy of the ordinance was introduced in the defendants' consolidated bench trials. Each of the defendants was a member of a group who appeared at the Women's Medical Center in Omaha and attempted to prevent women from entering the clinic, which supplied gynecological services, including termination of pregnancy by abortion. Each defendant, in cases consolidated for disposition in this court, contends that the county court for Douglas County, as the trial

court, erred by (1) refusing to grant a jury trial as requested by each defendant and (2) disallowing the justification or "choice of evils" defense, Neb. Rev. Stat. § 28-1407 (Reissue 1989), to each defendant.

BACKGROUND FOR CONVICTIONS

The Women's Medical Center, located at 4930 L Street in Omaha, is a medical clinic that offers various gynecological services, including abortions. The clinic's boundaries, or property lines, were confirmed by a survey before the defendants' appearance at the clinic and were marked by a white line. A perimeter chain link fence enclosed the clinic on all sides of the building except the front, which faced L Street. A gate in the fence provided access to the clinic's driveway and parking lot. The clinic had two entrances: the front door on L Street and another door for entry from the clinic's parking lot. On the morning of September 19, 1990, when the defendants arrived at the clinic, the clinic's staff shut and secured the driveway gate so that the only entrance into the clinic was through the front door.

On their arrival, the defendants formed a human blockade in front of the clinic to prevent access by the clinic's patients. Responding to the assembly, a lawyer, who represented the clinic and the owner of the clinic site, summoned police. The emergency response unit of the Omaha Police Division arrived and was met by the clinic's lawyer, who asked the police to remove the assemblage from clinic property. An officer of the police unit generally announced to the assembly that the group must disperse and leave the clinic's premises and that on refusal to leave, anyone remaining on the premises would be arrested for violation of OMC § 20-155. Sufficient time was allowed for the defendants to leave the premises. The clinic's lawyer and a police officer contacted each of the defendants and requested each defendant's departure from the premises. When the defendants refused to leave as requested, they were arrested and charged with violating OMC § 20-155, the "request to leave" ordinance.

REQUESTS FOR JURY TRIALS AND TRIALS

At arraignment, the court denied each defendant's request

for a jury trial.

During their trials, the defendants offered testimony from several eminent physicians who specialize in gynecology and family practice. These physicians testified that human "life begins at conception" and that an abortion kills a human being. Some physicians described and medically evaluated the various methods of abortion and harmful aftereffects to women who have had abortions. A psychiatrist testified about "post-abortion syndrome" and the psychological harm to a woman who has had an abortion.

Each of the defendants testified about his or her belief, based on information from physicians such as those who had testified, that human life begins at conception and that abortion is a serious moral wrong. The clinic was the site for the largest number of abortions in Omaha, and the defendants were aware that Wednesday, and therefore the day of the blockade, was one of the days on which abortions were scheduled at the clinic. The defendants considered a human blockade to be the only means to prevent entry into the clinic and provide time during which a woman might obtain counseling and reconsider whether to have an abortion. One defendant, Kaipust, testified that on the morning of the blockade, she had encountered several women who were about to enter the clinic for abortions and she had attempted to counsel them and offer information concerning alternatives to abortion. Other defendants recounted their seeing cars with women passengers stop in front of the clinic and, in view of the blockade, drive away.

Each defendant acknowledged that he or she had been requested to leave the clinic's premises, but refused to leave and was arrested for violating the ordinance previously mentioned. When arrested, the defendants were on the clinic's premises. As a result of the blockade or demonstration, the clinic was closed briefly, but reopened in the course of the day. Of the 30 abortions scheduled at the clinic on the morning of September 19, 1990, 16 were performed, and 14 were rescheduled due to the blockaded entry into the clinic.

The trial court disallowed the justification or choice of evils defense, that is, the contention that the harm from abortions is

greater than the harm from the defendants' violating OMC § 20-155, and therefore prevention of the greater harm justifies the trespass charged against each defendant. The court found each defendant guilty of violating OMC § 20-155 and sentenced each defendant to 1 day's incarceration in the Douglas County Correctional Center.

JURY TRIAL

Each defendant's first assignment of error concerns the trial court's refusal to grant a jury trial on the charge of violating OMC § 20-155, which is punishable by imprisonment not to exceed 6 months, a fine not to exceed $500, or both such imprisonment and fine.

The Nebraska Constitution states: "The right of trial by jury shall remain inviolate," Neb. Const. art. I, § 6, and "[i]n all criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury," Neb. Const. art. I, § 11.

Notwithstanding the preceding constitutional provisions for a jury trial, not every criminal charge is triable to a jury. " 'There is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of 6 months or less.' " *State v. Kennedy*, 224 Neb. 164, 172, 396 N.W.2d 722, 727 (1986). Accord, *State v. Miller*, 226 Neb. 576, 412 N.W.2d 849 (1987); *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986). Consequently, the right to a jury trial, protected by the Nebraska Constitution, is the right to a jury trial for a serious offense, that is, an offense punishable by incarceration for more than 6 months. See, *State v. Miller, supra*; *State v. Lynch, supra*; *State v. Kennedy, supra*. Since conviction on the trespass charge against each defendant was not punishable by incarceration for more than 6 months, the defendants were not entitled to jury trials, pursuant to the Nebraska Constitution.

Also, the U.S. Supreme Court, considering whether a defendant is entitled to a jury trial pursuant to U.S. Const. amends. VI and XIV for an offense punishable by incarceration for less than 6 months, stated in *Blanton v. North Las Vegas*, 489 U.S. 538, 543, 109 S. Ct. 1289, 103 L. Ed. 2d 550 (1989):

> Although we did not hold in *Baldwin* [*v. New York*, 399

> U.S. 66, 90 S. Ct. 1886, 26 L. Ed. 2d 437 (1970)] that an offense carrying a maximum prison term of six months or less automatically qualifies as a "petty" offense, and decline to do so today, we do find it appropriate to presume for purposes of the Sixth Amendment that society views such an offense as "petty." A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a "serious" one. This standard, albeit somewhat imprecise, should ensure the availability of a jury trial in the rare situation where a legislature packs an offense it deems "serious" with onerous penalties that nonetheless "do not puncture the 6-month incarceration line." [Quoting from the brief for petitioners.]

Further, the Nebraska Legislature has enacted Neb. Rev. Stat. § 25-2705 (Reissue 1989), which in pertinent part provides: "Either party to any case in county court, except criminal cases arising under city or village ordinances, traffic infractions, other infractions . . . may demand a trial by jury." Therefore, apart from constitutional considerations, § 25-2705 precludes a defendant's obtaining a jury trial in a prosecution for violation of a municipal ordinance. Additionally, under existing law, a court has no discretion to grant a jury trial in a prosecution for violation of a municipal ordinance, notwithstanding a defendant's demand for a jury trial. See *State v. Blair*, 230 Neb. 775, 433 N.W.2d 518 (1988).

Accordingly, since each defendant was not entitled to a trial by jury on the charge of violating OMC § 20-155, a municipal ordinance, the county court properly refused each defendant's request for a jury trial.

CHOICE OF EVILS DEFENSE

The justification or choice of evils defense is expressed in § 28-1407, which provides:

> (1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable

if:

(a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged;

(b) Neither sections 28-1406 to 28-1416 nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

The justification or choice of evils defense, authorized by § 28-1407, reflects the Nebraska Legislature's policy decision that certain circumstances excuse conduct that would otherwise be criminal. Therefore, the justification or choice of evils defense operates to legally excuse conduct that would otherwise subject a person to criminal sanctions. Professor LaFave describes the defense: "[I]f the harm which will result from compliance with the law is greater than that which will result from violation of it, [a person is] justified in violating it." 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 5.4 at 627 (1986). As a rationale for the justification or choice of evils defense, LaFave suggests that "the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law." *Id.* at 629.

Consequently, the justification or choice of evils defense requires that a defendant (1) acts to avoid a greater harm; (2) reasonably believes that the particular action is necessary to avoid a specific and immediately imminent harm; and (3) reasonably believes that the selected action is the least harmful alternative to avoid the harm, actual or reasonably believed by the defendant to be certain to occur. See, *State v. Reed*, 205

Neb. 45, 286 N.W.2d 111 (1979); *State v. Graham*, 201 Neb. 659, 271 N.W.2d 456 (1978); *State v. Schroeder*, 199 Neb. 822, 261 N.W.2d 759 (1978); *State v. Ralls*, 192 Neb. 621, 223 N.W.2d 432 (1974).

FACTUAL AVAILABILITY OF JUSTIFICATION DEFENSE

In the present appeals, assuming for the time being that abortion before fetal viability is a harm or evil within the meaning of § 28-1407, the defendants must factually establish that their actions in blockading the clinic were efforts to prevent a specific and immediate harm to at least one reasonably identifiable person affected by an abortion at the Women's Medical Center on September 19, 1990. A generalized belief, even if apparently well-founded, that abortions might occur at the clinic at an unspecified time and might involve an unidentified woman or women is insufficient to supply a factual basis for application of the justification or choice of evils defense.

Only Kaipust established that she had personal knowledge, gained through her contacts with women who were about to enter the clinic, that abortions were likely to be performed on the morning of the blockade. Consequently, Kaipust's attempt to block the clinic's entrance and prevent these identifiable women from entering for abortions factually supports availability of the justification or choice of evils defense for Kaipust.

However, the other eight defendants have failed to establish that they are entitled to the justification or choice of evils defense under the facts. These eight defendants expressed a general belief that abortions were performed at the clinic, but they did not establish a factual basis for their belief that an imminent threat of harm was about to occur to a reasonably identifiable person. Notwithstanding their claim that abortions were scheduled on September 19, 1990, none of the defendants, except Kaipust, knew whether any woman about to enter the clinic was seeking an abortion or whether any such woman was seeking some other gynecological service available at the clinic. Accordingly, other than Kaipust, the defendants did not

factually establish that they were acting to prevent infliction of a specific and immediate harm to a reasonably identifiable victim. Therefore, although the defendants were demonstrating their general moral opposition to abortions at the clinic, none, except Kaipust, were acting to prevent a specific and immediately imminent harm to a particular person. Also, any after-the-fact knowledge of the defendants' does not justify their prior conduct, because a defendant's belief concerning a harm must exist simultaneously with the action taken to avoid or prevent the harm.

Hence, the defendants, except Kaipust, failed to demonstrate a factual basis for availability and application of the justification or choice of evils defense to the prosecutions for violating OMC § 20-155. The county court correctly disallowed the defense for those defendants.

LEGAL APPLICATION OF JUSTIFICATION DEFENSE

Apart from the factual deficiencies precluding the justification or choice of evils defense, the truly dispositive issue is whether any of the defendants has a legal basis to claim the defense. One commentator has suggested that, for availability of the defense, a defendant's responsive criminal conduct must relate only to a legally protected interest, that is, "[t]he phrase 'legally protected interest' " "is to be interpreted broadly to include all interests that the community is willing to recognize and that are not specifically denied recognition by the legal system." 2 Paul H. Robinson, Criminal Law Defenses § 124(b)(1) at 47 (1984).

> The evil, harm, or injury sought to be avoided, or the interest sought to be promoted, by the commission of a crime must be legally cognizable to be justified as necessity. "[I]n most cases of civil disobedience a lesser evils defense will be barred. This is because as long as the laws or policies being protested have been lawfully adopted, they are conclusive evidence of the community's view on the issue."

State v. Sahr, 470 N.W.2d 185, 191 (N.D. 1991) (quoting from Robinson, *supra*, § 124(d)(1) at 52). "[I]t is commonly

conceded that the exercise of a moral judgment based upon individual standards does not carry with it legal justification or immunity from punishment for breach of the law." *United State v. Kroncke*, 459 F.2d 697, 703 (8th Cir. 1972). See, also, *U.S. v. Schoon*, 955 F.2d 1238 (9th Cir. 1991) (justification or choice of evils defense is unavailable for a defendant's criminal conduct responsive to governmental activity with which the defendant disagrees); *State v. Thomas*, 103 N.C. App. 264, 405 S.E.2d 214 (1991) (justification or choice of evils defense is inapplicable to excuse criminal activity of those who disagree with the decisions and policies of the lawmaking branches of government); *Dayton v. Drake*, 69 Ohio App. 3d 180, 590 N.E.2d 319 (1990) (justification or choice of evils defense is unavailable to exonerate criminal activity as a form of civil disobedience, no matter how laudable the defendant's goal).

Thus, availability and applicability of the justification or choice of evils defense require that a defendant's conduct be responsive to a legally recognized harm, and the defense may not be used to justify or excuse criminal activity as an expression of disagreement with decisions by a branch of government. Sincere belief and fervor, resulting in impatience with the alternative and frequently time-consuming process for change in a democracy subject to a constitution, do not supply a legal basis for the justification or choice of evils defense.

STATE ACTION

The defendants contend that *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), is irrelevant to their cases because their conduct involves only interaction by private individuals and does not implicate state action. In *Roe v. Wade*, the U.S. Supreme Court decided that a woman has a fundamental right, before viability of a fetus, to choose whether to terminate her pregnancy, a personal right of privacy expressed as follows:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to

> encompass a woman's decision whether or not to terminate her pregnancy. . . .
>
> . . . .
>
> We, therefore, conclude that the right of personal privacy includes the abortion decision . . . .

410 U.S. at 153-54.

Recently, in *Planned Parenthood v. Casey*, ____ U.S. ____, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), issued June 29, the U.S. Supreme Court reaffirmed a woman's constitutional right of privacy "to terminate her pregnancy in its early stages," 112 S. Ct. at 2803, and constitutional protection for a woman's right

> to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.

112 S. Ct. at 2804. In *Casey*, the Court continued: "Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. . . . It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." 112 S. Ct. at 2804-05. Further, in *Casey*, the Court observed:

> Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. . . .
>
> . . . .
>
> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime,

> choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.

112 S. Ct. at 2806-07. Finally, the Court stated: "We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy." 112 S. Ct. at 2816.

In view of a woman's constitutionally protected right of privacy concerning an abortion, several courts throughout the United States have concluded that the justification or choice of evils defense is unavailable to a defendant who seeks, by trespass during a demonstration or protest, to physically obstruct entry into an abortion clinic and prevent a woman from exercising her constitutional right to a chosen abortion at the clinic; for example, see *State v. Sahr*, 470 N.W.2d 185, 192 (N.D. 1991): "It is [the defendants'] interference with other persons' rights to engage in legally protected acts that makes the defendants' criminal trespasses unjustifiable." See, also, *Cleveland v. Municipality of Anchorage*, 631 P.2d 1073 (Alaska 1981); *People v. Garziano*, 230 Cal. App. 3d 241, 281 Cal. Rptr. 307 (1991); *Egger v. State*, 817 S.W.2d 183 (Tex. App. 1991); *State v. Thomas*, 103 N.C. App. 264, 405 S.E.2d 214 (1991); *Com. v. Wall*, 372 Pa. Super. 534, 539 A.2d 1325 (1988); *Sigma Repro. Health Cen. v. State*, 297 Md. 660, 467 A.2d 483 (1983).

A legal rationale for the preceding cases may be found in an examination of some federal decisions. In *Gilmore v. City of Montgomery*, 417 U.S. 556, 94 S. Ct. 2416, 41 L. Ed. 2d 304 (1974), the U.S. Supreme Court observed that protection of the 14th Amendment concerning state action "applies *de facto* as well as *de jure* because '[c]onduct that is formally "private" may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action.' " 417 U.S. at 565 (quoting from *Evans v. Newton*, 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966)). Later, in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 933, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982), the Court stated that "private use of the challenged state procedures with the help of state officials constitutes state action for purposes of the Fourteenth

Amendment."

The justification or choice of evils defense, expressed in § 28-1407, exists through legislative action of the State of Nebraska. The defendants seek to carry this statutory defense into judicial reality through application in a Nebraska court. In that manner, the defendants endeavor to bring state legislative action into a Nebraska courtroom to excuse their conduct as private citizens prosecuted for criminal trespasses designed to prevent a woman's exercising her constitutional right of privacy, existing under the 14th Amendment to the U.S. Constitution, for an abortion. Thus, the defendants' conduct is inextricably interwoven with state action to such a degree that the justification or choice of evils defense would be tantamount to use of state procedures and state officials to obtain formally and essentially private moral objectives and, therefore, would constitute state action within the purview of the 14th Amendment to the U.S. Constitution. In the present cases, if the justification or choice of evils defense is available in a prosecution for a trespass that effectively prevented, or was designed to prevent, the exercise of a woman's 14th Amendment right, and therefore a protected right under the U.S. Constitution, to terminate her pregnancy before viability of a fetus, state action is necessarily implicated in denying a right of privacy protected by the 14th Amendment to the U.S. Constitution. See, *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973); *Planned Parenthood v. Casey*, ____ U.S. ____, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). While the present appeals pertain to individuals' moral beliefs and judgments expressed by conduct at an abortion clinic, the justification or choice of evils defense necessarily relates to other situations involving exercise of a constitutionally guaranteed right. For example, if an individual's moral belief or judgment justifies commission of an offense that prevents exercise of a constitutionally protected right, then a person, believing that a religious sect's dogma is a morally reprehensible path to damnation, might escape punishment for arson in burning down a house of worship where the particular dogma was being disseminated under the First Amendment protection for freedom of religion or speech. The preceding illustration

involves an extraordinary situation, but validity of a rule is sometimes tested by application in exceptional circumstances. Hence, in relation to the justification or choice of evils defense, an offense committed as an expression of a moral belief or judgment preventing exercise of a First Amendment right is neither more nor less constitutionally repugnant than an offense preventing exercise of a 14th Amendment right, such as that implicated in the present appeals.

Consequently, we hold that the justification or choice of evils defense, authorized by § 28-1407, is unavailable in a prosecution for an offense, based on conduct as an expression of a defendant's moral belief or judgment, committed to prevent another's exercising a constitutional right or committed to deny another's constitutionally protected right.

In deciding that the justification or choice of evils defense is legally unavailable to the defendants in the present appeals, we are neither impugning the integrity of the defendants nor ignoring their obviously sincere moral beliefs. As the majority of the Court noted in *Planned Parenthood v. Casey, supra*:

> Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.

112 S. Ct. at 2806.

However, since the 14th Amendment to the U.S. Constitution guarantees a woman's right of privacy to choose an abortion, as enunciated in *Roe v. Wade, supra*, and reaffirmed by *Planned Parenthood v. Casey, supra*, that same 14th Amendment, interpreted by the U.S. Supreme Court, governs the decisions of this court, for we are bound to apply the 14th Amendment irrespective of Nebraska law or individual beliefs.

Under the circumstances, the county court correctly disallowed the justification or choice of evils defense in the defendants' trials.

CONCLUSION

Since the county court committed no error concerning the defendants' trials, we affirm the district court's judgments which affirmed the judgments of defendants' convictions in the county court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KEVIN G. FRANKLIN, APPELLANT.
488 N.W.2d 552

Filed September 25, 1992. No. S-91-504.

1. **Convictions: Homicide: Intent.** In order to support a conviction of second degree murder, the defendant must intend to kill.
2. **Homicide.** The essential elements of second degree murder are that the murder must be done purposely and maliciously.
3. **Intent: Weapons.** Intent to kill may be inferred from deliberate use of a deadly weapon in a manner reasonably likely to cause death.
4. **Criminal Law: Trial: Evidence.** There is no rule of law which requires a trial judge, acting as the trier of fact in a criminal case, to make any special findings of fact.
5. **Criminal Law: Evidence: Verdicts.** In a jury-waived action, the judgment of the trial court on the facts has the same force as a jury verdict and will not be set aside on appeal if there is sufficient competent evidence to support it. A guilty verdict of the fact finder in a criminal case must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it.
6. **Criminal Law: Trial: Judges: Presumptions.** It will be presumed in a jury-waived criminal trial that the judge was familiar with and applied the proper rules of law unless it otherwise clearly appears.

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

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

GRANT, J.

Defendant, Kevin G. Franklin, age 18, was charged by information with second degree murder, first degree assault, and two counts of use of a firearm in commission of a felony. The district court for Douglas County, sitting without a jury, convicted defendant of all four counts and sentenced him to life imprisonment for the murder, 4 to 6 years' imprisonment for the assault, and 4 to 6 years' and 3 to 5 years' imprisonment for the two counts of use of a firearm. The sentences are to be served consecutively, and credit was given for time served.

Defendant timely appealed. His sole assignment of error is that the district court "incorrectly applied the law to the Defendant's second degree murder and first degree assault convictions by following the State's theory of prosecution." We affirm.

The evidence at trial, viewed most favorably to the prosecution, as required by *State v. Lewis, ante* p. 334, 488 N.W.2d 518 (1992), showed the following facts:

Cheryl Collier, the assault victim, testified that the evening and night of August 31, 1990, she was at 3321 Manderson in Omaha. Also present at 3321 Manderson during all relevant parts of the evening were Bennie Booker; Laverne Morris (Booker's sister), who was the murder victim; Robert Ross (Booker's father); Vernon Turner (Booker's brother); and several children.

Throughout the evening Booker was arguing with Ricky and Garen Wright; with the Wrights' mother, Lilly Andersen; and with Booker's sister Tracey Booker. The argument with the Wright family centered around Booker's breaking some furniture belonging to the Wrights' sister. Booker admitted that he had "trashed" Linda Wright's house at about 5 p.m. because he "had just gotten into an argument" with her, but he could not remember what the argument was about.

In addition, Booker testified that Tracey Booker was angry with him because she thought he had called a company that day to come and repossess her car. Early in the evening, Booker and Tracey Booker "passed a few words," after which she attacked him with a knife. Ricky Wright, Tracey's boyfriend, told Booker that "he better not go out of the house anytime soon

because he was going to get him."

Defendant testified in his own behalf. Defendant is a longtime friend of Garen Wright. During the summer of 1990, defendant bought a 9-millimeter automatic handgun and a clip for $80, because he was

> having problems with these other people on the streets who they thought I was a gang member; but I told them, you know, I wasn't in no gangs and they were talking to me and I was, like, I don't want no part of it and so, you know, I got a gun, you know, to protect myself.

Defendant testified that on the night of August 31, 1990, about 8 or 8:30 p.m., he met Garen and Ricky Wright. They told defendant there had been a fight, and they wanted to use defendant's gun. Defendant agreed and got the gun from behind a tree across the street. The Wright brothers then left, and defendant went along, because "I went to see what they was going to do with my gun."

The Wright brothers and defendant went to Linda Wright's house and found her crying. Defendant said that he felt sorry for her, but he was not upset about what Booker had done to the house. The three then went to the K mart at 72nd and Ames, where Ricky Wright bought some bullets.

Garen Wright, defendant, and another friend drove to the house on Manderson about 10 p.m. Garen went in, while the others waited in the car. Defendant saw Booker and Garen come out of the house, and he also saw a woman whom he did not know.

Defendant testified that Booker and the woman tried to slam the door on Garen Wright's foot, and the door broke. He then said that Booker hit Garen in the face with some object. Garen's mouth was bleeding, he got in the car, and the group left. Defendant testified that Garen repeated about 15 times that he was going to kill Booker.

Following this incident, the police were called to 3321 Manderson at about 12:45 a.m. and left about 1:20 a.m.

Defendant, Garen Wright, and their companion met Ricky Wright and another friend. All five drove back to the house on Manderson. Apparently, the police had left by this time. Defendant testified that he thought they were going to pick up

Tracey Booker. Defendant drove the car up to the front of the house, and Ricky, with the gun, walked into the front yard.

Collier and Booker testified that they heard a car pull up outside the house, and Morris went to the window to look. One of the other adults also looked out the window, saw people getting out of the car, and told everyone to "get down."

Defendant testified that, at this point,

> Garen was next to me. He was saying, give me the gun, give me the gun. It was like I am going to kill Bennie. And somebody else said, give me the gun. And I said, no, just give it to me and Ricky gave me the gun and I walked up and Ricky was standing behind me and everybody else was in the car and I walked up to the front of the house and I seen someone in the window . . . .

Defendant testified that he knew there were two people in the house.

Defendant testified that he "thought that was Bennie in the window. I just seen a head in the window and then I just shot toward the door." He said that when he started firing, he was 15 feet from the house and he thought Booker was at the window. There were eight bullet holes in the bottom half of the door. The window in which he saw the person was about 3 or 4 feet from the door. He testified that he did not want to hit anyone, but just wanted to scare Booker. When asked why he shot into the door, he said, "I just didn't think of the consequences. I was just trying to scare him."

Collier testified that when the shooting started, she ran into the dining room, directly behind the living room, to help Robert Ross, who was blind, to get down. There she was shot in the hip and buttocks. When she was shot, she was in a direct line back from the front door. She testified that she saw bullet holes in the door, the window, and the window air conditioner unit. Collier testified that a minute or two after the shooting stopped, she saw Morris lying on the floor between the living room and the dining room.

The police received a call at 1:47 a.m. and returned to the house on Manderson within 5 to 10 minutes. They found Morris on the floor and ascertained that she had no pulse. Collier was taken to the hospital.

The parties stipulated that Morris died of the gunshot wound. The autopsy reported that the bullet was a "full metal jacketed bullet consistent with a 9.0 mm. bullet."

Defendant said he also intentionally shot the air conditioner unit that was in the window to the right of the door. He testified that the clip held 15 cartridges and that he fired all of them into the front of the house. The group then drove Garen Wright to a hospital so that he could have his mouth treated.

Defendant testified that Garen Wright heard on a CB radio in the hospital that two people had been shot at the house on Manderson. Garen told defendant and the others to leave and to return in a half hour to pick him up. Defendant and the others then dropped Ricky Wright off, hid the gun behind a bush, and went to a restaurant. They picked up Garen, returned for the gun, and went home.

Defendant testified that Ricky Wright came over about 7 a.m. and told him that Morris had been killed, and defendant said that he "just knew I made a mistake." Ricky and defendant then went to pick up Garen Wright, and the three drove around, devising an alibi. Later that afternoon, defendant sold the gun.

When defendant found out that the police were looking for him, he called the police station and "turned himself in." Defendant was arrested and taken to headquarters. There he was given the *Miranda* rights, and he was questioned by police on September 3, 1990. Initially, defendant attempted to state an alibi, but later confessed. Defendant gave an oral statement to the police, and he made a subsequent taped statement.

Defendant admitted that he stood in front of the house at 3321 Manderson and fired the shots into the house. Defendant stated that he was the only one with a gun. He said that the gun was a 9 millimeter. The shell casings found at the scene were 9-millimeter casings.

Defendant did not contend that he did not shoot into the house. The trial focused, rather, on his intent at the time of the shooting. After defendant's opening statement, in which counsel stated that defendant would testify that he intended only to scare Booker, and before the presentation of evidence, the prosecutor stated that defense counsel's theory of the law was wrong, and that

> under the law of Nebraska for a second degree murder you don't have to intentionally try to kill someone shooting into a house where you know people are congregated with a loaded handgun in disregard of whether or not it is going to hit someone qualifies as a second degree murder. So that distinction should be made.

Throughout his opening statement and closing argument, the deputy county attorney posited the erroneous position that the firing of a gun into a house where the shooter knows there are people constitutes, in itself, second degree murder. The position is not correct, as pointed out to the trial court, and to this court, by defense counsel. The accurate statement would be that those facts *may* constitute second degree murder. The intent to kill is an element of second degree murder, and that intent may be proved by conduct such as defendant's in this case. Defendant's counsel made this distinction clear in his statements and final argument.

In his closing argument, defense counsel directed the court to the information and the statute for the proper elements of second degree murder. The information stated that "on or about the 1st day of September, 1990, KEVIN G. FRANKLIN . . . did then and there intentionally, but without premeditation, kill Laverne M. Morris" and "did then and there intentionally or knowingly cause serious bodily injury to Cheryl Collier."

The defense attorney showed the court a previous jury instruction of the court in an earlier second degree murder case, which properly stated the elements of second degree murder. Defense counsel rebutted cases given to the court by the prosecutor from other jurisdictions which have dissimilar second degree murder statutes. He also submitted several cases from Nebraska defining the elements of second degree murder, all of which required that the killing be done purposely and maliciously.

Defense counsel continued during closing argument:

> [A] terrorist would have a defense if he can convince 12 jurors that he did not intend to kill anybody. . . . [B]ut that's the fact question for the jury to determine and that's the fact question that this court will determine as to what his intent was at the time that he opened fire on that house.

In response, the prosecutor repeated his erroneous argument, but continued:

> On the case here where he's talking about when you talk about intent, I think the instruction goes something to the effect that intent is rarely ever discernible by what someone says. You have to look at what their actions are and what they do. Your Honor, it is an insult to suggest that he accidentally or upon a sudden quarrel unloaded 15 rounds into the front of an occupied house killing one person outright and wounding another.

After an adjournment, the court found defendant guilty of all counts. The defense attorney then, for the first time, asked the court, "Can I ask you to justify what you actually found, your findings and application of the law?" Defense counsel stated, "I want to know if specifically you found from the evidence that my client beyond a reasonable doubt intentionally went up there and fired a firearm and intended to kill somebody?" The Court replied, "Why don't you give me a formal motion to that effect. I'm simply not prepared to go through my thought processes now and we'll talk about it." Five days later, defendant filed such a motion.

Neb. Rev. Stat. § 28-304 (Reissue 1989) states that a person is guilty of second degree murder if "he causes the death of a person intentionally, but without premeditation." A person is guilty of first degree assault if "he intentionally or knowingly causes serious bodily injury to another person." Neb. Rev. Stat. § 28-308(1) (Reissue 1989).

The statute plainly requires that the prosecution prove, beyond a reasonable doubt, that the defendant caused the victim's death intentionally. In order to support a conviction of second degree murder, the defendant must intend to kill. We have always so held. "The essential elements of second degree murder are that the murder must be done purposely and maliciously." *State v. Dean*, 237 Neb. 65, 73, 464 N.W.2d 782, 788 (1991). Accord *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983).

Defendant's interpretation of the elements of second degree murder is correct. The prosecutor's insistence that the State is not required to prove intent to kill is in error.

The facts before us, however, are sufficient to support a finding of intent to kill. "Intent to kill may be inferred from deliberate use of a deadly weapon in a manner reasonably likely to cause death." *State v. Rokus*, 240 Neb. 613, 622, 483 N.W.2d 149, 155 (1992). See, also, *State v. Bright*, 238 Neb. 348, 470 N.W.2d 181 (1991). Defendant's testimony that he did not intend to kill does not require that the court find such intent did not exist. The court could determine, beyond a reasonable doubt, that defendant had the intent to kill from defendant's act of firing 15 rounds from a 9-mm automatic weapon into an area 3 to 4 feet from where he had just seen a human head.

A trial judge sitting without a jury is not required to articulate findings of fact or conclusions of law in criminal cases. In *State v. Cowan*, 204 Neb. 708, 285 N.W.2d 113 (1979), the defendant argued that the court erred in failing to specifically find whether the defense of justification existed. We stated:

> Even if we assume the evidence raised the issue of justification, it presented simply a factual question for the finder of fact to determine. There is no rule of law which requires the trial judge, acting as the trier of fact in a criminal case, to make any special findings of fact. "In a jury-waived action, the judgment of the trial court on the facts has the same force as a jury verdict and will not be set aside on appeal if there is sufficient competent evidence to support it. A guilty verdict of the fact finder in a criminal case must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it."
>
> . . .
>
> Defendant argues he has no way of knowing if the court considered the matter of justification. It will be presumed in a jury-waived criminal trial that the judge was familiar with and applied the proper rules of law unless it otherwise clearly appears. In any event, the record of the de novo trial in the District Court indicates the matter was considered.

Cowan, 204 Neb. at 711, 285 N.W.2d at 115.

In *State v. Lozano*, 209 Neb. 772, 777, 311 N.W.2d 529, 532 (1981), the court stated: "The defendant complains that the

trial court refused to make specific findings of fact and conclusions of law. Neb. Rev. Stat. § 25-1127 (Reissue 1979), upon which the defendant relies, has no application to criminal proceedings."

In this case, we further note that a jury was formally waived by defendant 3 weeks before the trial to the court. No request for specific findings or for "justification" was made until after the court rendered its decision. We see no reason to require reversal of a conviction because the defendant is not satisfied with the prosecutor's understanding of the applicable law.

The trial court's decision that defendant was guilty of second degree murder is supported by the evidence. We will not assume, as defendant requests, that the trial judge was not aware of the elements of second degree murder.

AFFIRMED.

CAPORALE, J., concurring.

I agree with the result reached by the majority only because the requests that the findings of fact and conclusions of law be articulated were not made until after the defendant-appellant, Kevin G. Franklin, had been pronounced guilty. If, however, the majority opinion means that even in the face of a timely request, a trial judge acting as the fact finder need not reveal the factual and legal bases upon which a criminal judgment rests, then the opinion goes too far.

The statement in *State v. Cowan*, 204 Neb. 708, 711, 285 N.W.2d 113, 115 (1979), that "[t]here is no rule of law which requires the trial judge, acting as the trier of fact in a criminal case, to make any special findings of fact" is dictum because no request for such appears to have been made. Admittedly, however, the declaration in *State v. Lozano*, 209 Neb. 772, 311 N.W.2d 529 (1981), that Neb. Rev. Stat. § 25-1127 (Reissue 1979) (requiring that, upon request, a judge sitting as a trier of fact state in writing the conclusions of fact separately from the conclusions of law) does not apply to criminal cases implies that a timely request had been made.

But even if the separation of powers doctrine does not render a statute in this area irrelevant, a matter with which I do not now concern myself, the fact that no statute may require an articulation of the factual and legal bases upon which a criminal

judgment rests does not mean that other considerations do not demand that such be done. As noted in *People v Jackson*, 390 Mich. 621, 212 N.W.2d 918 (1973), findings of fact in a nonjury case serve a function paralleling the judge's charge in a jury case, that of revealing the law applied by the fact finder. Moreover, such findings of fact may be indispensable to a proper appellate review. *United States v. Brown*, 716 F.2d 457 (7th Cir. 1983).

If the rule indeed is that a trial judge acting as a fact finder in a criminal case need never reveal the facts and laws upon which the judgment is founded, a criminal defendant may be well advised not to waive a jury, especially in view of the reality that a circumspect judge cannot be held accountable for the evidential rulings made in such a trial. See, e.g., *State v. Garza ante* p. 256, 487 N.W.2d 551 (1992); *State v. Chambers, ante* p. 66, 486 N.W.2d 481 (1992).

DON MILES AND BARBARA MILES, NATURAL PARENTS AND NEXT FRIENDS OF TRAIG WILLIAM MILES, A MINOR CHILD, APPELLEES, V. BOX BUTTE COUNTY, NEBRASKA, A POLITICAL SUBDIVISION, DOING BUSINESS AS BOX BUTTE GENERAL HOSPITAL, APPELLANT.

489 N.W.2d 829

Filed October 2, 1992. No. S-89-310.

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. **Judgments: Appeal and Error.** In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. **Political Subdivisions Tort Claims Act: Notice.** Compliance with the notice requirement of Neb. Rev. Stat. § 13-905 (Reissue 1991) of the Political Subdivisions Tort Claims Act is a procedural precedent to commencement of the negligence action.
4. **Political Subdivisions Tort Claims Act: Pleadings: Notice: Proof.** If a political subdivision, by an appropriately specific allegation in a demurrer or answer,

raises the issue of a plaintiff's failure to comply with the notice requirement of Neb. Rev. Stat. § 13-905 (Reissue 1991), the plaintiff then has the burden to show compliance with the notice requirement.

5. **Political Subdivisions Tort Claims Act: Pleadings: Notice.** A general denial in a political subdivision's answer does not raise the issue of noncompliance, which must be raised as an affirmative defense specifically expressing the plaintiff's noncompliance with the notice requirement of Neb. Rev. Stat. § 13-905 (Reissue 1991) of the Political Subdivisions Tort Claims Act.
6. **Health Care Providers.** The proper measure of the duty of a hospital to a patient is the exercise of that degree of care, skill, and diligence used by hospitals generally in the community where the hospital is located or in similar communities.
7. **Trial: Negligence: Proximate Cause: Proof.** In an action for negligence, the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that such an act or omission was the proximate cause of the plaintiff's injury, or was a cause which proximately contributed to it.
8. **Trial: Evidence: Proof.** The burden of proving a cause of action is not sustained by evidence from which a finder of fact can arrive at a conclusion only by guess, speculation, conjecture, or choice of possibilities; there must be something more which would lead a reasoning mind to one conclusion rather than to another.
9. **Health Care Providers: Physician and Patient.** As a general rule, hospital staff members lack authority to alter or depart from an attending physician's order for a hospital patient and lack authority to determine what is a proper course of medical treatment for a hospitalized patient.
10. **Health Care Providers: Physician and Patient: Liability.** Generally, a hospital cannot be held liable for a patient's injury on the theory that nurses or other members of the hospital staff should have known that the treatment generated by a physician was inadequate or improper and therefore should have intervened.
11. **Negligence: Proximate Cause: Words and Phrases.** An efficient intervening cause is the intervening negligence of a third person who has full control of the situation and whose negligence could not have been anticipated, and which negligence breaks the causal connection between the original negligence and the injury.
12. **Negligence: Proximate Cause: Liability.** If the effects of a defendant's negligence actively and continuously operate to bring about harm to another, the fact that the active negligence of a third person is also a substantial factor in bringing about the harm does not protect the defendant from liability.
13. **Negligence: Liability.** If the separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the damage, although one of them alone could not have caused the result.
14. **Motions for New Trial: Appeal and Error.** A motion for new trial on the basis of newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
15. **New Trial: Evidence.** Newly discovered evidence is not a ground for a new trial

where the exercise of due diligence before the trial would have produced it.

16. **Motions for New Trial: Evidence: Proof.** In order to make a sufficient showing for a new trial grounded upon newly discovered evidence, the proof in support of the new trial motion must show that the evidence is of such a character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted.
17. **Trial: Evidence: Appeal and Error.** The erroneous admission of evidence in a bench trial of a law action is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings.
18. **Trial: Rules of Evidence: Expert Witnesses: Appeal and Error.** A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert under Neb. Evid. R. 702, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Edward F. Noethe and Joseph F. Bataillon, of Sodoro, Daly & Sodoro, for appellant.

William A. Wieland, of Healey Wieland Law Firm, and Dennis M. Mahoney for appellees.

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

BOSLAUGH, J.

The plaintiffs, Don and Barbara Miles, brought this action pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 through 13-926 (Reissue 1991), on behalf of their minor son, Traig William Miles, to recover damages, including post-majority-age medical costs, care costs, lost earnings, pain, disfigurement, and mental anguish, which were or will be incurred by Traig as a result of injuries occurring in connection with his birth on May 29, 1980. According to the defendant's brief, Don and Barbara Miles also sued on their own behalf, but the district court found that their claims were time barred.

After a bench trial the district court awarded damages in the amount of $1,589,280. The defendant, Box Butte County, the political subdivision which operated Box Butte General Hospital, has appealed from the judgment. Dr. Wendell Fairbanks, the attending physician, was also named as a

defendant in the action; however, Dr. Fairbanks and the plaintiffs reached a settlement in the amount of $25,000 prior to trial.

Box Butte County alleges that the district court erred in failing to find that the plaintiffs failed to prove compliance with the Political Subdivisions Tort Claims Act, finding that the county was negligent and that any alleged negligence was the proximate cause of any damage to the plaintiffs, failing to grant a new trial based upon newly discovered evidence, allowing into evidence a certain publication, failing to allow the testimony of an expert witness, receiving into evidence projections and related exhibits of future care costs and lost future earnings which were not discounted to present values, and allowing testimony and receiving into evidence certain exhibits concerning annuities.

Although not relevant in our consideration of this appeal, we note that a "Consent to Order of Revivor and Substitution of Party for Deceased Plaintiff" filed with this court on December 5, 1990, shows that Traig Miles is now deceased. The defendant's brief in resistance to the plaintiffs' motion for summary affirmance states that "[s]ubsequent to the verdict Traig William Miles was killed in a train accident."

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. *Stauffer v. School Dist. of Tecumseh*, 238 Neb. 594, 473 N.W.2d 392 (1991); *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). Furthermore, in reviewing a judgment awarded in a bench trial of a law action, the Supreme Court does not reweigh evidence, but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Ohnstad v. Omaha Public Sch. Dist. No. 1, supra.* Thus, in reviewing the findings of the trial court, we presume the court resolved any controverted facts in favor of the plaintiff, and we will consider the evidence and permissible inferences therefrom most favorably to the plaintiff. *Schmid v.*

Malcolm Sch. Dist., 233 Neb. 580, 447 N.W.2d 20 (1989).

Traig Miles, the son of Don and Barbara Miles, was born at 10:40 a.m. on May 29, 1980, at Box Butte General Hospital, which is located in Alliance, Nebraska. Dr. Wendell Fairbanks cared for Barbara Miles during her pregnancy.

On May 24, 1980, Dr. Fairbanks determined that Barbara Miles was suffering from preeclampsia and admitted her to Box Butte General Hospital. Preeclampsia was described by Dr. Fairbanks as "a group of symptoms that occur only in the last three months of pregnancy and are characterized by the elevation of blood pressure, protein in the urine, and usually edema." Barbara Miles was hospitalized by Dr. Fairbanks because preeclampsia may progress to eclampsia. According to Dr. Fairbanks, eclampsia is characterized by seizures in the mother which often result in a stroke or permanent injury to or death of the fetus. Preeclampsia can cause stress to the fetus and is a "roadmark" for placental insufficiency.

Placental insufficiency is described as a condition in which the placenta is doing an inadequate job of transferring oxygen and other chemicals from the maternal circulation to the fetal circulation, and carbon dioxide and other wastes from the fetal circulation to the maternal circulation. The plaintiffs' expert, Dr. Vincent Miles, a pediatric cardiologist who is not related to the plaintiffs, testified that preeclampsia can lead to placental insufficiency and result in the fetus' being starved for oxygen. A preeclamptic mother is considered by physicians to be a high-risk patient.

On the morning of May 27, 1980, Dr. Fairbanks determined that Barbara Miles' condition had improved, so he discharged her from the hospital. Later that day, Dr. Fairbanks left Alliance and apparently traveled to Hastings, Nebraska. At approximately 10:30 p.m. that same day, Barbara Miles was readmitted to Box Butte General Hospital by a Dr. Forney, an associate of Dr. Fairbanks' who was covering Dr. Fairbanks' practice while Dr. Fairbanks was out of town. Although Barbara Miles apparently was not in labor, she was readmitted to the hospital because her mucous plug had broken.

Because Dr. Forney was the admitting physician, the procedure at Box Butte General Hospital was that the staff

would follow Dr. Forney's standing orders for obstetrical patients. Dr. Forney's orders did not require nursing staff to attach a fetal heart monitor to Barbara Miles. The record shows that in 1980, some doctors in Alliance wanted the fetal heart monitor attached to their obstetric patients as soon as the patient arrived in the delivery room, while other doctors did not use the fetal heart monitor.

On the following day, May 28, 1980, Barbara Miles was attended to by Nurse Jane McConkey, an employee of the hospital. Nurse McConkey's duties at Box Butte Hospital on May 28, 1980, were not limited to caring for obstetrical patients, but she was also responsible for tending patients in the hospital's emergency room. At the trial, which began November 1, 1988, Nurse McConkey had no independent recollection of caring for Barbara Miles on May 28, 1980. Nurse McConkey relied upon hospital records in order to testify as to specific events which may have occurred on May 28, 1980. Similarly, Dr. Fairbanks also relied upon hospital records to attempt to recall what occurred on that date.

At approximately 8:15 p.m. on May 28, 1980, Barbara Miles was moved to a labor room in the hospital and a fetal heart monitor was attached to her. The function of a fetal heart monitor is to measure and chart an expectant mother's contractions and simultaneously measure and chart the rate of the fetus' heartbeat, which is referred to as the fetal heart rate. The charts or "tracings" derived from a fetal heart monitor can be used to measure changes in a fetal heart rate in relation to the mother's contractions, and may indicate fetal distress.

One indication of fetal distress is a "deceleration," which is a reduction in the fetal heart rate which may occur in response to a uterine contraction. A "late deceleration" is suggestive of placental insufficiency and may indicate that the fetus is in a hypoxic state. A late deceleration is indicated when the fetal heart rate does not return to the baseline rate until after a contraction. Placental insufficiency can be alleviated, at least to some extent, by hydrating and oxygenating the mother, and by turning the mother on her side.

After the fetal heart monitor was attached to Barbara Miles at approximately 8:15 p.m. on May 28, 1980, Nurse McConkey

noted a baseline fetal heart rate of 156 to 160 beats per minute and recorded this information in Barbara Miles' hospital chart. Nurse McConkey also recorded a note which, when medical abbreviations are translated, states: "Note marked decelerations to 80 with contractions. Returns to baseline in 10 seconds after contractions." Nurse McConkey also noted that Barbara Miles' contractions were mild to moderate, lasting 45 seconds, and that the patient "seems tired."

Immediately following that note is another recorded by Nurse McConkey at approximately 8:55 p.m. on May 28. The 8:55 note, when medical abbreviations are translated, states: "Continues to have variable decelerations to 80 with contractions. Return to baseline 10 seconds. Encouraged to move in bed to sides." Another note, which was recorded at 9:20 p.m., indicates that Barbara Miles is "up to walk in halls." Although the record shows that Barbara Miles was disconnected from the fetal heart monitor at approximately 9:22 p.m., the evidence at the trial does not show who removed her from the fetal heart monitor. The record indicates that the fetal heart monitor may have been disconnected by Dr. Fairbanks.

While Nurse McConkey was unable to recall whether she summoned Dr. Fairbanks to the hospital on May 28, Dr. Fairbanks' testimony indicates that his usual practice was to telephone the hospital when he returned from a trip. At 10 p.m., Nurse McConkey charted that Dr. Fairbanks was in the hospital seeing Barbara Miles. According to Nurse McConkey, 10 p.m. is not necessarily reflective of the time at which Dr. Fairbanks arrived at the hospital, but only reflects the time at which Nurse McConkey first saw him. Dr. Fairbanks' testimony indicates that before Nurse McConkey charted his appearance at the hospital, Dr. Fairbanks had conducted a sterile vaginal examination of Barbara Miles. Nurse McConkey testified that she was not with Dr. Fairbanks when he conducted the vaginal examination or she would have charted it in the hospital records. According to Don Miles, Dr. Fairbanks was in Barbara Miles' hospital room for "half an hour or forty-five minutes to an hour."

While Dr. Fairbanks' standing orders required an expectant

mother to be connected to a fetal heart monitor when she was in active labor, the record establishes that Barbara Miles was not in active labor on May 28. Dr. Fairbanks' orders therefore did not require that a fetal heart monitor be attached to her immediately after she had been examined by Dr. Fairbanks.

At 10 p.m., Dr. Fairbanks verbally ordered Nurse McConkey to give Barbara Miles a quarter of a grain of morphine sulfate and a grain of Seconal as a suppository. The effect of these drugs is to stop labor and allow a patient to rest. Morphine sulfate is a narcotic for pain and has a sedative effect. Seconal is a barbiturate for sedation and sleep. Morphine sulfate and Seconal would sedate the fetus as well as the mother.

While Dr. Fairbanks issued orders to administer morphine sulfate and Seconal at 10 p.m., the record also shows that Dr. Fairbanks' standard practice was to examine a patient and review hospital records prior to issuing such orders. Thus, although Dr. Fairbanks relied upon Nurse McConkey's notes to testify that he arrived at the hospital at 10 p.m., the record convincingly establishes that he arrived at the hospital prior to 10 p.m.

At trial, neither Nurse McConkey nor Dr. Fairbanks had an independent recollection of their 10 p.m. conversation. Nurse McConkey assumes that she talked with Dr. Fairbanks, because she recorded in her notes that he gave her verbal orders. Nurse McConkey testified that her standard practice in 1980 when she saw a physician was to review with the physician all that had occurred while she had been taking care of a patient. The information reviewed would have included the nursing notes, vital signs, vaginal examinations, character of the bag of water and fluid, character of the contractions, and any fetal heart monitor tracings which had been produced. Nurse McConkey testified that Dr. Fairbanks normally wanted a thorough report and that his standard practice was to review the fetal heart monitor tracings. She recalled that he often reviewed such tracings and discussed the patterns with nurses on duty in the hospital. However, Nurse McConkey does not recall whether she physically placed the Miles fetal heart monitor tracings in front of Dr. Fairbanks for his review on May 28, 1980.

When examined by the plaintiffs' attorney, Dr. Fairbanks

stated that his "usual practice is to talk to the nurses about the patients and check the labor record and examine the patients." Dr. Fairbanks also testified that on May 28, 1980, he would have received information concerning Barbara Miles by reading the nurses' notes in the hospital charts. Dr. Fairbanks then provided the following testimony concerning the question whether he had seen the fetal heart monitor tracings on May 28:

> Q. Did you look at the monitor tracings?
>
> A. I have no record that I looked at the monitor tracings.
>
> Q. Do you believe that you looked at the monitor tracings?
>
> A. I think I probably would not have looked at the tracings when I saw the nurses [sic] notes.
>
> Q. Why would you not have looked at the monitor tracings?
>
> A. Because the description is pretty exact there, "Noting marked decelerations to 80, but return to base line 10 seconds." That's a pretty benign pattern.

Although he testified that he "probably would not have looked at the tracings when I saw the nurses [sic] notes," Dr. Fairbanks also testified that the fact that he expected complications with a patient might cause him to seek out and review a fetal heart monitor tracing. According to Dr. Fairbanks, he would have followed Barbara Miles more closely than someone who had not had preeclampsia or other prenatal problems. Dr. Fairbanks also testified that the Miles fetal heart monitor tracing was "always available" for him to see if he had wanted to see it.

When asked what he deduced about Barbara Miles' status from reading Nurse McConkey's notes, Dr. Fairbanks testified:

> It looks like she was doing well. They had several notes about the decelerations down to 80 with contractions but returns to base line within 10 seconds after the contraction. That's what we call a variable contraction and is usually caused by cord compression and usually relieved by changing position of the patient and, since it returns to the base line in 10 seconds, it's not an ominous finding.

With respect to the fetal heart monitor tracing, Dr. Fairbanks testified that the tracing's variable pattern was

> not of . . . concern, but there's a rather late component to it, or these decelerations.
>
> . . . .
>
> . . . Typically, all of these have the pattern of being a variable in that they drop rather abruptly and come up rather abruptly. But deceleration begins after— At or after the peak of the contraction and the lowest point falls after the highest point of the contraction, and that is of some concern.

When asked what his course of conduct would have been if he had seen the monitor tracing or if he had been given a description of it, Dr. Fairbanks testified that he would have consulted an obstetrician in Scottsbluff for a second opinion, and would have arranged for delivery by cesarean section if the obstetrician had recommended such action. According to Dr. Fairbanks, a cesarean operation could have been commenced within 45 minutes of the time it was determined that such an operation was required.

Barbara Miles also testified at the trial. When asked what she recalled about the night of May 28, 1980, she testified:

> I remember when Dr. Fairbanks came down and he came in and asked me what I was doing there. I told him that was a silly question and that I was there having a baby. I asked him when I would deliver and he said that he was too tired and that I was too tired and that we would try the next morning.

Numerous expert witnesses, including nurses and physicians, testified on behalf of the plaintiffs. Four nurses appearing on behalf of the plaintiffs collectively testified that Nurse McConkey failed to meet the proper standard of care by failing to (1) properly interpret the fetal heart monitor tracing, (2) hydrate and oxygenate Barbara Miles, (3) notify Barbara Miles' physician, and (4) place the fetal heart monitor tracings in front of Dr. Fairbanks for his review when he appeared at the hospital. The plaintiffs' experts also testified that the proper standard of care was breached because the fetal heart monitor was disconnected at 9:22 p.m. and because Nurse McConkey

failed to remain in the labor room with Barbara Miles after a "nonreassuring" fetal heart pattern had been recorded.

As noted previously, Traig Miles was born at 10:40 a.m. on May 29, 1980. Prior to his death, Traig suffered from retardation and cerebral palsy caused by a lack of oxygen and inadequate blood flow to the brain during the process of labor and delivery. The record, when viewed most favorably to the plaintiffs, shows that if Traig had been delivered by midnight on May 28, 1980, or in the early morning on May 29, 1980, it is likely that Traig would not have suffered retardation or cerebral palsy.

The defendant first argues that the district court erred in failing to find in its favor because the plaintiffs failed to prove compliance with the notice of claim requirement of the Nebraska Political Subdivisions Tort Claims Act.

As a limitation on a plaintiff's right to commence a negligence action against a political subdivision, compliance with the notice requirement of § 13-905 of the Political Subdivisions Tort Claims Act is a procedural precedent to commencement of the negligence action.

Noncompliance with the notice requirement is a defense to a plaintiff's action. If a political subdivision, by an appropriately specific allegation in a demurrer or answer, raises the issue of a plaintiff's failure to comply with the notice requirement of § 13-905, the plaintiff then has the burden to show compliance with the notice requirement. *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990). However, a general denial in the political subdivision's answer does not raise the issue of noncompliance, which must be raised as an affirmative defense specifically expressing the plaintiff's noncompliance with the notice requirement of § 13-905 of the Political Subdivisions Tort Claims Act. *Id.*

In its amended answer to the plaintiffs' amended petition, the defendant affirmatively alleged: "Plaintiffs, Don and Barbara Miles, failed to timely file claims pursuant to the Political Subdivision Tort Claim [sic] Act and are therefore barred from claims and damages for which they *individually* may have been entitled to claim." (Emphasis supplied.) With this allegation, the defendant appears to allege that Don and

Barbara Miles, as *individual* plaintiffs, failed to file a notice of claim within 1 year of the time their claims accrued, as required by § 13-919. A review of the pretrial conference confirms that such is the case:

> THE COURT: Now, you raised an issue, Mr. Zimmerman [defendant's attorney], as to lack of compliance by the Plaintiffs with [the Political Subdivisions Tort Claims Act]. I gather, that you are saying with respect to any cause of action that the parents might have there was no compliance?
>
> MR. ZIMMERMAN: Correct.
>
> THE COURT: And they have not sued in that capacity?
>
> MR. ZIMMERMAN: I don't think so. I think Bill and I even talked about that, and he indicated that the parents were not making an independent claim for their damage.

This exchange during the pretrial conference makes it clear that the issue of noncompliance with the Political Subdivisions Tort Claims Act was raised only with respect to claims which Don and Barbara Miles may have had individually. The defendants did not affirmatively allege that the plaintiffs failed to comply with the Political Subdivisions Tort Claims Act with respect to the claims made by Don and Barbara Miles on behalf of their son.

In paragraph 12 of the amended petition, which was filed on February 9, 1988, the plaintiffs alleged the following:

> That on July 1, 1987, pursuant to the provisions of the Political Subdivisions Tort Claims Act . . . plaintiffs filed their Political Subdivision Tort Claim with the County Clerk of Box Butte County, Nebraska; . . . plaintiffs . . . have withdrawn their claim from consideration by the governing body of said county for the reason that the defendant county did not make final disposition of the claim within six months after its filing.

The defendant's amended answer to the plaintiffs' amended petition generally denied this and other allegations contained within the amended petition, but with respect to Traig Miles' claim, the defendant did not affirmatively allege in its amended answer that the plaintiffs had failed to comply with the notice requirement of § 13-905. Consequently, the defendant county's

first assignment of error has no merit. See *Millman v. County of Butler, supra.*

The county next contends that the district court erred in finding that the county was negligent and that any alleged negligence proximately caused Traig Miles' retardation or cerebral palsy.

As stated in *Wees v. Creighton Memorial St. Joseph's Hospital*, 194 Neb. 295, 297-98, 231 N.W.2d 570, 573 (1975): " 'The proper measure of the duty of a hospital to a patient is the exercise of that degree of care, skill, and diligence used by hospitals generally in the community where the hospital is located or in similar communities.' " Furthermore, in an action for negligence, the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that such an act or omission was the proximate cause of the plaintiff's injury, or was a cause which proximately contributed to it. *Wees, supra.*

As noted previously, a number of physicians and nurses appeared as expert witnesses on behalf of the plaintiffs, testifying that Box Butte County, through its employee Nurse McConkey, was negligent in several ways. The plaintiffs' experts, in part, testified that in light of the presence of a "nonreassuring" fetal heart pattern, Nurse McConkey was negligent in failing to remain in the labor room with Barbara Miles, in failing to hydrate and oxygenate Barbara Miles, in failing to contact her physician, and in disconnecting and failing to reconnect the fetal heart monitor.

First considering Nurse McConkey's alleged failure to contact Barbara Miles' physician, we determine the record lacks sufficient evidence to support a finding that Nurse McConkey committed such an omission. At trial, more than 8 years after the occasion of her alleged negligence, Nurse McConkey understandably could not recall whether she had contacted Dr. Fairbanks on May 28, 1980. However, the record does show that Nurse McConkey recorded a note at 8:55 p.m. which indicated continued decelerations in the fetal heart rate, and that by 10 p.m. Dr. Fairbanks had arrived at the hospital and, apparently, had reviewed the hospital charts and examined Barbara Miles. In light of that evidence, it appears likely that

the hospital staff did contact Dr. Fairbanks.

With respect to the hospital's alleged negligence in disconnecting the fetal heart monitor, the record fails to support a finding that the fetal heart monitor was, in fact, disconnected by hospital personnel. Given the evidence which was presented at trial, it is speculative whether the fetal heart monitor was disconnected by Dr. Fairbanks when he examined Barbara Miles or whether, instead, the monitor was disconnected by hospital staff. The burden of proving a cause of action is not sustained by evidence from which a finder of fact can arrive at a conclusion only by guess, speculation, conjecture, or choice of possibilities; there must be something more which would lead a reasoning mind to one conclusion rather than to another. See *Shibata v. College View Properties*, 234 Neb. 134, 449 N.W.2d 544 (1989).

Furthermore, even if it were to be conceded that Nurse McConkey was negligent in failing to remain in the labor room with Barbara Miles, in failing to hydrate and oxygenate Barbara Miles, in failing to contact her physician, and in disconnecting and failing to reconnect the fetal heart monitor, the record does not support a finding that the hospital's negligence proximately caused Traig Miles' retardation or cerebral palsy. This is so because the evidence presented at trial establishes that it is unlikely that Traig would have suffered the oxygen deficiency which resulted in his condition if he had been delivered very early on the morning of May 29; and because Dr. Fairbanks, rather than hospital staff, directed and controlled Barbara Miles' care after Dr. Fairbanks arrived at the hospital prior to 10 p.m. on May 28. Thus, it is unlikely that Traig suffered any irreversible harm prior to May 29. When Dr. Fairbanks arrived at the hospital, he had full control over treatment which Barbara Miles and her child were to receive.

As indicated by the testimony of the plaintiffs' expert witness Dr. John Yeast, the physician is primarily responsible for and makes the ultimate decisions regarding the course of care of a patient. "As a general rule, hospital staff members lack authority to alter or depart from an attending physician's order for a hospital patient and lack authority to determine what is a proper course of medical treatment for a hospitalized patient."

Jensen v. Archbishop Bergan Mercy Hosp., 236 Neb. 1, 8, 459 N.W.2d 178, 183 (1990). Consequently, a hospital generally cannot be held liable for a patient's injury on the theory that nurses or other members of the hospital staff should have known that the treatment generated by a physician was inadequate or improper and therefore should have intervened. See *Jensen v. Archbishop Bergan Mercy Hosp., supra.* Thus, under the circumstances presented in this instance and barring other negligence on the part of the hospital, the hospital could not be held liable for the course of treatment pursued by Dr. Fairbanks.

This, however, leaves Nurse McConkey's alleged negligence in failing to properly interpret the fetal heart monitor tracings and her alleged negligence in failing to show Dr. Fairbanks the fetal heart monitor tracings to be considered. With respect to Nurse McConkey's alleged failure to show Dr. Fairbanks the fetal heart monitor tracings, we think it is questionable whether hospital staff members are required to physically place in front of a doctor any important information which may be relevant to the care of a patient. Certainly a hospital has a duty to notify a physician of significant changes in a patient's medical status. See *George v. LDS Hosp.*, 797 P.2d 1117 (Utah App. 1990). However, when a physician is present at a hospital and is seeing a patient, and when the physician is clearly aware of available information which may be relevant to the diagnosis and treatment of that patient, it is unreasonable to require hospital personnel to make sure that the physician does, in fact, review that information.

Regarding Nurse McConkey's alleged negligence in failing to properly interpret the fetal heart monitor tracings, Nurse McConkey recorded in Barbara Miles' labor record: "Note marked decelerations to 80 with contractions. Returns to baseline in 10 seconds after contractions." Nurse McConkey later wrote: "Continues to have variable decelerations to 80 with contractions. Return to baseline 10 seconds. Encouraged to move in bed to sides."

Several expert witnesses appearing on behalf of the plaintiffs testified that the notes recorded by Nurse McConkey failed to properly describe the pattern of the fetal heart rate. Dr. Vincent

Miles, for example, testified that in some instances the fetal heart rate did not return to the baseline rate of 156 to 160 beats per minute until 40 to 50 seconds after a contraction. In addition, plaintiffs' experts testified that Nurse McConkey mischaracterized the decelerations as "variable," when at least some of the decelerations were "late" decelerations.

However, the plaintiffs' expert witnesses also testified that the fetal heart rate patterns were "subject to interpretation" and consistently testified that the notes recorded by Nurse McConkey indicated a "nonreassuring" fetal heart rate pattern which would alert them to possible fetal distress. The testimony of nurses and physicians appearing on behalf of the plaintiffs indicates that the pattern described in Nurse McConkey's notes would cause them to take further action in investigating the fetal heart rate or cause them to seek out and review the fetal heart monitor tracings. Plaintiffs' expert Dr. Miles testified: "There is a note here that's crying for action. There's a note here that says, 'marked decelerations with [sic] 80 with contractions.' I mean, that's demanding action."

If we assume that Nurse McConkey did misinterpret the fetal heart monitor tracings, in light of Dr. Fairbanks' presence at the hospital and his examination of Barbara Miles prior to 10 p.m., misinterpretation by Nurse McConkey of the tracings was not a cause proximately contributing to Traig Miles' condition unless Dr. Fairbanks, in fact, did not see the fetal heart monitor tracings, and unless her misinterpretation adversely affected Dr. Fairbanks' course of treatment. The duty was upon Dr. Fairbanks rather than the hospital to diagnose Traig Miles' hypoxic state and his fetal distress and dictate a course of treatment designed to remedy that condition. See *Jensen v. Archbishop Bergan Mercy Hosp., supra.*

At trial, however, Dr. Fairbanks did testify that he "probably would not have looked at the tracings when I saw the nurses [sic] notes . . . [b]ecause the description is pretty exact there, 'Noting marked decelerations to 80, but return to base line 10 seconds.' That's a pretty benign pattern." Thus, despite Nurse McConkey's testimony that Dr. Fairbanks normally wanted a thorough report and that his standard practice was to review monitor tracings which had been produced, and despite the fact

that Barbara Miles had suffered from preeclampsia and was therefore a high-risk patient, making it more likely that he would seek out the monitor tracings, and despite the fact that Nurse McConkey recorded a note which was, in the words of the plaintiffs' expert, "crying for action," and despite Dr. Fairbanks' testimony that he would have read Nurse McConkey's note, it cannot be said that the record completely fails to support a factual finding that Dr. Fairbanks did not review the fetal heart monitor tracings on May 28, 1980.

Thus, the trial court could find that Dr. Fairbanks did not review the fetal heart monitor tracings on May 28, 1980, and that the note which Nurse McConkey recorded in Barbara Miles' labor record failed to accurately describe the fetal heart rate pattern. The question then is whether Nurse McConkey's inaccurate description of the fetal heart rate pattern adversely affected Dr. Fairbanks' course of treatment and was a cause proximately contributing to the hypoxia which resulted in Traig Miles' retardation and cerebral palsy.

As noted previously, Dr. Fairbanks testified that if he had seen the monitor tracing or had been given a description of it he would have consulted an obstetrician in Scottsbluff for a second opinion, and would have arranged for delivery by cesarean section if the obstetrician had recommended such action. In light of this testimony, the record does contain evidence that the hospital's negligence proximately contributed to Traig Miles' condition. See *London v. Stewart*, 221 Neb. 265, 376 N.W.2d 553 (1985).

When the record is viewed as a whole, the evidence is tenuous at best in establishing that the hospital was negligent and that such negligence proximately resulted in Traig Miles' retardation or cerebral palsy. The record also is suggestive that Dr. Fairbanks' negligence was an efficient intervening cause which resulted in Traig's condition. An efficient intervening cause is the intervening negligence of a third person who has full control of the situation and whose negligence could not have been anticipated, and which negligence breaks the causal connection between the original negligence and the injury. See *Delaware v. Valls*, 226 Neb. 140, 409 N.W.2d 621 (1987).

However, if the effects of a defendant's negligence actively

and continuously operate to bring about harm to another, the fact that the active negligence of a third person is also a substantial factor in bringing about the harm does not protect the defendant from liability; furthermore, if the separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the damage, although one of them alone could not have caused the result. *London v. Stewart, supra.* Given Dr. Fairbanks' testimony that he "probably would not have looked at the tracings" and that he would have consulted an obstetrician and possibly arranged for a cesarean operation if he had seen the fetal heart monitor tracings or been given a description of them, we think the record presented a question of fact as to proximate cause.

The defendant county next alleges that the district court erred in failing to grant it a new trial on the basis of newly discovered evidence that a nurse on duty at the hospital on May 28, 1980, remembered that Nurse McConkey did make a telephone call to Dr. Fairbanks while Don and Barbara Miles were in the labor room on that date.

A motion for new trial on the basis of newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *Waite v. A. S. Battiato Co.*, 238 Neb. 151, 469 N.W.2d 766 (1991). Furthermore, newly discovered evidence is not a ground for a new trial where the exercise of due diligence before the trial would have produced it. *Gruenewald v. Waara*, 229 Neb. 619, 428 N.W.2d 210 (1988).

In a journal entry dated March 7, 1989, and filed March 15, 1989, the district court stated:

> The Court finds that the affidavit purporting to authorize a new trial on the grounds of newly discovered evidence is insufficient. The evidence could have been discovered before the trial. According to the record, the hospital is a small one. Nurse McConkey's lack of memory of the incident should have triggered an investigation and interviews with all employees on duty at the time. The evidence would have been uncovered.

The district court then overruled the defendant's motion for

new trial and did not abuse its discretion in doing so. See *Gruenewald v. Waara, supra.*

Furthermore, in order to make a sufficient showing for a new trial grounded upon newly discovered evidence, the proof in support of the new trial motion must show that the evidence is of such a character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted. *Federal Dep. Ins. Corp. v. Swanson*, 231 Neb. 148, 435 N.W.2d 659 (1989). Since the record does not support a finding that Nurse McConkey failed to contact Dr. Fairbanks, it cannot reasonably be expected that the defendant would achieve a different result by offering the newly discovered evidence at a new trial.

The defendant next alleges that the trial court erred in admitting into evidence the publication *An Introduction to Fetal Heart Rate Monitoring* (2d ed. 1975) by Edward H. Hon. In making this claim the defendant cites *Winters v. Rance*, 125 Neb. 577, 251 N.W. 167 (1933), and argues that medical treatises are not admissible as independent evidence of opinions expressed therein.

The problem with the defendant's argument is that the district court did not receive the Hon publication as evidence of anything which was written within that publication. In fact, the plaintiffs did not offer the publication as evidence, but the plaintiffs did use the publication while examining Nurse McConkey in an attempt to show that she was familiar with the publication and had used it in the past. The trial court then admitted the publication into evidence, but the court's comments show that it received the publication only for the limited purpose for which it had been used in examining Nurse McConkey. The court did not receive the publication as independent evidence of opinions expressed therein. Furthermore, the Hon publication is not necessary to support the trial court's findings.

The erroneous admission of evidence in a bench trial of a law action is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings. In such a case, a reversal is warranted if the record shows that

the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence. See, *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991); *Suess v. Lee Sapp Leasing*, 229 Neb. 755, 428 N.W.2d 899 (1988). In this instance, the defendant has failed to show that the district court committed reversible error in admitting the Hon publication into evidence.

The defendant next asserts that the district court erred in refusing to allow the testimony of Decio Rubano. At trial, the defendant attempted to elicit Rubano's testimony concerning the cost of purchasing an annuity which would cover at least a portion of Traig Miles' care costs after Traig reached the age of majority. Rubano testified at trial that he was the president of Case Management, Inc., a rehabilitation consulting firm, and that he was also the president of Settlement Advisors, which he described as a "brokerage house, and annuity purchasing system."

Rubano's testimony indicates that he has a bachelor of arts degree in speech therapy, that he attended 1 year of law school, and that he apparently has no formal academic training regarding financial planning. His testimony also suggests that he is primarily involved in rehabilitation consulting, that other employees of Settlement Advisors are primarily responsible for purchasing annuities, and that he relies upon the expertise of those employees in purchasing annuity contracts. Furthermore, Rubano would apparently have had to rely upon information provided to him by one of his employees in order to testify as to the cost of purchasing an annuity to cover Traig Miles' care costs. The plaintiffs objected to such testimony on foundational grounds, and the district court upheld the objection, stating: "As I understand this witness' testimony, he has no expertise in annuities. Someone else has that expertise and he's just relaying information that that gentleman that he referred to had secured, and that's the basis for my sustaining the objection."

A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert under Neb. Evid. R. 702, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal. *In re Interest of*

C. W. et al., 239 Neb. 817, 479 N.W.2d 105 (1992). The district court was not clearly wrong in ruling that Rubano did not qualify as an expert witness on the subject of annuities.

The defendant cites *Keim v. Keim*, 228 Neb. 684, 424 N.W.2d 112 (1988), for the proposition that Neb. Evid. R. 703 " 'clearly contemplates admission of an expert's opinion based on hearsay supplying facts or data for that opinion, rather than a requirement of firsthand knowledge as the only source of information for an expert's opinion.' " *Id.* at 688, 424 N.W.2d at 115, quoting *Gibson v. City of Lincoln*, 221 Neb. 304, 376 N.W.2d 785 (1985). However, because Rubano did not qualify as an expert witness, the rule stated in that case does not apply. Consequently, the record shows that the testimony which the defendant attempted to elicit from Rubano was inadmissible hearsay under Neb. Evid. R. 802.

The defendant finally contends that the district court erred in receiving into evidence projections and related exhibits of future care costs and lost future earnings which were not discounted to present values. As stated previously, the erroneous admission of evidence in a bench trial of a law action is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings. *State v. Lomack, supra*; *Suess v. Lee Sapp Leasing, supra.*

The plaintiffs in this case presented evidence to show that despite his condition, at the time of the trial Traig Miles had a normal life expectancy. The plaintiffs also presented evidence that Traig's mental ability would not progress beyond that of a 3-year-old and that he would never be able to earn a living. The evidence shows that Traig would have continued to incur medical expenses resulting from his condition, that the current cost of "group home" care is $80 to $106 per day, and that such costs have historically escalated at a rate approximately twice the consumer price index. In addition, plaintiffs sought damages for and presented evidence of pain, mental anguish, disfigurement, and disability suffered by Traig Miles as a result of his condition.

As viewed most favorably to the plaintiffs, the record supports the amount of the damages awarded.

Because each of the defendant's assignments of error is without merit, the judgment of the district court must be affirmed.

AFFIRMED.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, APPELLANT, V. FRANCES D. STARR, FORMERLY KNOWN AS FRANCES D. EHLERS, APPELLEE.

489 N.W.2d 857

Filed October 2, 1992. No. S-89-1249.

1. **Rules of Evidence: Negotiable Instruments.** A bank photocopy of a processed check qualifies as a "duplicate" under Neb. Evid. R. 1001(4), Neb. Rev. Stat. § 27-1001(4) (Reissue 1989).
2. **Rules of Evidence.** A duplicate writing, defined in Neb. Evid. R. 1001(4), Neb. Rev. Stat. § 27-1001(4) (Reissue 1989), is admissible under Neb. Evid. R. 1003, Neb. Rev. Stat. § 27-1003 (Reissue 1989), to the same extent as an original writing without a showing that the original is lost or destroyed or is otherwise unavailable under the circumstances expressed in Neb. Evid. R. 1004, Neb. Rev. Stat. § 27-1004 (Reissue 1989), regarding a lost or destroyed original writing.
3. **Rules of Evidence: Proof.** When a duplicate writing or document is offered as evidence, the burden of raising an issue concerning the authenticity of the original writing or document, or showing circumstances of unfairness to prevent admissibility of a duplicate, is on the party opposing the duplicate's admission into evidence.
4. _____: _____. A litigant must make more than a mere allegation regarding a lack of authenticity for an original writing or document; instead, the party opposing admission must show specific facts or circumstances that raise a reasonable question regarding authenticity of the original.
5. **Rules of Evidence.** Under Neb. Evid. R. 1003(2), Neb. Rev. Stat. § 27-1003(2) (Reissue 1989), unfairness must involve some infirmity with the duplicate itself; for example, an incomplete copy that fails to reproduce some vital part of the original document.
6. **Rules of Evidence: Trial: Appeal and Error.** As a result of Neb. Evid. R. 103(1), Neb. Rev. Stat. § 27-103(1) (Reissue 1989), reversible error may be predicated on an erroneous exclusion of evidence that affects a party's substantial right.
7. _____: _____: _____. In a civil case, to constitute reversible error contemplated in Neb. Evid. R. 103(1), Neb. Rev. Stat. § 27-103(1) (Reissue 1989), admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about such evidence admitted or excluded.

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Reversed and remanded for a new trial.

Daniel E. Klaus, of Rembolt Ludtke Parker & Berger, for appellant.

James D. Smith, of Brock, Seiler & Smith, for appellee.

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

SHANAHAN, J.

In a contract action brought by Equitable Life Assurance Society of the United States (Equitable) against Frances D. Starr, formerly known as Frances D. Ehlers, as comaker of a promissory note, Starr denied signing the note, and a jury found in her favor. In its appeal, Equitable contends that the trial court misapplied the "best evidence" rule.

FACTUAL BACKGROUND

On May 5, 1980, newlyweds Pamella and James Ehlers obtained a $147,000 loan from Equitable to consolidate some farm debt and finance construction of a home. As a condition for this loan, Equitable required that James' parents, Alvin and Frances Ehlers, as comakers, also sign the promissory note with Pamella and James. Part of the loan proceeds distributed to Pamella and James was represented by Equitable's check for $112,440. Five payees were designated on the check: "James A. Ehlers, Pamella J. Ehlers, Alvin R. Ehlers, Frances D. Ehlers," and also "Donald L. Robson Insurance and Realty Inc. York, Ne." Robson was Equitable's closing agent for the loan.

In 1988, Alvin Ehlers died. Frances, his widow, remarried and has taken the name "Starr." Pamella and James were unable to repay their loan from Equitable and obtained debtor protection under chapter 12 of the U.S. Bankruptcy Code. As a consequence of Pamella and James' bankruptcy and default on the promissory note, Equitable sought payment from Starr, who refused to pay the debt, even though the note ostensibly bore her signature. Equitable responded by suing Starr on the note.

THE TRIAL

At trial, James and Pamella testified that neither Alvin nor Frances Ehlers, James' parents, was at the loan closing, despite the fact that the promissory note bore the Ehlers' signatures. In contrast, Robson, Equitable's agent who closed the loan transaction, testified that James, Pamella, and Alvin were present at closing, but admitted that Frances was absent. Robson further testified that Alvin Ehlers signed the note in Robson's presence, and Alvin then took the note away to another location so that Frances could sign. Robson also testified that when Alvin returned, the note bore Frances Ehlers' signature. The original promissory note to Equitable was introduced into evidence. However, Equitable could not locate the original canceled check for distribution of the loan proceeds, but instead presented a photostatic copy showing the face of the original check without displaying the obverse side of the check and any endorsements.

In an effort to prove genuineness for the purported signature of Frances Ehlers on the promissory note, Equitable offered testimony from Harold W. Moon, an expert "questioned documents examiner," who had examined and tested thousands of documents for evidence of alteration and forgery. Under various testing procedures, Moon examined Frances Ehlers' disputed signature and compared it to known examples of her genuine signature. Based on his examination and comparison with Starr's valid signatures, Moon testified that the purported signature had definitely not been forged by any tracing techniques and that there was a "high degree of probability" that the questioned signature on the promissory note was the genuine signature of Frances Ehlers. However, Moon further testified that he could not say with certainty that the signature on the promissory note was that of Starr, because the signature on the note indicated some dissimilarities when compared with Starr's handwriting. Moon testified that the only way that the signature on the note could be a forgery was simulation by someone who had had "a great deal of practice" signing the name "Frances D. Ehlers," Starr's former name.

During the testimony of James Ehlers, Starr introduced James' original deposit slip, dated May 5, 1980, which was the

same day as the closing, showing the deposit of a $112,440 check from Equitable. This came as a surprise to Equitable, because Equitable's policy dictated that loan proceeds checks were given only to Equitable's closing agent, who, after endorsement of the check, would then typically distribute the proceeds to the borrowers. On cross-examination, James gave Equitable permission to obtain his bank's records concerning the deposit.

During a recess, Equitable's lawyer went to the bank and obtained a copy of the loan proceeds check from the bank's microfilmed records for James Ehlers. This photostatic copy showed both sides of Equitable's processed check which had been deposited in James' account. The check's reverse side disclosed the purported signatures of all five payees in the following order:

James A. Ehlers

Pamella J. Ehlers

Alvin R. Ehlers

Frances D. Ehlers

Donald S Robson
Ins & Realty, Inc
by Donald S Robson

Neither Starr nor Equitable asked the court to grant a recess to consider the impact of this recently discovered evidence.

Starr testified in her own defense, stating that she had never seen or signed the promissory note or proceeds check and that Alvin Ehlers, her late husband, had told Equitable's agents before closing that she would not sign the note. She also testified that her late husband, Alvin, had instructed her "under no circumstances, don't ever sign that note" and that she "just obeyed what he told me to do."

During cross-examination of Starr, Equitable sought to introduce the bank photocopy of the loan proceeds check. Court and counsel conferred in chambers and discussed the photocopied check's admissibility. Equitable's lawyer contended that the photocopy of the check was admissible

under Neb. Evid. R. 1001(4), 1002, and 1003 (Neb. Rev. Stat. §§ 27-1001(4), 27-1002, and 27-1003 (Reissue 1989)).

The definition of "duplicate" is expressed in Rule 1001(4): "A duplicate is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original."

Rule 1002 provides:

> To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress or of the Legislature of the State of Nebraska or by other rules adopted by the Supreme Court of Nebraska.

Rule 1003 states: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

Referring to these evidence rules, Starr's lawyer claimed that the photocopy was unfairly surprising, since the copy was not exchanged in accordance with the pretrial order which directed the parties to exchange exhibits, but did not identify exhibits to be exchanged. Starr's lawyer also stated that he was "definitely going to raise a question as to the authenticity of the original," but specified no grounds for such challenge and further argued that it would be impossible to test the photocopied check's signature for indicia of forgery; therefore, reception of the photocopy as evidence would be "just totally unfair."

During this conference, the court stated that admissibility of the photocopied check required consideration of, and determination by, Neb. Evid. R. 1004, Neb. Rev. Stat. § 27-1004 (Reissue 1989), which provides:

> The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:
>
> (1) All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) No original can be obtained by any available judicial process or procedure; or

(3) At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

(4) The writing, recording, or photograph is not closely related to a controlling issue.

After a lengthy discussion, the court announced its ruling on the admissibility of the photocopied proceeds check:

At this time I'm going to rule that [the photocopy] may not be introduced into evidence, or any reference made to it due to [Rule] 1003, subsection (2), in the circumstances it would be unfair to admit the duplicate in lieu of the original, and I am ruling in this manner because there has not been any evidence produced by the plaintiff at this point that the originals are lost or have been destroyed, and also under subsection (3) of [Rule] 1004.

Obviously, that leaves it open; if you do produce evidence in that area, then I may reconsider this ruling. But at this particular time, with this witness, [the photocopied check] will not be received.

. . . .

[EQUITABLE'S LAWYER]: Your Honor, obviously I reserve my objection to the ruling.

THE COURT: Yes, your objection to the ruling is noted for the record.

When the trial resumed, Equitable was unable to supply the foundational testimony that the court indicated during the conference in chambers; therefore, the photocopy of Equitable's check was excluded from evidence. Consequently, the court's exclusionary ruling was based on the Nebraska Evidence Rules and was not the result of any noncompliance with the pretrial order. After the parties rested, the jury returned a verdict for Starr.

EQUITABLE'S APPEAL

Equitable contends that the district court erred in requiring

that Equitable produce evidence that the original loan proceeds check, purportedly signed by Starr, was lost or destroyed before a photocopy of the check was admissible as a duplicate of the original check.

At the outset, we note that chapter 27, article 10, of the Nebraska Evidence Rules contains the so-called "best evidence" rule in Nebraska, *Omaha World-Herald Co. v. Nielsen*, 220 Neb. 294, 369 N.W.2d 631 (1985), and is virtually identical to the corresponding Federal Rules of Evidence, see Fed. R. Evid. 1001 to 1004.

The best evidence rule, which might more properly be called the "original writing" rule or, more correctly, the rule for "production of an original writing or document," is in reality

> a rule of preference for the production of the original of a writing, recording or photograph when the contents of the item are sought to be proved. Better described as the "Original Writing Rule", the rule is limited to writings, recordings, and photographs, Rule 1002; there is no general rule of evidence that a party must produce the best evidence which the nature of the case permits.

Michael H. Graham, Handbook of Federal Evidence § 1001.0 at 1058-59 (3d ed. 1991).

Thus, the original writing or "original document" rule, expressed in Rule 1002, does not set up a hierarchy for admissibility of evidence, but applies when a party seeks to prove material contents of a writing, recording, or photograph. See, *United States v. Gonzales-Benitez*, 537 F.2d 1051 (9th Cir. 1976); *State v. Lang*, 354 N.W.2d 723 (S.D. 1984); *State v. Stramiello*, 392 So. 2d 425 (La. 1980); *Mitchell v. State*, 84 Wis. 2d 325, 267 N.W.2d 349 (1978). The purpose of Rule 1002 is the prevention of fraud, inaccuracy, mistake, or mistransmission of critical facts contained in a writing, recording, or photograph when its contents are an issue in a proceeding. See, *U.S. v. Yamin*, 868 F.2d 130 (5th Cir. 1989) (original document rule prevents inaccuracy and fraud in an attempt to prove the contents of a writing); *Williams v. State*, 386 So. 2d 538 (Fla. 1980) (original document rule ensures accuracy in proof of a document's critical contents); *Proffitt v. Ricci*, 463 A.2d 514 (R.I. 1983) (in the absence of a satisfactory explanation for

nonproduction of an original document, the original document rule bars admission of secondary evidence to prove the contents of the document); *Crosson v. State*, 268 Ind. 511, 376 N.E.2d 1136 (1978) (original document rule excludes testimony concerning the contents of a document when the document itself is available for examination by the trier of fact). See, also, 2 McCormick on Evidence § 231 (John W. Strong 4th ed. 1992).

As observed in 2 McCormick on Evidence, *supra*, § 236 at 72-74:

> The treatment of copies under the rule requiring the production of the original document can only properly be understood when viewed in light of the technological history of copying itself. In its earliest stages, the rule appears to have developed against a background of copying performed by individuals of the Bob Cratchit sort, transcribing manually not always under the best of conditions. Errors under such circumstances were routinely to be expected. Only marginally greater reliability was to be found in the so-called letter-press. Here the original was written or typed in copying ink or with copying pencil. Presumably influenced by the infirmities present in such modes of copying, the courts generally declined to accept subsequently created copies as equivalent to originals.
>
> . . . .
>
> In the present day, copying by various photographic and other processes has become commonplace, replacing the carbon for many purposes. Various types of photographic copying, of course, produce facsimiles of an extremely high degree of verisimilitude, and thus might have been expected, as have carbons, to win recognition as duplicate originals. . . .
>
> . . . .
>
> . . . Insofar as the primary purpose of the original documents requirement is directed at securing accurate information from the contents of material writings, free of the infirmities of memory and the mistakes of hand-copying, we may well conclude that each of these forms of mechanical copying is sufficient to fulfill the

> policy. Insistence upon the original, or accounting for it, places costs, burdens of planning, and hazards of mistake upon the litigants. These may be worth imposing where the alternative is accepting memory or hand-copies. They are probably not worth imposing when risks of inaccuracy are reduced to a minimum by the offer of a mechanically produced copy.

One court has taken McCormick's observations to their logical conclusion:

> Professor Irving Younger vividly describes the human frailty of a copier, as a Bob Cratchit, fingers numbed by the cold in the counting house and fraught with anxiety over the health of Tiny Tim, might distractedly misplace a decimal point, invert a pair of digits or drop a line. A Xerox machine, by way of contrast, does not worry about Tiny Tim and does not, therefore, misplace decimal points, invert digits, drop lines, or suffer any of the other mental lapses that flesh is heir to.

Thompson v. State, 62 Md. App. 190, 212, 488 A.2d 995, 1006 (1985).

A bank photocopy of a processed check qualifies as a duplicate under Rule 1001(4). *State v. Costello*, 199 Neb. 43, 256 N.W.2d 97 (1977). See, also, *U.S. v. Patten*, 826 F.2d 198 (2d Cir. 1987); *United States v. Garmany*, 762 F.2d 929 (11th Cir. 1985); *United States v. Gerhart*, 538 F.2d 807 (8th Cir. 1976).

In what may be underscoring the obvious with the self-evident, we repeat the express language of Rule 1003: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Hence, a duplicate writing, defined in Rule 1001(4), is admissible under Rule 1003 to the same extent as an original writing without a showing that the original is lost or destroyed or is otherwise unavailable under the circumstances expressed in Rule 1004 regarding a lost or destroyed original writing.

When a duplicate writing or document is offered as evidence, the burden of raising an issue concerning the authenticity of the

original writing or document, or showing circumstances of unfairness to prevent admissibility of a duplicate, is on the party opposing the duplicate's admission into evidence. *State v. Frederiksen*, 224 Neb. 653, 400 N.W.2d 225 (1987). See, also, *Garmany, supra*.

Starr claims that there was a "genuine question as to the authenticity of the original," but offered no supporting factual basis for this assertion. Federal courts, addressing the question of an original document's authentication, have held that an opponent to admissibility of a duplicate must make more than a mere allegation regarding a lack of authenticity for an original writing or document; instead, the party opposing admission must show specific facts or circumstances that raise a reasonable question regarding authenticity of the original. See, *U.S. v. Leight*, 818 F.2d 1297 (7th Cir. 1987); *United States v. Georgalis*, 631 F.2d 1199 (5th Cir. 1980); *United States v. Rangel*, 585 F.2d 344 (8th Cir. 1978). See, also, 2 McCormick on Evidence, *supra*, § 236; 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 1003[01] (1992). In this appeal, the original document is a loan proceeds check, deposited into James Ehlers' bank account, with an increase exceeding $112,000 resulting from the transaction. None of the parties presented evidence that raised any question concerning the validity or authenticity of the documents involved in this depository transaction. Therefore, Starr has failed to meet her burden of factually establishing a question regarding the authenticity of the original document, Equitable's loan proceeds check.

Starr also contends that the admission of the photocopied check would have been "unfair" under Rule 1003(2), due to the surprise caused by its sudden appearance during trial. Starr apparently argues that reception of the check in evidence would be unfair in view of Equitable's failure to exchange the photocopied check pursuant to the pretrial conference order. This argument is also without merit. First, the photocopy of the check was discovered as the direct result of Starr's introduction of James Ehlers' 1980 deposit slip into evidence, a document reflecting deposit of Equitable's $112,440 check in James Ehlers' account. Existence of Equitable's check, therefore, was

indicated by the very evidence introduced by Starr. Actually, the only real surprise came to Equitable on learning that its company policy for distribution of loan proceeds was violated in the loan to Pamella and James Ehlers. Second, "surprise" is not a type of unfairness contemplated by Rule 1003(2). Courts which have addressed the issue of unfairness under Rule 1003 have uniformly held that, under Rule 1003(2), unfairness must involve some infirmity with the duplicate itself; for example, an incomplete copy that fails to reproduce some vital part of the original document. See, *United States v. Moore*, 710 F.2d 157 (4th Cir. 1983); *Amoco Production Co. v. United States*, 619 F.2d 1383 (10th Cir. 1980). See, also, 2 McCormick on Evidence, *supra*, § 236 at 75 n.11: "The requirement that introduction of the duplicate entail no 'unfairness' continues the doctrine that the duplicate must be a full rendition of the relevant material." Starr's argument regarding unfairness stems from the fact that the duplicate so accurately reproduced the original that it disclosed previously unknown evidence detrimental to Starr's case. Starr's arguments regarding unfairness prohibited by Rule 1003(2) are without merit. Therefore, the district court also erred in ruling that admission of the duplicate check would be unfair to Starr.

As a result of Neb. Evid. R. 103(1), Neb. Rev. Stat. § 27-103(1) (Reissue 1989), reversible error may be predicated on an erroneous exclusion of evidence that affects a party's substantial right. "In a civil case, to constitute reversible error contemplated in Neb. Evid. R. 103(1) . . . admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about such evidence admitted or excluded." *Rose v. City of Lincoln*, 234 Neb. 67, 76, 449 N.W.2d 522, 529 (1989). Accord, *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990); *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

The excluded photocopy of Equitable's check would have supplied relevant information for the jury on the issue whether Starr had signed the promissory note involved in the litigation. The excluded photocopy shows Frances Ehlers' purported signature and buttresses Equitable's position that, if Frances Ehlers endorsed Equitable's check, it was more probable than

not that she also signed the promissory note to Equitable, the loan document that resulted in issuance and endorsement of the check for loan proceeds deposited in James Ehlers' account. See Neb. Evid. R. 401, 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." Exclusion of the photocopied check affected Equitable's proof that Starr had signed the promissory note and prejudicially denied Equitable the fair opportunity to prove its case against her. Therefore, the district court committed reversible error by requiring Equitable to produce evidence that the check in question was lost or destroyed and, in the absence of such proof, excluding the photocopy of Equitable's check.

CONCLUSION

The district court's excluding from evidence the photostatic copy of Equitable's check, endorsed with the purported signature of Frances Ehlers, is reversible error under the circumstances. However, nothing in this opinion restricts Starr's right on retrial to dispute the authenticity of her purported signature as an endorsement on Equitable's check for the loan proceeds. Our decision today governs only admissibility of the photostatic copy of Equitable's check in view of the Nebraska Evidence Rules and does not prevent Starr from attempting to discredit that evidence before a jury.

REVERSED AND REMANDED FOR A NEW TRIAL.

FRANKIE LEVI COLE, APPELLANT, V. BOBBY KILGORE ET AL., APPELLEES.

489 N.W.2d 843

Filed October 2, 1992. No. S-89-1407.

1. **Judgments: Time: Appeal and Error.** A plaintiff in error is required to file a transcript of the proceedings containing the final judgment or order to be

reviewed at the time a petition in error is filed. This requirement is mandatory and jurisdictional.

2. **Actions: Prisoners: Time.** If a person entitled to bring any action is, at the time the cause of action accrued, imprisoned, every such person shall be entitled to bring such action within the respective times limited by Neb. Rev. Stat. ch. 25 (Reissue 1989) after such disability is removed.
3. **Judgments: Final Orders: Prisoners: Time.** Proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced within 30 days after the rendition of the judgment or making of the final order complained of, except that when the person entitled to such proceedings is imprisoned, he or she shall have 1 year, exclusive of the time of his or her disability, within which to commence such proceedings.
4. **Statutes.** Special provisions of a statute prevail over general provisions in the same or other statutes if there is a conflict.
5. **Prisoners: Time.** A showing of a recognizable legal disability, separate from the mere fact of imprisonment, which prevents a person from protecting his or her rights is required to entitle a prisoner to a period of exclusion from the normal time limitations.

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

Frankie Levi Cole, pro se.

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

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

FAHRNBRUCH, J.

For disobeying a direct order of a correctional officer, a 7-day room restriction was imposed upon Frankie Levi Cole, an inmate at the Omaha Correctional Center. The discipline was imposed by an institutional disciplinary committee following a hearing. On September 22, 1989, a disciplinary appeals board affirmed the committee's action.

Cole challenged the discipline imposed upon him by filing a petition in error in the district court for Douglas County. That court sustained the respondents' demurrer, which claimed the court lacked jurisdiction because Cole failed to timely file a transcript of the disciplinary proceedings. Cole's petition in error was dismissed.

In his appeal to this court, Cole's *sole* assignment of error

claims that because of his incarceration, the time for perfecting the filings required with a petition in error is tolled under Neb. Rev. Stat. § 25-213 (Reissue 1989). We hold that this contention is without merit and affirm the district court's dismissal of Cole's petition in error.

The record reflects that Cole timely filed his petition in error but failed to timely file the transcript of the disciplinary proceedings. Under Neb. Rev. Stat. § 25-1905 (Reissue 1989), a plaintiff in error is required to file a transcript of the proceedings containing the final judgment or order to be reviewed at the time a petition in error is filed. This requirement in § 25-1905 is mandatory and jurisdictional. See, *Glup v. City of Omaha*, 222 Neb. 355, 383 N.W.2d 773 (1986); *Marcotte v. City of Omaha*, 196 Neb. 217, 241 N.W.2d 838 (1976).

Even though he has been incarcerated at all relevant times, that, in and of itself, does not excuse Cole from complying with the foregoing jurisdictional requirement. In support of his assignment of error, Cole mistakenly relies upon § 25-213. That statute is a general tolling statute which provides, as relevant here: "[I]f a person entitled to bring any action . . . is, at the time the cause of action accrued . . . imprisoned, every such person shall be entitled to bring such action within the respective times limited by this chapter after such disability is removed."

Neb. Rev. Stat. § 25-1931 (Reissue 1989) is a more specific statute applying to the facts here and provides, so far as relevant:

> Proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced within thirty days after the rendition of the judgment or making of the final order complained of, except that when the person entitled to such proceedings is . . . imprisoned, he or she shall have one year, exclusive of the time of his or her disability, within which to commence such proceedings.

Special provisions of a statute prevail over general provisions in the same or other statutes if there is a conflict. *Holdrege Co-op Assn. v. Wilson*, 236 Neb. 541, 463 N.W.2d 312 (1990). Obviously, as between § 25-213 and § 25-1931, the latter controls the factual situation presented here.

We have long held that imprisonment in and of itself is not a disability entitling a prisoner to a period of exclusion from the normal time limitation of § 25-1931. A showing of a recognizable legal disability, separate from the mere fact of imprisonment, which prevents a person from protecting his or her rights is required. *Lewis v. Camp*, 236 Neb. 94, 459 N.W.2d 211 (1990); *Kock v. State*, 73 Neb. 354, 102 N.W. 768 (1905). This court recently extended this rule to § 25-213 in considering a prisoner's argument that he was entitled to tolling of the time period for filing his petition in error under both § 25-213 and § 25-1931. *Scott v. Hall, ante* p. 420, 488 N.W.2d 549 (1992).

Cole filed no pleading nor showing in the district court that his incarceration prevented him from exercising his legal rights in any way. The fact that Cole timely filed his petition in error, obtained a ruling thereon, and thereafter filed a timely appeal with this court demonstrates that his incarceration has not prevented him from timely utilizing the court system. Cole's sole assignment of error is meritless.

We also note that there is a defect in the parties defendant in Cole's petition in error. See *Scott v. Hall, supra*. However, that issue was not raised in the district court and therefore is not before this court.

AFFIRMED.

JOYCE A. RENNE AND DARREL RENNE, APPELLANTS, V. MELVIN D. MOSER, APPELLEE.

490 N.W.2d 193

Filed October 2, 1992. No. S-89-1419.

1. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
2. **Negligence: Damages: Proof.** A plaintiff in a negligence action for personal

injury may recover damages for aggravation of the plaintiff's preexisting condition if the plaintiff proves, by a preponderance of evidence, that the defendant's negligence caused an injury which combined with plaintiff's preexisting condition to produce the loss or damage for which the plaintiff seeks compensation.

3. **Jury Instructions.** Jury instructions should be confined to issues presented by the pleadings and supported by evidence.
4. **Negligence: Damages: Proof: Proximate Cause.** Although litigants may stipulate that a plaintiff's medical expenses are fair and reasonable costs or charges, to recover the stipulated expenses as damages in a negligence action, the plaintiff must prove that the defendant's conduct was the proximate cause of the medical expenses.
5. **Negligence: Damages.** A plaintiff, injured by another's negligence, is entitled to recover the reasonable value of medical expenses incurred as the result of the negligently caused injury and to recover the value of future medical expenses that are reasonably certain to be incurred as the result of the injury.
6. **Damages: Proof.** Although the amount of future medical expenses is not required to be established with mathematical certainty before the plaintiff may recover their value, conjecture or possibility regarding future medical expenses is insufficient to submit to a fact finder the issue of future medical expenses.
7. **Juries: Damages: Proof.** Before a trial court may submit to a jury any question concerning permanency of a plaintiff's injury and future medical expense, the plaintiff must have presented sufficient relevant evidence for the jury to determine whether the plaintiff has sustained permanent injury and will incur future medical expenses as a result of the injury.
8. **Expert Witnesses.** Although an expert's opinion need not be expressed with "reasonable certainty" within the expert's field of expertise, but may be expressed with "reasonable probability" or with terminology and meaning similar to "reasonable probability," the expert's opinion must be sufficiently definite and relevant to provide a basis for the fact finder's determination of an issue or question.
9. _____. An expert's opinion must be examined in the context of the expert's entire testimony.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded for a new trial on the issue of damages.

Roger C. Lott for appellants.

Patrick W. Healey, of Healey Wieland Law Firm, for appellee.

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

SHANAHAN, J.

Joyce A. Renne and Darrel Renne, wife and husband, appeal from the judgment on the verdict in a negligence action against Melvin D. Moser in the district court for Lancaster County. Rennes based their negligence claim on an automobile accident involving vehicles driven by Joyce Renne and Moser. Joyce Renne sued to recover damages for her personal injuries, while Darrel Renne joined the suit and sought damages for the loss of spousal consortium.

Rennes contend that the district court erred in its instructions and by refusing to give one of Rennes' requested instructions.

THE AUTOMOBILE ACCIDENT AND INJURIES

The Collision.

On the morning of August 29, 1985, Joyce Renne, in her car en route to physical therapy at St. Elizabeth Community Health Center in Lincoln, was struck from the rear by Moser in his pickup, while Renne was stopped and waiting for left-turning traffic to clear ahead of her. The impact hurled Renne against her car's steering wheel. An ambulance, summoned to the scene, transported Renne to the emergency room at St. Elizabeth.

Discharge from the Emergency Room.

At St. Elizabeth's emergency room, a physician examined Joyce Renne. During the examination, Renne told emergency room staff that she had a history of pain, weakness, and numbness in her left shoulder which she believed to be a "thoracic outlet syndrome." The thoracic outlet is a "choke point" or a "bottleneck" for vessels and tissue on their course from the human trunk into the arm. A thoracic outlet syndrome results from compression of tissue within the interior and constricted opening under the arm at the first rib and the rib's juncture with the shoulder, shoulder blade, and collarbone, impinging on arteries and veins that leave the chest area and enter the arm and also impinging on nerves running from the head, down the trunk, and into the arm. Reduction of the thoracic outlet causes pressure on the arteries and nerves at the site indicated and may result in poor muscle control, arm pain, weakness in the hand, and numbness in some fingers.

Consequently, thoracic outlet syndrome is compression of the brachial plexus nerve trunks, the major nerve roots passing through the shoulder to the arms, and is characterized by pain in the arms, paresthesia of the fingers, vasomotor symptoms, and weakness of the muscles in the hands. See The Sloane-Dorland Annotated Medical-Legal Dictionary 697 (1987). X rays were taken, but disclosed nothing abnormal about Renne's condition. Three hours later, Renne was discharged from the emergency room.

Although she missed some work, Renne returned to full employment in late September 1985 at the same pay rate that she was receiving at the time of the automobile accident. However, Renne still experienced numbness in her left arm, "popping" in her jaw, and ringing in her ears.

RENNES' TRIAL

Joyce Renne's Medical History Before the Automobile Accident.

As brought out in her trial that commenced on September 19, 1989, Joyce Renne, in 1976, complained of numbness in her right arm and pain in her left arm with numbness extending into her wrist, thumb, and index finger of her left hand. Renne contacted Dr. Louis J. Gogela, a neurosurgeon, who performed two surgical procedures in 1977 for decompression of a carpal tunnel syndrome in each of Renne's wrists. A carpal tunnel syndrome is "a complex of symptoms resulting from compression of the median nerve in the carpal tunnel, with pain and burning or tingling paresthesias in the fingers and hand, sometimes extending to the elbow." The Sloane-Dorland Annotated Medical-Legal Dictionary 689 (1987).

St. Elizabeth's records showed that on July 18, 1985, a little over a month before the automobile accident, Renne was admitted to the hospital's emergency room and was examined for an injury sustained when she was seated at a picnic table that collapsed and caused her to fall backward. As Renne was falling, she reached out with her left hand to break her fall. A physician, later treating Renne for her fall at the picnic table, applied a splint to immobilize Renne's left arm and wrist. Also, Renne hurt her left shoulder in the picnic table incident and

experienced pain for approximately 2 weeks. As a result of her wrist and shoulder injuries from the fall at the picnic table, Renne was undergoing physical therapy at St. Elizabeth, her destination at the time of the automobile accident.

Temporomandibular Joint Syndrome.

Since Joyce Renne was experiencing ringing in her ears and suffering from headaches, in November 1985, she went to Dr. Jim Ganser, a dentist. In supplying her history to Dr. Ganser, Renne did not mention an accident "other than the motor vehicle accident" of August 29, 1985, and she told him about severe pain in the area of her jaw and her difficulty with sleeping and chewing. During his examination of Renne, Dr. Ganser found "quite a bit of muscle sensitivity in the muscles of mastication and in the muscles that support the head and neck area . . . . She had problems with opening. When she did, she had some popping and clicking in the joints."

Dr. Ganser diagnosed Renne's problem as temporomandibular joint syndrome, which pertains to the point where the lower jaw joins the upper jaw in a ball-and-socket arrangement. A series of ligaments, muscles, and tendons hold the temporomandibular joint together. Temporomandibular joint syndrome is a dysfunction at the juncture of the temporal bone (part of the lateral surface of the skull at its base) with the mandible, which is the lower jawbone, and is marked by a clicking or grinding sensation in the joint, pain in or around the ear, stiffness of the jaw, and soreness upon waking. See The Sloane-Dorland Annotated Medical-Legal Dictionary 696 (1987). Dr. Ganser concluded that Renne's symptoms were "probably consistent" with "whiplash," a sudden jerking of the head either forward or backward, in which the initial trauma causes severe edema, or swelling, in the tissue surrounding the temporomandibular joint and impedes proper functioning of the joint. As Dr. Ganser explained:

> [I]t becomes difficult for the teeth to fit together the way they did before, and so you get into a situation that kind of builds on itself. Because it's difficult to chew and do everything else, you begin to brace the muscles differently and it gets to be a cycle of musculature problems that

builds on itself.

Dr. Ganser prescribed "muscle relaxants and anti-inflammatory agents" to alleviate Renne's discomfort and, to relieve pressure on the temporomandibular joint, directed Renne to wear an acrylic splint "similar to a football mouth guard" to "build an ideal bite so that she has contact on each of the teeth in an attempt to take some of the load off the joint and reduce the inflammation that takes place back in that area."

In later examining and treating Renne, Dr. Ganser found that Renne's temporomandibular joint "just doesn't seem to be totally healthy" and noted that Renne's symptoms were consistent with "intercapsular damage" to the temporomandibular joint, or in Dr. Ganser's words:

> [T]he joint itself is surrounded by a cartilaginous membrane and there's actually a piece of cartilage that fits between the ball and socket. When you move that forward in a traumatic fashion, oftentimes you'll tear the ligaments and the tendons that are attached to that. The healing process in the joint is quite a bit different than those in muscles and things because you don't have a direct circulation. It depends on transfer of fluids through the membrane walls rather than a direct blood supply, and so if you have stretched or torn those areas, the healing process can become very difficult, if not impossible.

Based on Renne's history and his examination, and "with a reasonable amount of medical or dental certainty" concerning the cause of Renne's condition, Dr. Ganser concluded that, since Renne had been "symptom free," the "act of trauma" which necessarily was the automobile accident as the only traumatic event in the history given by Renne was causally related to the accident because "one follows from the other," that is, Renne's condition resulted from the auto accident.

In the course of direct examination of Dr. Ganser, the following interrogation occurred:

> Q. Can you form — or have you formed an opinion with reasonable medical and dental certainty as to whether she will improve more over the rest of her life than she has now?
>
> A. My guess is that without intervening surgically or

> something, that you're probably not going to change the situation that exists now.

Later, Dr. Ganser testified that Renne would need adjustments of the acrylic splint for her mouth because "almost invariably there's a series of adjustments necessary to make sure that it's perfectly symmetrical." When asked whether Renne's condition would become "better or worse," Dr. Ganser answered: "I expect that it will either be stable or probably deteriorate." Dr. Ganser's bill for dental services to Renne was marked as an exhibit and was received into evidence without objection.

Thoracic Outlet Syndrome.

Joyce Renne was examined by Dr. Chester Paul, a thoracic surgeon, in April 1987. At that time, Renne was experiencing pain and discomfort in her arms, neck, and shoulders with weakness and numbness in her right hand. Renne informed Dr. Paul that she had been involved in an automobile accident in August 1985 and told Dr. Paul about the care of Dr. William Garvin, an orthopedist, and Dr. George Walcott, a neurologist, during the 18 months preceding Renne's examination by Dr. Paul. As the result of three subsequent examinations, Dr. Paul, in 1989, was "a little more convinced" and finally rendered the diagnosis that Renne suffered from thoracic outlet syndrome. When asked whether he had an opinion, to a reasonable degree of medical certainty, concerning the causal relationship between the automobile accident and Renne's thoracic outlet syndrome, Dr. Paul responded: "I see no other circumstances which would have caused this, so my answer is yes, I think so." However, in light of Renne's history of pain, weakness, and numbness in her hands before the accident and her injury to her arm and wrist in the picnic table incident, none of which had been disclosed to Dr. Paul while he was examining or treating Renne, Dr. Paul commented: "If in fact she had similar complaints, I would assume that she had some of the problems or some kind of problem ahead" of the automobile accident. According to Dr. Paul, "Joyce's prognosis is not particularly good," and, regarding any permanent disability, even after surgery, and the possibility of future medical expenses, Dr. Paul commented: "That's just speculation."

STIPULATED MEDICAL EXPENSES

Without agreeing that the designated medical services were connected to the automobile accident of August 29, 1985, or that such expenses "were necessary as a result of the accident," the lawyers for the parties signed a stipulation, exhibit 16, regarding the fair and reasonable charges for 12 items of expense in the total of $3,665.70. With the exception of the $176.61 charge for Joyce Renne's ambulance transportation to St. Elizabeth, the balance of the stipulated medical expenses related to doctor and hospital charges incurred by Renne at some time unspecified in the stipulation. Although exhibit 16 was received into evidence, there was no explanatory evidence presented that the medical expenses itemized on exhibit 16 were the result of Renne's automobile accident.

INSTRUCTIONS AND VERDICT

During the conference concerning prospective instructions, the court, over Rennes' objection, indicated that instruction No. 10 would be given; namely, in considering damages proximately caused by Moser's negligence, the jury could take into account the reasonable value of medical and hospital charges "provided to the plaintiff to date," "physical pain and mental suffering the plaintiff has experienced to date," and Darrel Renne's "loss of consortium to date."

Regarding Joyce Renne's thoracic outlet syndrome, the court, also over Rennes' objection, said that instruction No. 11 would be given: "There is evidence that the plaintiff had thoracic outlet syndrome prior to the date of the accident. The defendant is liable only for any damages that you find to be proximately caused by the accident." Since instruction No. 11 is an excerpt from NJI2d 4.09 concerning aggravation of a preexisting condition, Rennes requested, but were refused, an addition or supplement to instruction No. 11 in accordance with the balance of NJI2d 4.09: "If you cannot separate damages caused by the preexisting (condition) from those caused by the (occurrence, accident, collision, et cetera), then the defendant is liable for all of those damages."

Instruction No. 12 pertained to medical expenses. Over Rennes' objection, the court stated that with the exception of

the expense for Joyce Renne's ambulance transportation to St. Elizabeth, there was no proof that the itemized expenses resulted from the automobile accident; hence, the jury was required to disregard the itemized doctor and hospital expenses designated in exhibit 16, the stipulation of the parties.

After the instruction conference, the court gave instructions Nos. 10, 11, and 12 as mentioned during the instruction conference. The jury returned a verdict for Rennes in the amount of $6,150.

ASSIGNMENTS OF ERROR

Rennes contend that the court erred by (1) refusing to give Rennes' requested instruction on aggravation of a preexisting condition related to damages; (2) giving instruction No. 12 which removed from the jury's consideration Rennes' doctor and hospital expenses reflected in the parties' stipulation, exhibit 16; and (3) giving instruction No. 10 which removed the issues of permanency of Joyce Renne's injuries and future medical or dental expenses from the jury's consideration.

REVIEW OF INSTRUCTIONS

Refusal to Give Requested Instructions; Appellants' Burden.

> To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law; (2) the tendered instruction is warranted by the evidence; and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.

State v. Reynolds, 235 Neb. 662, 691, 457 N.W.2d 405, 423 (1990). Accord, *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. 1, 459 N.W.2d 178 (1990); *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989); *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 438 N.W.2d 485 (1989).

As previously mentioned, instruction No. 11, as an excerpt from NJI2d 4.09, stated: "There is evidence that the plaintiff had thoracic outlet syndrome prior to the date of the accident. The defendant is liable only for any damages that you find to be proximately caused by the accident." Rennes requested the remainder of NJI2d 4.09 as an instruction on aggravation of a

preexisting condition: "If you cannot separate damages caused by the preexisting (condition) from those caused by the (occurrence, accident, collision, et cetera), then the defendant is liable for all of those damages."

A plaintiff in a negligence action for personal injury may recover damages for aggravation of the plaintiff's preexisting condition if the plaintiff proves, by a preponderance of evidence, that the defendant's negligence caused an injury which combined with plaintiff's preexisting condition to produce the loss or damage for which the plaintiff seeks compensation. See, *Carnes v. Weesner*, 229 Neb. 641, 428 N.W.2d 493 (1988); *McCall v. Weeks*, 183 Neb. 743, 164 N.W.2d 206 (1969).

While Rennes' evidence through Dr. Paul shows that Joyce Renne's condition was a thoracic outlet syndrome resulting from the automobile accident, evidence from Dr. Paul also indicates that, in reference to a thoracic outlet syndrome, Renne experienced "some kind of problem" before the automobile accident. However, Dr. Paul did not express the opinion that the automobile accident aggravated whatever may have been Renne's preexisting condition. Thus, the evidence in Rennes' case fails to establish that any preexisting condition of Joyce Renne was even aggravated and, more importantly, fails to establish that the trauma from the automobile accident aggravated any preexisting condition. Therefore, without establishing a cause-and-effect relationship between the automobile accident and Joyce Renne's condition before the accident, Rennes were not entitled to an instruction on aggravation of a preexisting condition.

Also, we note that Rennes' requested instruction, as a supplement to instruction No. 11, actually is an instruction for apportionment of damages. Whether Nebraska law allows apportionment of damages for aggravation of a preexisting condition involved in a negligence action, we need not decide and, consequently, do not decide inasmuch as Rennes, in the first instance, failed to prove causation of an aggravated preexisting condition; hence, in the absence of such causation, apportionment of damages would be inappropriate in any event. Cf. *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb.

459, 461 N.W.2d 565 (1990) (an employee may be entitled to full compensation from the employer, notwithstanding that the employee's disability is the result of a preexisting condition aggravated by a work-related injury).

Consequently, the district court correctly refused to give Rennes' requested supplement to instruction No. 11.

Instructions Given; Appellants' Burden.

"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 *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. 1, 459 N.W.2d 178 (1990). "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 *Jensen v. Archbishop Bergan Mercy Hosp., supra.*

"Jury instructions should be confined to issues presented by the pleadings and supported by evidence." *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. at 8, 459 N.W.2d at 183. See, also, *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986).

"Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is, generally, prejudicial and results in a new trial." *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. at 9, 459 N.W.2d at 183. See, also, *Mandery v. Chronicle Broadcasting Co.*, 228 Neb. 391, 423 N.W.2d 115 (1988).

(A) Instruction No. 12: Stipulated Expenses.

Rennes claim that the district court erred by excluding from the jury's consideration the doctor and hospital expenses itemized on exhibit 16. Although litigants may stipulate that a plaintiff's medical expenses are fair and reasonable costs or charges, to recover the stipulated expenses as damages in a negligence action, the plaintiff must prove that the defendant's conduct was the proximate cause of the medical expenses. See, *Bay v. House*, 226 Neb. 521, 412 N.W.2d 466 (1987); *Oliverius v. Wicks*, 107 Neb. 821, 187 N.W. 73 (1922). While Rennes and

Moser stipulated that the itemized medical expenses were fair and reasonable charges, there was no evidence that the automobile accident was the proximate cause of the expenses listed on exhibit 16. Thus, exhibit 16, the stipulated list of expenses, is just a collection of names and numbers without reference to any particular time. As such, exhibit 16 lacked probative value and, as irrelevant information, was properly excluded from the jury's consideration. Therefore, since there was no evidence that the itemized medical expenses on exhibit 16 resulted from the automobile accident, the district court properly excluded the itemized expenses from the jury's consideration of damages.

(B) Instruction No. 10: Permanent Injury and Future Expenses.

Rennes contend that instruction No. 10 prejudicially precluded the jury from considering permanency of Joyce Renne's injuries and future medical expenses for her condition.

> 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, 225 Neb. 771, 785, 408 N.W.2d 280, 289 (1987). Accord, *Thilking v. Travelers Ins. Co.*, 240 Neb. 248, 482 N.W.2d 548 (1992); *Tarvin v. Mutual of Omaha Ins. Co.*, 238 Neb. 851, 472 N.W.2d 727 (1991).

A plaintiff, injured by another's negligence, is entitled to recover the reasonable value of medical expenses incurred as the result of the negligently caused injury and to recover the value of future medical expenses that are reasonably certain to be incurred as the result of the injury. See, *Steinauer v. Sarpy County*, 217 Neb. 830, 353 N.W.2d 715 (1984); *Schaefer v. McCreary*, 216 Neb. 739, 345 N.W.2d 821 (1984); *Zager v. Johnson*, 174 Neb. 106, 116 N.W.2d 1 (1962). Although the amount of future medical expenses is not required to be established with mathematical certainty before the plaintiff may recover their value, conjecture or possibility regarding future medical expenses is insufficient to submit to a fact finder

the issue of future medical expenses. See, *Steinauer v. Sarpy County, supra*; *Schaefer v. McCreary, supra*; *Hermilla v. Peterson*, 171 Neb. 365, 106 N.W.2d 507 (1960).

Before a trial court may submit to a jury any question concerning permanency of a plaintiff's injury and future medical expense, the plaintiff must have presented sufficient relevant evidence for the jury to determine whether the plaintiff has sustained permanent injury and will incur future medical expenses as a result of the injury. See, *Steinauer v. Sarpy County, supra*; *Schaefer v. McCreary, supra*; *Johnsen v. Taylor*, 169 Neb. 280, 99 N.W.2d 254 (1959).

Rennes' evidence concerning permanency of Joyce Renne's injuries and future medical expenses was the testimony of Drs. Paul and Ganser.

(1) Testimony of Dr. Paul.

Dr. Paul testified that, although Joyce Renne's condition was a thoracic outlet syndrome caused by the auto accident, permanency of that injury is "speculation." Dr. Paul's acknowledgment that permanency of Renne's thoracic outlet syndrome was "speculation" prevented submitting to the jury any question about permanency of the thoracic outlet syndrome and Renne's future damages, including medical expenses, regarding that injury.

(2) Testimony of Dr. Ganser.

In view of the restrictive effect of instruction No. 10, directing the jury to consider Rennes' situation only "to date," that is, September 1989 and not beyond, Dr. Ganser's opinion concerning permanency of Joyce Renne's temporomandibular joint syndrome and related future dental expense becomes the focal point in this appeal. When asked to express his opinion "with reasonable medical and dental certainty" on the question whether Renne's condition would improve, Dr. Ganser replied, "My guess is that without intervening surgically or something, that you're probably not going to change the situation that exists now." Rennes contend that Dr. Ganser's opinion, coupled with his further testimony that Joyce Renne's condition would "either be stable or probably deteriorate," establishes a submissible issue for the jury on the question of permanent

injury to Renne. Moser counters that Dr. Ganser's testimony, although received without objection, is, nevertheless, a "guess" and is nothing more than speculation or conjecture; therefore, Dr. Ganser's testimony supplied no basis for submitting the question of permanent injury for the jury's consideration.

Although an expert's opinion need not be expressed with "reasonable certainty" within the expert's field of expertise, but may be expressed with "reasonable probability" or with terminology and meaning similar to "reasonable probability," the expert's opinion must be sufficiently definite and relevant to provide a basis for the fact finder's determination of an issue or question. See, *Hohnstein v. W.C. Frank*, 237 Neb. 974, 468 N.W.2d 597 (1991); *Gilbert v. Sioux City Foundry*, 228 Neb. 379, 422 N.W.2d 367 (1988); *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981).

In *Welke v. City of Ainsworth*, 179 Neb. 496, 138 N.W.2d 808 (1965), this court recognized that "probably" means " '[r]easonably; credibly; presumably[;] [i]n all probability; very likely,' " 179 Neb. at 502, 138 N.W.2d at 812, and concluded that a physician's expression " '[i]n my opinion [the] injury and resultant disability was probably due to [the incident in question],' " *id.*, when read in context, indicated the physician's "best judgment to be that the injury" was sustained in the described incident, 179 Neb. at 503, 138 N.W.2d at 812. See, also, *Hare v. Watts Trucking Service*, 220 Neb. 403, 370 N.W.2d 143 (1985).

Later, in *Lane v. State Farm Mut. Automobile Ins. Co.*, *supra*, the court concluded that "reasonable certainty" and "reasonable probability" are one and the same and that an attempt to differentiate those phrases was a search for " 'a distinction without a difference.' " 209 Neb. at 412, 308 N.W.2d at 512. In *Lane*, the court also observed: "[T]he new Nebraska Evidence Rules, with reference to testimony by experts, do not require that medical experts testify 'with reasonable certainty.' The test would seem to be whether their specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." 209 Neb. at 412-13, 308 N.W.2d at 512. See, also, Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1989) (expert's opinion to assist fact

finder).

In light of the foregoing, we stated in *Edmonds v. IBP, inc.*, 239 Neb. 899, 479 N.W.2d 754 (1992): "[A] medical expert's testimony need not be couched in the magic words 'reasonable degree of medical certainty or reasonable probability.' " *Id.* at 905, 479 N.W.2d at 757 (quoting from *Hohnstein v. W.C. Frank, supra*). See, also, *Morton v. Hunt Transp.*, 240 Neb. 63, 480 N.W.2d 217 (1992); *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991).

Also, we have recognized that an expert's opinion must be examined in the context of the expert's entire testimony. See, *Morton v. Hunt Transp., supra*; *Miner v. Robertson Home Furnishing, supra*; *Welke v. City of Ainsworth, supra*.

With that background, we turn to the word "guess" used by Dr. Ganser in expressing his opinion concerning prospective change in Renne's condition and the concomitant question concerning permanency of Renne's temporomandibular syndrome.

Synonyms or substitutes for "guess" include "DEDUCE, INFER," "BELIEVE . . . THINK." Webster's Third New International Dictionary, Unabridged 1008 (1981). In *Hinrichs v. Young*, 403 S.W.2d 642 (Mo. 1966), the court considered whether a witness' use of "guess" in testifying about a vehicle's speed destroyed the probative value of the witness' testimony. In concluding that the testimony was appropriate for a jury's consideration, the Missouri Supreme Court stated: "Use of 'guess' is not necessarily destructive of a witness's testimony if it appears, for instance, from his whole testimony that the witness intended to express an opinion or judgment." 403 S.W.2d at 646. In a similar manner, the court in *Collier v. St. Louis Public Service Company*, 298 S.W.2d 455 (Mo. 1957), to determine whether evidence established that the plaintiff's injury was permanent, considered a physician's testimony that he did not "think" that the plaintiff's enlarged finger and injured shoulder would improve. The *Collier* court concluded: "It is obvious that the word 'think' as used by the doctor indicated the formation of a judgment or opinion" on the issue of permanency. 298 S.W.2d at 461.

Returning to Dr. Ganser's testimony, we note that the doctor was asked whether he had an opinion, "with reasonable

medical or dental certainty," concerning duration of Renne's condition. In answering that question, Dr. Ganser's use of "guess," in the context of his entire testimony, correlated with the doctor's expression that Renne's condition "was probably not going to change," was the expression of an opinion, that is, what the doctor deduced or inferred from all the information he had about Renne and what he considered his best judgment concerning Renne's condition in the future. Consequently, Dr. Ganser's use of "guess," in the context of his entire testimony, did not destroy the probative value of his testimony concerning Renne's prospective condition. Moreover, Dr. Ganser's subsequent opinion that Renne's condition would "either be stable or probably deteriorate" conveyed relevant information that Renne's condition would remain the same with her pain and problems from the temporomandibular joint syndrome, or would "probably deteriorate," that is, become worse. Dr. Ganser's description, therefore, supplied information that the jury was entitled to consider concerning permanency of Renne's temporomandibular joint syndrome. Also, Dr. Ganser's testimony supplied information about the necessity of future dental expenses as the result of adjustments in the acrylic splint Renne had to wear. In summary, Dr. Ganser's testimony was evidence concerning permanency of Renne's temporomandibular joint syndrome, an injury sustained in the auto accident, and was evidence regarding future dental expenses reasonably certain to be incurred by Renne. The weight of Dr. Ganser's testimony was a matter for the jury. Hence, it was error for the district court, in giving instruction No. 10, to limit the jury's consideration of damages to the date of Rennes' trial, effectively precluding the jury's consideration of Ganser's testimony in reference to permanency of Joyce Renne's injury, future expenses for her condition, and Darrel Renne's claim for future loss of spousal consortium. Since Moser's negligence and liability were established and not questioned in this appeal, the error by the district court prevented a fair trial for Rennes on the issue of future damages and necessitates our reversing the district court's judgment and granting a new trial to Rennes on the issue of damages.

CONCLUSION

Having considered each of Rennes' assignments of error, we conclude that there was prejudicial error in the court's instruction No. 10, and, therefore, we reverse the judgment of the district court and remand this cause to the district court for a new trial on the issue of damages.

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

WILLIAM D. LAWSON, APPELLANT, V. WILLIAM H. SMITH, JR., AND JEAN SMITH, HUSBAND AND WIFE, AND FORD MOTOR COMPANY, APPELLEES, THE TRAVELERS COMPANIES, INTERVENOR-APPELLEE.

489 N.W.2d 566

Filed October 2, 1992. No. S-90-001.

1. **Workers' Compensation: Subrogation: Attorney Fees.** Unless the right is forfeited, one who creates a fund which benefits a workers' compensation subrogee is entitled to reimbursement for that portion of a reasonable attorney fee attributable to the benefit conferred.
2. **Workers' Compensation: Subrogation: Attorney Fees: Conflict of Interest.** A workers' compensation subrogee is not liable for any portion of a fee exacted by an attorney who, because of a conflict of interest, abandoned protection of the subrogee's rights.

Appeal from the District Court for Butler County: BRYCE BARTU, Judge. Affirmed as modified.

George H. Moyer, Jr., of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellant.

David J. Kolenda for intervenor-appellee.

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

PER CURIAM.

Although the record does not contain the pleading which initiated the proceeding resulting in this appeal, the matter appears to arise from an application of the plaintiff-appellant, William D. Lawson, for a determination of the amount of the

subrogation interest, if any, of the intervenor-appellee, The Travelers Companies, the workers' compensation carrier for his employer, and for leave to deduct therefrom a portion of the attorney fee he incurred in effecting a $385,000 settlement with the defendant-appellee Ford Motor Company. In any event, the district court found that Travelers was entitled to $72,936.14 of the settlement proceeds and that Lawson could not deduct therefrom any portion of his attorney fee. Lawson contends that the district court erred in both of those determinations. We affirm as modified.

On June 11, 1978, Lawson, then a minor residing with his parents, was involved in an accident arising out of and in the course of his employment with Travelers' insured when the Ford-manufactured vehicle Lawson was driving, said to have been owned and modified by the defendants-appellees William H. Smith, Jr., and Jean Smith, collided with a vehicle operated by Mark E. Svoboda. As a consequence, Travelers, according to the stipulation of the parties, paid Lawson benefits totaling $84,936.14 under the provisions of the Nebraska Workers' Compensation Act, Neb. Rev. Stat. § 48-101 et seq. (Reissue 1988).

The dispute arises under § 48-118, which, in relevant part, provides that when

> a third person is liable to the employee . . . for the injury . . . the employer shall be subrogated to the right of the employee . . . against such third person . . . . Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employee . . . and shall be treated as an advance payment by the employer, on account of any future installments of compensation . . . .

On February 1, 1979, Svoboda's liability carrier paid the limit of its $15,000 coverage to Lawson and Travelers. Lawson received $3,000 from that payment, and the balance of $12,000 was applied to Travelers' subrogation interest.

On April 30, 1981, a firm of lawyers then known as Moyer, Moyer & Egley wrote Travelers that it intended to file a products liability suit and advised that if it was to represent

Travelers' interest, it would do so on a specified contingent basis. Travelers then engaged the Moyer firm "to protect its subrogation interest."

On June 9, 1982, after Lawson had reached his majority, the Moyer firm filed on Lawson's behalf a suit against Ford and the Smiths, claiming that the collision resulted from their negligence. The suit sought, among other things, to recover $68,152.09 for medical care and treatment, the exact amount Travelers had paid for these purposes, and $22,464 in lost wages.

On December 22, 1988, the Moyer firm wrote Travelers a letter revealing that the firm had persuaded Travelers that its "lien" was in the amount of $58,421.85 and which sought to verify the firm's understanding that Travelers would accept one-half of that amount, or $29,210.92, in full settlement of its interest. Having received no response to that letter, the Moyer firm again wrote Travelers on January 7, 1989, to make clear that the firm would retain one-third of the $29,210.92 as an attorney fee. On January 12, Travelers responded that it had not agreed to pay a fee on the $29,210.92, but to accept that sum in full satisfaction of its interest. On January 16, the Moyer firm advised Travelers that "[w]e have no deal" and that as there was a conflict between Lawson and Travelers, the Moyer firm could no longer represent Travelers. On or about January 24, Travelers engaged another attorney to protect its interest.

On January 31, 1989, Lawson, without any involvement of Travelers' replacement attorney, reached his settlement with Ford.

Lawson's quarrel with the district court's computation of Travelers' subrogation interest rests on the proposition that as he was a minor when the expenses for his medical care were incurred and he suffered a loss in wages, the claims for these items lodged not in him but in his father. He then postulates that in reality it was therefore not he, but his father, who benefited by the payments Travelers made for these purposes. From these premises Lawson concludes that Travelers cannot now seek reimbursement for those items from the recovery that he, not his father, made from Ford and that since the $68,152.09 in medical expenses and $22,464 in wage loss total $90,616.09, or

$17,679.95 more than Travelers' unreimbursed expenditures, Travelers is entitled to nothing from the settlement proceeds.

This sophism overlooks § 48-115(2), which provides, in relevant part: "Every person in the service of an employer . . . including . . . minors . . . for the purpose of making election of remedies under the [act] shall have the same power of contracting and electing as adult employees." Thus, the right to recover workers' compensation benefits is in the employee, even if the employee is a minor. Moreover, Lawson's contention overlooks that every cent Travelers spent was paid to him or on his behalf as a benefit specified by the compensation act. Travelers seeks to do nothing more than recover those benefits, as the language of § 48-118 quoted earlier gives Travelers the right to do. That those benefits may also have other attributes for other purposes does not detract from their nature as compensation benefits for the purposes of § 48-118.

Thus, the district court correctly found the amount of Travelers' subrogation interest to be $72,936.14, the difference between its expenditure of $84,936.14 and the $12,000 it recovered from Svoboda's liability carrier.

That brings us to the question of whether Lawson can deduct a portion of his attorney fee from Travelers' subrogation interest.

So far as is relevant to the matter before us, § 48-118 provides that if an employee and the employer or its compensation carrier join in prosecuting a claim against a third party and are represented by counsel, "the reasonable expenses and the attorney's fees shall be, unless otherwise agreed upon, divided between such attorneys as directed by the court before which the case is pending and if no action is pending then by the district court in which such action could be brought."

In *Gillotte v. Omaha Public Power Dist.*, 189 Neb. 444, 203 N.W.2d 163 (1973), *overruled in part on other grounds, Nekuda v. Waspi Trucking, Inc.*, 222 Neb. 806, 388 N.W.2d 438 (1986), we applied to the right of subrogation created by § 48-118 the principle announced in *United Services Automobile Assn. v. Hills*, 172 Neb. 128, 109 N.W.2d 174 (1961), that one who incurs a fee in effecting a monetary recovery which benefits an equitable subrogee is entitled to reimbursement for that portion

of the fee attributable to the benefit conferred. Inasmuch as the *Gillotte* subrogee's separate attorney had done little in the proceedings which resulted in a $29,840.99 benefit to his client, we held that the trial court had not abused its discretion in awarding the employee's attorney a fee of $10,000 from the subrogee's portion of the total recovery. The operation of § 48-118 was further clarified in *Schulz v. General Wholesale Coop. Co., Inc.*, 195 Neb. 410, 238 N.W.2d 463 (1976). Therein, the employee and the subrogee each had separate attorneys. The two attorneys cooperated in the prosecution of the claim against the third party, but the subrogee did not rely upon the services of the employee's attorney to protect its subrogation interest; rather, the subrogee was fully and adequately represented in that pursuit by its own attorney. We thus affirmed the trial court's denial of the request of the employee's attorney for a fee from the portion of the settlement proceeds attributable to the subrogee's interest, noting that when "the required cooperation exists between counsel in this type of dual prosecution of claims, it is virtually inevitable that there will be mutual benefit to the parties, which, of itself, does not call for any division of attorneys' fees." *Id.* at 416, 238 N.W.2d at 467.

Nekuda v. Waspi Trucking, Inc., supra, also held that the compensation subrogee's attorney fee was to be computed on the basis of the value of the benefit conferred upon it, irrespective of the fact that it had not paid its entire obligation as of the time of settlement with the third party.

It is clear beyond question that through the Moyer firm, Lawson created a fund from which Travelers benefits in some amount. Accordingly, under the principles announced in *Gillotte, supra*; *Schulz, supra*; and *Nekuda, supra*, Lawson would, under ordinary circumstances, be entitled to deduct from Travelers' recovery the portion of the reasonable attorney fee attributable to the benefit so conferred upon Travelers. However, since the circumstances are far from ordinary and are such that Lawson, through the conduct of the Moyer firm, has forfeited that right, it is unnecessary for us to determine the extent of the benefit conferred upon Travelers.

When Travelers refused to accept two-thirds of the

$29,210.92 offered in full satisfaction of its subrogation interest, or $19,473.95, the Moyer firm chose to cure the conflict in which it found itself by unceremoniously withdrawing from its representation of the client with the lesser economic stake and thereby forced that client to engage another attorney to define, protect, and enforce the very right of subrogation the Moyer firm earlier undertook to protect. Without embarking on a detailed study of the ethical questions such conduct may possibly suggest, we note it has been held that a law firm or an attorney may not cure a conflict in interest by withdrawing representation from a client of the firm's or attorney's choice, but must withdraw representation from both clients. *Margulies by Margulies v. Upchurch*, 696 P.2d 1195 (Utah 1985); *Civil Service Com'n v. Superior Court*, 163 Cal. App. 3d 70, 209 Cal. Rptr. 159 (1984). It is also appropriate to recall that in *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990), we disqualified a law firm from representing a client with interests adverse to those of others who had been represented by attorneys the disqualified firm had hired. We therein also reaffirmed the caution we had earlier expressed in *Wendell's, Inc. v. Malmkar*, 225 Neb. 341, 405 N.W.2d 562 (1987), against the representation of conflicting interests in litigation, even if the clients consented. See, also, *Baker v. Farnsworth*, 117 Neb. 504, 221 N.W. 17 (1928); Canon 4, DR 4-101, Canon 5, DR 5-105, and Canon 9 of the Code of Professional Responsibility.

We hold that in view of the fact that when a conflict in interest arose, the Moyer firm elected to abandon the protection of Travelers' rights, Lawson cannot deduct any portion of his attorney fee from Travelers' recovery. Although, as noted earlier, the district court correctly found that Travelers possessed a $72,936.14 subrogation interest, it ordered that Travelers recover but $72,336.14. The judgment is thus $600 less than it should be and is accordingly hereby increased by that amount.

AFFIRMED AS MODIFIED.

WHITE, J., not participating in the decision.

STATE OF NEBRASKA, APPELLEE, V. GEORGE E. CARTER AND VICTOR L. CARTER, APPELLANTS.

489 N.W.2d 846

Filed October 2, 1992. No. S-90-416.

1. **Postconviction.** In a proceeding under the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989), 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.
2. **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.
3. **Postconviction: Evidence: Witnesses.** The postconviction judge, as the trier of fact, resolves conflicts in the evidence and questions of fact, including the credibility and weight to be given the testimony of a witness.
4. **Postconviction: Appeal and Error.** A motion for postconviction relief may not be used as a substitute for an appeal or to receive a further review of issues already litigated.
5. **Postconviction: Effectiveness of Counsel: Proof.** When the defendant in a postconviction proceeding alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area.
6. **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 counsel's performance was deficient and that such deficient performance prejudiced the defense.
7. **Effectiveness of Counsel: Proof.** A showing of prejudice to the defense requires a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.
8. **Effectiveness of Counsel: Words and Phrases.** A reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different is a probability sufficient to undermine confidence in the outcome.
9. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous. In making this determination, this court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court observed the witnesses testifying in regard to such motion.
10. **Constitutional Law: Identification Procedures: Due Process.** An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive

and conducive to an irreparably mistaken identification that a defendant is denied due process of law.

11. _____: _____: _____. The initial inquiry is whether an identification procedure was unduly suggestive. A determination of impermissible suggestiveness is based on the totality of the circumstances.
12. **Trial: Identification Procedures: Evidence.** Even if there have been impermissible pretrial suggestions as to an accused's identity, in-court identification may be received when it is independent of and untainted by the impermissible identification procedures.
13. **Motions for Continuance.** The denial of a request for a continuance is not an abuse of discretion unless it clearly appears that the movant will suffer prejudice as a result of the denial.
14. **Trial: Effectiveness of Counsel: Witnesses.** The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves ineffective, will not, without more, sustain a finding of ineffectiveness of counsel.
15. **Trial: Evidence: Hearsay.** Admission of hearsay testimony is harmless where the same fact is established by other admissible evidence.
16. **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.
17. **Criminal Law: Aiding and Abetting: Intent: Liability.** Where a crime requires the existence of a particular intent, an alleged aider or abettor cannot be held criminally liable as a principal unless it is shown that the aider knew that the perpetrator of the act had the required intent, or that the aider himself possessed the required intent.
18. **Criminal Law: Aiding and Abetting: Intent: Other Acts.** One who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act.
19. **Criminal Law: Motions to Dismiss: Evidence.** In determining whether a criminal defendant's motion to dismiss for insufficient evidence should be sustained, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference that reasonably can be drawn from the evidence, and every controverted fact resolved in its favor.
20. **Criminal Law: Directed Verdict.** In a criminal case a trial court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) the evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained.

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

Gregory M. Schatz, of Stave, Coffey, Swenson, Jansen & Schatz, P.C., for appellants.

Don Stenberg, Attorney General, Donald A. Kohtz, and, on brief, Susan M. Ugai for appellee.

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

PER CURIAM.

The defendants, George E. Carter and Victor L. Carter, were charged in separate informations with first degree murder and use of a firearm in the commission of a felony. The cases were consolidated for trial in 1986, and the jury returned verdicts of guilty in both cases. The defendants were sentenced to life imprisonment on the murder counts and to imprisonment for 10 years on the use of a firearm counts. The judgments were affirmed in *State v. Carter*, 226 Neb. 636, 413 N.W.2d 901 (1987) (*Carter I*).

On June 8, 1989, the defendants filed a joint motion for postconviction relief. After an evidential hearing, the trial court denied postconviction relief. From that judgment the defendants have appealed. The defendants contend that the trial court erred in failing to find that they are entitled to postconviction relief because of the changed testimony of the witness Gerald Kincaid and because they received ineffective assistance of counsel during their trial and original appeal.

> "In a proceeding under the Nebraska Postconviction Act [Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989)], 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 . . . ."

State v. White, 238 Neb. 840, 845, 472 N.W.2d 720, 724 (1991), quoting *State v. Start*, 229 Neb. 575, 427 N.W.2d 800 (1988).

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. Blank*, 239 Neb. 188, 474 N.W.2d 689 (1991); *State v. Keithley*, 238 Neb. 966, 473 N.W.2d 129 (1991); *State v. Whitmore*, 238 Neb. 125, 469 N.W.2d 527 (1991). Furthermore, it is the postconviction judge who, as the trier of

fact, resolves conflicts in the evidence and questions of fact, including the credibility and weight to be given the testimony of a witness. *State v. Joubert*, 235 Neb. 230, 455 N.W.2d 117 (1990); *State v. Costanzo*, 235 Neb. 126, 454 N.W.2d 283 (1990).

In their first assignment of error, the defendants claim that the trial court erred in failing to find that the credibility of Kincaid's trial testimony was so doubtful on its face that it deprived them of a fair trial. They base this claim on the fact that Kincaid changed his statement to police approximately 2 weeks prior to their original 1986 trial, see *Carter I*, and upon testimony at the hearing on the postconviction motion.

At the postconviction hearing, Dorothy Kincaid, Kincaid's mother, testified that within 6 months after the Carters' original trial, Kincaid told her that he had lied when he positively identified the Carters as the persons involved in the murder for which they were convicted. According to Dorothy Kincaid, Kincaid told her that he identified the Carters from the pictures which the prosecutor had shown him and that he did so because he thought that they were the murderers. Kincaid's father, Bernard Kincaid, testified that he was present when Kincaid made such statements to his mother.

Barbara Keithley testified at the postconviction hearing that she was a witness to the shooting and that the victim was shot by Kincaid. According to Keithley, Kincaid fired two shots from inside his house, and those were the only two shots which were fired. While Keithley testified that she could see that Kincaid fired the shots with a gun, she could not describe the gun and could not tell whether the gun was a handgun, a long-barreled rifle, or a shotgun. Keithley also testified that the shooting occurred between 12:30 and 1 a.m. on October 9, 1985.

At the time that she testified, Keithley was serving a sentence for felony theft by deception. She testified that she did not contact the police regarding the shooting because she "[does not] like dealing with anything that has to do with the police." According to Keithley, when she met the Carters' sister, Sherry Carter, in the Douglas County jail, she told Sherry Carter that she had witnessed the shooting, and the Carters' postconviction counsel eventually contacted Keithley.

Kincaid testified twice at the postconviction hearing. On February 26, 1990, Kincaid testified that despite his testimony at the trial, see *Carter I*, he was not able to identify the Carters as the persons involved in the shooting and that he had lied at the Carters' trial. However, when recalled as a witness on March 2, 1990, Kincaid recanted his February 26 testimony and testified that he had been "threatened with a knife" and "knocked around a few times" by the Carters' cousin Roy Ellis. Kincaid was threatened when both he and Ellis were incarcerated at the Omaha Correctional Center. The assault and threats by Ellis against Kincaid are documented in a Department of Correctional Services disciplinary misconduct report. The report indicates that Ellis threatened Kincaid in order to coerce him to change his testimony in the present case.

In his March 2, 1990, testimony, Kincaid testified, as he had at the defendants' trial, that the defendants were the participants in the homicide for which they were convicted. According to Kincaid, the reason for his changed testimony on February 26, 1990, was his fear that his "life was in jeopardy at the penitentiary."

It cannot be said that the trial court was clearly wrong in denying the defendants' motion for postconviction relief based upon the changed testimony of Kincaid. With respect to the testimony of Keithley, the district court could easily have found an absence of credibility in her testimony. While Keithley's testimony may be suspect in view of her conviction for theft by deception, her testimony also conflicts with the evidence at the defendants' original trial. Keithley, for instance, testified that only two shots were fired, while numerous trial witnesses testified that up to eight shots were fired. Keithley also testified that the shooting occurred between 12:30 and 1 a.m. on October 9, 1985, although the trial testimony establishes that the shooting occurred at approximately 3 a.m. or shortly thereafter.

In addition, while she testified that she saw Kincaid fire a weapon from inside his residence, Keithley could not state whether Kincaid fired a handgun or a long-barreled weapon. Furthermore, the testimony of trial witnesses shows that immediately before the shooting began, Kincaid did not remain

in the house and fire a weapon, but instead grabbed his 3- or 4-year-old son and hustled him to safety in the basement of the residence. Kincaid then went out a basement door and saw the defendants firing handguns from the vicinity of their vehicle.

While Kincaid's trial testimony did change when he first testified at the hearing on the motion for postconviction relief, the record shows that Kincaid had changed his testimony only because he had been threatened by one of the appellants' relatives. Furthermore, despite the statement which Kincaid made to his mother, he testified under oath, at both the trial and the postconviction hearing, that the Carters were the persons who perpetrated the victim's murder. The issue of Kincaid's credibility was one to be decided by the jury at the defendants' 1986 trial, and the appellants cannot use their postconviction motion to relitigate that issue. See *State v. Ferrell*, 230 Neb. 958, 434 N.W.2d 331 (1989) (a motion for postconviction relief may not be used as a substitute for an appeal or to receive a further review of issues already litigated).

The appellants have failed to show that they are entitled to have their convictions set aside due to the changed testimony of Kincaid.

In their second assignment of error, the appellants claim that they received ineffective assistance of counsel at their trial and on the original appeal, and they discuss 16 instances in which their counsel was allegedly ineffective. When the defendant in a postconviction proceeding alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. *State v. Blank*, 239 Neb. 188, 474 N.W.2d 689 (1991). 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 counsel's performance was deficient and that such deficient performance prejudiced the defense. *State v. Blank, supra*; *State v. White*, 238 Neb. 840, 472 N.W.2d 720 (1991).

A showing of prejudice to the defense requires a

demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different is a probability sufficient to undermine confidence in the outcome. *State v. Blank, supra*; *State v. Salas*, 237 Neb. 546, 466 N.W.2d 790 (1991).

In contending that they were denied effective assistance of counsel, the appellants first cite their attorneys' failure to object to the in-court identification of the appellants by Peggy Hatfield and Scott Reynolds. See *Carter I*. However, despite their failure to object at trial, appellants' trial counsel did move to suppress the lineup identification of the appellants by Hatfield and Reynolds. The district court conducted a pretrial hearing with respect to those motions and denied the motions.

In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous. In making this determination, this court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court observed the witnesses testifying in regard to such motion. *State v. Sanders*, 235 Neb. 183, 455 N.W.2d 108 (1990).

An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law. The initial inquiry is whether an identification procedure was unduly suggestive. A determination of impermissible suggestiveness is based on the totality of the circumstances. *Id.* Furthermore, even if there have been impermissible pretrial suggestions as to an accused's identity, in-court identification may be received when it is independent of and untainted by the impermissible identification procedures. *State v. Tyrrell*, 234 Neb. 901, 453 N.W.2d 104 (1990).

In the present case, there is no evidence in the record to show that the lineup identification of the defendants by Hatfield and Reynolds was impermissibly suggestive. Instead, the record

shows that Hatfield's and Reynolds' identification of the defendants was based upon the witnesses' recollections of their encounter with the defendants when Victor Carter pointed a handgun toward Hatfield and her vehicle. Consequently, the trial court, in the original trial, properly overruled the defendants' motions to suppress the lineup identification. Because Hatfield's and Reynolds' identification of the defendants was proper, it cannot be said that the defendants received ineffective assistance of counsel because of their attorneys' failure to object to such identification.

The defendants next contend that the counsel they received was ineffective because their attorneys failed to object to evidence stemming from the arrest and search of the appellants. In their brief, the defendants do not address any alleged constitutional infirmity of the arrest and search of George Carter. However, we note that in their motion to vacate their convictions, the appellants state that an arrest warrant was outstanding for George Carter at the time he was arrested and that "George Carter was arrested by Officer Clyde Nutsch after he was found [a short time after Victor Carter was arrested] alledgely [sic] hiding in some bushes . . . in an area close to where Victor and Chester Carter and Ms. [Janelle] Anzalone had already been arrested." As stated previously, 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. Blank, supra*; *State v. Keithley*, 238 Neb. 966, 473 N.W.2d 129 (1991); *State v. Whitmore*, 238 Neb. 125, 469 N.W.2d 527 (1991). There is no indication in the record before us that the police unlawfully arrested George Carter, and therefore there is no showing that the appellants were in any way prejudiced by their attorneys' failure to challenge that arrest or the search incident to that arrest.

The appellants also challenge the arrest and search of Victor Carter. A report prepared by Jeffrey Thuelen, the arresting officer, shows that he arrested Victor Carter, Chester Carter, who was not charged, and one other unnamed person who is described as a white female. While the report also indicates that Officer Thuelen made the arrests because the white female

matched the description of one of the suspects in the shooting, the appellants argue that there were no white female suspects.

Contrary to the argument of the appellants, one of the witnesses who was at the scene of the shooting when it occurred had informed police that Anzalone may have accompanied the appellants in the vehicle they were driving at the time of the shooting. Furthermore, the record shows that Anzalone was arrested when the Carters were arrested. Consequently, it is apparent that Anzalone is the white female whom Officer Thuelen referred to in his report. Officer Thuelen's report also shows that not only did the white female match a description of one of the suspects, but that the appellants were arrested near a motel and that Officer Thuelen had observed a vehicle in the motel parking lot which matched the description of the vehicle thought to have been involved in the shooting. Furthermore, the police had information which would lead them to believe that at least two black males were involved in the shooting, and Officer Thuelen had been informed that at least three black males had been seen fleeing from the motel near the site where the appellants were arrested.

Under these circumstances, Officer Thuelen had probable cause to arrest and search Victor Carter and his two companions. See, e.g., *State v. Kimminau*, 240 Neb. 176, 481 N.W.2d 183 (1992); *State v. Roach*, 234 Neb. 620, 452 N.W.2d 262 (1990). Consequently, the appellants were not prejudiced by their attorneys' failure to challenge the constitutional validity of the arrest and search of Victor Carter.

Appellants next contend that the performance of their attorneys was deficient in that their attorneys failed to make written application for a continuance after learning that Kincaid would appear as an eyewitness to the shooting at the original trial. See *Carter I*. While the merit of this contention is, for the most part, adequately addressed in the disposition of a similar assignment of error which was raised on appeal in *Carter I*, we noted in that opinion that the appellants' attorneys' failure to file written applications for a continuance was a relevant factor in determining whether the trial court abused its discretion in denying a motion for continuance. Appellants now argue that a written motion for continuance

should have been filed and speculate that this court would have found the trial court's denial of a continuance to have been an abuse of discretion if such written motions had been filed.

As we stated in *Carter I*:

> The defendants base their request on the fact that the prosecution witness Kincaid changed his previous statement and claimed to be an eyewitness to the shooting. The record shows that the defense counsel learned of the changed statement approximately 2 weeks before the start of the trial, they were given copies of the new statement, and they had full opportunity to cross-examine the witness at trial. These facts show there was no abuse of discretion in overruling the motion for a continuance.

226 Neb. at 642, 413 N.W.2d at 905-06. See, also, *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990) (the denial of a request for a continuance is not an abuse of discretion unless it clearly appears that the movant will suffer prejudice as a result of the denial).

Despite this, the defendants contend that if a written motion had been filed and a continuance granted, they would have discovered the existence of another witness, Keithley, who testified at the postconviction hearing. However, as discussed previously in this opinion, given the testimony of other witnesses and her questionable credibility, the defendants have failed to show that there is a reasonable probability that the testimony of Keithley would have had any effect upon the outcome of the trial.

The defendants also charge that their attorneys were deficient in failing to adequately question several witnesses, including Michaela Earlywine, Officer Robert Vondrasek, and Dr. Jerry Jones. The appellants argue that by more fully questioning these witnesses, their attorneys could have created grounds for a self-defense instruction, or established grounds for a second degree murder or manslaughter conviction rather than a first degree murder conviction. However, as evidenced by their motion for postconviction relief, the defendants maintain that they were not involved in the murder for which they were convicted. Consequently, such questioning of these witnesses would have contradicted the defendants' theory of

defense and the grounds underlying their motion for postconviction relief. The appellants cannot credibly argue that they were not involved in the victim's murder and at the same time argue that their trial counsel was deficient in failing to elicit evidence to show that they were acting in self-defense when they shot and killed the victim.

The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves ineffective, will not, without more, sustain a finding of ineffectiveness of counsel. *State v. Ellefson*, 231 Neb. 120, 435 N.W.2d 653 (1989). A similar rule applies here with respect to the attorneys' decision not to attempt to show that the appellants were acting in self-defense.

Furthermore, any contention that the appellants were acting in self-defense when they shot the victim is unsupported by the record before us. See *State v. Allison*, 238 Neb. 142, 469 N.W.2d 360 (1991). Thus, the defendants' attorneys were not deficient in their questioning of Earlywine, Officer Vondrasek, or Dr. Jones.

The defendants next argue that they received ineffective assistance of counsel in that their attorneys failed to object to hearsay testimony within the preliminary hearing testimony of Ross Little which was admitted at trial. In *Carter I*, we found that the trial court had not committed reversible error in admitting Little's preliminary hearing testimony. However, the defendants now argue that their attorneys should have objected to a statement within the preliminary hearing testimony that Reynolds had told Little that the defendants had guns and were looking for Kincaid.

Both Reynolds and Hatfield testified at the trial that they had encountered the defendants prior to the shooting, and this testimony duplicated the hearsay testimony of Little. Consequently, even assuming that the defendants' counsel was deficient in failing to object to such testimony, this failure could not have resulted in any prejudice to the defendants. See *State v. Jones*, 237 Neb. 920, 468 N.W.2d 120 (1991) (admission of hearsay testimony was harmless where the same fact was established by other admissible evidence).

The defendants next claim that they received ineffective

assistance of counsel because their attorneys did not challenge the admissibility of 12 ammunition cartridges which were found in the immediate vicinity of George Carter when he was arrested. These cartridges were similar to another cartridge which was found upon the person of George Carter when he was arrested. The crux of the appellants' argument is that because the bullets encased in the cartridges found near George Carter did not match either the type of bullet recovered from the victim, a copper encased bullet, or another type of bullet which was recovered near the scene of the shooting, a metal point bullet, their attorneys should have objected to the admission of the 12 bullets on relevancy grounds. However, the State's ballistics expert testified that the same weapon which was used to fire the bullet which killed the victim could also be used to fire the bullets encased in the 12 cartridges found in the immediate vicinity of George Carter's arrest.

"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. We believe that there is no question in this case but that the ammunition cartridges recovered in connection with the arrest of George Carter were admissible in the appellants' 1986 trial. Cf. *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991) (shotgun shells inadmissible to attempt to prove that a defendant was guilty of theft by receiving stolen property and of intent to distribute or deliver amphetamine). Because the ammunition cartridges were clearly admissible, the appellants' attorneys were not remiss in failing to object to the admission of the ammunition cartridges at trial.

The defendants next contend that although George Carter's trial attorney moved for a directed verdict at the close of the State's case in chief, that attorney was deficient in failing to move for a dismissal of the first degree murder charges against him or for a directed verdict on the specific grounds that the State had failed to present evidence that George Carter acted with the requisite intent required for a first degree murder conviction. In their brief, the defendants point to Kincaid's testimony that Victor Carter fired the shot which killed the

victim and state that the prosecutor's theory in charging George Carter with first degree murder was that he had aided and abetted Victor Carter in the murder of the victim.

Where a crime requires the existence of a particular intent, an alleged aider or abettor cannot be held criminally liable as a principal unless it is shown that the aider knew that the perpetrator of the act had the required intent, or that the aider himself possessed the required intent. *State v. Dittrich*, 191 Neb. 475, 215 N.W.2d 637 (1974). However, one who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act. *State v. Trackwell*, 235 Neb. 845, 458 N.W.2d 181 (1990).

In the present case, although George Carter may not have fired the fatal shot, there is evidence that he acted purposely and with deliberate and premeditated malice, see Neb. Rev. Stat. § 28-303(1) (Reissue 1989), in the carrying out of the victim's murder. The record shows that just prior to the shooting, George Carter was driving a vehicle in which he was accompanied by Victor Carter, when Victor Carter, while brandishing a handgun, sought to determine whether Kincaid was in the vehicle driven by Hatfield. George Carter then drove to the Kincaid residence, fired shots, and sped away.

In determining whether a criminal defendant's motion to dismiss for insufficient evidence should be sustained, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference that reasonably can be drawn from the evidence, and every controverted fact resolved in its favor. *State v. Grantzinger*, 235 Neb. 974, 458 N.W.2d 461 (1990). In a criminal case a trial court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) the evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained. *State v. Schumacher*, 240 Neb. 184, 480 N.W.2d 716 (1992).

Under the facts of this case, the trial court could not have properly dismissed George Carter's first degree murder charge, nor could it have directed a verdict in favor of George Carter.

The defendants next argue that they received ineffective assistance of counsel in that their attorneys did not call them to testify during their trial and because their attorneys also failed to call Anzalone to testify on their behalf. However, during their trial, each of the defendants stated on the record that he had discussed with his attorney the option of testifying before the jury. Each of the defendants stated that his attorney had explained that if the defendant testified on his own behalf, the State would be entitled to question him regarding prior convictions. The defendants each then stated that they did not wish to testify at trial. Similarly, the defendants stated that they did not wish to have Anzalone testify on their behalf.

It is clear from the record that each of the defendants, in consultation with his attorney, made an informed decision not to testify. With these decisions, the defendants prevented the disclosure of their prior criminal records. The issue raised by the defendants is one of trial strategy, and their attorneys were not deficient in advising them not to testify. See, *State v. El-Tabech*, 234 Neb. 831, 453 N.W.2d 91 (1990); *State v. Journey*, 207 Neb. 717, 301 N.W.2d 82 (1981).

The record shows that the defendants also participated in the decision not to call Anzalone as a witness. As stated earlier in this opinion, the decision to call or not to call a particular witness, made by counsel as a matter of trial strategy, even if that choice proves ineffective, will not, without more, sustain a finding of ineffectiveness of counsel. *State v. Ellefson*, 231 Neb. 120, 435 N.W.2d 653 (1989).

The defendants also claim that the counsel they received was ineffective because their attorneys failed to request jury instructions on self-defense and manslaughter. As noted previously, the record does not support a self-defense instruction. See *State v. Allison*, 238 Neb. 142, 469 N.W.2d 360 (1991). In addition, each of the defendants stated on the record during the trial that, after consultation with his attorney, he preferred that the jury be instructed only on the first degree charges. It appears from their trial tactics that, given their criminal records and the fact that their potential sentences would be subject to enhancement under Nebraska's habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 1989), the

appellants sought to limit the avenues by which the jury could convict them. The fact that this tactic was not successful does not, by itself, prove that trial counsel was ineffective. See, *State v. El-Tabech, supra*; *State v. Journey, supra*.

Furthermore, the trial court instructed the jury with respect to both first and second degree murder. By finding the defendants guilty of the greater offense, first degree murder, the jury not only determined that the defendants had *intentionally* killed the victim, but it also found that the defendants killed the victim *purposely and with deliberate and premeditated malice*. See § 28-303(1) and Neb. Rev. Stat. § 28-304 (Reissue 1989). To have found the defendants guilty of only manslaughter, the jury would have had to find that the defendants acted without malice when they killed the victim. See Neb. Rev. Stat. § 28-305 (Reissue 1989). Consequently, the jury's verdict in this case makes it clear that the defendants would not have benefited from a manslaughter instruction.

The defendants next contend that their attorneys were deficient in failing to create a record with respect to the jury's questions regarding the instructions and the jury's request for a ruler. However, the defendants have failed to demonstrate that they were prejudiced by the lack of such a record.

In addition, according to the defendants, it apparently was discovered during jury deliberations that, contrary to the trial court's admonitions, one of the jurors was in possession of a newspaper. The defendants argue that their trial attorneys were ineffective in failing to raise the issue of such juror misconduct. However, in this case, the record contains no proof that a juror was exposed to any extraneous prejudicial information. There is no indication in the record that any juror was exposed to any extraneous information relating to the charges against the defendants. Cf., *State v. West*, 217 Neb. 389, 350 N.W.2d 512 (1984); *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986); *State v. Woodward*, 210 Neb. 740, 316 N.W.2d 759 (1982); *State v. Trammell*, 240 Neb. 724, 484 N.W.2d 263 (1992).

As stated earlier, to sustain a claim of ineffective assistance of counsel and thereby obtain reversal of a defendant's conviction, the defendant must show that counsel's performance was deficient and that such deficient performance

prejudiced the defense. *State v. Blank*, 239 Neb. 188, 474 N.W.2d 689 (1991); *State v. White*, 238 Neb. 840, 472 N.W.2d 720 (1991). The defendants have failed to show that they were prejudiced by the performance of their attorneys regarding a juror's alleged possession of a newspaper.

The defendants also argue that the performance of their attorneys was deficient with respect to several other issues, including evidential questions relating to the admission of a gun case and evidence relating to the altercation at 19th and Lothrop Streets which occurred prior to the shooting, as well as questions regarding the peremptory challenges of African-American jurors. However, these issues were raised by the defendants' trial counsel and were decided by this court in the defendants' direct appeal. A motion for postconviction relief may not be used as a substitute for an appeal or to receive a further review of issues already litigated. See *State v. Ferrell*, 230 Neb. 958, 434 N.W.2d 331 (1989).

Because the defendants have failed to show that they are entitled to postconviction relief, the judgment of the trial court must be affirmed.

AFFIRMED.

MAY BROADCASTING COMPANY, A CORPORATION, APPELLEE, V. JOHN M. BOEHM, STATE TAX COMMISSIONER, AND THE NEBRASKA DEPARTMENT OF REVENUE, APPELLANTS.

490 N.W.2d 203

Filed October 9, 1992. Nos. S-89-502, S-89-503.

1. **Administrative Law: Appeal and Error.** Proceedings for judicial review of an administrative ruling filed prior to July 1, 1989, are reviewed by an appellate court de novo on the record.
2. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. **Taxation: Property.** Syndicated programming purchased by broadcasters is tangible property and taxable under the Nebraska sales tax, Neb. Rev. Stat.

§ 77-2703 (Reissue 1990).

4. _____: _____. Under Neb. Rev. Stat. § 77-2702 (Reissue 1990), the "sale for resale" exemption to Nebraska's use tax applies only to tangible property.

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

Robert M. Spire, Attorney General, and David Edward Cygan for appellants.

John C. Hewitt, of Andersen, Berkshire, Lauritsen & Brower, for appellee.

Paul C. Jessen and M. Shaun McGaughey, of Koley, Jessen, Daubman & Rupiper, P.C., for amicus curiae Pappas Telecasting of the Midlands/KPTM.

Paul C. Jessen and M. Shaun McGaughey, of Koley, Jessen, Daubman & Rupiper, P.C., for amici curiae Busse Broadcasting, Inc./KOLN and KGIN, et al.

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

GRANT, J.

Defendants-appellants, John M. Boehm, State Tax Commissioner, and the Nebraska Department of Revenue (hereinafter, collectively, Department) appeal orders of the Lancaster County District Court, which orders reversed the findings and orders of the Department. The Department had assessed a use tax on the gross payments of plaintiff-appellee, May Broadcasting Company (hereinafter May), for various syndicated programming agreements between May and distributors.

In case No. S-89-503, on March 31, 1986, the Department assessed May a consumer's use tax deficiency for the tax period from August 1982 through July 1985. May paid the assessed deficiency and filed a petition for redetermination, seeking a refund of that payment, with the Department. After a hearing ending in April 1987, by order dated May 6, 1988, the Department denied the petition for redetermination. May appealed to the district court for Lancaster County, where on April 25, 1989, after consideration of the record made in the

Department's hearing, the district court reversed the Department's determination. The Department timely appealed to this court.

In case No. S-89-502, on December 2, 1987, May filed a use tax return for the period from August 1985 through December 1986 and paid, under protest, the total amount claimed by the Department to be due. On the same day, May filed a petition before the Department seeking a refund of the tax payment. The Department denied May's petition for refund, and May appealed to the district court for Lancaster County. There the matter was considered on the record made in the hearing before the Department, and on April 25, 1989, the district court reversed the determination of the Department and ordered the refund of the tax payment. The Department timely appealed to this court.

In this court, the cases were consolidated for briefing and argument. The Department has assigned three errors, contending that the district court erred (1) in "determining that the license of syndicated programing constitutes the transfer of intangible property rights and as such is not subject to Nebraska Consumer's Use Tax"; (2) in determining that the license of syndicated television programming "constitutes a 'sale for resale,' as contemplated by Neb.Rev.Stat. §§77-2701, et seq. and is, therefore, exempt from the Nebraska Consumer's Use Tax"; and (3) in making the previous two determinations because they are irreconcilable. There was no cross-appeal. The third assignment of error is without merit and will not be considered. In that regard, the district court made alternative findings disposing of the cases, in the event that this court determined that the district court had erred in its first disposition. Considering the two assignments of error submitted to us, we reverse the judgments of the district court.

The Department states that "[t]his is an appeal . . . from two Findings and Orders entered by defendant John M. Boehm, State Tax Commissioner, denying a use tax refund claim" and that since the appeals were filed prior to July 1, 1989, the court is required "to affirm the Commissioner's decision if the record demonstrates that it is supported by substantial evidence, is not arbitrary or capricious, and is not affected by error of law . . . ."

Brief for appellant at 2. That statement does not reflect the fact or the law. The cases before us are appeals from the district court for Lancaster County. Since proceedings for judicial review in case No. S-89-503 were filed in the district court on May 23, 1988, and in case No. S-89-502 on June 8, 1988, our review is de novo on the records. See *Department of Health v. Manor Care, Inc.*, 237 Neb. 269, 465 N.W.2d 764 (1991).

The Department hearings resulted in a "Findings And Order" of 67 pages in case No. S-89-503 and of 9 pages, incorporating the findings in case No. S-89-503, in case No. S-89-502. The review hearings in the district court resulted in a 22-page "Findings of Fact and Conclusions of Law" in case No. S-89-503 and a similar 6-page document, incorporating the 22-page document, in case No. S-89-502.

The records before the Department and before this court show the following facts. At all times relevant to these two cases, May operated in Omaha, under the call letters KMTV, as a television network affiliate. During certain periods of the broadcast day, May received and broadcast programming produced by the national network. May also obtained syndicated programming from independent distributors for those periods of its broadcast day during which it did not receive network programming. This type of syndicated programming is always stored by May for use by it at its convenience during the contract term.

During the period of time involved in case No. S-89-503, almost all syndicated programming was delivered to May on film or videotape by physical transfer of the film or videotape from the distributor to May. One program in particular, "The All New Let's Make a Deal," was delivered by satellite transmission from the distributor's transmitter to May's receiver, where the transmission was put on videotape and stored. During the second period, the time involved in No. S-89-502, 42 percent of the programming was delivered by satellite, and the remainder was delivered on film or videotape.

Generally, syndicated programming is copyrighted news and entertainment features sold to the highest bidder in a given television market. Agreements between distributors and television stations grant broadcast rights for a specific

television series or a group of movies and guarantee delivery of the agreed-upon programs, either by videotape or by satellite transmission, on or before certain dates. According to the terms of these agreements, licensees are prohibited from making copies of the programs, unless otherwise agreed to, and in such cases are usually required to destroy the copies. The television stations are also prohibited from exhibiting the programs at any time or place not provided for in the agreements. These agreements also provide that the broadcasts are to be made available to nonpaying audiences only.

Typical of the programs licensed to May in the audit periods are "Wheel of Fortune," "M*A*S*H," "Star Trek," and "Oprah Winfrey." Factors which determine how much a station pays for the syndicated programming include the demand in the market among the stations, the demand in the market among viewers, and when the station will be allowed to air the given program.

In its review of case No. S-89-503, the district court determined, as a matter of law, that "[t]he license of syndicated programming constitutes a transfer or use of intangible property rights and as such is not subject to Consumer's Use tax" and that "satellite transmissions of syndicated programming are clearly transfers of intangible property." The court also stated that since it had found the license of syndicated programming to be intangible, the court did not have to determine whether the provisions of the sale for resale definition within the tax code apply to May's situation. The district court, however, went on to determine that in the event that syndicated programming was determined to be a transfer of tangible property, the transfer of programming would be exempt from consumer's use taxation as a sale for resale.

These cases involve no actual dispute as to facts, but rather turn on interpretation of Nebraska's tax code and the application of that code to the undisputed facts. Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990).

Appellant's first assignment of error asserts, "The District

Court erred in determining that the license of syndicated programing constitutes the transfer of intangible property rights and as such is not subject to Nebraska Consumer's Use Tax."

During the period of time from August 1, 1982, through August 25, 1983, the Nebraska use tax provision, Neb. Rev. Stat. § 77-2703(2) (Reissue 1981), provided: "A use tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property . . . ." The section was amended in 1983, and for the time from August 26, 1983, through September 30, 1985, the statute provided: "A use tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property . . . or of intellectual or entertainment properties referred to in subdivision (4)(c) of section 77-2702." § 77-2703(2) (Cum. Supp. 1984).

Neb. Rev. Stat. § 77-2702(4)(c)(ii) (Cum. Supp. 1984) clarified that the use tax on "gross receipts" would be assessed on "the gross income received from the license, franchise, or other method establishing the charge" for sales or leases of videotapes and movie film, except where admission is charged to view the movies.

In 1985, § 77-2703(2) was again amended. The statute, for the time from October 1, 1985, through December 31, 1986, provided:

> A use tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased, leased, or rented from any retailer and on any transaction the gross receipts of which are subject to tax under subsection (1) of this section [the "gross receipts" provision of § 77-2702(4)(c)(ii).]

§ 77-2703(2) (Supp. 1985 & Reissue 1986).

The changes in the statute did not materially affect the meaning of the statute for the purposes of these cases. Each amendment was an effort to clarify the meaning of the statute, but the essential thrust of § 77-2703(2) (Reissue 1981) has not changed. The district court treated the statutes covering each audit period as having the same effect. There has been no cross-appeal by May, and this court will treat the statutes in the same way.

The district court set out in its findings and conclusions in case No. S-89-503 that "syndicated programming, no matter its method of delivery, constitutes an intangible property right and therefore is not subject to Consumer's Use tax." In support of its position, adopted by the district court, May noted a great deal of case law regarding taxation on the transfer of computer software and stated that syndicated programming was analogous to computer software. We recognize that this position has been adopted by a number of jurisdictions, but decline to apply this line of cases to this legal problem.

In appellee's brief, appellee hints at another reason for determining that syndicated programming is intangible and not subject to Nebraska's use tax and states:

> Technology has advanced to the point where a television station is no longer limited to renting a tape and broadcasting its contents by inserting that specific tape in the station's tape machine. Syndicated programs may be, and are, transmitted by satellite to a licensee station for recording on the station's own blank tapes. . . . Just as easily a distributor could transmit the program directly to the audience of a licensee station pursuant to a license contract. With syndicated programming, no tangible property need be transferred between the parties; tangible property is not a crucial element.

Brief for appellee at 23.

We disregard the implication to which appellee is obliquely referring. A transmission by satellite is the transmission of a tangible thing—an electronic signal. The mere fact that the signals may be received and stored shows that a tangible thing is in issue. The concept of physically storing an intangible thing is beyond comprehension. We hold that the method of transmission does not affect the applicability of the Nebraska use tax.

Typical of the software cases is *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405 (Tenn. 1976), which held that what is sold in such a transaction is information and that the medium of transfer is only a method of transmission. The *Tidwell* court held that "[i]t is merely incidental that these intangibles are transmitted by way of a tangible reel of tape that is not even

retained by the user." *Id.* at 407. Thus, the *Tidwell* court held that the existence of alternative methods of delivery of software, i.e., telephone, magnetic tape, punch cards, etc., distinguished it from those cases involving movie films. The alternative methods of delivery of the information on the computer software would include a skilled person's going to the customer's place of business and personally encoding the program on the customer's computer equipment. Such a delivery would be purely by personal services, and not subject to a use tax.

In distinguishing this holding from its earlier ruling in *Crescent Amusement Co. v. Carson*, 187 Tenn. 112, 213 S.W.2d 27 (1948), the *Tidwell* court stated that the tax in *Crescent Amusement Co.* was levied on the movie film, which was inherently related to the movie, and stated, "[W]ithout the film there could have been no movie." *Tidwell*, 538 S.W.2d at 407. The court held that this distinction was "the crucial difference," *id.*, between use-taxable movies and use-tax-exempt computer software, stating, "The whole of computer software could be transmitted orally or electronically without any tangible manifestations of transmission." *Id.* at 407-08.

Results similar to the *Tidwell* "alternative methods of transmission" rationale are found in numerous software cases. Appellee states that because of the many methods of transmission of the syndicated programming, the software cases are more applicable to May's situation than are cases determining taxation of motion pictures for theater distribution.

We determine that the alternative methods analysis is not controlling in the decision as to the application of the use tax to syndicated programming. While we agree that the method of transmission is of little relevance to the broadcasters, we also determine that focus upon the method of transmission is misplaced. We look not at the method of transmission, but instead at the result of the transmission. In the software cases, the result of the transmission is a computer's responding in a certain way to certain stimuli. In the syndicated programming cases, the result is a broadcast over the airwaves.

In every case involving syndicated television, the desired result contracted for is a tangible film or videotape which may be played and broadcast by the station. Although the videotapes require machines to "encode" and "decode" them, the videotapes are tangible, unique, material items altered by the distributor to suit the customer. A videotape imprinted with a licensed-for program is an item of tangible personal property. Contrary to appellee's contention, the frequent requirement that broadcasters destroy copies of programming upon the expiration of their licenses does not indicate an intangible quality to the product licensed. This merely demonstrates the ease with which copies are made.

The Department directs this court to a growing body of case law which deals directly with taxation of syndicated programming, and we find this law persuasive. The body of these decisions is based on early cases determining the issue of taxability of movie film rentals by theaters.

Typical of the film rental holdings is *Crescent Amusement Co. v. Carson, supra*, in which motion picture theater operators appealed the assessment of sales taxes on rentals of motion pictures from distributors for exhibition in appellants' theaters. The theater operators asserted that the transactions were grants of the privilege to use and exhibit copyrighted material and that, therefore, the operators were merely exercising an intangible (and hence nontaxable) property right. The Tennessee Commissioner of Finance and Taxation countered that the transaction was a lease of tangible personal property and thus subject to the broad definition applying the state sales tax.

The *Crescent Amusement Co.* court agreed with the commissioner. Citing *Matter of United Artists Corp. v. Taylor*, 273 N.Y. 334, 7 N.E.2d 254 (1937), the Tennessee court noted that the transaction necessarily involved the transfer of corporeal property in the form of positive and negative prints, with the license to exhibit these films. This amounted to a singular transaction, involving tangible property, and thus was taxable as a sale.

The *Crescent Amusement Co.* court also cited *Saenger Realty Corporation v. Grosjean*, 194 La. 470, 193 So. 710

(1940), which reached a similar conclusion. The *Saenger Realty Corporation* court held that the right to exhibit a film could be of no greater value than the use of the film.

The courts applying the *Crescent Amusement Co.* rationale to syndicated programming cases have recognized that both motion picture rentals by theaters and syndicated program "licenses" transfer tangible possession and control of a recorded event. Appellee equates this recognition to a "lack [of] independent analysis" and blind reliance on outdated precedent. Brief for appellee at 16. We do not agree. These films and videotapes are tangible, no less so than if the event were recorded in a book or newspaper—neither of which could reasonably be characterized as intangible.

In *American TV Co. v. Hervey, Comm'r*, 253 Ark. 1010, 490 S.W.2d 796 (1973), the Arkansas Supreme Court addressed the assessment of a use tax on the use by American Television Company (ATC) of videotaped motion picture films, syndicated programming, and other artistic performances. The appellant, ATC, asserted that the Arkansas tax (similar to our own) is only assessed on tangible personal property. ATC contended that it acquired only an intangible "right to broadcast." (Emphasis omitted.) *Id.* at 1014, 490 S.W.2d at 799. The Arkansas Commissioner of Revenue held that when a television station takes possession of a film, loads it, and broadcasts it, that station uses that tangible personal property so as to make the use taxable.

The Arkansas court turned to its state sales tax statute defining "sale" as a "transfer . . . of tangible personal property, regardless of the manner, method, instrumentality, or device by which such transfer is accomplished." Ark. Stat. Ann. § 84-1902 (Repl. 1960).

The court held:

> Every purchase or rental of property is the acquisition of the right to use that property for its intended purposes. Likewise, practically every piece of property subject to rent or sale is a product of someone's original idea and the rental thereof is for the purpose of using it.

American TV Co., 253 Ark. at 1018, 490 S.W.2d at 801 (quoting from *Florida Association of Broadcasters v. Kirk*, 264

So. 2d 437 (Fla. App. 1972)).

The court then concluded that to separate the right to use from the possession of the videotape would create an impossible tax situation and held the sales tax to be applicable. See, also, *Mt. Mansfield Television v. Commr. of Taxes*, 133 Vt. 284, 336 A.2d 193 (1975).

We find the reasoning in these cases to be persuasive. We recognize that an examination of the issues raised in these actions makes it clear that there is a split of authority on the issues presented. Taking into consideration the opposing views, we are persuaded by the cases advanced by the Department rather than the cases advanced by May. It would seem anomalous to separate the right to broadcast copies of these syndicated programs from the necessary physical possession of them. We hold that the basis of these courts' decisions is sound. Although there is a purchase or rental in these cases of an intangible right to use, the value of the agreements between television stations and distributors is based on the physical possession by the stations of a copy of the original film or videotape. In the cases before us, the television stations usually operate from a videotape or film transferred to them or from a videotape which the television station had made and stored. As such, the transactions are transfers of tangible personal property and are taxable.

The Department's second assignment of error asserts that it was error for the district court to find that "the license of syndicated television programming constitutes a 'sale for resale' as contemplated by Neb.Rev.Stat. §§77-2701, et seq. and is, therefore, exempt from Nebraska Consumer's Use Tax."

It is May's contention that the Nebraska sales and use tax applies only to retail sales, see § 77-2703 (Reissue 1986), and because the property in question here is purchased by broadcasters for "resale," the transaction is exempt from tax, pursuant to § 77-2703.

Section 77-2702(11) (Reissue 1986) provides:

> Retail sale or sale at retail shall not include the sale of:
>
> (a) Tangible personal property which will enter into and become an ingredient or component part of tangible personal property manufactured, processed, or fabricated

for ultimate sale at retail.

Section 77-2702(14) provides that a "sale for resale" includes:

> tangible personal property [purchased] for the purpose of reselling it in the normal course of . . . business, either in the form or condition in which it is purchased or as an attachment to or integral part of other tangible personal property.

The parties differ as to what is the product sold by May to advertisers. The Department asserts that the property sold is not the syndicated programming, but an entirely different commodity—a television broadcast for a certain audience. May contends, however, that it simply resells, in a modified form, what is purchased—syndicated programming. It is May's contention that if this court defines syndicated programming as tangible, then the sale for resale statute exempts the second transaction from taxation.

The Department contends that the cases depended upon by May for support in this area should not be followed in the present cases. The facts in one of the cases May depends upon, *Midcontinent Broadcasting v. Rev. Dept.*, 424 N.W.2d 153 (S.D. 1988), are much the same as the facts in the cases before us. The South Dakota Supreme Court first held, as does this court in this decision, that the syndicated programming was tangible personal property purchased by television stations for distributors.

Next, the *Midcontinent Broadcasting* court held that the transaction between the stations and advertisers was a sale to the advertisers of a necessary element of the television station's final product: "broadcast time." *Id.* at 155. The court held that like newspapers' combining information, advertising, and entertainment in a form to be resold to readers, a purchase of syndicated programming for incorporation into a television station's broadcast was a purchase for resale and was thus not taxable under the provisions of South Dakota law.

The South Dakota Supreme Court noted its earlier holding of *Sioux Falls Newspapers v. Sec'y of Rev.*, 423 N.W.2d 806 (S.D. 1988), in which it held syndicated materials were purchased with the intent to reproduce them in the newspaper

and sell to readers. The court held in *Sioux Falls Newspapers* that the syndicated materials were purchased for resale in the ordinary course of business and, pursuant to S.D. Codified Laws Ann. § 10-46-1(2) (1989), were thus nontaxable resale uses under the South Dakota use tax, which is very similar to our own.

The *Midcontinent Broadcasting* case was decided in South Dakota under different taxing statutes. For one thing, certain services are taxable in South Dakota while no services are taxable in Nebraska. Apparently, in South Dakota, advertising is a type of service exempted from the service tax. It is apparent that in considering a taxable event, the concept of a use or sales tax on services presents different questions than the problem before us. We hold that the *Midcontinent Broadcasting* case is not persuasive in the analysis of the problem before this court.

We do agree fully, as set out above, with that portion of the *Midcontinent Broadcasting* case holding that syndicated programming is tangible personal property subject to a use tax. We do not hold that, under Nebraska law, May's product sold to its advertisers is tangible property, nor do we hold that the product sold by May to its advertisers is a resale of the product purchased by May from the syndicated program distributors.

First of all, as stated earlier in this opinion, the tangible product purchased by May from its distributors is a film or videotape, together with the right to use that film or videotape.

The products purchased by May cannot, by the terms of May's agreements with the distributors, be resold to others. What May sells to its advertisers is the right for the advertiser to present its message to a certain audience watching the broadcast film or videotape. May's sale to its advertising customers is a sale of right to present advertising during a film or videotape broadcast. May's purchase from its distributors is the purchase of a film or videotape in tangible form for later broadcast. It cannot be said that what May sells is a resale of what it bought.

A further reason for holding that May's sales of its product to its advertisers do not constitute sale for resale of the product bought by May is that the product purchased by May is tangible as set out above, but the product sold by May is intangible. Section 77-2702(14) provides that a sale for resale consists of

tangible property.

May's national sales manager, when asked what kind of a product May had to sell, testified:

> Our product is basically, let me start first with, our clients are those who want to advertise on our station. And, the reason they want to advertise on our station, is to reach the audience that watches the programs that we carry. So actually, I think our product can be defined as the audience we reach.

What is sold by May to each potential advertiser is a specific audience as determined by demographic studies available to both May and its advertisers.

The time sold by the television station to its advertisers is time in which to display advertising to an audience. The time is available within the broadcast of a film or videotape which May broadcasts over the airwaves to be received without charge by viewers. Primarily, prices for advertising time are based on the size and type of audience watching a program and on when the program airs. An advertiser will choose when to air its commercials based on when it will most economically reach its targeted audience.

After 20 pages of testimony explaining how the demographics of a potential audience influence advertising rates, May's sales manager stated, "It's extremely volatile to pricing and selling television time, because of the nature of the product. It's so intangible."

Because the "product" May sells to advertisers is not the same product it buys from distributors and because the product sold to advertisers is not tangible, we hold that the exemption within §§ 77-2702 and 77-2703 does not apply to May's product, and the transactions between May and its advertisers are not sale for resale of the product May purchased from its distributors.

Appellee in its brief raises the question of the constitutionality of Nebraska's use tax, in that appellee contends the tax violates the First Amendment. The issue of the constitutionality of the use tax was not decided by the district court, since it decided the case on other issues. The Department, as appellant, did not raise the issue. The appellee

did not raise the issue, as one which should have been decided, in a cross-appeal. The question of constitutionality is not before us.

The judgments of the district court are reversed, and the causes are remanded to the district court with directions to enter an order in each case in favor of appellants in conformity with this decision. Appellee's motions in each case for costs, including attorney fees, are denied.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting in part.

The use tax involved in these cases is imposed on "the storage, use, or other consumption in this state of tangible personal property." See Neb. Rev. Stat. § 77-2703(2) (Reissue 1986). The majority opinion of the court holds that the purchase of syndicated programming, without regard to the method of transmission to the purchaser, is subject to the tax.

In *Moeller, McPherrin & Judd v. Smith*, 127 Neb. 424, 255 N.W. 551 (1934), this court described tangible personal property as personal property having a physical existence and referred to a dictionary definition that tangible meant capable of being touched. That case involved a statute in which the Legislature had attempted to tax intangible property as if it were tangible. This court held that the Legislature could not define and designate as tangible that which is, in fact and in truth, intangible. See, also, *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991); *State ex rel. Meyer v. Peters*, 191 Neb. 330, 215 N.W.2d 520 (1974).

The records in these cases show that some syndicated programming is transmitted to the purchaser by means of radio waves. It seems to me that to the extent that syndicated programming is transmitted to the purchaser by that means, the purchaser has not received tangible personal property from the seller which can be taxed as such.

HASTINGS, C.J., joins in this dissent.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, A UTAH CORPORATION, APPELLANT.

490 N.W.2d 461

Filed October 9, 1992. Nos. S-89-1144, S-89-1345, S-89-1347.

1. **Summary Judgment: Appeal and Error.** Although the denial of a motion for summary judgment is not a final order and thus is not appealable, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both of the motions and may determine the controversy which is the subject of those motions.
2. **Summary Judgment.** A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Conveyances: Property: Intent.** The rule in Nebraska is that an otherwise effective conveyance of property transfers the entire interest which the conveyor has, and has the power to convey, unless an intent to transfer a less interest is effectively manifested.
5. **Conveyances: Estates.** An estate in fee simple determinable is created by a special limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that the estate shall automatically expire upon the occurrence of a stated event.
6. **Conveyances: Deeds: Estates.** A deed which conveys an estate in fee simple, but provides that the grantor or his successor has power to terminate the estate upon the happening of some event or condition, creates an estate in fee simple subject to a condition subsequent.
7. **Conveyances: Intent.** It is the intent of the parties, manifested within the language of the entire instrument, which determines the nature of the conveyance.
8. **Deeds.** In a deed it is the habendum clause which defines the extent of the ownership in the thing granted to be held and enjoyed by the grantee.

Appeals from the District Courts for Custer, Dawson, and Buffalo Counties: RONALD D. OLBERDING, JOHN P. MURPHY, AND DEWAYNE WOLF, Judges. Reversed and remanded with directions.

Brenda J. Council for appellant.

Robert M. Spire, Attorney General, and Jeffery T. Schroeder for appellee.

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

GRANT, J.

These appeals involve three separate cases. Case No. S-89-1144 was filed in Custer County, Nebraska; case No. S-89-1345 was filed in Dawson County; and case No. S-89-1347, in Buffalo County. Since the cases involve similar questions, they will be considered together. Both defendant-appellant, Union Pacific Railroad Company (hereinafter Railroad), and plaintiff-appellee, State of Nebraska, Department of Roads (hereinafter State), filed motions for summary judgment in each case. Each motion was submitted on stipulations between the parties, affidavits, and the pleadings. The stipulations included deeds to the State and to the Railroad as to the property in question. There was no factual dispute.

The district court in each county sustained the State's motion and denied the Railroad's motion. The summary judgment granted in the district court in each county quieted title in the State to the lands in question.

The Railroad timely appealed in each case and in this court assigns the same three errors in each case. The Railroad contends that the trial court erred (1) in determining that, as a matter of law, the Railroad and its predecessors in title obtained only an easement in the property it acquired; (2) in determining that upon the Railroad's abandonment of rail service over the acquired property, the State obtained title to the one-half of the property abutting state Highway 40; and (3) in sustaining the State's motion for summary judgment and denying the Railroad's motion for summary judgment. We reverse.

The record in each case before us shows the facts before the district courts and this court as set forth in the stipulations filed with the respective trial courts. The record shows that the Railroad's predecessors in interest acquired property by "Right of Way Deeds" in Buffalo, Custer, and Dawson Counties. The majority of the deeds were executed in 1886, with a few executed in 1887, some in 1890, and one in 1892. The language of the right-of-way deeds will be set out below. The land was used in the Railroad's operation of what came to be known as

the Kearney Branch, which extended generally from Kearney, Nebraska, north and west to Callaway, Nebraska.

In the 1930's and 1960's, the State, by general warranty deeds, acquired property which abuts the railroad line. The State's land is located parallel to and south and west of the Railroad property for the length of the Kearney Branch. The land was purchased by the State for construction of Highway 40.

In the early 1980's, because of decreasing traffic levels on the Kearney Branch line, the Railroad requested and obtained Interstate Commerce Commission approval to abandon rail service over much of that line. The Railroad removed its track from these portions of its line, and has, since that time, been negotiating with interested parties, including the State, to sell the property.

In summary, the State's position is that the Railroad's right-of-way is an easement and, once abandoned, reverts to the owners of the land adjoining the easement. The State purchased its right-of-way from the assigns of the Railroad's original grantors, and out of the same original tracts of land from which the Railroad's right-of-way came. The State asserts that as an owner of land abutting the Railroad's right-of-way, the State owns the land to the centerline of the Railroad's abandoned right-of-way, and therefore, that land must revert to the State. The Railroad asserts that it held possession pursuant to warranty deeds which contained a clause providing for the possibility of reverter to the original grantors in the event that the Railroad ceased to use the land for railway purposes; that under current law, the possible reversion is void as against public policy; and that the land belongs, in fee, to the Railroad, pursuant to the original warranty deeds to its predecessors in title.

As stated above, the Railroad has appealed from the granting of summary judgment to the State and from the denial of its motion for summary judgment. As we stated in *Nu-Dwarf Farms v. Stratbucker Farms*, 238 Neb. 395, 397, 470 N.W.2d 772, 775-76 (1991):

> [A]lthough the denial of a motion for summary judgment is not a final order and thus is not appealable, when

> adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both of the motions and may determine the controversy which is the subject of those motions, making an order specifying the facts which appear without substantial controversy and directing such further proceedings as it deems just. *Licht v. Association Servs., Inc.*, 236 Neb. 616, 463 N.W.2d 566 (1990).

Each of the district courts sustained the State's motion for summary judgment and quieted title to the southwest one-half of the Railroad right-of-way in the State.

> "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."

Wiles v. Metzger, 238 Neb. 943, 948, 473 N.W.2d 113, 118 (1991).

Additionally, since the parties in each of the cases seek to quiet title to the property in question, the cases are in equity. Our review, therefore, is de novo on the record. See *Drew v. Walkup*, 240 Neb. 946, 486 N.W.2d 187 (1992).

The Railroad's first assignment of error asserts that the trial court erred "in determining that, as a matter of law, the estate taken under the deeds by which Defendant acquired the subject property was an easement." The Railroad contends instead that its predecessors in interest acquired a defeasible fee simple.

The disposition of this question is pivotal to the Railroad's claims. If the estates conveyed to the Railroad's predecessors in title were easements, as the State contends, the law of Nebraska is clear that on abandonment of railroad use, title to the land contained within the right-of-way would revert to the adjoining

landowner, which is the State in these cases. See *Lillich v. Lowery*, 211 Neb. 757, 320 N.W.2d 463 (1982).

The rule in Nebraska is that an otherwise effective conveyance of property transfers the entire interest which the conveyor has, and has the power to convey, unless an intent to transfer a less interest is effectively manifested. Neb. Rev. Stat. § 76-104 (Reissue 1990); *Sun Oil Co. v. Emery*, 183 Neb. 793, 164 N.W.2d 644 (1969).

An estate in fee simple determinable is created by a special limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that " 'the estate shall automatically expire upon the occurrence of a stated event.' " *Ohm v. Clear Creek Drainage District*, 153 Neb. 428, 431, 45 N.W.2d 117, 119 (1950). The term "special limitation" is defined as one which causes the created interest to terminate automatically, such as a transfer of Blackacre to " ' "B and his heirs so long as the town of C remains unincorporated." ' " *Id.* See, also, Ronald R. Volkmer, *The Law of Future Interests in Nebraska (Part One)*, 18 Creighton L. Rev. 259 (1985).

In *Ohm*, we also stated, "A deed which conveys an estate in fee simple, but provides [that] the grantor or his successor has power to terminate this estate, upon the happening of some event or condition, creates an estate in fee simple subject to a condition subsequent." 153 Neb. at 432, 45 N.W.2d at 120. The difference between the two types of deeds is that in the case of a fee simple defeasible, the estate will automatically terminate on the occurrence of a stated event, while a fee simple subject to a condition subsequent does not terminate automatically, but only if a person having the power chooses to exercise the power of termination. In *Ohm*, we held that the deed involved "created and conveyed . . . an estate in fee subject to a condition subsequent." 153 Neb. at 432, 45 N.W.2d at 120. Similarly, in the cases before us, since the condition is not expressed in the granting clauses, we determine the deeds herein convey a fee simple estate subject to a condition subsequent.

The Railroad is the successor in interest to all the land in question. Its predecessors received title from the original owners of the land through deeds, each entitled "Right Of Way Deed." The Railroad's predecessors were the Omaha and

Republican Valley Railway Company of Nebraska (88 deeds) and the Kearney and Black Hills Railway Company (7 deeds). Each deed contains virtually the same preprinted or hand-copied language, except for necessarily unique portions, such as the consideration, the legal description, and sometimes, the width of the land conveyed. The Omaha and Republican Valley deeds provided in pertinent part:

> Know all Men by these Presents, That [the Grantors] For the consideration of . . . Dollars in hand paid by the Omaha and Republican Valley Railway Company of Nebraska a corporation organized under the laws of the State of Nebraska, the receipt of which is hereby acknowledged, do hereby GRANT and CONVEY unto the said Railroad Company and to their [sic] successors and assigns forever, the following piece or parcel of land, situate in the County of . . . and State of Nebraska, to-wit: A strip of land through . . . two hundred (200) feet in width, being One Hundred feet on either side of the centre line of the Road of said Company as located or to be located by the Engineer of said Railroad Company.
>
> TO HAVE AND TO HOLD the same unto the said Railroad Company and to their [sic] successors and assigns forever. *PROVIDED*, That in case said Railroad Company do [sic] not construct their [sic] road through said tract, or shall after construction permanently abandon the route through said tract of land, then the same shall revert to and become reinvested in the said grantors, their heirs or assigns.

The Kearney and Black Hills deeds granted and conveyed to the Railroad

> the following tract or parcel of land situate in the County of . . . and State of Nebraska to-wit . . . .
>
> TO HAVE AND TO HOLD unto the said Railway Company, its successors and assigns forever.
>
> PROVIDED, That in case the said Railway Company does not construct its line of railway through the said tract of land, or if after construction it shall permanently abandon the same, then the said tract or parcel of land shall revert to and be reinvested in the grantor . . . herein.

The language of the granting clauses of these deeds makes no reservation of any rights to the grantors. The grants are of "pieces," "parcels," or "tracts" of land, not rights to cross over or use the land described. This language indicates an intent on the part of the conveyor to convey all of the rights associated with the land. See Annot., 6 A.L.R.3d 973 (1966).

We have held that it is the intent of the parties, manifested within the language of the entire instrument, which determines the nature of the conveyance. *Bode v. Flobert Industries, Inc.*, 197 Neb. 488, 249 N.W.2d 750 (1977) (overruled in *Lillich v. Lowery*, 211 Neb. 757, 320 N.W.2d 463 (1982), to the extent that this court determined in *Bode* that a grantor who excepts from conveyance a railroad right-of-way retains fee title to property underlying the easement).

The State responds to the Railroad's contentions by urging that "in Nebraska . . . Right-of-Way Deeds used by railroad companies to acquire railroad right-of-way convey only an easement to the railroad, and not a fee simple estate in the property." Briefs for appellee at 6 and 7. Appellee cites three cases in support of this proposition: *Simacek v. York County Rural P.P. Dist.*, 220 Neb. 484, 370 N.W.2d 709 (1985); *Bode v. Flobert Industries, Inc., supra*; and *George v. Pracheil*, 92 Neb. 81, 137 N.W. 880 (1912), *overruled in part on other grounds, Commercial Fed. Sav. & Loan v. ABA Corp.*, 230 Neb. 317, 431 N.W.2d 613 (1988).

In *Simacek*, the issue before the court was "whether the defendant [power company] acquired a prescriptive easement to maintain the powerline on plaintiffs' property." 220 Neb. at 485, 370 N.W.2d at 710. In that case, the predecessor in title to the plaintiffs, the owners of a quarter section of land, had conveyed to a railroad company, " 'for the purpose of constructing a Railroad thereon, and for all uses and purposes connected with the construction and use of said Railroad, a strip of land One Hundred feet in width' over and across the land owned by the plaintiffs." 220 Neb. at 484, 370 N.W.2d at 710. The deed provided that in the event the railroad right-of-way was abandoned, it would revert to the grantor, his heirs or assigns. In turn, the railroad's successor had granted a written license to the defendant, York County Rural Public

Power District, to construct and use an electric power transmission line along the right-of-way. A transmission line was constructed in 1967.

In 1976, the next successor railroad in title abandoned the right-of-way and removed the trackage. The power district continued to use the transmission lines.

In 1983, the Simaceks, the owners of the land within which the railroad right-of-way existed, commenced the action against the power district. The railroad was not a party. Our opinion states that the action was for a declaratory judgment, to recover possession of the property, and for an injunction to compel the district to remove its transmission line from the property.

In *Simacek*, we assumed that the railroad had an easement for the right-of-way in question in that case. As stated above, the railroad was not a party to the Simacek action, and both Simaceks and the district assumed that the interest of the railroad was an easement over the property. In view of the language in the deed to the railroad, such an assumption fits squarely within the meaning of § 76-104 and the holding of *Sun Oil Co. v. Emery*, 183 Neb. 793, 164 N.W.2d 644 (1969). The intent of the original grantors in the *Simacek* case was clearly to convey land for the limited purpose of constructing and operating a railroad. Such a limited conveyance results in an easement, and the parties in *Simacek* and this court properly assumed an easement had been created. We then concluded that the power district's presence on the right-of-way was by license from the railroad and that the district's permitted use did not constitute adverse possession sufficient to satisfy this state's requirements for prescriptive easements. We concluded: "[W]e determine only that the defendant did not acquire an easement across the plaintiffs' land by prescription." 220 Neb. at 489, 370 N.W.2d at 712. *Simacek* does not support appellee's contention in the present cases.

Bode v. Flobert Industries, Inc., supra, also relied on by the State, required this court to determine whether two deeds conveyed an easement or a fee simple defeasible. The language of the deeds stated in the granting clause that the grantors,

"being desirous of the constructon [sic] of said railroad,

> and to aid the same by the grant herein made . . . *do give, grant, bargain, sell, convey and confirm . . . for the purpose of constructing a railroad thereon*, and *for all uses and purposes connected with the construction and use of said railroad, a strip of land . . . .*"

(Emphasis in original.) *Bode*, 197 Neb. at 490, 249 N.W.2d at 752.

The habendum of the deeds stated the conveyances granted the railroad the land

> "*[t]o have, hold, and enjoy . . . and the right to use the said land and material of whatsoever kind within the limits of the said one hundred feet above conveyed . . .* unto the said party of the second part . . . *and its successors and assigns, forever, for any and all uses and purposes connected with the construction, preservation, occupation and enjoyment of said railroad.*"

(Emphasis in original.) *Id.* at 490-91, 249 N.W.2d at 752.

Each of the deeds also contained a reversion clause similar to that found in the deeds in the present case. The language of the *Bode* deeds demonstrates an intent on the part of the grantor to limit the grant of land conveyed. The granting clauses of those instruments reveal that the grantors intended the land to be used only by the railroad and only for railroad purposes. Both the granting clause and the habendum of each instrument clearly set out that the conveyance was of a "right to use," and each deed later required reversion of the conveyance for failure to comply with the conditions. This plainly grants much less than a fee simple, and our holding that the deed conveyed only an easement was well founded. See, § 76-104; *Sun Oil Co. v. Emery, supra.*

In the granting clauses, the deeds in the cases before us convey the entire estate, with no exceptions, reservations, or specifications for use of the land. No conditions for use are placed upon the property. In each habendum, the grantors convey the entire estate. Black's Law Dictionary 710 (6th ed. 1990), states that in a deed it is the habendum clause "which defines the extent of the ownership in the thing granted to be held and enjoyed by the grantee." Also, this court has stated that ordinarily in the event of repugnancy and inconsistency between grant, habendum, and description clauses of a deed,

the granting clause will prevail. *City of Gering v. Jones*, 175 Neb. 626, 122 N.W.2d 503 (1963).

Immediately following the habendum, the grantors provide that the land will revert to them if the railroad fails to construct and maintain the road. The language of these deeds comports exactly with the requirements of the Restatement of Property § 45 at 133 (1936), which provides:

> An estate in fee simple subject to a condition subsequent is created by any limitation which, in an otherwise effective conveyance of land,
>
> (a) creates an estate in fee simple; and
>
> (b) provides that upon the occurrence of a stated event the conveyor or his [or her] successor in interest shall have the power to terminate the estate so created.

See, also, *Ohm v. Clear Creek Drainage District*, 153 Neb. 428, 45 N.W.2d 117 (1950). The *Bode* case does not support the State's position in the cases before us.

Finally, the State urges that the case *George v. Pracheil*, 92 Neb. 81, 137 N.W. 880 (1912), controls. In *George*, appellant Joseph Vrbsky, a purchaser of one-half of a quarter section of land at a referee's sale, questioned whether the land he purchased was an 80-acre tract or was a tract of 80 acres less 6.1 acres over which a railroad had constructed its tracks. It was the purchaser's contention that the land used by the railroad was held in fee simple subject to a condition subsequent. Thus, the purchaser contended that he should not have to pay for the 6.1 acres. The trial court ruled that the right-of-way was an easement and that Vrbsky had purchased 80 acres of land, with 6.1 acres of that land subject to the railroad easement. The holding of the trial court was affirmed on appeal to this court.

The State, in the present case, asserts that if this court had intended in the *George* case to hold that the railroad occupied the ground under a fee simple determinable, the purchaser would not have had to pay for the railroad right-of-way. The State notes that the *George* court specifically held that the ownership interest of the railroad constituted only an easement. The deed to the railroad contained language almost identical to that found in the deeds in the present case.

The trial court in *George* found that the railroad had only an

easement, to be used, on condition of reverter, for construction and operation of a railroad only. We stated that "[t]he court will look at the entire deed for the purpose of ascertaining what the grantor and grantee intended." 92 Neb. at 84, 137 N.W. at 882. We noted the use of the term "forever" was "not inconsistent" with an intent on the grantor's part to permanently dispose of his interest, when the term is found in conjunction with a provision of reverter. *Id.* The opinion then concludes that because of the reverter language, the conveyance must have been solely to enable the road to occupy the strip for right-of-way alone, "and that can give no more than an easement." *Id.*

Counsel in *George* offered three cases for authority supporting the purchaser's contention that " 'the said condition in said deed was in law a condition subsequent . . . .' " 92 Neb. at 86, 137 N.W. at 882. The *George* court then stated that an examination of these authorities seemed to justify the conclusion reached by counsel. The *George* court examined and discussed each case at length. Each case held that similar language to that found in the *George* deed constituted a condition subsequent.

This court concluded, however, that the deed in question created not a fee simple subject to a condition subsequent, but, rather, an easement. We stated that the conclusion that the *George* deed created a condition subsequent, "fully expressed, would seem to be that whatever title, right or interest in the land has been conveyed to the railroad company reverts to the original grantor, his heirs or assigns, if there is a forfeiture . . . ." 92 Neb. at 86, 137 N.W. at 882.

The *George* court concluded that such a sequence of events, whether as the termination of an easement, or reversion of a fee simple conveyance, would operate to reunite the entire 80-acre tract upon which the purchaser bid. Based on this, more than on the actual language of the conveyance, it would seem, the court held that the conveyance was an easement, that the segment of land was a complete 80-acre tract, and that the purchaser was liable for his $86-per-acre bid as to the entire 80 acres. A determination of the interest held by the railroad was important only as it affected the purchaser. The railroad was

not a party to the *George* case, and the decision therefore could not have competently determined the rights of the railroad.

To the extent, then, that *George v. Pracheil, supra*, interprets the language of the deed in that case to reflect an intent to convey an easement rather than a fee simple subject to a condition subsequent, it is overruled. The trial courts' determinations in the cases before us that the Railroad held only an easement in the property are incorrect.

The Railroad's next assignment of error contends "[t]he court erred in determining that, upon Defendant's abandonment of rail service over the subject property, Plaintiff obtained title to the one-half of the subject property abutting State Highway 40."

All three trial courts, in one form or another, determined that because the Railroad had an easement and had abandoned that easement, the land reverted to the owners of the abutting land. As stated above, had the Railroad obtained only an easement, the trial courts' holdings would have been correct. Since we have, however, determined that the Railroad obtained a fee title, we must then determine who has the title to the Railroad land, under the terms of the conveyances to the Railroad, after the Railroad abandoned its right-of-way use. As set out above, the deeds stated in that event, the land "shall revert to and become reinvested in the said grantors, their heirs or assigns." A literal reading of this clause would mean that title to the land in question would revert to the State in any event.

Neb. Rev. Stat. § 76-107 (Reissue 1990), however, provides in relevant part:

> (1) The conveyance of an existing future interest, whether legal or equitable, is not ineffective on the sole ground that the interest so conveyed is future or contingent, except that possibilities of reverter or rights of reentry for breach of condition subsequent shall not be alienable or devisable.
>
> (2) Neither possibilities of reverter nor rights of reentry for breach of condition subsequent relating to any property, whether created on, before, or after July 9, 1988, when the condition has not been broken, shall be valid for a longer period than thirty years from the date of

> the creation of the condition or possibility of reverter or right of reentry. If such possibility of reverter or right of reentry is created to endure for a longer period than thirty years, it shall be valid for thirty years.

The Omaha and Republican Valley Railway Company and the Kearney and Black Hills Railway Company were the predecessors to the appellant railway company. The plain language of § 76-107 shows that the conditions subsequent expired either upon the conveyance of the land to the Railroad by its predecessors in title or, at the latest, after 30 years from the date of the conveyances to the Railroad. With this operation of law, the railroad obtained fee simple absolute. The trial courts' judgments that the State acquired title to the property because of the appellant's abandonment of the right-of-way were incorrect.

The facts of these cases were not disputed and the law, as applied to those facts, has herein been determined. We therefore reverse the judgment of each of the trial courts and remand the causes to the respective courts for orders to be entered consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. AUBREY W. SANDERS, APPELLANT.

490 N.W.2d 211

Filed October 9, 1992. No. S-91-338.

1. **Postconviction: Constitutional Law.** An evidentiary hearing on a postconviction motion is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.
2. **Aiding and Abetting: Words and Phrases.** Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary; nor is it necessary that any physical part in the commission of the crime is taken, or that there was an express agreement therefor. Mere encouragement or assistance is sufficient.

3. **Pleas: Sentences: Restitution.** Failure to inform a defendant of the possibility of restitution as a sentence renders the entry of a plea of guilty involuntary and unintelligent in that regard and consequently prevents the imposition of an order of restitution.
4. **Postconviction: Effectiveness of Counsel: Proof.** The appellant, in order to maintain a successful ineffective assistance of counsel argument, must make a showing of how he was prejudiced in the defense of his case as a result of his attorney's actions or inactions and that, but for the ineffective assistance of counsel, there is a reasonable probability that the result would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome. When one is unable to make such a showing, denial of the requested relief is required.
5. **Postconviction.** Unless the motion for postconviction relief and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto.
6. **Postconviction: Right to Counsel: Appeal and Error.** In the absence of a showing of an abuse of discretion, the failure to appoint an attorney in postconviction proceedings is not error.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Aubrey W. Sanders, pro se.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

WHITE, J.

Appellant, Aubrey W. Sanders, and a codefendant were arrested in November 1987 in connection with three burglaries involving three tire stores. Since no evidence linked the recovered tires and the third burglarized tire store, appellant was charged with only two counts of burglary, in violation of Neb. Rev. Stat. § 28-507(1) (Reissue 1989). Appellant pled guilty and was sentenced to 2 years' probation, 180 days in the Douglas County jail, court costs, and restitution in the amount of $333.21, or one-half the total damages arising out of the burglaries.

While on probation, appellant was charged with shoplifting in the State of Iowa on January 24, 1990, thereby violating the

terms of his probation. Appellant pled guilty to violation of probation on February 8 and was sentenced to 3 to 10 years' imprisonment on each of the burglary counts, to be served consecutively. Credit was granted for 212 days served. Appellant's attorney delayed his filing of a direct appeal and instead filed a motion for sentence reduction, which was not ruled upon until more than 30 days after the sentencing date, thereby barring appellant's direct appeal. Sanders appeals from the district court's order denying his motions for postconviction relief, appointment of counsel, and an evidentiary hearing.

ASSIGNMENTS OF ERROR

Appellant alleges, in summary, that the district court erred by denying his constitutional right to due process under the 14th Amendment by nature of the following: accepting a guilty plea which had not been entered into knowingly or intelligently, imposing sentences for burglary and probation which did not comply with the statutory provisions, denying appellant his right of appeal, denying appellant his right to inspect his presentence investigation report and refute erroneous information contained therein, and denying appellant the effective assistance of counsel. Appellant further generally alleges that the court erred by denying an evidentiary hearing on the matter, not appointing counsel to represent appellant in the postconviction proceedings, and failing to provide appellant the opportunity to amend the postconviction motion prior to dismissal.

DISCUSSION

An evidentiary hearing on a postconviction motion is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. See, *State v. Schneckloth*, 235 Neb. 853, 458 N.W.2d 185 (1990); *State v. Start*, 229 Neb. 575, 427 N.W.2d 800 (1988); *State v. Jackson*, 226 Neb. 857, 415 N.W.2d 465 (1987); *State v. Malek*, 219 Neb. 680, 365 N.W.2d 475 (1985). In an appeal involving a proceeding for postconviction relief, the lower court's findings will be upheld unless clearly erroneous. *State v. Rubek*, 225 Neb. 477, 406 N.W.2d 130 (1987).

DUE PROCESS VIOLATIONS: INEFFECTIVE ASSISTANCE OF COUNSEL

Within appellant's ineffective assistance of counsel argument, he complains that he has been deprived of a fair sentence, his right of direct appeal, his right to inspect the presentence investigation report, and a voluntary and intelligent guilty plea. Appellant alleged that his attorney did review the presentence investigation, but did not afford appellant the opportunity to personally review the report and rebut allegations contained therein.

Appellant further alleges that his court-appointed counsel failed to inform him that forcible breaking and entering was a necessary element for the charge of burglary and that appellant's failure to do so constituted a viable defense to the charge; hence, he contends that his guilty plea was not knowingly or intelligently made.

The evidence was uncontested that appellant had been approached by the codefendant 2 weeks prior to the burglaries and was asked for his assistance in the endeavor. The codefendant offered to award appellant $1,000 for his participation in the burglaries, to be paid out of the proceeds from the sale of the stolen merchandise. Two weeks later, appellant agreed to participate, and he did so on the night of the burglaries. He consistently testified that he had merely driven the vehicle, had not entered or carried the stolen goods, and had not so much as trespassed, as he claimed he had parked the getaway truck on the public streets.

Appellant's contention that, due to these facts, he could not be charged with or convicted of burglary, clearly is contrary to Nebraska law. Neb. Rev. Stat. § 28-206 (Reissue 1989) specifically states that any person "who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender." Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary; nor is it necessary that any physical part in the commission of the crime is taken, or that there was an express agreement therefor. Mere encouragement or assistance is sufficient. *State v. Bennett*, 219 Neb. 601, 365 N.W.2d 423

(1985); *State v. True*, 210 Neb. 701, 316 N.W.2d 623 (1982). The assignment is without merit.

As to appellant's complaint that he was not afforded an opportunity to inspect the presentence investigation report and rebut the manner in which his restitution was calculated, the contention is without merit. The presentence investigation does contain certain information about the existence of and losses resulting from the third tire store's burglary; however, the fact remains that appellant was not charged with the third burglary, and no evidence suggests that this evidence was considered by the court in its acceptance of the guilty plea or at the sentencing phase.

Appellant claims that his sentence of restitution was excessive, not only because he was not apprised of the possibility that restitution could be ordered, but because a broken window in the burglary of the third tire store was factored into the restitution calculation. Appellant asserts that had he known restitution could be imposed, he would not have pled guilty to the charges. The failure to inform a defendant of the possibility of restitution as a sentence renders the entry of a plea of guilty involuntary and unintelligent in that regard and consequently prevents the imposition of an order of restitution. See *State v. War Bonnett*, 229 Neb. 681, 428 N.W.2d 508 (1988). The fact that Sanders claims he was not apprised of the possibility of restitution in his case does not render his guilty plea involuntary. Since the restitution was a condition of probation, rather than a criminal penalty, his contention is without merit.

We next address appellant's claim that the broken window in the third burglary was factored into the calculation of restitution and that his attorney failed to object to the alleged error. Appellant fails to allege sufficient facts to support his allegation. An inspection of the record reveals only that three broken windows were listed as out-of-pocket losses of the victim business owner, and the record does not reveal whether one of the three broken windows was actually that of the third tire store, for which burglary appellant was not charged. His contention is without merit.

Finally, appellant claims that his counsel's erroneous belief

that he could file appellant's notice of appeal after the motion for sentence reduction had been ruled upon prejudiced appellant and deprived him of availing himself of any relief on direct appeal.

When one seeks postconviction relief based upon the allegation of the violation of the constitutional right to the effective assistance of counsel, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law area. Appellant must make a showing of how he was prejudiced in the defense of his case as a result of his attorney's actions or inactions and that, but for the ineffective assistance of counsel, there is a reasonable probability that the result would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome. When one is unable to make such a showing, denial of the requested relief is required. *State v. Rubek*, 225 Neb. 477, 406 N.W.2d 130 (1987). See, also, *State v. Holloman*, 209 Neb. 828, 311 N.W.2d 914 (1981); *State v. Holloman*, 197 Neb. 139, 248 N.W.2d 15 (1976).

While a competent criminal attorney is expected to know the procedure for direct appeal and that filing a motion for a reduction in sentence does not toll the 30-day window for direct appeal, appellant fails to show how he has been prejudiced by his attorney's failure to file in a timely manner. He has raised no colorable ground for appeal of any merit and has raised no valid argument upon which relief can be afforded to him. Any appeal Sanders would have timely filed, at least on the merits of his argument here, would have been frivolous. The assignment is without merit.

DENIAL OF EVIDENTIARY HEARING

Neb. Rev. Stat. § 29-3001 (Reissue 1989) sets forth, inter alia, "Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." Accord, *State v. Luna*, 230 Neb. 966, 434 N.W.2d 526 (1989); *State v. Sowell*, 227 Neb. 865, 420

N.W.2d 704 (1988); *State v. Schaeffer*, 218 Neb. 786, 359 N.W.2d 106 (1984); *State v. Meredith*, 212 Neb. 109, 321 N.W.2d 456 (1982). We glean from the record no merit to appellant's petition for postconviction relief, and thus appellant was not entitled to a hearing.

FAILURE TO APPOINT COUNSEL FOR POSTCONVICTION PROCEEDINGS

It is within the discretion of the district court to determine whether legal counsel shall be appointed to represent a defendant upon appeal to this court, and in the absence of a showing of an abuse of discretion, the failure to appoint an attorney in postconviction proceedings is not error. *State v. Paulson*, 211 Neb. 711, 320 N.W.2d 115 (1982); *State v. Hizel*, 181 Neb. 680, 150 N.W.2d 217 (1967). The assignment is without merit.

FAILURE TO PERMIT POSTCONVICTION AMENDMENT

The record does not reveal that Sanders had requested an opportunity to amend his motion for postconviction relief; nevertheless, had he requested such amendment, we find that no prejudice resulted and that such denial was harmless error. The assignment is without merit.

For the foregoing reasons, we affirm the matter in its entirety.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ANTHONY J. RUIZ, APPELLANT.
489 N.W.2d 865

Filed October 9, 1992. No. S-91-744.

1. **Convictions: Circumstantial Evidence.** A conviction may rest on circumstantial evidence if the evidence is substantial.
2. _____: _____. In determining the sufficiency of circumstantial evidence to support a conviction, any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused.

3. **Convictions.** A conviction cannot be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded with directions to dismiss.

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

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

BOSLAUGH, J.

Following a trial to a jury, the defendant, Anthony J. Ruiz, was convicted of burglary and sentenced to 3 years' probation, including 180 days in jail. In his appeal to this court, the defendant contends that the evidence was insufficient to support the conviction.

The record shows that on the evening of January 1, 1991, Kathy Williams and Jim Jensen were watching a football game in their apartment at 7313 Decatur Avenue in Omaha, Nebraska, with their friends Wes Schweigart and Christine Miller. Schweigart and Miller left at about 10:30 p.m.

Schweigart testified that as they left the apartment, he heard a hitting sound and looked over at the True Value hardware store. He saw a person kick in the south door and then enter the store. Schweigart described the person as wearing a dark jacket with something covering his head. Miller described the person as a male wearing a dark coat and a hat.

Schweigart and Miller returned to the apartment and told Williams to call 911 to report a burglary. Miller, Jensen, and Schweigart then went to the kitchen window of the apartment, where Jensen could see an older, big, dark-colored car parked in front of the store. The burglar got in the car and drove onto 73d Street, but did not turn on its headlights. After that, the three observers lost sight of the car.

About 5 to 7 minutes after Williams called 911, she left the building with the other three people and observed a man getting into a car in the apartment parking lot. The car was parked in an east-west direction behind cars that were parked in stalls in a north-south direction. The man then drove the car very slowly with its lights off and parked it behind the True Value store.

Williams described the car as an older blue car with a black top. Miller testified that the outline of the car was the same as the outline of the car she had seen leaving the True Value parking lot after the burglary.

Schweigart also observed the car drive by very slowly and park in the True Value parking lot. According to Schweigart, the headlights were on when the car drove by and parked in the lot.

Jensen testified that he too saw a car pull up close to them, drive slowly to the True Value store, and park. He testified that the car was similar to the car that he had seen parked in front of the store at the time of the burglary; however, Jensen told the police that the car involved in the burglary had two doors, while the defendant's car had four doors.

After Officer Robert Steele heard the report on the police radio concerning the burglary, he drove to the back of the True Value store in the event someone might be flushed out of the store. He found an Oldsmobile Cutlass automobile parked behind the store with the defendant sitting in it.

The defendant was then handcuffed, and he and his car were searched; however, nothing was found in the search. The defendant told the officer that he was coming from a friend's house where he had been watching football. He had developed car trouble, so he parked the car at the True Value store.

Officer Steele noticed that in the light, the defendant's jacket appeared to sparkle. He did not know whether the sparkling was caused by glass fragments.

The owner of the True Value store, who was called to the store, testified that two guns valued at approximately $800 each were missing from his store.

The glass in both the outside doors and the inside doors had been smashed. The broken glass was swept up and placed into a Dumpster in front of the store. The glass from the store's outer

doors was safety glass.

The defendant, when arrested, was wearing a leather jacket and a cap. Three of four glass fragments that were brushed out of his jacket and analyzed were found to be similar to the glass that had been in the doors at the store. However, the analyst was unable to say whether the glass fragments that were analyzed came from the glass at the True Value store.

The defendant testified that prior to going to the home of his friend Michael Stephenson at about 9 p.m. to watch football, he had picked up a battery charger. His car's battery was weak, and he intended to charge the battery that night. He left Stephenson's apartment at around 10:40 p.m.

At Stephenson's apartment, the defendant parked his car, an older model Oldsmobile Cutlass, behind Stephenson's car and Stephenson's grandmother's car. When he was ready to leave, the defendant got in his car and let it idle a few minutes before turning the lights on. He left the apartment parking lot very slowly and passed a group of people. He noticed them because it was very cold that evening and some of them were not wearing coats.

Because the car was hesitating, the defendant proceeded slowly to the True Value parking lot and stopped the car. He chose that particular location because there was a slope to the parking lot, and he wanted the car to face downhill to avoid stalling it. Also, there was more light when the car was facing south, and he anticipated that he would have to work on the car to get it in condition to take him home.

The defendant and his fiancee testified that he worked on his car almost every day and that in the winter he wore his jacket all the time. To fix the car, he would often lie down in the parking lot, in which was found various types of debris, including glass.

Pallas Hoffmann and Stephenson testified that Stephenson lived in apartment No. 4 of the Contemporary Apartments complex at 7319 Decatur Street, which was across from Williams and Jensen's apartment. Both Stephenson and Hoffmann testified that on January 1, 1991, the defendant was at Stephenson's apartment and watched a football game on television. Hoffmann recalled that the defendant left at approximately 10:40 p.m. Both Hoffmann and Stephenson

testified that the defendant came in and left the apartment only once that evening.

Stephenson admitted that later in the evening of January 1, police officers had come and questioned him regarding the defendant's whereabouts and Stephenson's lying to them when he said that the defendant had not been there that evening. Stephenson said that he lied to the police because he was concerned that the defendant was in some trouble that Stephenson knew nothing about and with which he did not want to get involved.

After Stephenson found out the details of the allegations against the defendant, both he and his grandmother, Opal Scott, went to the police station in the early hours of the morning and gave a written statement to the police saying that the defendant had been at Stephenson's apartment at the time he testified he was.

Scott testified that she lived across the hallway in the same building as her grandson Michael Stephenson and that she would park her car in space No. 3 and he would park his car in space No. 4 in the apartment parking lot. It was customary for the defendant to park his car behind the cars in those spaces when he was visiting Stephenson's apartment.

Scott testified that she first saw the defendant's car around 9 o'clock in the evening. She noticed that its lights were not on and that there was no exhaust coming from the tailpipe. She heard the defendant say goodbye to her grandson and saw the defendant in the parking lot when he left at about 10:40 p.m. The defendant got into his car and drove very slowly toward the True Value parking lot.

"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." Neb. Rev. Stat. § 28-507(1) (Reissue 1989).

The evidence which the State introduced was clearly sufficient to establish that a burglary occurred. However, the evidence was not sufficient to identify the defendant as the burglar.

The evidence the State presented was entirely circumstantial.

A conviction may rest on circumstantial evidence if the evidence is substantial. *State v. Clark*, 236 Neb. 475, 461 N.W.2d 576 (1990). "[I]n determining the sufficiency of circumstantial evidence to support a conviction, ' "[a]ny fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused." ' " *State v. Dawson*, 240 Neb. 89, 96, 480 N.W.2d 700, 704 (1992).

So far as the record shows, the stolen guns were never recovered. The defendant and his car were searched, and no weapons or burglary tools were found. The one fingerprint obtained from the True Value store did not match the defendant's fingerprints.

In this case, no witness could identify the defendant as the person they saw breaking into the True Value store. No witness was able to describe the model of the perpetrator's car, and one witness recalled telling the police that the car parked in front of the True Value store during the burglary had only two doors. The defendant's automobile had four doors.

Several of the facts which support the defendant's theory of the case were provided by the State's witnesses and are uncontroverted.

The State's witnesses testified that the defendant's car was driven very slowly; however, none of the State's witnesses testified that the burglar drove his car slowly when leaving the True Value store.

The State's witness who observed the defendant's car parked behind the two other cars acknowledged that the two cars were parked in parking spaces which belonged to the apartments in which the defendant's friends lived.

The defendant was seen driving out of the apartment parking lot after the burglary, but even though they had an unimpeded view, none of the witnesses testified that they saw the defendant drive into the parking lot of the apartment building after the burglary.

A conviction cannot be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained. *State v. Jansen*, 241 Neb. 201, 486 N.W.2d 501 (1992). See, also,

State v. Dawson, supra.

The evidence of the State was inadequate to establish that the defendant was the person who entered the True Value store and committed the burglary. At best, the State's evidence placed the defendant in the vicinity of the True Value store at about the time the burglary occurred. The State's evidence was insufficient to overcome the presumption of innocence accorded the defendant, and it does not support a finding of guilt beyond a reasonable doubt. See *State v. Dawson, supra.*

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

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. KENNETH LEROY WELCH, APPELLANT.

490 N.W.2d 216

Filed October 16, 1992. Nos. S-91-297, S-91-298, S-91-306.

1. **Sexual Assault: Mental Competency: Witnesses.** The purpose of a psychiatric examination in a case involving a sex offense is to detect any mental or moral delusions or tendencies causing distortion of the imagination which would affect the probable credibility of the complaining witness.
2. **Trial: Mental Competency: Appeal and Error.** The determination of whether to grant a request for a psychiatric evaluation of the victim is a matter of discretion for the trial court and will not be overturned absent an abuse of discretion.
3. **Trial: Mental Competency.** The trial court may order a psychiatric examination of the victim when the record establishes compelling reasons.
4. **Trial: Rules of Evidence.** Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.
5. **Rules of Evidence: Words and Phrases.** Unfair prejudice means an undue tendency to suggest a decision on an improper basis.
6. **Trial: Rules of Evidence: Proof.** Evidence of demeanor or mannerisms exhibited by a person under interrogation is not admissible as proof that the person was untruthful in the absence of foundation evidence sufficient to establish that the methods and techniques used during the interrogation are reliable and may be used to determine truthfulness.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Reversed and remanded for a new trial.

Francis L. Goodwin, of Baron, Sar, Goodwin, Gill & Lohr, for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

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

BOSLAUGH, J.

The defendant, Kenneth Leroy Welch, was charged in separate informations with first degree sexual assault (case No. 91-297), kidnapping (case No. 91-298), making terroristic threats (case No. 91-306), and use of a weapon to commit a felony. The jury returned verdicts of guilty on all charges except the weapon charge. The defendant was sentenced to concurrent terms of 10 to 20 years' imprisonment on the assault and kidnapping charges, and 15 to 36 months' imprisonment on the terroristic threats charge.

The defendant has appealed and contends that the trial court erred in refusing to order a psychiatric examination of the victim, in receiving evidence of a previous conviction of the defendant for a similar offense, in permitting a police officer to testify concerning mannerisms exhibited by the defendant during interrogation, in failing to sustain the defendant's motion for a mistrial, in refusing to permit the defendant to introduce evidence of prior alleged sexual assaults of the victim, and in instructing the jury that it could convict the defendant on the basis of the victim's inability to resist or appraise the nature of her conduct.

The victim was a 26-year-old single woman who lived in Sioux City, Iowa, with her three children and a boyfriend. The assault took place in Nebraska on January 19, 1990. At the beginning of the trial, the defendant stipulated that he had sexual intercourse with the victim on January 19.

There was evidence from which the jury could find that the victim, after donating plasma on the morning of January 19, started drinking at about noon. She had consumed about 18 to 20 cans of beer before encountering the defendant at approximately 10:30 p.m. outside the Blue Mill tavern in Sioux

City.

The victim felt sick, so she went outside the tavern and was vomiting behind a phone booth in front of the tavern when the defendant came up behind her and asked whether she was "okay." The defendant then offered her a ride home, which she accepted. They stopped at a convenience store along the way, where the defendant bought the victim a pack of cigarettes and a six-pack of Coca-Cola.

They then proceeded toward the victim's home, but did not stop there. The victim asked the defendant to stop, but he refused and suggested that they drive around for a while so she could clear her head. The victim suggested that they stop at a bar they had passed, saying that her sister might be there, but the defendant refused and drove onto the interstate and proceeded to the defendant's home near Hubbard, Nebraska.

After they had passed the last exit to South Sioux City, Nebraska, the defendant ordered the victim to disrobe. When she refused, he hit her in the mouth. According to the victim, the defendant then pulled a gun from beside the driver's door and threatened to kill her if she did not comply with his requests. The victim then removed her clothes. The outside temperature at that time was about 18 degrees.

After turning onto a dirt road, the defendant unzipped his pants and forced the victim to perform oral sex. When they arrived at the defendant's residence, he grabbed the victim by her hair and pulled her out of the truck while she was still naked. After they had entered the house, the defendant again forced the victim to perform oral sex and have sexual intercourse with him in various positions. The defendant also forced the victim to perform other perversions and attempted to penetrate the victim anally.

Later, the defendant returned to Sioux City, where he let the victim out near a bar. As the defendant was pushing the victim out the passenger door of the truck, she noticed an envelope in its seat with his name and address on it.

After the victim told her boyfriend and her sister that she had been sexually assaulted, her boyfriend insisted that she go to the hospital and be examined. At the hospital she was examined by Dr. Joseph Van Richards.

Dr. Van Richards testified that when he examined the victim, he found that she had a cut inside her lip which was consistent with being hit in the mouth. Dr. Van Richards observed no other trauma on the victim's body and found no signs of laceration or bruising in the vaginal area.

Dr. Van Richards testified that a blood test, which was taken approximately 9 hours after the victim had had her last drink, showed that the victim's blood alcohol content was .116 of 1 gram by weight of alcohol per 100 milliliters of blood. Dr. Van Richards estimated that at the time of the alleged offense, the victim's blood alcohol level would have been approximately .236.

With respect to the defendant's request that the trial court order a psychiatric examination of the victim, "The purpose of a psychiatric examination in a case involving a sex offense is to detect any mental or moral delusions or tendencies causing distortion of the imagination which would affect the probable credibility of the complaining witness." *State v. Nelson*, 235 Neb. 15, 21, 453 N.W.2d 454, 458 (1990). The determination of whether to grant a request for a psychiatric evaluation of the victim is a matter of discretion for the trial court and will not be overturned absent an abuse of discretion. *Id.* The trial court may order a psychiatric examination of the victim when the record establishes compelling reasons, " 'but not for a mere fishing expedition.' " *Id.* at 21, 453 N.W.2d at 458, quoting *State v. Buckley*, 325 N.W.2d 169 (N.D. 1982).

In *State v. Maestas*, 190 Neb. 312, 207 N.W.2d 699 (1973), this court affirmed the trial court's denial of the defendant's request to have the victim examined by a psychiatrist when the testimony of the victim did not bear any obvious indications of unreliability or mental aberration. In this case, the defendant failed to demonstrate a compelling reason to have the victim examined by a psychiatrist, and the victim's testimony does not bear any obvious indications of unreliability or mental aberration. The trial court did not abuse its discretion in refusing the defendant's request.

The defendant contends that the trial court erred in allowing a witness to testify, over the defendant's objections, as to the defendant's sexual assault of her which occurred 21 years earlier

in California.

That witness testified that when she was 18 years old and was walking to her grandmother's house just after dark, a vehicle approached her. The defendant, who was the driver, opened the passenger door from the inside, pointed a gun at her, and told her to get inside. After she got in, the defendant used his left hand to place the gun between the driver's door and the seat. He then drove to a park and began to undress her. When she resisted, the defendant hit her and told her that he was going to sexually assault her. The defendant then forced her to perform oral sex on him. Later, she was able to escape, and reported the matter to the police. She testified that the defendant was prosecuted for this crime and served a short sentence.

The trial court instructed the jury that the testimony of that witness "will be received only for the limited purpose of helping you to decide . . . motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. You may not in any fashion use this evidence in considering whether the defendant in this case acted in conformity therewith."

The defendant argues that the trial court erred in admitting the California assault victim's testimony because that evidence was inadmissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1989), which states:

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

The State contends that the California victim's testimony was offered for the purpose of proving motive and modus operandi and was therefore admissible under rule 404(2). The State contends also that the testimony tended to show that the defendant's motive for assaulting the victim in the present case was to reenact his previous crime as part of his therapy to get over what he had done in California 21 years ago. In support of this theory, the State refers to testimony of the defendant's second wife, Jody Voils, who stated that the defendant felt it

was necessary to reenact sexual acts from his past in order to get over the trauma associated with them.

The principal issue in this case is whether the defendant had consensual intercourse with the victim. There was no issue as to the identity of the victim.

Even though the California victim's testimony may have had some relevance, under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989), relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In the context of rule 403, " ' "unfair prejudice" means an undue tendency to suggest a decision on an improper basis.' " *State v. Reynolds*, 240 Neb. 623, 626, 483 N.W.2d 155, 158 (1992). Given the facts and issues involved in this case, including the remoteness of the assault in California, we believe that the evidence of the defendant's previous conviction for a similar offense had an undue tendency to influence the jury's verdict on an improper basis. This error requires that the judgment be reversed and the cause remanded for a new trial.

The defendant's motion for a mistrial was made during cross-examination of the defendant about his previous conviction for the California assault. The defendant was asked, "Isn't it a fact that you were diagnosed as having sexually deviant behaviors?" Since we have determined that the evidence concerning the California assault should not have been admitted, it is unnecessary to determine this assignment of error.

At the trial, Gerald Krieger, an investigator for the Nebraska State Patrol, was allowed to testify over objection that he was trained in interrogation techniques which allowed him to detect deception through verbal and nonverbal communications during an interview. Krieger also testified that he had experience in the administration of polygraph examinations. The defendant's objection to this line of questioning regarding Krieger's knowledge of various interrogation techniques was overruled.

Krieger went on to testify that when he interviewed the

defendant, he was within 3 feet of him, similar to one of the interrogation techniques Krieger had described. He stated that during the interview, the defendant showed changes in his demeanor when discussing a gun, physical abuse on the night in question, and the issue of consent.

Krieger also testified that he looked for lack of eye contact and for lint picking, crossed-arm posture, evasion, and jumping to a different topic. Krieger testified that his experience, as well as what he had learned through his interrogation training, had shown that those behaviors tended to occur when a person was giving deceptive answers.

Krieger went on to testify that he had noted changes in the defendant's demeanor during the course of their interview when the defendant was asked about a weapon, whether there was blood in his vehicle, and whether the victim resisted his advances.

> The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982). Neb. Rev. Stat. § 27-702 (Reissue 1985) provides that "[if] scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

State v. Borchardt, 224 Neb. 47, 58, 395 N.W.2d 551, 559 (1986).

One problem here is that the evidence is not sufficient to show that Krieger had sufficient expertise to offer an opinion that would assist the jury to understand the evidence or determine a fact in issue.

In *State v. Borchardt*, this court held that the trial court erred in permitting a Nebraska State Patrol officer to testify as to the administration and interpretation of the horizontal nystagmus test because the record contained no competent evidence that the test in fact revealed the presence of intoxication. We stated, "Evidence of a test result cannot be characterized as 'scientific' or qualify as 'technical or other specialized knowledge,' and

thus within the purview of § 27-702, unless and until it is established that the . . . test result demonstrates what it is claimed to demonstrate." 224 Neb. at 58, 395 N.W.2d at 559.

In the present case, the evidence is not adequate to establish that Krieger's interrogation techniques may be used to prove that a person is lying when he or she exhibits a certain demeanor or certain mannerisms while being questioned. Accordingly, the trial court erred in permitting Krieger to testify as to the administration of his various interrogation techniques.

Although Krieger was never asked whether he thought the defendant was lying, the impression given to the jury was that Krieger believed the defendant was lying during the interview because Krieger had observed signs of deception in the defendant's demeanor similar to those he had previously described regarding his interrogation training.

Because the defendant's credibility was central to the issue of consent in this case, it cannot be said that the error in admitting Krieger's testimony concerning interrogation techniques was harmless.

By a pretrial motion, and again by an offer of proof made during the cross-examination of the victim, the defendant requested permission to present evidence concerning the victim's prior sexual assaults and abuse. The trial court overruled the motion and sustained the objection by the State to the offer of proof on the basis of the Nebraska rape shield law, Neb. Rev. Stat. § 28-321(2) (Reissue 1989).

The evidence which the defendant wanted to introduce consisted of statements made by the victim to the examining physician at the hospital that she had been molested for 4 years by her brother, that she had been sexually assaulted four times in high school, and that her 5-year-old child was the product of a sexual assault. None of this evidence appears to have any relevance and was not admissible under the rape shield law.

The defendant contends that because the trial court refused his request to admit evidence concerning the alleged prior sexual assault accusations made by the victim, he was denied the opportunity to confront and to present evidence which would have showed that the victim has a propensity for making false claims of sexual assault.

In the present case, the defendant made no showing at any time that any claim the victim had made concerning prior sexual assaults and familial sexual abuse was false. Accordingly, there was no error.

The defendant claims the trial court erred in instructing the jury that it could convict on the basis of the victim's inability to resist or to appraise the nature of her conduct, because there was no evidence from which the jury could find that the victim was unable to resist or to appraise the nature of her conduct.

There was evidence that at the time of the assault the victim was both intoxicated and ill. The record shows that the victim had consumed 18 to 20 beers prior to encountering the defendant in front of the Blue Mill tavern. Approximately 9 hours after the victim had had her last drink, her blood alcohol content was .116 of 1 gram by weight of alcohol per 100 milliliters of blood. Dr. Van Richards estimated that at the time of the alleged offense, the victim's blood alcohol level would have been approximately .236.

That evidence related to the victim's ability to resist and appraise the nature of her conduct, and it was not error for the trial court to instruct the jury on that issue.

For the reasons stated, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. DAVID C. PHELPS, APPELLANT.

490 N.W.2d 676

Filed October 16, 1992. No. S-91-577.

1. **Constitutional Law: Confessions: Evidence.** Voluntariness is imposed as a constitutional prerequisite to the receipt into evidence of confessions and admissions.
2. **Confessions.** The voluntariness of a statement is a question of fact to be determined by the trial court in light of all the surrounding circumstances.

3. **Appeal and Error.** In deciding whether a trial court's ruling on a question of fact is erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed the witnesses.
4. **Confessions: Appeal and Error.** A preliminary determination by the trial court that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong.
5. **Rules of Evidence: Other Acts.** Neb. Rev. Stat. § 27-404(2) (Reissue 1989) is an inclusionary rule permitting the use of relevant evidence of other crimes, wrongs, or acts for purposes other than to prove the character of a person in order to show that such person acted in conformity with that character.
6. _____: _____. Neb. Rev. Stat. § 27-404(2) (Reissue 1989) permits evidence of other crimes, wrongs, or acts if such is relevant for a purpose other than to show a defendant's propensity or disposition to commit the crime charged.
7. _____: _____. Neb. Rev. Stat. § 27-404(2) (Reissue 1989) permits the introduction of evidence of other crimes, wrongs, or acts for the purposes of showing such things as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
8. _____: _____. Evidence admissible under the provisions of Neb. Rev. Stat. § 27-404(2) (Reissue 1989) is limited by Neb. Rev. Stat. § 27-403 (Reissue 1989), which provides for the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of, among other things, unfair prejudice.
9. **Rules of Evidence: Other Acts: Time.** The question of remoteness for the purposes of Neb. Rev. Stat. § 27-404(2) (Reissue 1989) is a matter within the discretion of the trial court.
10. _____: _____: _____. Although remoteness in time may weaken the value of the evidence for the purposes of Neb. Rev. Stat. § 27-404(2) (Reissue 1989), such remoteness does not, in and of itself, necessarily justify exclusion of the evidence.
11. **Rules of Evidence: Other Acts.** For purposes of Neb. Rev. Stat. § 27-404(2) (Reissue 1989), it is sufficient that the evidence be of similar involvement reasonably related to the charged conduct and be presented in a manner in which prejudice does not outweigh its probative value.
12. **Trial: Rules of Evidence.** Balancing the probative value of evidence against the danger of unfair prejudice is within the discretion of the trial court.
13. _____: _____. The primary consideration in determining whether probative evidence is to be excluded as unfairly prejudicial is whether the probative value of the evidence is outweighed by the danger of its unfair prejudice.
14. **Rules of Evidence.** For exclusion under the provisions of Neb. Rev. Stat. § 27-403 (Reissue 1989), it is not enough that the evidence is merely prejudicial, for most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party.
15. _____. To be unfairly prejudicial, evidence must have a tendency to suggest a decision on an improper basis.
16. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to

support a finding of guilt in a criminal case, an appellate 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.

17. **Criminal Law: Circumstantial Evidence: Evidence: Appeal and Error.** In criminal cases, circumstantial evidence is to be treated the same as direct evidence, the State being entitled upon review to have all conflicting evidence, direct and circumstantial, viewed in its favor.
18. **Convictions: Circumstantial Evidence: Proof.** Circumstantial evidence is adequate to support a conviction if the evidence, taken as a whole, establishes guilt beyond a reasonable doubt.
19. **Venue: Waiver: Proof.** In the absence of a defendant's waiver, the State has the burden to prove proper venue beyond a reasonable doubt.
20. **Venue: Juries: Due Process: Proof.** Mere jury exposure to news accounts of a crime does not presumptively deprive a criminal defendant of due process; rather, to warrant a change of venue, a defendant must show the existence of pervasive misleading pretrial publicity.
21. **Venue: Juries: Proof.** In order for a defendant to successfully move for a change of venue based on pretrial publicity, he or she must show that the publicity has made it impossible to secure a fair and impartial jury.
22. **Venue.** A number of factors must be evaluated in determining whether publicity has made it impossible to secure a fair and impartial jury, including the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in the selection of the jury, the number of challenges exercised during the voir dire, the severity of the offenses charged, and the size of the area from which the venire was drawn.
23. **Venue: Juror Qualifications.** Voir dire examination provides the best opportunity to determine whether venue should be changed.
24. **Juror Qualifications.** A criminal defendant is not guaranteed a jury totally ignorant of the facts and circumstances of his or her case; it is sufficient if the juror can lay aside his or her impressions or opinion and render a verdict based on the evidence presented at trial.
25. **Criminal Law: Pretrial Procedure.** Discovery in a criminal case is, in the absence of a constitutional requirement, controlled by either a statute or court rule.
26. **Pretrial Procedure: Appeal and Error.** Unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of the trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion in the discovery ruling.
27. **Constitutional Law: Criminal Law: Due Process: Evidence.** The U.S. Constitution requires the State to disclose exculpatory material to an accused.
28. **Criminal Law: Due Process: Pretrial Procedure: Evidence.** Suppression by the State of evidence favorable to and requested by an accused violates due process

where the evidence is material to the guilt of the defendant.

29. **Constitutional Law: Criminal Law: Pretrial Procedure: Evidence.** The State is not under a constitutional duty to disclose all information that might affect a jury's verdict; rather, a prosecutor has a duty to disclose all material exculpatory evidence.
30. **Constitutional Law: Criminal Law: Pretrial Procedure.** There is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.

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

David A. Domina and Denise E. Frost, of Domina & Copple, P.C., for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

Defendant-appellant, David C. Phelps, was, pursuant to verdict, adjudged guilty of kidnapping in violation of Neb. Rev. Stat. § 28-313 (Reissue 1989) and was sentenced to life imprisonment. As treated in his brief, the errors he assigns combine to assert that the district court mistakenly (1) received certain evidence, (2) concluded the evidence was sufficient to support the charge, (3) refused to change the venue, (4) overruled his challenge to the array, and (5) refused certain pretrial discovery. We affirm.

II. BACKGROUND

On August 13, 1987, 9-year-old Jill Cutshall disappeared; she has not been seen since.

She was a happy, mature, and intelligent child who was outgoing and athletic. She was on good terms with her father, mother, and stepmother and had not expressed any desire to run away.

Although the decree dissolving her biological parents' marriage granted her custody to the mother, at the time of her disappearance the child was living, by the parents' mutual

agreement, with her father and stepmother at the McNeely Apartments in Norfolk, Madison County, Nebraska. The mother was at that time living at Great Bend, Kansas.

On the day of the child's disappearance, the father and stepmother left home at 6 o'clock in the morning. The stepmother noted that the child was then awake but still dressed in a nightshirt. The stepmother also noted that the child had laid out a purple shirt and a pair of blue jeans. Under a relatively new arrangement with the child's babysitter, the child was to leave the McNeely Apartments at approximately 8 a.m. and walk to the sitter's house, some 4 1/2 blocks away. If the sitter was not awake when the child arrived, she was to use a key left in the mailbox to let herself in.

The stepmother finished work at 3 o'clock in the afternoon and went directly to the sitter's house to pick up the child. It was then that the stepmother first learned that the child had not arrived at the sitter's house that day. The sitter thought that the child had merely stayed home with her father, as she had done once previously. The sitter's live-in boyfriend did not see the child when he left for work between 7:30 and 7:50 that morning.

After checking with numerous relatives throughout and around Norfolk, the stepmother, at approximately 3:30 or 4 p.m., went to get the child's father at his place of work. After contacting friends and the relatives again as to the child's whereabouts, the father and stepmother went to the Norfolk Police Department. As a result, an intensive search by various law enforcement agencies and private interests ensued.

As the hunting season approached, hunters were asked to watch for evidence related to the child's disappearance. On November 7, 1987, a hunter sporting in the Wood Duck State Special Use Area in Stanton County, Nebraska, discovered what were later identified as the child's blouse, jeans, underwear, shoes, and keys. The underwear was white with numerous clown face or ice cream cone designs. After the scene was secured, a Federal Bureau of Investigation evidence team was immediately dispatched to the area. The bureau's analysis revealed nothing with respect to fingerprints, semen, blood, hairs, or fibers.

Det. Steve Hecker of the Norfolk Police Department began investigating current and former tenants of the McNeely Apartments. Tenant Kermit Baumgartner was interviewed on March 24, 1988, after which he moved out of the apartments. While searching for Baumgartner, Hecker found Phelps, then a 24-year-old man standing 5 feet 10 inches tall and weighing approximately 195 pounds, at Baumgartner's new place of residence. Hecker asked if he would answer some questions at the police department. During the interview which followed, Hecker asked if Phelps knew why Hecker wanted to talk with him. Phelps replied that he thought there were three reasons: he knew the child and used to babysit her, he used to live in the McNeely Apartments, and he knew Baumgartner. Other evidence suggests, however, that Phelps was not living at the McNeely Apartments during the times he said he babysat the child at that location.

Phelps also told Hecker that in June and July 1987, he lived in a tent at the Ray Schoen residence in Norfolk and that he had lived with Larry Pennybacker in nearby Plainview, Nebraska, from late July until late August or early September. In a subsequent interview with Hecker on April 18, 1988, Phelps stated that he was mistaken about where he lived during 1987, now recalling that he lived with Pennybacker and moved back to Norfolk and lived in a tent at Schoen's residence just prior to the child's disappearance.

Brian Pinkelman, a former homosexual partner of Phelps', testified that he lived with Phelps in a tent at Schoen's for 2 weeks and that Phelps had worked with him at Schoen's lawn service on August 13, 1987. It was also shown that Pinkelman had, prior to the child's disappearance, suffered a memory loss due to a head injury inflicted when he was hit by a frying pan and that he had written a suicide note on August 18, 1987.

Schoen testified that he first met Phelps on August 12, 1987, and that Phelps had slept at Schoen's home the night of August 12. Schoen, Phelps, and Pinkelman spent the day of August 13 mowing lawns. After the child disappeared, Schoen also threatened to kill himself.

In a conversation with Hecker on April 29, 1988, Phelps stated that he now recalled that on August 11, 1987, he was

staying with Guy LaChance in the McNeely Apartments and that on the evening of August 12, he was living at the McNeely Apartments in a room rented by Kathy Pendergast. Between 2 and 3 a.m. on August 13, Phelps was removed from the building by his then girl friend and now wife and by Donna Hansen and was taken to Hansen's apartment at the Madison Hotel.

An acquaintance of Phelps' wife testified that in approximately June 1988, she was at a bar with her niece. The acquaintance described her niece as being about 8 or 9 years of age with blond hair and blue eyes and resembling the missing child. Although Phelps had met the niece on previous occasions, he called her by the name Jill at least three or four times during a 1- to 2-hour period. The acquaintance corrected Phelps, telling him that her niece's name was not Jill. The niece also corrected Phelps. The acquaintance asked Phelps why he was calling her niece Jill, and Phelps replied that Jill looked a lot like the niece. When the acquaintance dropped Phelps and his now wife off after they left the bar, Phelps again called the niece Jill, for which he apologized. Phelps did not explain who Jill was.

III. ANALYSIS

With that brief background, we turn our attention to the summarized assignments of error and the facts and law which relate to them.

1. Evidential Rulings

The first summarized assignment of error questions the district court's (a) failure to suppress a videotaped statement Phelps gave and (b) receipt into evidence of Phelps' descriptions of his sexual interest in and contacts with young girls.

(a) Videotaped Statement

In the course of her efforts to find her child, the mother met Roy Stephens, who operated as a finder of missing children and also functioned as a member of a firm of private investigators operating under the name Interstate Bureau of Investigation. Stephens, a bearded felon standing 6 feet 2 inches tall and

weighing 300 pounds, obtained his private investigator's license from the State of Nebraska by lying as to his criminal record. Not only was Stephens not connected with any state or federal law enforcement agencies, he did not have a friendly relationship with law enforcement personnel.

Stephens made his initial contact with Phelps in October 1988, at which time Phelps denied knowing the child. Stephens again met with Phelps on December 3, 1988, at the request of the latter's half sister. During this audiotaped interview, Phelps, to the extent relevant, spoke about his homosexual relationship with Baumgartner and his previous instances of sexual involvement with children. However, he denied knowing Baumgartner at the time of the child's disappearance.

At Stephens' request, two representatives of an Omaha television station traveled to Norfolk on January 4, 1989. Stephens had informed one of these representatives that he was traveling to Norfolk to talk with Phelps because Phelps might know something about the child's disappearance.

The two representatives met with Stephens and Diane Robinette, another Interstate operative, at approximately 11 a.m. at a Norfolk restaurant. During the approximately 1/2-hour conversation, Stephens told the two representatives that he was going to talk to Phelps and that they could go to Stephens' nearby motel room to wait for Stephens' telephone call. At approximately noon, Stephens and Robinette left the motel, and the two representatives remained.

Meanwhile, in an attempt to locate Phelps, Stephens and Robinette went to his home. Phelps' wife told Stephens that Phelps was on foot and would return shortly. Stephens and Robinette thereupon drove to the parking lot of a nearby store and waited. They soon saw Phelps, and Stephens asked him to come with them, as they needed his help and had something to show him.

Robinette then drove Stephens and Phelps to the Wood Duck area, where the child's clothing had been found. When the threesome got out of the vehicle, Stephens handed Phelps a shovel and told him that the shovel was going to help find the child. At this point Stephens gave his gun to Robinette to hold. Stephens then told Phelps to show him where the child was

buried.

As Phelps led Stephens and Robinette through the area, Stephens incessantly asked, "Is this where Jill is?" Stephens also told Phelps that they were not leaving until they found the child's body. Stephens, in an attempt to encourage Phelps to talk, told Phelps that "I could kill you right here and nobody would ever find you" and that "your wife and daughter would be in some serious trouble."

As Stephens, Robinette, and Phelps walked around, Stephens retrieved his gun from Robinette and fired it into the air. Phelps stated that "surprisingly it didn't startle me and I didn't drop to the ground like somebody might." Stephens testified that he saw no reaction from Phelps after the gunshot. Robinette, however, stated that Phelps was indeed surprised or startled. Stephens commented that "300 pound men don't like nature walks." Phelps then told Stephens that he had heard that the child's body was in the Wood Duck cemetery area. The threesome then walked back to the vehicle, and Robinette drove to the cemetery area.

Upon arrival at the cemetery area, although Stephens left his gun in the vehicle, Phelps walked to a point he selected and began to dig. After Phelps had dug for approximately 20 minutes and was sweating and appeared "fatigued," he told Stephens he was ready to talk. Stephens summoned Robinette to retrieve his tape recorder, and Stephens audiotaped Phelps' statement while in the cemetery area. According to this account, which started at 2:41 p.m. on January 4, Phelps spent the evening of August 12, 1987, with Baumgartner, consuming alcoholic beverages. The next morning, Phelps was awakened by Baumgartner, who told Phelps that he had the child out in his automobile and that they were going for a ride. Baumgartner drove Phelps and the child to the Wood Duck area, where Baumgartner sexually assaulted the child while Phelps held on to her. Phelps described the child's attire as a "light lavender colored . . . blouse . . . and matching shorts" and white or cream-colored underwear with "[l]ittle swirls and stuff on them." Phelps stated that he became "aroused" and nervous and suggested to Baumgartner that they leave. Baumgartner told Phelps to take the automobile back into Norfolk by

himself, and Phelps left in the automobile, leaving the child behind with Baumgartner.

On their return trip to Norfolk, Stephens told Phelps that the two Omaha television representatives were awaiting their arrival. Phelps expressed relief for getting the story off his chest, but he also expressed concern for the safety of his family from Baumgartner.

At approximately 3:30 or 4 p.m. on January 4, 1989, Stephens and Robinette returned to the motel room with Phelps. The motel room door was unlocked, and Phelps was not told that he could not leave or that he could not use the telephone. In addition, Stephens, Robinette, and the two representatives all testified that neither they nor anyone else made any threats to Phelps while he was in the motel room.

Because Phelps again expressed concern for the safety of his wife and child, Stephens left to move Phelps' wife and child to Phelps' half sister's house. The two representatives introduced themselves to Phelps, although it is disputed whether they identified themselves as working for a particular television station. They waited in the motel room, along with Robinette and Phelps, and watched television until Stephens returned. One of the representatives testified that as they watched a show, Phelps laughed and talked about it. This representative testified at trial that she thought they watched the show no later than 4:30 p.m. However, a perhaps incomplete listing of television programs listed the show in question as scheduled for showing by one station at 6:05 p.m.

Robinette testified that Phelps inquired as to whether the motel room television set had free "porno movies." Phelps and Robinette also spoke about the fact that they both had daughters about the same age.

Stephens returned in approximately one-half hour and told Phelps that he had successfully moved his wife and child to Phelps' half sister's house. One of the representatives testified that Phelps appeared to be "relieved." Reintroductions were then made.

One of the representatives asked Phelps if he would talk with them, and Phelps consented. Phelps then gave an approximately 30-minute-long videotaped interview, during

the course of which he in essence calmly repeated the information he had given during the audiotaped interview earlier that day. The representative conducting the interview expressed doubt about Phelps' veracity, testifying at the suppression hearing that she did not believe everything Phelps said during the filming process; although she did not know such to be the case, he seemed to her to ramble and to be making the account up as he went along.

Upon conclusion of the interview, Stephens left to place a telephone call to the child's mother, who then called the Norfolk police. She was then met by Hecker and Det. Herb Angell, after which the three proceeded to the motel room, arriving at approximately 5 p.m., some 5 to 15 minutes after the conclusion of the taping. Phelps agreed to accompany the officers to the police station.

Upon arrival at the station at approximately 5:25 p.m., and after receiving and waiving his *Miranda* rights, Phelps largely confirmed the version of events he described during the videotaped interview. However, he then recanted his statements, telling Hecker that he had fabricated the entire story out of fear, for he felt Stephens was going to kill him with the gun. Phelps then requested a specific attorney, at which time, approximately 6 p.m., police questioning stopped.

After the requested attorney (not the attorney representing Phelps at trial and in this court) met separately with the county attorney and with Phelps, police questioning resumed. Phelps again essentially repeated the story he had given Hecker and Angell when the three first arrived at the station after the videotaping. Hecker then asked Phelps to tell him "what really happened with him and [the child] on the morning of August 13th of 1987." In response, Phelps recited a version of events which largely paralleled the description he gave in his initial interview with Hecker in March 1988. Phelps then began to talk about his problems with alcohol and claimed an inability to remember all the events surrounding August 13, commenting that he may have done something he did not remember. At this point his requested attorney ended the questioning, and Phelps was permitted to depart.

Whether Stephens had his gun in the motel room during

Phelps' interview or, instead, retrieved it from the van to put it away after Phelps had left with the Norfolk police is in dispute; however, it was not until after Phelps had left with Angell and Hecker that the television representatives saw Stephens' gun as he removed it, according to one of the representatives, from underneath his shirt and placed it in a case. Stephens testified that he had not carried the gun under his shirt and told one of the representatives that the gun was for "protection." This representative described the gun as a "big" "silver" "pistol." Both Stephens and Robinette consciously omitted any reference to the gun in any of their reports to the Norfolk police. Stephens did not reveal the use of the gun at the Wood Duck area until some 10 months later while being interviewed for a national television program.

Phelps argues that as the videotaped statement he gave the television representative was coerced as the result of Stephens' prior conduct, it was erroneously received in evidence in violation of the due process requirement of Neb. Const. art. I, § 3, and the privilege against self-incrimination contained in Neb. Const. art. I, § 12. (The audiotaped statement Phelps gave Stephens at the Wood Duck area was not received in evidence.)

As to the first claim, there is no question that voluntariness is imposed as a constitutional prerequisite to the receipt into evidence of confessions and admissions. See, *State v. Brewer, ante* p. 24, 486 N.W.2d 477 (1992); *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989); *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). Moreover, relying upon our pronouncement in *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985), Phelps urges it matters not that the coerced statement occurred at the hands of a private party. It is true that *Bodtke* proclaims that the "[u]se of an accused's involuntary statement, whether admission or confession, offends due process and fundamental fairness in a criminal prosecution, because one acting with coercion, duress, or improper inducement transports his volition to another who acts in response to external compulsion, not internal choice." 219 Neb. at 510, 363 N.W.2d at 922. However, at least in the view of one source of commentary, that decision has been called into

question by *Colorado v. Connelly, supra*. 1 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 6.2 n.77.2 (Supp. 1991). In *Connelly*, the U.S. Supreme Court ruled that to deprive one of due process, some degree of state action is essential, writing that "[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause." 479 U.S. at 166. However, as the analysis which follows demonstrates, we need not resolve at this time whether the *Bodtke* rule is nonetheless still viable in this jurisdiction.

The voluntariness of a statement is a question of fact to be determined by the trial court in light of all the surrounding circumstances. See *State v. Brewer, supra*. Moreover, in deciding whether a trial court's ruling on a question of fact is erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed the witnesses. See, *State v. Coleman, post* p. 731, 490 N.W.2d 222 (1992); *State v. Brewer, supra*. Thus, a preliminary determination by the trial court that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong. *State v. Brewer, supra*.

Here, the statement with which we are concerned was given not to Stephens at the Wood Duck area, but to him and others in a motel room several hours after Stephens had fired his gun and after Stephens had been away from the room for one-half hour while he took steps to protect Phelps' family from possible harm at the hands of yet another. Under these circumstances, the occurrences at the Wood Duck area cannot be said as a matter of law to have carried over to the statement Phelps made in the motel room. See *State v. Jones*, 327 N.C. 439, 396 S.E.2d 309 (1990) (confession given 26 hours after allegedly coerced statements and at a different place to different interviewers held to be admissible).

Moreover, as to the second claim, Phelps fails to explain how the statement he gave the television representative became the type of official questioning to which article I, § 12, applies. See *State v. Sites*, 231 Neb. 624, 437 N.W.2d 166 (1989).

Accordingly, the district court correctly refused to suppress

the videotaped interview.

(b) Sexual Interest Statements

Not only did Phelps describe in his videotaped statement his interest in young girls, but Hecker testified that when he interviewed Phelps on April 22, 1988, Phelps recalled six such prior incidents of sexual contact, dating back to 1980. It is the April 22 statement that Phelps, in this portion of the first summarized assignment of error, claims was erroneously admitted into evidence.

The first incident Phelps described occurred when he was approximately 16 years old and living in Arkansas. Phelps stated that he had removed all of his clothing and crawled into bed with a 4-year-old girl and that although nothing occurred, he had a "very strong urge" to have something happen. The second incident, also in 1980, occurred while Phelps was mowing a family's lawn in Valentine, Nebraska, when their 7-year-old daughter asked Phelps to kiss her and he did. The third incident, also believed to be in 1980, occurred in Wayne, Nebraska, when Phelps had taken a 4-year-old neighbor girl up to his room, removed her panties, and felt her buttocks and vagina with his hands. The fourth incident involved the same girl, except that on this occasion Phelps took her behind some bushes in the area to commit similar acts. The fifth incident, the location of which Phelps declined to disclose for fear of being caught, involved a young girl whom Phelps took from a residence to a county road, where he removed her panties and fondled her buttocks and vagina. Phelps was unable to place a date on the sixth incident, but stated that it occurred in Norfolk. On this occasion, he experienced an erection and ejaculated while holding the daughter of some friends of his on his lap. No formal complaints were filed against Phelps for any of these incidents.

Phelps explained that his sexual desires were for girls between the ages of 4 and 6, with blue eyes and blonde hair. When asked specifically about Jill Cutshall, Phelps stated that although he liked her blue eyes and the way she could control people and how she helped others, she was too old for him. Phelps stated that he could not control these urges but that he

now tried to be with adult females.

Neb. Rev. Stat. § 27-404(2) (Reissue 1989) provides:

> 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.

We have said that the foregoing is an inclusionary rule permitting the use of relevant evidence of other crimes, wrongs, or acts for purposes other than to prove the character of a person in order to show that such person acted in conformity with that character. Thus, the statute permits evidence of other crimes, wrongs, or acts if such is relevant for a purpose other than to show a defendant's propensity or disposition to commit the crime charged. See, *State v. Stephens*, 237 Neb. 551, 466 N.W.2d 781 (1991); *State v. Donhauser*, 231 Neb. 114, 435 N.W.2d 186 (1989). The rule thus permits the introduction of evidence of other crimes, wrongs, or acts for the purposes of showing such things as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *State v. Nesbitt*, 226 Neb. 32, 409 N.W.2d 314 (1987).

The evidence admissible under the rule is, of course, limited by Neb. Rev. Stat. § 27-403 (Reissue 1989), which provides for the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of, among other things, unfair prejudice. *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987).

That the child's clothing was found at a secluded place suggests a sexual motive for the abduction; thus, the evidence of Phelps' prior acts is clearly relevant as tending to show his motive for kidnapping Jill Cutshall, that is, to achieve sexual gratification through assaulting her.

Phelps' contention that the events he described were too remote in time to be admissible overlooks that the question of remoteness is a matter within the discretion of the trial court. See *State v. Keithley*, 218 Neb. 707, 358 N.W.2d 761 (1984). "[T]here is no magic in the amount of time by which the other

offenses must have preceded or followed the case being tried . . . ." *State v. Ellis*, 208 Neb. 379, 393, 303 N.W.2d 741, 750 (1981). Although remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence. *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1990); *State v. Rincker*, 228 Neb. 522, 423 N.W.2d 434 (1988). As this court held in *State v. Schaaf*, 234 Neb. 144, 160, 449 N.W.2d 762, 772 (1989),

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

Accord *State v. Yager*, supra.

Phelps also erroneously urges that the evidence is irrelevant because the prior acts all involved consenting children and thus bore no relationship to the crime prosecuted. The fact is that aside from the incident in Valentine where the girl asked Phelps to kiss her, the record is devoid of evidence of consent. Granted, the crime charged is not identical in every respect to Phelps' prior acts. In each of the prior incidents, Phelps did not abduct and transport the child in an automobile to sexually assault her. However, the prior acts need not be identical to the act charged in order to be admissible. It is sufficient that the evidence be of similar involvement reasonably related to the charged conduct and be presented in a manner in which prejudice does not outweigh its probative value. *State v. Sherrod*, 229 Neb. 128, 425 N.W.2d 616 (1988). The thread which ties the prior acts to the crime in question is the use of young girls to achieve sexual gratification.

Balancing the probative value of evidence against the danger of unfair prejudice is also within the discretion of the trial court. *State v. Stephens, supra*, citing *State v. Jacobs, supra*. The primary consideration in this connection is whether the probative value of the evidence is outweighed by the danger of its unfair prejudice. For exclusion, it is not enough that the evidence is merely prejudicial, for most, if not all, of the evidence a party offers is calculated to be prejudicial to the

opposing party. Thus, it is only evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial and the concern of § 27-403. *State v. Stephens, supra.*

Because the evidence bears on the matter of Phelps' motive to abduct the child, it cannot be said as a matter of law that the evidence had a tendency to suggest a decision on an improper basis. Accordingly, the district court correctly received the evidence.

2. SUFFICIENCY OF EVIDENCE

In the second summarized assignment of error, Phelps claims that the evidence was insufficient to support the conviction in that (a) the crime itself was not proved and (b) the location of the crime was not proved.

(a) The Crime

Section 28-313 provides, in relevant part, that one "commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to . . . (d) Commit a felony . . . ."

Under the provisions of Neb. Rev. Stat. § 28-320.01 (Reissue 1989), one who is at least 19 years of age commits the felony of sexually assaulting a child "if he or she subjects another person fourteen years of age or younger to sexual contact . . . ."

Neb. Rev. Stat. § 28-206 (Reissue 1989) provides that one who "aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender."

As is well known, in determining the sufficiency of the evidence to support a finding of guilt in a criminal case, an appellate 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. *State v. Williams*, 239 Neb. 985, 480 N.W.2d 390 (1992); *State v. Kennedy*, 239 Neb. 460, 476 N.W.2d 810 (1991).

Accordingly, Phelps' admissions, combined with the child's disappearance and the discovery of her clothes, adequately

support the conviction. Although, except for the admissions, the evidence is largely circumstantial, such evidence is to be treated in criminal cases the same as direct evidence, the State being entitled upon review to have all conflicting evidence, direct and circumstantial, viewed in its favor. *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991). Thus, circumstantial evidence is adequate to support a conviction if the evidence, taken as a whole, establishes guilt beyond a reasonable doubt. *State v. Kennedy, supra.*

(b) Location of Crime

Phelps also urges that in any event, the evidence fails to establish that the crime occurred in Madison County, where it was prosecuted.

This claim rests on the fact that a variety of people thought they had seen the child at a multiplicity of places. For example, according to two witnesses, a girl resembling the child was seen at approximately 6:30 on the morning of her disappearance walking down a Norfolk street. Another witness saw a girl matching the child's description at approximately 6:30 to 6:45 a.m. of the same day sitting on the steps of the babysitter's residence. When this witness passed the babysitter's residence on her return trip some 5 minutes later, she did not see the girl. A girl resembling the child was also seen near the McNeely Apartments between approximately 6:30 and 6:45 a.m. of that day by another witness. Still another witness thought she saw the child and another young girl in the store at which the witness worked around 10 a.m. on the day of the child's disappearance. A young witness testified that she spoke with a girl resembling the child on the afternoon of that day at the same store. A man from Valley, Nebraska, believed he saw a girl resembling the child leaving a Fremont hotel with an older man on August 14, 1987. A woman from Ames, Nebraska, testified that shortly after the child's disappearance, she saw a girl resembling the child in a van traveling south out of West Point, Nebraska. A woman from Norfolk testified that the child was with another girl at a truckstop 5 miles north of Norfolk at 1 to 1:30 a.m. on August 14, 1987. A woman living approximately a block away from the McNeely Apartments testified that the child and

another girl cut across her lawn between 12 and 1 p.m. on August 13, 1987. Yet another woman testified that she saw a girl resembling the child in a shopping mall in Sioux City, Iowa, on Saturday, August 15.

There is no question that in the absence of a defendant's waiver, the State has the burden to prove proper venue beyond a reasonable doubt. *State v. Gorman*, 232 Neb. 738, 441 N.W.2d 896 (1989); *State v. Vejvoda*, 231 Neb. 668, 438 N.W.2d 461 (1989); *State v. Lindsey*, 193 Neb. 442, 227 N.W.2d 599 (1975).

> " 'The venue of an offense may be proven like any other fact in a criminal case. It need not be established by positive testimony, nor in the words of the information; but if from the facts appearing in evidence the only rational conclusion which can be drawn is that the offense was committed in the county alleged, it is sufficient.' "

State v. Gorman, 232 Neb. at 740, 441 N.W.2d at 898, quoting *State v. Vejvoda, supra*. Accord *Weinecke v. State*, 34 Neb. 14, 51 N.W. 307 (1892).

Generally, all criminal cases are to be tried in the county where the offense was committed. Neb. Rev. Stat. § 29-1301 (Reissue 1989). However, Neb. Rev. Stat. § 29-1301.01 (Reissue 1989) provides that if an offense is committed against the person of another, the accused may be tried in the county in which the offense is committed, or in any county into or out of which the victim may have been brought in the prosecution of the offense, or in which an act is done by the accused in instigating, procuring, promoting, or aiding in the commission of the offense, or in aiding, abetting, or procuring another to commit such offense. Accord, *State v. Tiff*, 199 Neb. 519, 260 N.W.2d 296 (1977); *State v. Garza*, 191 Neb. 118, 214 N.W.2d 30 (1974).

An example of the proof needed to prove venue is found in *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981). The defendant therein was convicted of manslaughter in Lancaster County. The evidence showed that the victim was last seen on October 3, 1974, in that county; however, her remains were discovered on September 13, 1978, in Cass County. Although there was no direct evidence that the defendant had transported the victim from the first to the second county, the circumstantial

evidence of defendant's prior conduct and acquaintance with the victim was held sufficient to establish that the crime took place in Lancaster County.

Notwithstanding that the child's clothing was found in Stanton County and that Phelps contends his getting out of the vehicle, holding the child's arms, becoming aroused, being frightened, and departing all occurred in Stanton County, the facts remain that the child and her father and stepmother lived in Madison County, as did the child's babysitter, where the child was to be on August 13, 1987, and that the child did not have the ability to transport herself out of Madison County. Accordingly, there is sufficient circumstantial evidence from which a fact finder could reasonably conclude that the child was originally abducted in Madison County, and the district court thus correctly submitted the issue of venue to the jury.

3. Refusal of Venue Change

Phelps contends in the third summarized assignment of error that the district court incorrectly overruled his motion for a change of venue because, as a result of the publicity surrounding the matter, it was impossible for him to receive a fair trial in Madison County.

There is no question that extensive local, state, and national publicity surrounded the child's disappearance and the trial to follow. The coverage included attention by local and state newspapers, local radio, and both regional and national television. In addition to establishing the foregoing, Phelps also produced 32 affidavits of Madison County citizens, each asserting that due to the media coverage the affiant could not serve as a fair, impartial juror in the case. In addition, Phelps produced the affidavits of Madison County trial lawyers expressing the opinion that a fair and impartial trial could not be held in Madison County.

Section 29-1301 permits a change of venue when it appears that "a fair and impartial trial cannot be had" in the county where the offense was committed. A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof. *State v. Williams*, 239 Neb. 985, 480 N.W.2d 390 (1992); *State v.*

Boppre, 234 Neb. 922, 453 N.W.2d 406 (1990); *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987); *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987); *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986); *State v. Irwin*, 191 Neb. 169, 214 N.W.2d 595 (1974).

In arguing his position, Phelps places undue reliance on *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963). Therein, the defendant was charged with robbery, kidnapping, and murder. He was filmed while being interrogated in jail by the sheriff, during the course of which, in response to leading questions, the defendant admitted the crimes in detail. The film was broadcast on television on three separate occasions, reaching at least one-third of the population in the parish in which he was tried and convicted. In holding that the denial of a change of venue amounted to a denial of due process, the U.S. Supreme Court noted that "[f]or anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense *was* Rideau's trial—at which he pleaded guilty to murder." (Emphasis in original.) 373 U.S. at 726.

However, in *Murphy v. Florida*, 421 U.S. 794, 799, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975), the U.S. Supreme Court wrote:

> The proceedings in [*Rideau*] were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob. [*Rideau*] cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process.

Thus, mere jury exposure to news accounts of a crime does not presumptively deprive a criminal defendant of due process. Rather, to warrant a change of venue, a defendant must show the "existence of pervasive misleading pretrial publicity." *State v. Bradley*, 236 Neb. 371, 386, 461 N.W.2d 524, 536 (1990), *cert. denied* ____ U.S. ____, 112 S. Ct. 143, 116 L. Ed. 2d 109 (1991). Indeed, in order for a defendant to successfully move for a change of venue based on pretrial publicity, he or she must

show that the "publicity has made it impossible to secure a fair and impartial jury." *State v. Jacobs*, 226 Neb. at 190, 410 N.W.2d at 473. Accord *State v. Heathman*, 224 Neb. 19, 395 N.W.2d 538 (1986). A number of factors must be evaluated in determining whether that burden has been met, including the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in the selection of the jury, the number of challenges exercised during the voir dire, the severity of the offenses charged, and the size of the area from which the venire was drawn. *State v. Williams, supra*; *State v. Red Kettle*, 239 Neb. 317, 476 N.W.2d 220 (1991); *State v. Jacobs, supra*; *State v. Bird Head, supra*; *State v. Kern, supra*; *State v. Heathman, supra*; *State v. Fallis*, 205 Neb. 465, 288 N.W.2d 281 (1980); *State v. Ell*, 196 Neb. 800, 246 N.W.2d 594 (1976).

As noted in *State v. Bradley, supra*, voir dire examination provides the best opportunity to determine whether venue should be changed. A jury was able to be selected in this case in approximately 4 hours. At the conclusion of that process, each of the venirepersons seated as a juror raised his or her hand in response to Phelps' inquiry as to whether each felt that he or she

> could serve on this jury and fairly try this case free of influence of anything you have heard before this day and based exclusively on what comes from this chair and the exhibits that are received, free of any sense at all of any expectation by the community or your family or neighbors or anything else[.]

Under the circumstances, we cannot say the district court abused its discretion in denying Phelps' request for a change of venue. As we have noted in the past, the law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impression or opinions and render a verdict based upon the evidence presented in court. *State v. Bradley, supra*.

4. PRESERVATION OF THE ARRAY

In a related move, Phelps, in the fourth summarized assignment of error, contends that the district court should have sustained his challenge to the array, as all the venirepersons had formed or expressed an opinion about the case.

The principles considered in connection with the third summarized assignment of error in large measure resolve this issue as well. The fact that many, most, or even all the jurors knew something about the case in advance would not entitle Phelps to a change of venue, for a criminal defendant is not guaranteed a jury totally ignorant of the facts and circumstances of his or her case. See, *State v. Williams*, 239 Neb. 985, 480 N.W.2d 390 (1992); *Murphy v. Florida*, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 589 (1975). It is sufficient if the juror can lay aside his or her impressions or opinion and render a verdict based on the evidence presented at trial. *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); *State v. Williams, supra*; *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987); *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987); *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986); *State v. Navarrete*, 221 Neb. 171, 376 N.W.2d 8 (1985); *State v. Torrence*, 192 Neb. 213, 219 N.W.2d 772 (1974), *cert. denied* 420 U.S. 928, 95 S. Ct. 1127, 43 L. Ed. 2d 399 (1975). Moreover, Neb. Rev. Stat. § 25-1636 (Reissue 1989) provides that

> [i]t shall not be a cause of challenge that a juror has read in the newspapers an account of the commission of a crime with which a prisoner is charged, if such juror shall state on oath that it is the belief of said person that he or she can render an impartial verdict according to the law and the evidence; and the court shall be satisfied as to the truth of such statement . . . .

See, also, Neb. Rev. Stat. § 29-2006 (Reissue 1989).

A careful review of the voir dire in this case indicates no hostility toward Phelps by the jurors who served in his trial as to suggest a partiality that could not be set aside. Indeed, the district court scrupulously inquired as to the extent to which prospective jurors had expressed opinions regarding the crime, excusing those who indicated that they might not be able to set

aside their knowledge or opinions of the crime and fairly and impartially judge Phelps on the evidence presented at trial.

5. NONDISCOVERY

In the fifth and final summarized assignment of error, Phelps asserts the district court erred in overruling his motion to discover the materials accumulated by the Federal Bureau of Investigation.

In May and June 1990, a bureau agent operated covertly at a Perry, Iowa, restaurant at which Phelps worked. During this time, over 18 hours of conversation between the agent and Phelps were recorded. The audiotapes were made available to Phelps. Upon Phelps' offer, the jury heard approximately 45 minutes of the more than 1,080 minutes of the covertly recorded conversations between the bureau's agent and Phelps. Our review of that 45 minutes establishes nothing of relevance to the issues presented.

Discovery in a criminal case is, in the absence of a constitutional requirement, controlled by either a statute or court rule. Thus, unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of the trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion in the discovery ruling. *State v. Tuttle*, 238 Neb. 827, 472 N.W.2d 712 (1991); *State v. Meis*, 217 Neb. 770, 351 N.W.2d 79 (1984); *State v. Pierce and Wells*, 215 Neb. 512, 340 N.W.2d 122 (1983).

The U.S. Constitution requires the State to disclose exculpatory material to an accused. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), recognized that the suppression by the State of evidence favorable to and requested by an accused violates due process where the evidence is material to the guilt of the defendant. *State v. Meis, supra*. In *Moore v. Illinois*, 408 U.S. 786, 794-95, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972), the U.S. Supreme Court explained that

> [t]he heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution

after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence.

However, the State is not under a constitutional duty to disclose all information that might affect the jury's verdict. *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). Rather, a prosecutor has a duty to disclose all material exculpatory evidence. *Brady v. Maryland, supra.* As we said in *State v. Tweedy*, 224 Neb. 715, 718, 400 N.W.2d 865, 868 (1987), citing *State v. Rice*, 214 Neb. 518, 335 N.W.2d 269 (1983): "In order to be a material omission, the omitted proposed evidence must create a reasonable doubt as to the defendant's guilt that did not otherwise exist. That the evidence 'might' influence the outcome is insufficient."

Neither has the U.S. Supreme Court found any constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case. *Moore v. Illinois, supra.*

Since Phelps was provided the tapes of his own statements, as required by Neb. Rev. Stat. § 29-1912 (Reissue 1989), we cannot under the circumstances say the district court abused its discretion in refusing to require that the State obtain the remainder of the bureau's file and deliver it to Phelps.

IV. JUDGMENT

For the foregoing reasons, we, as first said in part I above, affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MAURICE COLEMAN, APPELLANT.
490 N.W.2d 222

Filed October 16, 1992. No. S-91-770.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous.

2. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed witnesses testifying in regard to such motion.
3. **Rules of Evidence.** In proceedings where the statutes embodying the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.
4. **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.
5. **Criminal Law: Identification Procedures.** Whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures.
6. **Trial: Identification Procedures.** The factors to be considered in determining the likelihood of misidentification include (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the degree of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.
7. **Trial: Evidence.** Objection to the admission of evidence is not timely unless it is made at the earliest opportunity after the ground for the objection becomes apparent.
8. **Trial: Evidence: Waiver: Appeal and Error.** If a party fails to make a timely objection to evidence, the party waives the right to assert on appeal prejudicial error concerning the evidence received without objection.
9. **Rules of Evidence: Other Acts.** Evidence of other crimes, wrongs, or acts may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the accused's guilt of the offense in question.
10. **Rules of Evidence.** Evidence of other crimes, wrongs, or acts is admissible for the purpose of establishing identity or a particular method of operation.
11. **Trial: Appeal and Error.** An abuse of discretion takes place when the trial court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.

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.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

HASTINGS, C.J.

Following a jury trial, the defendant, Maurice Coleman, was convicted of forgery in the second degree involving more than $300 and was sentenced to a term of imprisonment for not less than 2 years nor more than 4 years. The defendant appeals, assigning as error the court's (1) overruling of his motion to suppress an in-court identification, (2) allowing evidence of uncharged misconduct and prior bad acts into evidence, and (3) imposing an excessive sentence. We affirm.

In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Melton*, 239 Neb. 790, 478 N.W.2d 341 (1992); *State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed witnesses testifying in regard to such motion. *State v. Melton, supra*; *State v. Tingle, supra*.

In proceedings where the statutes embodying the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *State v. Timmerman*, 240 Neb. 74, 480 N.W.2d 411 (1992); *State v. Schwartz*, 239 Neb. 84, 474 N.W.2d 461 (1991).

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. Start*, 239 Neb. 571, 477 N.W.2d 20 (1991); *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991).

On September 21, 1988, Sherri Sowers was employed as a customer service representative at Baker's Supermarket at 90th and Fort Streets in Douglas County, Nebraska. That evening, she was presented with a Palleton Inc. payroll check by a person unknown to her. She asked for identification and was given a

photo identification card. Sowers recognized the name of the company on the check, which alerted her to the fact that the check should not be cashed because it was a "line-four check." However, she did carry out the procedure of writing the identification number on the check, and she then took both the check and the identification card to the back of the customer service center. She then picked up the telephone to call a manager to alert him to the line-four check. At that time, the person who had presented the check ran from the store. At the trial, Sowers identified the defendant as the person who had presented the check to her.

The police were contacted following the incident, and on September 28, 1988, Sowers was shown an array of six photographs to see if she could identify the person who had attempted to cash the check. She identified the defendant as that person by choosing photograph No. 4.

At a pretrial suppression hearing, and again at trial, the defense objected to Sowers' in-court identification of the defendant, arguing that it was tainted by this out-of-court photographic lineup. The basis of defendant's objection seemed to be that the photograph of himself with a large bandage on his forehead was the only one of the lineup photos in which a bandage appeared. However, there was nothing in the record to tie the fact of a bandage to the defendant or his activities. The objection was overruled.

Jack Belmont, proprietor of Crosstown Jewelry, testified that on September 20, 1988, he had cashed a Palleton payroll check for the defendant, which was subsequently returned to him by the bank. He further testified that on calling the Palleton company, he was informed that the check was one of several check blanks that had been stolen. Belmont further testified that about 6 to 8 weeks prior to trial in the case at bar, just before February 20, 1991, he had been contacted by the defendant to find out if he would accept payment to make this last check good. The defendant's objection to this evidence on the ground of relevance was overruled.

Larry Meyer, owner of Palleton, testified that he was not acquainted with the defendant and that the defendant had never worked for him nor been on the Palleton payroll. He also

identified the two checks involved as containing nonauthentic signatures and as being part of the lot of discontinued checks that had been stolen.

Defendant's complaint as to the suggestiveness of the photo array shown to Sowers and the subsequent tainting of the in-court identification is without merit. "[T]his court has held that whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures." *State v. Gibbs*, 238 Neb. 268, 273, 470 N.W.2d 558, 563 (1991). The factors to be considered in determining the likelihood of misidentification include (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the degree of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *State v. Garcia*, 235 Neb. 53, 453 N.W.2d 469 (1990); *State v. Richard*, 228 Neb. 872, 424 N.W.2d 859 (1988).

Sowers testified that she was required to and did request a photo identification when cashing the check. She had a "good look" at the person presenting the check and was able to see his face clearly. She also testified that she was alerted to the fact that she was being presented with a line-four check, which was not to be cashed. She nevertheless completed the procedure of accepting the photo identification card, and she had a good look at the person who handed it to her. She said that she compared the photo identification with the face of the man presenting it, and he appeared to be the same person.

Sowers was told by the police officer who presented the six-photo array to her that she should look carefully and that she should pay attention to faces rather than hairstyles, which could be changed. She was not told that the suspect was among the six in the array, nor that she had to pick anyone. Sowers also testified at trial that the photo identification which was introduced into evidence was a picture of the defendant whom she saw present in the courtroom.

There is no merit to defendant's assignment of error relating

to his identification.

We next consider defendant's claim that allowing evidence of uncharged misconduct and prior bad acts resulted in a denial of the defendant's right to a fair trial.

Defendant refers to a "veritable landslide of evidence tending to show that the defendant was a person of bad character." A part of this landslide refers to testimony relating to defendant's "alleged traffic difficulties." However, the only apparent testimony involving traffic warrants was elicited from Officer Mark Lang on cross-examination by the defense. That argument is without merit.

Defendant next complains that Belmont was "allowed to testify over objection as to a check presented in another instance by the defendant . . . ." The record shows that Belmont did testify, without objection, to the fact that he had cashed a check for the defendant, that he had contacted the Palleton company to inquire about its check, and that he had turned the check over to the Omaha Police Division. The defendant did not object to this testimony, but did proffer an objection when the check was offered in evidence. Objection to the admission of evidence is not timely unless it is made at the earliest opportunity after the ground for the objection becomes apparent. *State v. Rodgers*, 237 Neb. 506, 466 N.W.2d 537 (1991). If a party fails to make a timely objection to evidence, the party waives the right to assert on appeal prejudicial error concerning the evidence received without objection. *State v. Rodgers, supra.*

However, even if the objection was timely, the testimony would have been admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1989), which states that 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.

Evidence of other crimes, wrongs, or acts may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial

probative value in determining the accused's guilt of the offense in question. *State v. Ruyle*, 234 Neb. 760, 452 N.W.2d 734 (1990).

In *State v. Johnson*, 205 Neb. 778, 781, 290 N.W.2d 205, 207 (1980), this court found that "[i]n a forgery case involving a patterned plan of operation, evidence of prior similar acts committed within 1 month before the act charged is relevant." Evidence of other crimes, wrongs, or acts is admissible for the purpose of establishing identity or a particular method of operation. *State v. Evans*, 235 Neb. 575, 456 N.W.2d 739 (1990). These authorities are applicable in this case.

Finally, the statutory punishment for forgery in the second degree is imprisonment of from 1 to 20 years, a fine of $25,000, or both such fine and imprisonment. A sentence imposed within statutory limits will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Start*, 239 Neb. 571, 477 N.W.2d 20 (1991). An abuse of discretion takes place when the trial court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Crowdell, ante* p. 216, 487 N.W.2d 273 (1992); *State v. McCaslin*, 240 Neb. 482, 482 N.W.2d 558 (1992).

The sentencing court noted that the defendant's presentence report contained a record of many police contacts dating back to 1976, including two felony convictions. The court also found that based upon the defendant's past history, there was a substantial risk that during any period of probation, he would continue to engage in criminal conduct.

There is no error in the record, and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. LONNIE L. CRIFFIELD, APPELLEE.

490 N.W.2d 226

Filed October 16, 1992. No. S-92-069.

1. **Sentences.** Any court which imposes a sentence for a criminal offense may reduce such sentence within 120 days after (1) the sentence is imposed or probation is revoked or (2) receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal. No hearing shall be required concerning any request for reduction denied under Neb. Rev. Stat. § 29-2308.01 (Reissue 1989).
2. **Constitutional Law: Appeal and Error.** Except in the most unusual of cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. If not so raised, it will be considered to have been waived.
3. **Records: Appeal and Error.** It is incumbent on the party appealing to present a record which supports the error assigned; absent such a record, the decision of the lower court is to be affirmed.

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

Mark J. Young and Jerom E. Janulewicz, Deputy Hall County Attorneys, for appellant.

Steven W. Dowding and Vince Dowding for appellee.

Don Stenberg, Attorney General, and Mark D. Starr as amicus curiae.

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

FAHRNBRUCH, J.

In this appeal, the Hall County Attorney's office attempts to challenge the constitutionality of Neb. Rev. Stat. § 29-2308.01 (Reissue 1989), which permits a sentencing judge to reduce a criminal sentence within 120 days after the sentence is imposed.

Because the record contains no showing that the issue was raised in the trial court, we affirm the order of the district court for Hall County reducing the sentence of Lonnie L. Criffield.

On December 4, 1990, Criffield was sentenced to serve a term of not less than 5 years nor more than 7 years in prison for robbery. On March 22, 1991, pursuant to § 29-2308.01,

Criffield filed a motion for a reduction of his sentence. Section 29-2308.01 provides that

> [a]ny court which imposes a sentence for a criminal offense may reduce such sentence within one hundred twenty days after (1) the sentence is imposed or probation is revoked or (2) receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal. No hearing shall be required concerning any request for reduction denied under this section.

On September 27, 1991, a deputy Hall County attorney gave notice to Nebraska's Attorney General and to Criffield and his attorney of the Hall County Attorney's *intent to contest* the constitutionality of the reduction of sentence statute. The transcript fails to reveal a pleading by the Hall County Attorney's office that in fact challenges the constitutionality of § 29-2308.01.

On December 11, 1991, the district court heard arguments on the motion to reduce the sentence. On December 30, the court reduced Criffield's sentence to not less than 42 months nor more than 7 years. On January 24, 1992, the deputy Hall County attorney filed an application for leave to docket error proceedings in this court pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1989).

In essence, the Hall County Attorney's office claims in its brief that § 29-2308.01 violates the separation of powers doctrine by (1) authorizing the judiciary to reduce sentences after they have become final and (2) invading the exclusive province of the executive branch to reduce and commute sentences.

The application by the county attorney requesting leave to file an appeal contains a request that this court review the constitutionality of the sentence reduction statute. There is nothing in the Hall County Attorney's application to show that the constitutionality of § 29-2308.01 was in fact raised before the trial court or ruled upon by that court. Neither the transcript nor the bill of exceptions presented to this court reflects that the constitutionality of § 29-2308.01 was in fact presented to, or ruled upon by, the district court for Hall County. Except in the most unusual of cases, for a question of

constitutionality to be considered on appeal, it must have been properly raised in the trial court. If not so raised, it will be considered to have been waived. *State v. Thomas*, 236 Neb. 355, 461 N.W.2d 513 (1990).

Moreover, the journal entry of the proceeding from which this appeal was taken does not reflect that the constitutionality of § 29-2308.01 was presented to, considered by, or ruled upon by the district court. Therefore, this court will not consider whether the reduction of sentence statute is constitutional.

It is incumbent on the party appealing to present a record which supports the error assigned; absent such a record, the decision of the lower court is to be affirmed. *Abboud v. Cutler*, 238 Neb. 177, 469 N.W.2d 763 (1991).

Since the only error assigned by the deputy Hall County attorney was the constitutionality of § 29-2308.01, the reduction of sentence by the district court for Hall County must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STANLEY JONES, APPELLANT.

491 N.W.2d 30

Filed October 23, 1992. No. S-86-796.

1. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the relevant evidence, when viewed and construed in the light most favorable to the State, is sufficient to support the verdict.
2. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and the verdict will be affirmed, in the absence of prejudicial error, if properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
3. **Trial: Effectiveness of Counsel: Witnesses.** The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves ineffective, will not, without more, sustain a finding of ineffectiveness of counsel.
4. **Records: Convictions: Sentences: Appeal and Error.** Typically, only the

conviction and sentencing records created in the district court prior to an original direct appeal are properly reviewable in a reinstated direct appeal.

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

Steven M. Lathrop, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellant.

Stanley Jones, pro se.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

WHITE, J.

Stanley Jones appeals his jury convictions of attempted robbery (count I) and use of a firearm to commit a felony (count II). Both convictions are Class III felonies for which Jones was sentenced to consecutive terms of from 6 to 10 years.

On appeal, Jones' claims can be summarized to assert that the trial court erred in not granting him a new trial because (1) the evidence against him was insufficient to sustain a conviction and (2) he was denied effective assistance of counsel as guaranteed by the Sixth Amendment to the U.S. Constitution. We affirm.

On March 27, 1986, a man entered the Metropolitan Building and Loan Association (MB&LA) in Omaha, Nebraska, at approximately 10:05 a.m. The man approached a gate near the counter, pulled a mask over his lower face, and pointed a gun at a teller. The teller is the wife of the owner of MB&LA. The owner was in an adjoining office, and when he saw the would-be robber point a gun at his wife, he shot at the robber with a gun he kept in his office.

The shot missed the suspect, who ran from the building, and the owner and his son briefly chased him. Two bystanders also saw the suspect fleeing. One of the bystanders observed him jump into the back seat of a car and noted the license plate number. This license plate number was registered to a vehicle which matched the bystanders' description and was owned by Jones, the appellant.

Police investigators compiled a photographic spread of Jones and five other persons. Two bank tellers from MB&LA separately identified Jones as the would-be robber from this photo spread, and formal charges were subsequently brought against Jones.

At a hearing on Jones' motion to suppress identification, an officer testified to the procedure used in obtaining the identification through the photo spread. The tellers testified about the circumstances of the attempted robbery and the events surrounding the viewing of the photo spread. Based on this evidence, the district court determined that the circumstances surrounding the tellers' identification and the photo spread were not unduly suggestive and overruled Jones' objection to their admission at trial.

These three witnesses also testified at the ensuing jury trial. Jones elected not to take the stand, and he was subsequently convicted, on September 3, 1986. The motion for a new trial was denied, and this appeal resulted.

The procedural posture of this reinstated direct appeal is unusual and bears examination, as it pertains to the review of the record required of this court.

Jones' first court-appointed counsel, the public defender, filed a notice of appeal to this court on September 18, 1986. Approximately 3 months later, counsel filed a motion for leave to withdraw appearance in the case. This request was based on counsel's assessment that the appeal had no legal merit and was therefore frivolous. Counsel filed a brief in support of his motion to withdraw wherein he referred to potential issues for reversal of Jones' conviction but gave arguments only in favor of affirming the conviction. We granted the public defender's motion to withdraw and summarily dismissed Jones' direct appeal on February 2, 1987.

Jones then filed for postconviction relief based in part on the allegation that he was denied effective assistance of counsel on appeal to the Nebraska Supreme Court. The district court observed that the counsel's brief filed in the Nebraska Supreme Court on direct appeal had failed to advance arguments for reversal, while instead arguing in favor of affirming the conviction. Citing the U.S. Supreme Court holding in *Anders*

v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), the district court noted that such argument in withdrawal briefs is not permitted by the federal courts because it deprives the defendant of his right to adequate representation on direct appeal. Consequently, the district court granted Jones a new direct appeal to the Nebraska Supreme Court from his original convictions and sentences.

We note that the remedy ordered by the district court for a violation of the dictates of the *Anders* decision, i.e., a reinstated direct appeal, has been approved by the U.S. Court of Appeals for the Eighth Circuit. See *Robinson v. Black*, 812 F.2d 1084 (8th Cir. 1987).

As previously noted, the present appeal is predicated on two claims. First, the insufficiency of evidence claim challenges the ability and opportunity of the two MB&LA tellers to observe the perpetrator and subsequently identify Jones as the suspect.

We have consistently held that a verdict in a criminal case must be sustained if the relevant evidence, when viewed and construed in the light most favorable to the State, is sufficient to support the verdict. *State v. Jansen, ante* p. 196, 486 N.W.2d 913 (1992). It is only when properly admitted evidence lacks sufficient probative force as a matter of law that an appellate court may set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *Id.*

Defendant has not briefed, nor could we find, any plain error in the trial court's determination that the photo spread identification was not unduly suggestive. Additionally, the testimony at trial, when viewed most favorably for the State, reveals that on the day in question the tellers were both working at teller windows in a well-lit area of the building, both looked up when the door to the building opened, and both observed the would-be perpetrator walk in and approach the "gate" near one of the teller windows. Both tellers saw the suspect's face before he pulled up the mask.

The farther teller, who had extensive security and robbery training from working at a bank for 13 years, wrote down a description of the suspect and did not discuss the identification with the other teller. When the suspect pulled out the gun, the teller was, at most, 10 feet away.

The other teller was not engaged when the suspect entered the building, and she stepped over to the gate when the suspect approached. She stood immediately to the side of him as he attempted to cover his lower face with a handkerchief and did not duck when her husband fired shots at the perpetrator. This teller always wears glasses and was wearing them on that day. She also did not speak about the man's appearance with the other teller.

> In reviewing a criminal conviction, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and the verdict will be affirmed, in the absence of prejudicial error, if properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.

State v. Sassen, 240 Neb. 773, 774, 484 N.W.2d 469, 470 (1992).

An examination of the evidence in the record, construed in favor of the State in light of the defendant's convictions, discloses that the opportunity and ability of the tellers to identify Jones as the attempted robber are not insufficient as a matter of law. We therefore conclude that the challenged evidence is relevant and sufficient and supports the judgments of conviction.

Jones' second assignment of error, ineffective assistance of counsel, is based on several alleged failures of the then appointed counsel. Jones alleges that counsel failed to call a 9-year-old bystander whose description of the suspect somewhat differed from the tellers' identification and that counsel failed to attempt to secure the testimony of a witness, identified only as "Chuckie," who had allegedly borrowed Jones' car on the morning of the attempted robbery.

The allegation as to counsel's decision not to call the minor bystander, whose differing description was of questionable value to the defense, is not meritorious. "The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves ineffective, will not, without more, sustain a finding of ineffectiveness of counsel." *State v. Ellefson*, 231 Neb. 120, 123, 435 N.W.2d 653, 656 (1989).

A defense attorney's duty is " 'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' " *State v. Painter*, 229 Neb. 278, 281, 426 N.W.2d 513, 516 (1988) (quoting *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The record reveals that the attorney attempted to locate "Chuckie" through the defendant's sister and various suggested hangouts, but counsel was unable to ascertain either his full name or his whereabouts. The attorney having made a reasonable investigation given the limited information, this evidence does not support a claim of ineffective counsel.

Jones also maintains that counsel was ineffective because he failed to secure a complete record of the trial proceedings, which should have included voir dire, opening statement, and closing argument. Furthermore, Jones, who is black, alleges that counsel failed to object to the State's striking of the lone black venireperson in light of the then-recent U.S. Supreme Court holding in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

In Jones' appeal brief, he cites to the postconviction hearing record as the reference point for testimony relating to the improper exclusion of the black venireperson. To reiterate, Jones' petition for postconviction relief was filed after the original direct appeal but just prior to this reinstated direct appeal.

As the State notes, testimony from the postconviction relief hearing would not generally be before this court on a direct appeal. Typically, only the conviction and sentencing records created in the district court prior to an original direct appeal are properly reviewable in a reinstated direct appeal.

While the postconviction record is necessarily before the court as a prerequisite to this court's jurisdiction, this limited purpose precludes a review of the entire postconviction record on direct appeal.

A review of the conviction and sentencing records reveals that Jones' counsel did not request a recordation of voir dire, opening statement, or closing argument. However, to sustain a claim of ineffective assistance of counsel, the defendant must demonstrate prejudice was suffered, and the record must

affirmatively support the claim. *State v. Sanders*, 235 Neb. 183, 455 N.W.2d 108 (1990).

At the combined hearing on Jones' motion for a new trial and hearing to impose sentence, Jones stated that he "was denied fair jury selection by my attorney, who refused to allow me to strike a juror at my request. And no blacks were allowed on my jury, and I was convicted by an all white jury." The jury roster does not indicate the race of the potential jurors or indicate in any way whether the State acted improperly by striking a black venireperson. The trial record is void of any other independent evidence upon which an alleged prejudicial finding can be based.

Without other evidence tending to demonstrate prejudice suffered by a criminal defendant, the failure of counsel to request a recordation of voir dire, opening statement, or closing argument is insufficient to support an ineffective assistance of counsel claim. Consequently, there is also insufficient evidence in the trial record to substantiate the appellant's claims regarding an improper challenge to a black venireperson.

In conclusion, we find that the tellers' opportunity to identify Jones as the would-be robber was not insufficient to support the convictions. We further find that there is insufficient evidence in the record before us to support defendant's claim of ineffective assistance of counsel. We hold that the trial court did not err in denying Jones' motion for a new trial, and we therefore affirm the defendant's convictions and sentences.

To clarify, by affirming the trial court proceedings on this direct appeal, we are simply ruling on the merits of those assignments of error that were properly reviewable from the conviction and sentencing record. By affirming the trial court's judgments on direct appeal, we are not ruling on the merits of the postconviction claims.

AFFIRMED.

ANTHONY ABBOUD AND ROBERT DOYLE, APPELLANTS, V. FORREST R. MICHALS, JR., AND TWIN TOWERS, LTD., A NEBRASKA LIMITED PARTNERSHIP, APPELLEES.

491 N.W.2d 34

Filed October 23, 1992. No. S-89-700.

1. **Summary Judgment.** A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Proof.** 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. **Contracts: Sales: Real Estate: Brokers: Agents.** Every contract for the sale of lands between the owner thereof and any broker or agent employed to sell the same shall be void unless the contract is in writing and subscribed by the owner of the land and the broker or agent. Such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent. Neb. Rev. Stat. § 36-107 (Reissue 1988).
5. **Contracts: Parol Evidence.** Proof of prior or contemporaneous oral agreements which alter, vary, or contradict the terms of a written agreement are rendered ineffective by the parol evidence rule.
6. _____: _____. If negotiations between the parties result in an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity. Oral testimony is not admissible under the ambiguity exception to the parol evidence rule to establish an understanding at variance with the plain terms of the written instrument.
7. **Fraud: Proof.** To establish misrepresentation, the party alleging it must plead and prove that a representation was made; that the representation was false; that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion; that it was made with the intention that the plaintiffs should rely on it; that the plaintiffs reasonably did so rely; and that the plaintiffs suffered damage as a result.

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

Alan M. Thelen and Kelle J. Westland, of Westland & Associates, P.C., for appellants.

Peter C. Wegman, of Rembolt Ludtke Parker & Berger, for appellees.

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

GRANT, J.

Plaintiffs, Anthony Abboud and Robert Doyle, appeal from an order of the district court for Douglas County. The order granted summary judgment to defendants, Forrest R. Michals, Jr., and Twin Towers, Ltd., a Nebraska limited partnership, in plaintiffs' suit for damages to recover a real estate commission for the sale of Twin Towers, a condominium in Omaha, Nebraska. This case marks the second appearance of plaintiffs in this court on the issue of payment of real estate commission on the sale of Twin Towers. The first case resulted in a judgment in favor of the buyer of the property on the issue of the payment of a commission to plaintiffs. See *Abboud v. Cutler*, 238 Neb. 177, 469 N.W.2d 763 (1991). This action is directed against the sellers of the property.

Plaintiffs timely appealed from the summary judgment and in this court assign as error the actions of the district court in (1) "entering summary judgment against [plaintiffs] as to the theory of recovery of breach of contract" and (2) entering summary judgment even though plaintiffs' seventh amended petition "pleads the requisite elements of fraud, and that the evidence on the record creates material factual issues." Brief for appellants at 24. We affirm.

The record before us consists of the pleadings, depositions, and affidavits and shows the facts set out below. On November 8, 1982, plaintiffs, who are licensed real estate agents and brokers, prepared and submitted to defendants a nonexclusive listing agreement for the sale of Twin Towers. The proposal provided that the selling price would be $5.5 million and provided that the seller would pay a commission of $250,000 if a sale was made or a buyer was found. This original nonexclusive listing proposal was not agreed to by defendants. Instead, Michals changed the language of the proposal to provide that the selling price for Twin Towers would be $5.25 million, and made no provision for the payment of a

commission by the sellers. At the bottom of the document, Abboud wrote: "COMMISSON [sic] OF 250,000 TO BE PAID BY BUYER." This agreement was signed by Michals as "General Partner" and owner and by Abboud as a representative of Gateway Realty of Omaha. Gateway assigned its interest to plaintiffs. On November 8, 1982, when the agreement was signed, plaintiffs had no prospects to buy Twin Towers and did not know of Michael Cutler, the eventual buyer.

Pursuant to the November 8 agreement, plaintiffs began efforts to sell the property. They placed an ad in the Exchange Journal and sent out information to various parties. They also prepared, from information supplied by Michals, materials showing the income and expenses of Twin Towers.

Plaintiffs testified that they delivered to Michals a one-party listing agreement naming Cutler as their client. Plaintiffs contend that the document required Michals to ensure that if Cutler purchased the property, plaintiffs would get a commission. Plaintiffs concede that this document was never signed, and no copy of it is before this court.

An agreement dated June 2, 1983, was executed by Michals and given to the plaintiffs. The agreement provided that in consideration of plaintiffs' presentation of Cutler and in further consideration of their "willingness to make all commission arrangements exclusively with the said Mike Cutler," Michals agreed not to "solicit, show or in any way attempt to sell" Twin Towers to Cutler for a period of 1 year. This agreement was signed by Michals and plaintiffs.

Cutler called plaintiffs in response to the advertisements placed by plaintiffs. Cutler was sent information on Twin Towers. Plaintiffs testified that they showed the property to Cutler sometime in May or June 1983, but were unsure if this first meeting took place before or after the June 2 agreement. Michals was present for the first tour of the Towers building at the plaintiffs' invitation and answered questions from Cutler. After this first meeting, plaintiffs discussed with Cutler possible uses for the property, the price, and the buyer's responsibility for the real estate commission. Abboud testified that Cutler had no objection to paying the commission.

Cutler visited the property several more times in 1983, both

with and in the absence of the plaintiffs. Abboud testified that he never told Cutler not to go through the building without the plaintiffs, nor did he instruct Cutler to speak to plaintiffs rather than to Michals about the property.

Abboud testified that he was not aware of any specific instances in which Cutler and Michals discussed the property without the plaintiffs being present, but was sure that they had done so. He made no complaints, however, about the direct contacts, nor did he complain about the showings, solicitations, or attempts to sell by Michals.

In July 1983, plaintiffs supplied Cutler with a commission proposal which stated that Cutler agreed to pay $250,000 in commissions to plaintiffs if he purchased Twin Towers. Cutler never signed this agreement.

The first draft of the proposed sale agreement between defendants and Cutler, dated July 8, 1983, listed the sale price as $5 million but contained nothing about the payment of a commission.

In a letter dated August 5, 1983, Michals made a counteroffer to Cutler. His letter contained the following proposed term:

> 5. Broker's Commissions. We understand that you have been dealing with certain real estate agents, specifically Bob Doyle and Tony Abboud, concerning your possible purchase of the property. In the event that a commission becomes due and owing to these individuals, or any other individual with whom you have dealt, you will be solely responsible for any such commission and we will not be required to pay any of the same.

The letter was signed by Michals, and Cutler signed it after the language "AGREED AND ACCEPTED."

Abboud testified that he did not attempt to prevent any of the parties from signing these documents. He made no further attempts to get Cutler to sign a written commission agreement.

On November 18, 1983, a final purchase agreement was entered into by Michals as the sole general partner of Twin Towers, Ltd., and by Cutler. The purchase price was $5 million, and the agreement contained the following clause:

Real Estate Commissions. The parties acknowledge there

> is no listing or brokerage contract relating to the Property. Buyers represent that any lawful commission determined to be due and owing will be the sole obligation of Buyers and will not become a lien on the Property or an obligation of Seller. . . . Seller and Buyers each represent and warrant to the other that no other persons are entitled to any real estate commission as a result of the sale of the Property and each party hereto agrees to indemnify the other and hold it harmless from and against any obligations to pay any such real estate commissions. This provision is solely between Seller and Buyers and shall in no manner be construed to establish a right by any third party to receive a real estate commission upon a sale of the Property.

The agreement was signed by both Cutler and Michals and was notarized.

Plaintiffs were not paid by Cutler. They are now making a claim against Michals based on the above-mentioned June 2 agreement, asserting that the agreement required Michals to "protect" the plaintiffs' commission arrangements with Cutler. Plaintiffs further contend that Michals' failure to protect them resulted in their loss of the $250,000 commission and that Michals should be required to pay damages in that amount.

In each of their assignments of error, plaintiffs contend that the court erred by granting summary judgment for Michals and Twin Towers, Ltd. We have held:

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

Murphy v. Spelts-Schultz Lumber Co., 240 Neb. 275, 277, 481

N.W.2d 422, 425 (1992); *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988). See, also, Neb. Rev. Stat. § 25-1332 (Reissue 1989).

Further, we have held: " '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.' " *Wiles v. Metzger*, 238 Neb. 943, 949, 473 N.W.2d 113, 118 (1991).

Plaintiffs' first assignment of error asserts that the district court erred "in entering summary judgment against Abboud and Doyle . . . as to the theory of recovery of breach of contract." Plaintiffs contend that Michals breached a contract to " 'protect' the [plaintiffs'] commission interest." Brief for appellants at 24-25.

Plaintiffs base this contention on testimony which they say indicates that an "understanding" had been reached by the parties as to the commission. The relevant testimony by Michals provides:

> Q. What was the understanding you reached with [Abboud]?
>
> A. . . . I had no discussions with Tony . . . Abboud . . . or anyone else, as far as assurances of anybody receiving a commission. My understanding with them was that they were willing to bring me a client and they and I would deal in good faith on that, which I did. . . .

Plaintiffs contend that Michals was contractually obligated to protect the plaintiffs' ability to collect a commission. Testimony offered by plaintiffs shows the contrary. Michals' testimony specifically states that he did not make any "assurances of anybody receiving a commission," and the plaintiffs' argument appears to be based solely upon his use of the term "understanding."

Additional testimony was offered by plaintiffs to buttress their assertion that an "agreement to protect" existed. Michals testified, "I'm telling you that had they [plaintiffs] come to me . . . and said there was a problem, that they were not being treated fairly, or whatever, yes I would not have closed." Again, these statements are presented by the plaintiffs as

"indications . . . of some type of 'understanding.' " Brief for appellants at 15.

Further, plaintiffs offered the November 8, 1982, nonexclusive listing agreement and the June 2, 1983, single-party listing agreement as evidence of Michals' intent to protect the plaintiffs' commission. The November 8 agreement states, in relevant part:

> In consideration of your agreement to offer for sale the property . . . and to use your efforts to find a Purchaser therefore, I hereby give you the Non-exclusive right to sell Twin Towers Building . . . for the sum of $5,250,000.00 . . . . I agree to allow you to advertise my property for sale . . . . I understand there is to be no charge to me for advertising . . . or any other services that Gateway offers . . . .

All references to payment of a commission by the owner were struck out, and the following was inserted by Abboud at the bottom of the document: "COMMISSON [sic] OF 250,000 TO BE PAID BY BUYER."

As to the June 2 agreement, plaintiffs offered testimony by Doyle to explain the arrangement between Michals and the two real estate agents:

> Q. What did you say to Mr. Michals and what did he say to you?
>
> A. He said, "Any clients that you have, bring it in writing to me and I'll protect you on the commission."
>
> Q. And when you say "protect," what do you mean?
>
> A. That we would be assured that we would get our commission.
>
> Q. From the buyer?
>
> A. From the buyer or the seller, whoever, he'd make sure we got it.

The record does not show that any written agreement between plaintiffs and anyone else was ever presented to Michals. The June 2 agreement was executed when the plaintiffs presented Cutler as a potential buyer. On this issue, the agreement itself provides in toto:

> In consideration of your agreement to present Mike Cutler - Heafey & Heafey to Twin Towers, Ltd. as a

> potential purchaser of the office complex located at 3000 Farnam Street, Omaha, Nebraska, and in further consideration of your willingness to make all commission arrangements exclusively with the said Mike Cutler - Heafey & Heafey, the undersigned hereby agree not to solicit, show or in any way attempt to sell said office complex or any part thereof to the said Mike Cutler . . . for a period of 12 (months) . . . after the date hereof.

In examining the disputed contract, it must first be determined what type of agreement is involved. Defendants contend that if the agreement of June 2, 1983, was for the payment of real estate commissions, it is void because it fails to meet the statutory requirements under Neb. Rev. Stat. § 36-107 (Reissue 1988). Section 36-107 provides:

> Every contract for the sale of lands between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent. Such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent.

It is clear that the contract is one for the potential sale of land, between a landowner and a broker, as contemplated by statute. The contract sufficiently describes the property. The contract does not, however, set out "the compensation to be allowed by the owner."

As to plaintiffs' recovery under a breach of contract theory, Abboud further stated in his deposition that the June 2 agreement was an integration of the oral discussions to that point:

> Q. Were you satisfied that [the June 2 agreement] summarized the verbal discussions you had with Mr. Michals regarding your clients?
>
> A. Verbal discussions we had with Mr. Michals, I believe I was satisfied with. I know I was satisfied with this agreement, yes.
>
> Q. Was there anything that was not in [the June 2 agreement] that you felt should be in [it]?
>
> A. No. At the time we accepted the [June 2 agreement], I was satisfied with it.

The plaintiffs contend that the combined "acts of the parties indicate an intention on the [defendants'] part to protect the [plaintiffs'] commission interest." Brief for appellants at 18. Plaintiffs' testimony, however, shows that the June 2 agreement was adopted by the parties as the final and complete expression of their agreement. Abboud stated that the June 2 agreement was "the protection agreement to which [he was] referring."

Proof of prior or contemporaneous oral agreements which alter, vary, or contradict the terms of a written agreement are rendered ineffective by the parol evidence rule. *Perry v. Gross*, 155 Neb. 662, 53 N.W.2d 73 (1952).

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

Five Points Bank v. White, 231 Neb. 568, 571, 437 N.W.2d 460, 462 (1989). Accord *Sederstrom v. Burge*, 216 Neb. 512, 343 N.W.2d 770 (1984).

Under the unambiguous language in the June 2 agreement, the defendants agreed only "not to solicit, show or in any way attempt to sell" the Twin Towers building. In exchange for this promise, plaintiffs agreed to present Cutler as a potential purchaser, and further agreed to "make all commission arrangements exclusively with the said Mike Cutler." Plaintiffs now seek to alter the language of the agreement with evidence of prior oral negotiations to establish some type of "understanding" between the parties. The parol evidence rule expressly bars such evidence.

The agreement relied on by plaintiffs as a basis to collect damages from defendants, however, does not "set forth the compensation to be allowed by the owner," but instead provides that plaintiffs were to "make all commission arrangements exclusively with the said Mike Cutler." In any event, the document in question was not signed by the seller, and therefore, any oral contract evidenced by this document is a nullity under § 36-107. There was no written agreement shown

in the evidence that would present a factual issue as to the existence of a written agreement to pay a real estate commission in accordance with § 36-107. The trial court did not err in granting summary judgment to defendants as to this theory of recovery. Plaintiffs' first assignment of error is without merit.

Plaintiffs' second assignment contends that the district court erred "in entering summary judgment dismissing [plaintiffs'] Seventh Amended Petition in its entirety on April 12, 1989; and in denying [plaintiffs'] Motion for New Trial as to the same." Plaintiffs contend that their seventh amended petition "pleads the requisite elements of fraud, and that the evidence on the record creates material factual issues as to the same." Brief for appellants at 24.

We have held that the elements of fraudulent misrepresentation are as follows:

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

Earl v. Priority Key Servs., 232 Neb. 584, 589, 441 N.W.2d 610, 614 (1989). Accord, *Bock v. Bank of Bellevue*, 230 Neb. 908, 434 N.W.2d 310 (1989); *Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986). See, also, *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991) (negligent misrepresentation).

In their seventh amended petition to the district court, plaintiffs alleged the following misrepresentations by Michals: (1) defendants would protect the plaintiffs' right to obtain a commission from the buyers, (2) no closing would take place unless that commission was protected and provided for in the closing, and (3) defendants' continued representations that the commission interest would be protected and provided for.

Plaintiffs cite several statements in the record as support for these allegations. Each of the above-cited elements for misrepresentation should therefore be examined in light of this evidence.

As to the first requirement (that representations were made),

Doyle testified that Michals made three specific statements which constituted representations. Initially, Doyle testified, Michals stated that he would "protect" the plaintiffs' commission interest. Next, in response to the initial purchase agreement which did not include the plaintiffs' commission interest, Doyle testified that Michals stated, "[D]on't worry, I'll make sure that I get you in the purchase agreement and protect you." Finally, Doyle testified that Michals said, "I'll make sure you get the commission."

As to the second requirement (that the representations be false), plaintiffs contend that it can now be determined from the record that the statements attributed to Michals are false, since the plaintiffs received no commission for the sale of Twin Towers.

As to the third requirement (that when the representation was made, the declarant knew it was false), the evidence pointed to by plaintiffs allegedly shows that after Michals had made the above statements, a draft of the purchase agreement prepared by his attorney included the following:

> Buyers acknowledge that they will be liable to certain real estate brokers, particularly Bob Doyle and Tony Abboud, for a real estate brokerage commission for the purchase contemplated in this Agreement. . . . Seller shall be solely responsible to pay a real estate commission to Nebraska Real Estate Corporation or a related entity.

It could be inferred from this document that Michals was attempting to help plaintiffs get a commission for the sale and that his statements relating thereto were accurate at the time they were made. There is no contradicting evidence that shows Michals was aware that the statements were false when he made them.

As to the fourth requirement (that the representations were made with the intention they be relied on), the record shows that the statements were not made with the intent that the plaintiffs should rely on them. Plaintiffs, by their own testimony, knew from the provisions of the June 2 agreement that it was plaintiffs' responsibility to make commission arrangements with Cutler. Further, the nonexclusive agreement of November 8, 1982, indicated that any commission on the sale

was to be paid by the buyer. Plaintiffs had nearly 20 months, after the November 8 agreement until the closing in June 1984, to make arrangements for their commission. This they did not do, and now, in this litigation, attempt to place the blame for their inaction upon defendants.

As to the fifth issue (whether the plaintiffs reasonably relied on the representations by Michals), there are a number of factors which require finding that plaintiffs' alleged reliance was not reasonable. Initially, plaintiffs contend that "[a]s a licensed real estate agent, Michals knew or should have known of the Statutory requirement that contracts for commission must be in writing." Reply brief for appellants at 9. This argument, however, ignores the fact that plaintiffs jointly had nearly 40 years of real estate experience and knew the statutory requirements on their own. *Weiner v. Hazer*, 230 Neb. 53, 58, 430 N.W.2d 269, 272 (1988), stated:

> Weiner was a licensed real estate broker, charged with knowledge of § 36-107 concerning the necessity of a written contract for a specified real estate commission. Under the circumstances, Weiner could not in good faith rely on an oral contract for payment of a real estate commission to a broker.

In addition, the written documents in the record before us show that it was the responsibility of the plaintiffs to make any necessary commission arrangements in regard to the sale of the property. An undated letter from Michals states, in relevant part:

> Twin Towers, LTD. will not enter into any type of listing agreement for the sale of the premises . . . .
>
> Twin Towers, LTD. will not pay a commission to a selling agent. Therefore, any and all commission arrangements should be made exclusively with prospective purchasers, who will remain solely responsible for same.

The nonexclusive agreement of November 8, 1982, states, in part, "COMMISSON [sic] OF 250,000 TO BE PAID BY BUYER." Finally, the agreement of June 2, 1983, states that the agreement is made "in further consideration of your willingness to make all commission arrangements exclusively with the said Mike Cutler - Heafey & Heafey."

Plaintiffs were aware for nearly 20 months before the closing in June 1984 that any commission on the sale was to be paid by the buyer and that they themselves were solely responsible for making the arrangements. The fact that the plaintiffs were "left out" of the arrangements 16 days before the closing means little in light of the time that they had prior to the closing to secure a commission agreement.

It was not reasonable for two real estate brokers, each with 20 years of experience, to rely on three brief oral statements to enforce a commission of $250,000.

Plaintiffs have not satisfied the test for misrepresentation and fraud set out in *Earl v. Priority Key Servs.*, 232 Neb. 584, 441 N.W.2d 610 (1989). Plaintiffs' second assignment of error is without merit.

No material issue of fact is present in the record before us. The district court's action in sustaining defendants' motion for summary judgment was correct and is affirmed.

AFFIRMED.

LEROY BLITZKIE, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

491 N.W.2d 42

Filed October 23, 1992. No. S-89-1175.

1. **Tort Claims Act: Appeal and Error.** On appeal to an appellate court under the State Tort Claims Act, the findings of the trial court will not be disturbed unless clearly wrong.
2. _____: _____. Whether the allegations made by a plaintiff constitute a cause of action under the State Tort Claims Act or whether the allegations set forth claims which are precluded by the discretionary function or misrepresentation exemptions are questions of law. Accordingly, an appellate court has an obligation to reach its conclusions on these questions independent from the conclusions reached by the trial court.
3. **Tort Claims Act.** The discretionary function or duty exemption in the State Tort Claims Act extends only to the basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions.
4. _____. Day-to-day management of businesses regularly requires judgment as to which of a range of permissible courses is the wisest. Discretionary conduct is not confined to the policy or planning level. It is the nature of the conduct,

rather than the status of the actor, that governs whether the discretionary function exception applies to a given case.

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

C.J. Gatz, of Jewell, Gatz, Collins, Dreier & Fitzgerald, and Lyle Joseph Koenig for appellant.

Robert M. Spire, Attorney General, and John R. Thompson for appellee.

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

HASTINGS, C.J.

Plaintiff, LeRoy Blitzkie, appeals the action of the district court, which entered judgment in favor of the State of Nebraska in his suit for damages. In its memorandum order, the district court held that any warnings which plaintiff alleges the State failed to give as to the proximity of a pseudorabies outbreak would have been a discretionary act for which the State enjoys immunity under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1981).

This is the third appearance of this case before the court. In *State v. Blitzkie*, 216 Neb. 105, 342 N.W.2d 5 (1983), we reversed a summary judgment in favor of the State because of the failure to give Blitzkie time to file counteraffidavits, and in *Blitzkie v. State*, 228 Neb. 409, 422 N.W.2d 773 (1988), we again set aside a summary judgment in favor of the State because of a waiver of jurisdictional defect by the State. This time, we affirm the judgment of the district court.

Plaintiff was a farmer who raised certified SPF (specific pathogen-free) hogs for breeding stock. In order to maintain certification, every 3 months plaintiff's veterinarian would test a different 25 percent of his stock for pseudorabies and brucellosis. In order to protect his herd from pseudorabies, it was necessary for plaintiff to issue boots and coveralls to anyone coming on the premises, followed by disinfecting of that clothing; to keep other animals and wildlife away from the hogs; to keep the buildings clean; and to avoid contact by outside trucks with his hog lots.

Around the first of April 1980, some of plaintiff's hogs became sick, and approximately April 9, some of plaintiff's hogs were diagnosed as having pseudorabies. A number of plaintiff's hogs died, including 10 "big sows" and about 500 young pigs.

Shortly after the outbreak of the disease in plaintiff's herd, the plaintiff learned of clinical diagnoses of pseudorabies in swine herds on several farms in Boyd County during the months of February and March. At that time, according to witness Dr. N.W. Kruse, the Nebraska Department of Agriculture had no statutory authority to eradicate pseudorabies, but did have authority and did, in the instances referred to, try to control the disease by quarantine. No general notice was given to the public of any outbreak of pseudorabies, but the State did have a practice of sending, every month between the first and the fifth, a list of all current pseudorabies-quarantined herds to all veterinarians practicing in the State of Nebraska, which included the plaintiff's two veterinarians.

The Nebraska Department of Agriculture is granted certain powers and duties by Neb. Rev. Stat. § 54-701 (Reissue 1988) as follows:

> The Department of Agriculture shall be vested with the power and charged with the duties of protecting the health of livestock in Nebraska, of determining and employing the most efficient and practical means for the prevention, suppression, control and eradication of dangerous, infectious, contagious or otherwise transmissible diseases among domestic animals, and, to that end, of placing in quarantine any county or part of any county, or any private premises, or private or public stockyards, and of quarantining any domestic animal or animals infected with such disease, or which have been, or are suspected of having been, exposed to infection therefrom, and of killing any animal so infected, and of regulating or prohibiting the arrival into and departure from and movement within the state of animals infected with such disease or exposed or suspected of having been exposed, to the cause, infection or contagion therefrom, and at the

> cost of the owner, of detaining any domestic animal found in violation of any departmental or statutory regulation or prohibition and to promulgate, adopt and enforce such reasonable rules and regulations as may be . . . proper . . . .

Plaintiff's petition filed against the State of Nebraska alleged knowledge on the part of the State of the outbreak of pseudorabies, the negligent failure of the State to notify the general public, and that as a proximate result of that negligence the plaintiff suffered loss of his property.

Plaintiff assigns as error the findings of the trial court that the State of Nebraska was immune from liability by reason of the discretionary function exception contained in the State Tort Claims Act, the finding that the Department of Agriculture had no duty to notify plaintiff of the outbreak of pseudorabies, the finding that the State's failure to notify plaintiff was not a proximate cause of plaintiff's loss, and the finding that plaintiff had failed to prove with reasonable certainty the amount of his damages. Because we agree with the district court that the duties imposed upon the State of Nebraska were discretionary duties and therefore not the basis for liability on the part of the State, we discuss only the first assignment of error, and we affirm.

On appeal to an appellate court under the State Tort Claims Act, the findings of the trial court will not be disturbed unless clearly wrong. *Kumar v. Douglas County*, 234 Neb. 511, 452 N.W.2d 21 (1990).

Whether the allegations made by a plaintiff constitute a cause of action under the State Tort Claims Act or whether the allegations set forth claims which are precluded by the discretionary function or misrepresentation exemptions are questions of law. Accordingly, an appellate court has an obligation to reach its conclusions on these questions independent from the conclusions reached by the trial court. *Marvin E. Jewell & Co. v. Thomas*, 231 Neb. 1, 434 N.W.2d 532 (1989).

The Legislature specifically exempted from the State Tort Claims Act

> [a]ny claim based upon an act or omission of an employee of the state, exercising due care, in the execution of a

> statute or regulation, whether or not such statute or regulation be valid, *or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty* on the part of a state agency or an employee of the state, whether or not the discretion be abused.

(Emphasis supplied.) § 81-8,219(1)(a). As we have previously held, the discretionary function or duty exemption in the State Tort Claims Act extends only to the basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions. See *Wickersham v. State*, 218 Neb. 175, 354 N.W.2d 134 (1984).

The very letter of § 54-701 implies that the Department of Agriculture has the discretion of "employing the most efficient and practical means" in the control and prevention of livestock disease. The evidence is uncontroverted that the Department of Agriculture did quarantine the affected animals, in compliance with the statute, and in its discretion, notified the state's veterinarians by way of newsletter. The method of notice and to whom the notice would be sent were completely discretionary functions, and plaintiff's claims that these activities were ministerial, rather than discretionary, are without merit.

As recently as *First Nat. Bank of Omaha v. State, ante* p. 267, 488 N.W.2d 343 (1992), we were faced with a remarkably similar question in principle. In that case, the Nebraska Department of Banking encouraged First National Bank of Omaha not to sell stock in Security Bank and Trust Company of Beatrice and First Security Savings of Beatrice, which stock it held as collateral on some loans, but, rather, encouraged First National to take over both of those institutions. First National rejected that proposal and sent potential buyers notice that the stock would be sold.

In the meantime, the department received written notice from the Federal Bureau of Investigation in regard to apparent fraudulent dealings involving Security Bank. At no time did the department make First National aware of that information.

Nevertheless, and shortly thereafter, a meeting was held with representatives of First National, the department, and others, at which meeting the director of the department proposed that

First National acquire the stock of Security Bank and Security Savings. Such an agreement was reached with apparently disastrous results to First National.

The basis of First National's suit against the State of Nebraska was that the department, by fostering and approving the agreement, undertook a self-imposed duty to act with due care, but instead acted negligently, to First National's detriment.

In rejecting that argument, this court stated, "We specifically found that while Neb. Rev. Stat. § 8-102 (Reissue 1991) and § 8-401 empower the department to supervise and control banks and industrial loan and investment companies, 'none of the statutes . . . requires the [d]epartment to execute any of its authorized powers.' " *First Nat. Bank of Omaha v. State, ante* at 273, 488 N.W.2d at 347, citing *Security Inv. Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989).

The court in *First Nat. Bank of Omaha v. State, ante* at 275, 488 N.W.2d at 348, quoting *U.S. v. Gaubert*, 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), stated the following:

> "Day-to-day management of banking affairs, like the management of other businesses, regularly require [sic] judgment as to which of a range of permissible courses is the wisest. Discretionary conduct is not confined to the policy or planning level. '[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.' *Varig Airlines, supra*, at 813, 104 S.Ct., at 2764." 111 S. Ct. at 1275. Thus, the *Gaubert* Court concluded operational level decisions . . . are not necessarily outside the discretionary function exemption. We agree.

In the present case, the Department of Agriculture was charged with "employing the most efficient and practical means for the prevention, suppression, control and eradication of dangerous, infectious, contagious or otherwise transmissible diseases among domestic animals, and, to that end, of placing in quarantine any county or part of any county . . . and of quarantining any domestic animal . . . ." § 54-701. In quarantining herds, the Department of Agriculture followed

those requirements to the letter and exercised its discretion as to its other actions, which it was authorized and obligated to do.

This case comes within the discretionary function exemption of the State Tort Claims Act, and the judgment of the district court is affirmed.

AFFIRMED.

GEORGINE SCHLEICH, APPELLEE, V. ARCHBISHOP BERGAN MERCY HOSPITAL, A NEBRASKA CORPORATION, APPELLANT.

491 N.W.2d 307

Filed October 23, 1992. No. S-89-1412.

1. **Directed Verdict.** A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law.
2. **Mental Distress: Negligence: Proximate Cause: Proof.** In order to recover for negligent infliction of emotional distress, the plaintiff is required to show that a negligent act of the defendant's proximately caused her to suffer severe emotional distress.
3. **Liability.** There is a qualified privilege for any citizen to report facts to the proper governmental authorities.
4. **Mental Distress.** To be actionable, emotional distress must have been so severe that no reasonable person could have been expected to endure it.
5. _____. To be actionable, emotional anguish or mental harm must be medically diagnosable and must be of sufficient severity that it is medically significant.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded with directions.

Thomas D. Wulff, of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Richard J. Dinsmore for appellee.

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

BOSLAUGH, J.

This is an action for negligent infliction of emotional

distress. The case was submitted to the jury, which returned a verdict for the plaintiff, Georgine Schleich, in the amount of $30,000. The defendant, Archbishop Bergan Mercy Hospital, has appealed.

The record shows that on July 26, 1988, Allison Jasperson, the daughter of the plaintiff, was admitted to the defendant hospital for gallbladder surgery. While in the operating room, Allison suffered cardiac arrest and went into a coma. Allison was then placed in the hospital's coronary care unit, where she remained in a coma.

Allison's doctors determined that she was brain dead and would not regain consciousness. Allison's family, including her husband, Larry, and the plaintiff, decided to follow the doctors' advice and placed Allison on "no code" status, which meant that in the event of another heart attack, no action would be taken to assist or revive Allison.

On August 14, 1988, it was decided to remove Allison's endotracheal tube in order to allow her to die with peace and dignity. The tube was to be removed that evening or the next morning, and following its removal, Allison would be transferred from coronary care to a less-intense-care area of the hospital.

At about noon of August 14, Larry and two other men came to the hospital to make a videotape of Allison. After checking the hospital's policy regarding videotaping patients, the shift supervisor, Nurse Sonia Astle, permitted the men to enter Allison's room.

Later that day, about 2:26 p.m., while Larry and the plaintiff were visiting Allison, Nurse Betsy Clark entered Allison's room for the purpose of suctioning Allison's endotracheal tube. Her husband, Larry, insisted that the nurse not suction Allison at that time because a respiratory therapist had just been in to do it. Larry and the plaintiff had the door to Allison's room shut, and the nurse thought this was uncharacteristic because prior to that day Larry and the plaintiff had always left the door open and wanted Allison to have all care necessary to be sure that she was comfortable.

Approximately 4 minutes after Larry and the plaintiff left Allison's room, Allison went into ventricular fibrillation, and

she died shortly after that. When the nurses came into Allison's room, they noticed that her sandals had been placed in the wastebasket and that all of the water in her flowers had been emptied.

Because Allison's condition had been stable prior to her death and because of the unusual circumstances of the afternoon, Nurse Astle felt that it was necessary to have the cause of Allison's death determined. Nurse Astle telephoned one of her supervisors at home and was told to contact Allison's doctors. Nurse Astle then called Dr. Imbrock and related the events of the afternoon. Dr. Imbrock instructed Nurse Astle to notify the county coroner. Nurse Astle then called Kristina Murphree, the acting county coroner.

The hospital's policy regarding notification of the coroner states that the house manager or her designate shall notify the coroner under specified instances. The house manager testified that she did not notify the coroner in this case and that she did not designate Nurse Astle to do it.

After the coroner had been notified, the coroner called the pathologist, who suggested that an autopsy be performed and the police be called so that the incident could be investigated promptly. Accordingly, the coroner contacted the police, who then went to the hospital and interviewed the nurses on duty that afternoon, as well as Larry and the plaintiff.

The plaintiff was briefly interviewed by a police officer. During the interview, the plaintiff was cooperative and never asked that the interview be stopped. The plaintiff was never directly accused of any criminal conduct and was never placed under arrest.

The evidence presented by the plaintiff regarding the emotional distress she suffered consists of the following:

> Q. And when you returned, Georgine, what happened when you and Larry returned to the hospital after you visited with the family members?
>
> A. As soon as we entered the emergency section, they right away separated us and put me in one room and said that Allison had died and that we couldn't see her.
>
> Q. And you were separated from Larry?
>
> A. Yes.

Q. And you were taken to a room?

A. Yes.

Q. By whom?

A. By one of the nurses, and we were allowed to use the telephone in the emergency ward anytime we wanted to, so I immediately went and called my son and daughter to come.

Q. Did you think something was wrong?

A. Yes.

Q. Did you find out that the police were there?

A. Yes, and my son came and told me that they were questioning Larry about killing her.

Q. And then did they then come for you?

A. Yes, and then they questioned me.

Q. And did the person identify himself as a policeman?

A. Yes, he did.

Q. What did he ask you?

A. He asked me if I had ever monkeyed with her — any of her machines or anything to cause her death. Of course I said no.

Q. Did he ask you if Larry did?

A. Yes, also if I knew Larry had done anything. I was sure that he hadn't.

Q. Did there come a time that you observed or were told that they were photographing your daughter's body, the crime lab people?

A. I might have, but I was so shook up by being accused of murdering my own child that I hardly knew what was going on.

Q. Were you subsequently allowed to go and see your daughter and have a prayer service in the room for your daughter?

A. Yes, we were. And the priest came but —

Q. . . . Were you allowed to kiss your daughter or touch your daughter?

A. No. We couldn't go near her at all.

Q. Who told you that?

A. The nurse, and they stood guard in the room right beside her.

Q. Georgine, you're obviously bothered today talking about this.

A. Yes. I'm sorry, I wasn't going to breakdown.

Q. We're almost done. How has it been since? I have to ask you how has it been since the time of your daughter's death. I know you of course mourn your daughter's death; is that correct?

A. Well, it's very painful, especially when they accuse you of killing your own child.

Q. What causes you to think of that?

A. Her pictures in the home, anytime anyone talks about it. A day doesn't go by that you don't think about it. It's bad enough having your child die but having them accuse you that you killed them is that much worse.

The plaintiff testified that as a result of the police interview she has suffered emotional distress; however, the plaintiff has not sought professional counseling, and no medical testimony was offered regarding her condition.

The defendant contends that a verdict should have been directed in its favor because the plaintiff failed to establish a prima facie case of negligent infliction of mental distress in that she failed to prove that she suffered severe emotional distress.

" '[A] directed verdict is proper only where reasonable minds cannot differ and can only draw but one conclusion from the evidence, where an issue should be decided as a matter of law.' " *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 298, 436 N.W.2d 151, 159 (1989).

In order to recover, the plaintiff was required to show that a negligent act of the defendant's proximately caused her to suffer severe emotional distress. *Turek v. St. Elizabeth Comm. Health Ctr., ante* p. 467, 488 N.W.2d 567 (1992). See, also, *Molien v. Kaiser Foundation Hospitals*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980); *Rodrigues v. State*, 52 Haw. 156, 472 P.2d 509 (1970); *Bass v. Nooney Co.*, 646 S.W.2d 765 (Mo. 1983); *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983).

The only negligence alleged in the petition was that employees of the defendant hospital informed the homicide division of the Omaha Police Division that the plaintiff or

decedent's husband or both had some part in causing the death of the decedent. The evidence does not support a finding that the allegation made in the petition was true, and the most that the plaintiff proved was that the decedent's death occurred under suspicious circumstances.

The evidence in this case failed to prove negligence on the part of the defendant which caused severe emotional distress to the plaintiff. The fact that the coroner was notified by Nurse Astle instead of the house manager, as the policy of the defendant hospital required, is of no legal significance. There is no evidence in this case of any violation of a standard of care which was an accepted standard of care in the industry.

In this case the death of the patient, Allison Jasperson, occurred under suspicious circumstances. Nurse Astle, who was the supervisor of the coronary care unit of the hospital and who was on duty when Allison died, first contacted one of her supervisors, who instructed her to contact the patient's attending physician. The physician then instructed Nurse Astle to notify the coroner. What happened after that was at the direction of the coroner and the police. It might well have been negligent for the hospital to do nothing under the circumstances of this case. As the defendant points out, there is a qualified privilege for any citizen to report facts to the proper governmental authorities. *Johnson v. First Nat. Bank & Trust Co.*, 207 Neb. 521, 300 N.W.2d 10 (1980). In this case, the hospital employees merely notified the coroner of the unusual circumstances, and the coroner in turn notified the police, who determined what kind and extent of an investigation should be made. Under such circumstances there is no liability upon the persons who provide the information to the proper authorities. See *Edgar v. Omaha Public Power Dist.*, 166 Neb. 452, 89 N.W.2d 238 (1958).

In this case, there was also no evidence that the plaintiff suffered severe emotional distress.

To be actionable, emotional distress must have been so severe that no reasonable person could have been expected to endure it. *Hassing v. Wortman*, 214 Neb. 154, 333 N.W.2d 765 (1983); *Gall v. Great Western Sugar Co.*, 219 Neb. 354, 363 N.W.2d 373 (1985); *Davis v. Texaco, Inc.*, 210 Neb. 67, 313 N.W.2d 221

(1981). Furthermore, the emotional anguish or mental harm must be medically diagnosable and must be of sufficient severity that it is medically significant. *Turek, supra*, citing *Bass v. Nooney Co., supra*.

Here, the plaintiff as a matter of law failed to prove that she had suffered severe emotional distress, as it has been defined by this court and other jurisdictions, for which recovery may be had.

It is unnecessary to consider the other assignments of error.

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

REVERSED AND REMANDED WITH DIRECTIONS.

DELORIS ANDERSON, APPELLANT, V. THE TRANSIT AUTHORITY OF THE CITY OF OMAHA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

491 N.W.2d 311

Filed October 23, 1992. No. S-89-1464.

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. **Appeal and Error.** In reviewing the findings of the trial court, we presume that the court resolved any controverted facts in favor of the successful party, and we consider the evidence and permissible inferences therefrom most favorably to that party.
3. **Motor Carriers: Proximate Cause: Negligence: Liability.** Common carriers are required to exercise the utmost skill, diligence, and foresight consistent with the business in which they are engaged for the safety of their passengers and are liable for the slightest negligence proximately causing injury.
4. **Motor Carriers: Liability.** Common carriers are not held to the strict liability of insurers.
5. **Motor Carriers: Negligence.** A common carrier has a duty to exercise reasonable care and diligence to keep its bus steps reasonably clear of snow and packed slush.
6. _____: _____. A common carrier is not required to remove any and all snow or slush which may accumulate on the steps of a bus during its operation, but the carrier does have a duty to diligently attempt to remove excessive accumulations of slush or snow which may pose an unreasonable risk to the safety of its

passengers.

7. _____: _____. It is a common carrier's duty to warn passengers of known dangerous conditions.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed and remanded for a new trial.

Lowell R. Johnson and Dennis E. Martin, of Martin & Martin, P.C., for appellant.

Eric H. Lindquist and Timothy M. Kenny, of Abrahams, Kaslow & Cassman, for appellee.

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

BOSLAUGH, J.

The plaintiff, Deloris Anderson, was injured on February 5, 1986, when she fell while stepping off a bus operated by the defendant, The Transit Authority of the City of Omaha. She brought this action, pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 through 13-926 (Reissue 1987), to recover damages for her injuries.

The trial court found in favor of the defendant. The plaintiff has appealed and contends that the trial court erred in finding that she failed to prove that the defendant had committed the slightest negligence in connection with its business and in admitting into evidence the depositional testimony of a passenger on the bus.

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. *Stauffer v. School Dist. of Tecumseh*, 238 Neb. 594, 473 N.W.2d 392 (1991); *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). Thus, in reviewing the findings of the trial court, we presume that the court resolved any controverted facts in favor of the successful party, and we consider the evidence and permissible inferences therefrom most favorably to that party. *Schmid v. Malcolm Sch. Dist.*, 233 Neb. 580, 447 N.W.2d 20 (1989).

The record shows that at approximately 7:15 a.m. on February 5, 1986, the plaintiff boarded the defendant's bus at 30th and California Streets in Omaha after completing her shift as an admitting clerk at St. Joseph Hospital. The bus then made several stops before arriving at 19th and Douglas Streets, where the plaintiff intended to transfer to another bus and continue on her way home from work. When the plaintiff attempted to step off the bus at 19th and Douglas Streets, she fell and broke her ankle. The plaintiff testified that she slipped on ice or slush which had accumulated on the steps of the bus. The defendant's busdriver, Ernest White, testified that the plaintiff appeared to stumble as she was leaving the bus.

According to the plaintiff, after she fell she observed 2 to 4 inches of packed slush and ice which had accumulated at the back of the step where she had fallen. White testified that he observed a "small amount" of slush on the steps immediately before the plaintiff attempted to leave the bus.

That morning, before beginning his route at 6:40 a.m., White had placed sand on the steps of the bus because of the likelihood of snow on that day. Approximately 10 minutes after White started his route, it began to snow, and it continued to snow, sometimes heavily, until the time when the plaintiff fell. White remembered using a long-handled scraper to clean the steps of the bus at the corner of 40th and Lake Streets and again at the corner of 33d and Burt Streets. It is apparent that these two instances in which White cleaned the steps occurred prior to the time that the plaintiff entered the bus. The plaintiff testified that White did not clean the steps of the bus at any time while she was aboard it. White did not remember cautioning the plaintiff regarding the slush on the steps, and the plaintiff's testimony indicates that he did not caution her.

In arriving at its decision, the trial court considered the depositional testimony of Janet Frahm, a passenger on the bus who had observed the plaintiff's fall. The defendant contends that Frahm was "unavailable" as a trial witness because although she had been subpoenaed, she planned to attend a funeral on the morning that she was scheduled to appear at the trial.

According to Frahm's depositional testimony, White did use

a scraper to clean the steps at 30th and Douglas Streets, only 3 to 4 minutes prior to the plaintiff's fall, while the plaintiff was a passenger on the bus. In her deposition, Frahm also testified that White did caution passengers to "be careful" and "watch your step" when leaving the bus.

In the November 8, 1989, order dismissing the plaintiff's petition, the district court stated:

> The negligence claim by the Plaintiff is based on the Defendant's allowing "ice and slush" to accumulate on the steps and further failing to warn the Plaintiff of this condition. . . .
>
> . . . .
>
> The evidence shows that the Defendant's agent, the bus driver Ernest White, attempted to "make sure the steps are as clear as much as he could" and cleaned the steps "as necessary". *He further testified . . . that he scraped the steps at least two times between the time the Plaintiff entered and exited the bus.* This testimony and the question of warnings by the bus driver were supported by the testimony of Janet Frahm. . . . The Plaintiff testifies to the contrary relative to warnings and the cleaning of the steps.
>
> The burden is upon the Plaintiff to prove by a preponderance of the evidence or by the greater weight of the evidence that the Defendant committed the slightest negligence consistent with its business. See *Serritos v. Chicago Transit Authority*, [153 Ill. App. 3d 265, 505 N.E.2d 1034 (1987)]. The Court finds by a review of the totality of the evidence in this record, that the Plaintiff has failed to do so.

(Emphasis supplied.)

The plaintiff first contends that the trial court erred in finding that she had failed to prove that the defendant had committed the slightest negligence consistent with its business. She points out that common carriers such as the defendant are required to exercise the utmost skill, diligence, and foresight consistent with the business in which they are engaged for the safety of their passengers and are liable for the slightest negligence proximately causing injury. *Pruitt v. Lincoln City*

Lines, 147 Neb. 204, 22 N.W.2d 651 (1946). However, common carriers are not held to the strict liability of insurers. *Ware v. Yellow Cab, Inc.*, 193 Neb. 159, 225 N.W.2d 565 (1975).

In arguing that the judgment should be affirmed, the defendant cites *Serritos v. Chicago Transit Authority*, 153 Ill. App. 3d 265, 505 N.E.2d 1034 (1987), *appeal denied* 116 Ill. 2d 576, 515 N.E.2d 127, the case which the district court cited in the order dismissing the plaintiff's petition. *Serritos* involved a factual situation very similar to that presented in this appeal. In the *Serritos* case the Appellate Court of Illinois determined that the Chicago Transit Authority, the defendant in that case, had no duty to clear accumulations of snow and slush from bus steps. The court reasoned:

> Even though a common carrier is held to a higher degree of care than a business-invitor . . . we feel that it is impractical to impose such a duty upon every CTA driver who operates a bus or elevated train during the winter months. Requiring defendant's drivers to remedy a slushy condition on their steps which was brought about by snow being tracked into their vehicles by patrons would bring the transit system to a complete standstill. Therefore, we agree with the trial court that it is totally impracticable to impose such a duty upon defendant. Since there is no duty to remove slush and snow from the steps of its vehicles, defendant's drivers were under no duty to warn passengers of such conditions, especially since such conditions are readily apparent.

Serritos v. Chicago Transit Authority, 153 Ill. App. 3d at 271-72, 505 N.E.2d at 1039.

The defendant suggests that the rule applied in *Serritos* should be adopted and followed in Nebraska. However, we believe that a rule which would permit a bus operator to do nothing while excessive amounts of snow, ice, and slush accumulated on the steps of the vehicle would be inconsistent with the rule stated in *Pruitt v. Lincoln City Lines, supra.* Reasoning which is consistent with *Pruitt* is presented in *Bradford v. Milwaukee & Suburban Transport Co.*, 25 Wis. 2d 161, 130 N.W.2d 282 (1964), in which the court stated:

> While a certain amount of snow and slush is to be

> expected in the entrance of a bus on a winter day when the streets and sidewalks are covered with snow, we cannot hold as urged by the defendant that the duty of the bus driver was fulfilled by only sweeping these steps off and sanding them at the end of a run. The accumulation of snow or slush on the steps forming ice renders the steps or is likely to render the steps of the bus slippery and thus unsafe during the run. A bus driver need not sweep and sand the steps at every stop but he does have a duty to ascertain and keep the bus entrances in a reasonably safe condition at all times . . . . This is not an impractical or an unreasonable requirement.

Bradford, 25 Wis. 2d at 165-66, 130 N.W.2d at 284. See, also, *Lesser v. MABSTOA*, 157 A.D.2d 352, 556 N.Y.S.2d 274 (1990) (a common carrier has a duty to exercise reasonable care and diligence to keep its bus steps reasonably clear of snow and packed slush).

Certainly a bus passenger cannot expect the steps of a bus to always be completely clean and dry in inclement weather, especially during the winter season, but a passenger is entitled to steps which are kept in a reasonably safe condition consistent with the weather conditions in which the bus is operating. Thus, we hold that a carrier such as the defendant is not required to remove any and all snow or slush which may accumulate on the steps of a bus during its operation, but the carrier does have a duty to diligently attempt to remove excessive accumulations of slush or snow which may pose an unreasonable risk to the safety of its passengers.

Furthermore, it is a carrier's duty to warn passengers of known dangerous conditions, see *Brooks v. Bi-State Development Agency*, 787 S.W.2d 713 (Mo. 1990). Such a warning may be accomplished through a simple sign which would serve to alert passengers of hazards which might exist on the steps of a bus.

In the order dismissing the plaintiff's petition, the trial court found that the plaintiff had failed to prove that the defendant had committed the slightest negligence consistent with its business and cited *Serritos v. Chicago Transit Authority, supra*. The trial court also made other factual findings which make the

basis for the trial court's decision unclear. If the trial court relied upon the rule stated in *Serritos* to dispose of the case, thereby holding that the defendant had no duty to clean the steps of the bus, the decision is erroneous. If the trial court determined that the defendant had carried out its duty to warn the plaintiff of the dangerous condition of the steps and its duty to remove excess snow and slush from the steps of the bus, the decision is erroneous because the record does not support the statement of the trial court concerning when the driver cleared the steps.

If the trial court relied upon *Serritos* and thus determined that the defendant had no duty to clean the steps of the bus or to alert Anderson to the possible danger posed by snow and slush on the steps of the bus, it is clear that the judgment must be reversed and the cause remanded for a new trial under the rule of law stated in this opinion.

If the trial court found that the defendant had complied with its duty to remove excessive snow and slush from the bus steps, it is apparent that the trial court relied upon a clearly erroneous factual finding to arrive at the decision. As a basis for the order dismissing the plaintiff's petition, the district court noted that busdriver White stated that "he scraped the steps at least two times between the time the Plaintiff entered and exited the bus." However, White did not testify that he cleaned the steps twice while Anderson was a passenger on the bus. Instead, White's testimony indicates that he cleaned the steps on two occasions prior to the time that Anderson entered the bus; White did not remember cleaning the steps while Anderson was a passenger on the bus.

Because the district court may have based its decision on either an incorrect rule of law or a clearly erroneous factual finding, we conclude that the cause must be remanded for a new trial.

Anderson also alleges that the trial court erred in admitting into evidence the depositional testimony of Janet Frahm. The parties stipulated that although the defendant had issued a subpoena for Frahm to appear, she would not appear on the scheduled date because she had to attend her grandmother's funeral on that day. The defendant argued that because she would fail to appear, Frahm was an unavailable witness under

Neb. Evid. R. 804. The defendant did not request a continuance so that Frahm could appear at a later time.

Rule 804(1)(e) permits the admission of depositional testimony when a declarant is "absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means." See rule 804(2)(a). It is not clear from the record that a formal offer was made or that Anderson's counsel ever objected to an offer of Frahm's depositional testimony.

In attempting to introduce Frahm's depositional testimony, counsel for the defendant stated:

> We have subpoenaed [Frahm] to appear to testify tomorrow at 9 a.m. I believe Mr. Martin spoke with her today and was informed that she was not going to comply with that subpoena and appear. Thus . . . I would like to offer certain excerpts from her deposition as an exception to the hearsay rules since she is now unavailable, since . . . she is not going to attend and honor that subpoena.

At the close of the defendant's evidence on October 12, 1989, the parties discussed the problem of the Frahm deposition with the trial court. According to the defendant's counsel, Frahm had been subpoenaed for the following day. The defendant proposed to offer excerpts from the deposition. The plaintiff's counsel stated that he wanted to "check the statutes" to see if the deponent was unavailable as a witness. The discussion ended with the trial court's stating that the deposition would be marked "tentatively" as the next exhibit. Counsel was then to call the trial court, "or stop over in the morning, and we'll work out this little procedural problem."

At the close of all the evidence, the trial court stated that "we'll take care of that in the morning." The deposition was marked exhibit 8, and copies highlighted by counsel appear as exhibits 8A and 8B in the record, but the record is silent as to what, if anything, happened on the following day.

The record is not sufficient to permit a resolution of the issues raised by the plaintiff's assignment of error.

The judgment of the trial court is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

WILLIAM G. LINE, INDIVIDUALLY AND AS A PARTNER ON BEHALF OF KERRIGAN, LINE & MARTIN, A PARTNERSHIP, APPELLANT, V. HONORABLE GERALD E. ROUSE, ACTING AS A JUDGE OF THE COUNTY COURT FOR DODGE COUNTY, NEBRASKA, BY DESIGNATION, APPELLEE, AND MERRILL SNOVER AND DOROTHY WILLNERD, COPERSONAL REPRESENTATIVES OF THE ESTATE OF WALTER SNOVER, DECEASED, INTERVENORS-APPELLEES.

491 N.W.2d 316

Filed October 23, 1992. No. S-91-387.

1. **Jurisdiction.** Prohibition is the proper remedy where an inferior tribunal assumes to exercise judicial power not granted by law, or is attempting to make an unauthorized application of judicial force.
2. _____. In general, three things are necessary to justify the issuance of a writ of prohibition: that the court, officer, or person against whom it is directed is about to exercise judicial or quasi-judicial power; that the exercise of such power by such court, officer, or person is unauthorized by law; and that the exercise of such power will result in injury for which there is no other adequate remedy.
3. **Courts: Jurisdiction: Decedents' Estates.** In Nebraska, a county court has exclusive original jurisdiction of all matters relating to decedents' estates.
4. **Courts: Jurisdiction: Decedents' Estates: Executors and Administrators.** A county court has jurisdiction to review and discipline a personal representative for breach of fiduciary duties until there has been full compliance with all judgments, orders, and decrees and until the estate is placed in the hands of the distributees.
5. **Decedents' Estates: Executors and Administrators: Damages.** An action to surcharge a personal representative may be brought to recover losses to an estate for an alleged breach of fiduciary duty by the personal representative. The measure of damages is the monetary damage to the estate caused by the personal representative's breach of fiduciary duties.
6. **Pleadings: Courts: Jurisdiction.** When the pleadings or discovery proceedings in a civil action filed in the county court indicate that an amount in controversy may exceed $10,000, the county court shall certify the proceedings to the district court as provided in Neb. Rev. Stat. § 25-2706 (Reissue 1989).

Appeal from the District Court for Dodge County: RAYMOND J. CASE, Judge. Affirmed.

Thomas A. Grennan and Michael C. Schilken, of Gross & Welch, P.C., for appellant.

Don Stenberg, Attorney General, and Charles E. Lowe for appellee.

Charles H. Wagner, of Edstrom, Bromm, Lindahl, Wagner & Miller, for intervenors-appellees.

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

BOSLAUGH, J.

The plaintiff, William G. Line, has appealed from the judgment of the district court denying his petition for a writ of prohibition against Gerald E. Rouse, a county judge.

This case arises out of a controversy between Line and two beneficiaries of the estate of Walter Snover, deceased. Line, who is an attorney at law, was appointed as a coconservator for Snover on June 30, 1982. Snover died on December 24, 1985, and on January 10, 1986, Line was appointed personal representative in the Snover estate proceeding.

Line was removed as personal representative by an order of the district court on October 2, 1987, which was affirmed in *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989).

After Line had been removed as personal representative, Merrill Snover and Dorothy Willnerd were appointed as successor copersonal representatives. On July 27, 1990, the successor copersonal representatives filed a motion in the county court to surcharge Line. The motion to surcharge alleged claims against Line individually and as former personal representative in the estate of Walter Snover; John Kerrigan, Daniel Martin, and Line, individually and doing business as Kerrigan, Line & Martin; State Surety Company; and United States Fidelity and Guarantee Company.

The motion to surcharge further alleged that Line

> as Co-Conservator, individually, Personal Representative, individually, and as an attorney for the Estate, and Kerrigan, Line & Martin, Partnership, as attorneys for Co-Conservator and Personal Representative, failed to observe the standard of care applicable to Conservators, Personal Representatives, and attorneys, and further failed to settle and distribute the Estate of the decedent in accordance with the terms of the probated and effective Will and of the Uniform Probate Code as expeditiously and efficiently as was consistent with the best interests of the Estate . . . .

The motion to surcharge then sets out seven paragraphs

which identify the acts complained of, all of which are acts of Line as former personal representative. The motion prayed for judgment against Line, individually; against his law firm, Kerrigan, Line & Martin; and against State Surety Company in a sum exceeding $60,000.

Line and his law firm filed a special appearance and demurrer challenging the jurisdiction of the county court to hear the motion to surcharge on the ground that the action was one for legal malpractice alleging damages in excess of $10,000. The county court overruled both the special appearance and the demurrer, finding that the $10,000 limitation on jurisdiction provided in Neb. Rev. Stat. § 24-517(4) (Reissue 1989) was inapplicable because a motion to surcharge is a matter which is exclusively within the county court's probate jurisdiction.

On October 31, 1990, Line, individually and as a partner in his law firm, filed a petition for a writ of prohibition against Judge Rouse. An alternative writ of prohibition was issued November 28, and an amended petition was filed December 10.

On February 11, 1991, the district court dissolved the alternative writ of prohibition and denied the plaintiff's petition for a writ of prohibition. The district court specifically found that

> the County Court would limit its surcharges to the area of probate matters as opposed to legal malpractice, either for negligence or failure to meet standards of other attorneys practicing in the community. . . .
>
> . . . .
>
> 1. That the petitioners have an adequate remedy at law by way of appeal from a judgment rendered in the County Court.
>
> 2. That numerous acts set out in the motion for surcharge concern the acts of the personal representative while acting in that capacity.
>
> 3. That the County Court has full jurisdiction to review the acts of the executor/administrator while acting in that capacity.
>
> 4. That tort actions may be filed in either the County or District Court dependant [sic] upon the amount prayed for in the petition.

From that judgment, Line has appealed.

The plaintiff has assigned as error the district court's findings, its failure to grant a writ of prohibition, and its failure to find that the defendant's construction of the county court jurisdictional statutes was a violation of the Nebraska Constitution.

The plaintiff claims that if the county court has jurisdiction to hear the attorney malpractice allegation contained in the successor copersonal representatives' motion to surcharge, his right to a jury trial as provided in article I, § 6, of the Nebraska Constitution would be violated as well as his right under article V, § 9, of the Nebraska Constitution which provides for chancery and common-law jurisdiction in the district courts. Accordingly, he argues that a writ of prohibition should have been granted to prevent the county court from violating his constitutional rights.

> " 'Prohibition is the proper remedy where an inferior tribunal assumes to exercise judicial power not granted by law, or is attempting to make an unauthorized application of judicial force . . . .' "
>
> . . . "In general, three things are necessary to justify the issuance of a writ of prohibition; that the court, officer, or person against whom it is directed is about to exercise judicial or quasi-judicial power, that the exercise of such power by such court, officer, or person is unauthorized by law, and that it will result in injury for which there is no other adequate remedy."

State of Nebraska ex rel. Line v. Kuhlman, 167 Neb. 674, 681, 94 N.W.2d 373, 379 (1959).

In Nebraska, the county court has exclusive original jurisdiction of all matters relating to decedents' estates. See § 24-517(1) and Neb. Rev. Stat. § 30-2211 (Reissue 1989). In *Sass v. Sass*, 182 Neb. 277, 154 N.W.2d 456 (1967), this court held that the county court has jurisdiction to review and discipline a personal representative for breach of fiduciary duties until there has been full compliance with all judgments, orders, and decrees and until the estate is placed in the hands of the distributees.

An action to surcharge a personal representative may be

brought to recover losses to the estate for an alleged breach of fiduciary duty by the personal representative. Michael L. Johnson, *Surcharge Litigation in Nebraska*, 22 Creighton L. Rev. 351 (1989). The measure of damages is the monetary damage to the estate caused by the personal representative's breach of fiduciary duties. *Id.*

This case is complicated by the fact that the copersonal representatives combined allegations against only Line in his capacity as the former personal representative, with allegations against Line and his law firm sounding in tort and, in effect, alleging legal malpractice. The county court should have required the copersonal representatives to separate what amounts to separate causes of action so that they could be dealt with separately and in an efficient manner.

In the present case, the successor copersonal representatives' motion to surcharge Line alleges damage to the estate in excess of $60,000, which was caused by various acts of Line in his capacity as personal representative. The motion also alleges that Line and his law firm breached the standard of care applicable to attorneys; however, it does not specifically allege how the standard of care was violated. The successor copersonal representatives pray for a monetary judgment exceeding $60,000 against Line as personal representative and against Line and his law firm as attorneys.

Section 24-517(4) provides that the county court shall have

> [c]oncurrent original jurisdiction with the district court in all civil actions of any type when the amount in controversy does not exceed ten thousand dollars. When the pleadings or discovery proceedings in a civil action indicate an amount in controversy may exceed ten thousand dollars, the county court shall certify the proceedings to the district court as provided in section 25-2706.

While jurisdiction over the surcharge allegations against Line is properly before the county court as a matter related to Snover's estate, it appears that the legal malpractice allegations against Line and his law firm are not properly before the county court because the damages alleged exceed $10,000.

A writ of prohibition is not the proper remedy to prevent the

county court from exercising jurisdiction over the malpractice allegations against Line and his law firm. The proper remedy is to certify that part of the proceeding which concerns legal malpractice to the district court as provided in § 24-517(4). After that has been done, only the proceeding to surcharge Line will be pending in the county court.

The judgment of the district court denying a writ of prohibition is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. WILLIAM G. LINE, APPELLANT, V. HONORABLE GERALD E. ROUSE, ACTING AS A JUDGE OF THE COUNTY COURT FOR DODGE COUNTY, NEBRASKA, BY DESIGNATION, APPELLEE, AND MERRILL SNOVER AND DOROTHY WILLNERD, COPERSONAL REPRESENTATIVES OF THE ESTATE OF WALTER SNOVER, DECEASED, INTERVENORS-APPELLEES.

491 N.W.2d 320

Filed October 23, 1992. No. S-91-585.

1. **Mandamus: Words and Phrases.** Mandamus is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to do the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of law.
2. **Mandamus.** A writ of mandamus may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions, but it cannot control judicial discretion.
3. **Attorney Fees.** Reasonable attorney fees and court costs may be assessed against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

Appeal from the District Court for Dodge County: RAYMOND J. CASE, Judge. Affirmed.

William G. Line, of Kerrigan & Line, for appellant.

Don Stenberg, Attorney General, and Charles E. Lowe for appellee.

Charles H. Wagner, of Edstrom, Bromm, Lindahl, Wagner & Miller, for intervenors-appellees.

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

BOSLAUGH, J.

This case arose out of a controversy between the relator, William G. Line, an attorney at law, and Merrill Snover and Dorothy Willnerd, two beneficiaries of the estate of Walter Snover, deceased. The respondent is Gerald E. Rouse, a county judge.

Line was formerly the personal representative appointed in the Snover estate proceedings, but in *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989), the order of the district court removing Line as personal representative was affirmed.

Merrill Snover and Willnerd were appointed as copersonal representatives to succeed Line, and they then filed a motion in the estate proceeding to surcharge Line.

During the course of pretrial discovery proceedings concerning the surcharge motion, Line filed a motion to disqualify Charles H. Wagner and his law firm, Edstrom, Bromm, Lindahl & Wagner, the attorneys representing the successor copersonal representatives, from further representation of Snover and Willnerd on the ground that the attorneys would be called as witnesses in the proceeding on the surcharge motion. On October 15, 1990, the county court overruled Line's motion to disqualify Wagner and his firm because it had not been shown that counsel for the copersonal representatives would be needed as witnesses in the surcharge proceeding.

On October 31, 1990, Line commenced this action by a motion filed in the district court for a writ of mandamus to compel the respondent, Judge Rouse, to disqualify Wagner and his law firm from representing the successor copersonal representatives in the surcharge proceeding. The successor copersonal representatives then intervened in the mandamus

action.

On May 13, 1991, the district court found that Line had a clear and adequate remedy by an appeal from any rulings made by the county court and that a writ of mandamus would tend to control judicial discretion. The district court also found that the mandamus proceeding was a frivolous action. The district court dismissed the motion for a writ of mandamus and assessed attorney fees as costs in the amount of $800 against Line.

Line has appealed and assigned as error the finding that he had an adequate remedy by appeal, the finding that the writ of mandamus sought to control judicial discretion, the failure to find that counsel for the corepresentatives were essential witnesses for either the corepresentatives or Line, and the assessment of attorney fees against him on the ground that the action was frivolous.

In *State ex rel. Pederson v. Howell*, 239 Neb. 51, 56, 474 N.W.2d 22, 26 (1991), we held:

> Mandamus is defined as an extraordinary remedy, not a writ of right, *State ex rel. Thompson v. Alderman*, 230 Neb. 335, 431 N.W.2d 625 (1988), issued to compel the performance of a purely ministerial act or duty, *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990), imposed by law upon an inferior tribunal, corporation, board, or person, see Neb. Rev. Stat. § 25-2156 (Reissue 1989), where (1) the relator has a clear legal right to the relief sought; (2) there is a corresponding clear duty existing on the part of the respondent to do the act in question, *State ex rel. Mercurio v. Board of Regents*, 213 Neb. 251, 329 N.W.2d 87 (1983), *cert. denied* 463 U.S. 1214, 103 S. Ct. 3554, 77 L. Ed. 2d 1400; and (3) there is no other plain and adequate remedy available in the ordinary course of law, *State ex rel. PROUD v. Conley*, 236 Neb. 122, 459 N.W.2d 222 (1990).

While a writ of mandamus "may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion." Neb. Rev. Stat. § 25-2156 (Reissue 1989).

The principal allegations against Line in the surcharge

proceeding relate to Line's failure to file a federal estate tax return when it was due and his failure to comply with the "Family Settlement Agreement." The successor copersonal representatives further allege that Line's failure to file a timely federal estate tax return resulted in an assessment of $5,455.86 in penalties to date and $11,451.67 in interest. They further allege that the estate was damaged in the amount of $21,823.43 in estate taxes because of Line's failure to comply with the "Family Settlement Agreement."

In defense of those allegations, Line contends that the settlement which the successor copersonal representatives made with the Internal Revenue Service was improvident and unreasonable and that the surcharge proceeding is barred by the statute of limitations.

Line argues that the testimony of the attorneys for the successor copersonal representatives is necessary to prove the intervenors' case and to establish his defense in the surcharge proceeding. He contends the attorneys should be disqualified from further representation of the successor copersonal representatives pursuant to Canon 5, DR 5-102 of the Code of Professional Responsibility.

DR 5-102 provides:

> (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).
>
> (B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

Line argues that DR 5-102 generally prohibits an attorney from being both a witness and counsel in the same case; that the

successor copersonal representatives' attorneys will necessarily be witnesses in the surcharge proceeding; and that therefore, the respondent, Judge Rouse, had no choice but to grant his motion to disqualify Wagner and his firm. We think it is far from clear that DR 5-102 is controlling in this case. The attorneys for the successor copersonal representatives have stated that they have no intention to testify in the surcharge proceeding and can fully present their clients' case without the necessity of having to testify on behalf of their clients. Counsel for the successor copersonal representatives have employed Gale Tessendorf, an independent counsel, in regard to the federal estate tax due, and believe that his testimony and admissions in the record and other documentation will be sufficient to make out their clients' case and to overcome the defenses raised by Line.

Line further contends that it is clear that he will call counsel for the successor copersonal representatives as witnesses for his defense in the surcharge proceeding and that, necessarily, their testimony will be prejudicial to the successor copersonal representatives. While Line has attempted unsuccessfully to depose the successor copersonal representatives' attorneys, he has not shown that the information he seeks cannot be obtained through interrogatories or other discovery methods.

The question presented in that regard is whether testimony of the successor copersonal representatives' attorneys would prejudice their clients. The resolution of that issue turns on a number of factors and is a matter of judicial discretion. Line has not shown that the respondent had a clear duty to disqualify counsel for the successor copersonal representatives under the facts presented.

Furthermore, Line has not established that he has no plain adequate remedy if mandamus is not issued. The facts show that Line has at least three plain and adequate remedies in the ordinary course of law.

Line can proceed in the surcharge proceeding and renew his motion to disqualify counsel at a later time if additional facts are developed which will show that the successor copersonal representatives' attorneys ought to be called as witnesses. The respondent made it clear he will be willing to consider further

motions as the surcharge proceeding progresses.

Line can still call the successor copersonal representatives' attorneys as witnesses if later he can establish that their testimony is relevant and necessary for his defense and that their testimony does not fall within a privilege or an immunity. If it then appears that the testimony would be prejudicial to the successor copersonal representatives, the attorneys could be disqualified.

Finally, if the respondent errs in failing to sustain a later motion to disqualify the successor copersonal representatives' attorneys, that error can be adequately remedied by an appeal if Line is surcharged. The appellate court could order a new trial, with the successor copersonal representatives' attorneys disqualified from acting as counsel in that trial and available as witnesses if any party calls them. This would remedy any error in not disqualifying counsel earlier.

Without regard to what the merits may be in the surcharge proceeding, it is clear from the record in this case that Line had no right at this time to a writ of mandamus against the respondent and that this action was frivolous. Line had no clear legal right to disqualification of counsel for the successor copersonal representatives, the respondent had no clear duty to disqualify the attorneys, and there were plain and adequate remedies available to Line in the ordinary course of law.

Neb. Rev. Stat. § 25-824(2) (Reissue 1989) provides for an assessment of "reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith." The record and the procedural history of this case demonstrate that the district court's assessment of attorney fees against Line was proper.

The court's judgment refusing to issue a writ of mandamus directing the respondent to disqualify the successor copersonal representatives' attorneys is affirmed in all respects. The appellees are allowed an additional $800 for the services of their attorneys in this court under § 25-824, to be taxed as costs against the appellant.

AFFIRMED.

MICHELLE LAPAN, APPELLANT, V. SANDRA MYERS, APPELLEE.

491 N.W.2d 46

Filed October 30, 1992. No. S-89-1443.

1. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts well pled and the factual and legal inferences which may be reasonably deduced from such facts, but does not accept conclusions of the pleader.
2. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
3. **Limitations of Actions: Libel and Slander.** A cause of action for libel or slander accrues on the date of publication of the defamatory matter.
4. _____: _____. Ignorance of the publication of defamatory matter, or of the evidence that would tend to prove such publication, does not toll the statute.
5. **Limitations of Actions: Demurrer.** If a petition alleges a cause of action ostensibly barred by the statute of limitations and fails to allege some excuse tolling the operation and bar of the statute, the petition fails to allege sufficient facts to constitute a cause of action and is subject to a demurrer.
6. **Actions: Dismissal and Nonsuit: Presumptions: Appeal and Error.** An appellate 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.
7. **Demurrer: Pleadings.** It is an abuse of discretion by the trial court to sustain a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment, particularly in the case of an original complaint.
8. **Demurrer: Pleadings: Judicial Notice.** It is proper, in considering whether a plaintiff should be granted leave to amend a petition as to which a demurrer has been sustained, to take notice of the records in another case before the same court, which case is so closely interwoven as to be interdependent with the case under consideration.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Jim L. Brown, of Dawson, Fleming & Brown, P.C., on brief for appellant.

William F. Austin, Lincoln City Attorney, and James D. Faimon for appellee.

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

GRANT, J.

Plaintiff, Michelle LaPan, appeals from an order dismissing her amended petition. The petition was dismissed after the trial court sustained a demurrer filed by defendant-appellee, Sandra Myers. In her appeal plaintiff assigns as error the actions of the trial court in (1) sustaining defendant's demurrer, (2) failing to specify on which of three grounds the demurrer was sustained, and (3) dismissing plaintiff's petition without granting plaintiff leave to amend. We affirm.

The record before us shows the following facts: On July 19, 1989, plaintiff filed a petition, denominated a "Complaint," in the district court for Lancaster County in a case docketed as "Docket 442 Page 262." The petition named Sandra Myers, an employee of the Lincoln Police Department, as defendant and sought damages from her because defendant, on May 27, 1988, allegedly "did defame the Plaintiff by uttering, printing and or publishing false statements . . . ." On September 5, 1989, plaintiff filed an "Amended Complaint." The pleading was captioned "In the United States District Court," but the record shows it was filed in Lancaster County District Court. The error led to some confusion, since it became apparent at a hearing in this case that plaintiff also had an action pending in the federal court. The parties treated the pleading as filed in the state court.

In any event, defendant filed a demurrer to the amended petition on the grounds (1) that the court had no jurisdiction over defendant's person, (2) that the plaintiff had no legal capacity to sue, and (3) that the amended petition "does not state facts sufficient to constitute a cause of action against the Defendant." On November 6, 1989, the district court sustained the demurrer, without specifying the grounds, and dismissed plaintiff's petition.

When reviewing an order sustaining a demurrer, an appellate court accepts "the truth of facts well pled and the factual and legal inferences which may be reasonably deduced from such facts, but does not accept conclusions of the pleader." *Weiner v. Hazer*, 230 Neb. 53, 55-56, 430 N.W.2d 269, 271 (1988). Accord *Security Inv. Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989). In considering a demurrer, a court must

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

Matheson v. Stork, 239 Neb. 547, 550, 477 N.W.2d 156, 159 (1991).

Neb. Rev. Stat. § 25-208 (Reissue 1989) provides a 1-year statute of limitations for actions based on defamation. We have held that a cause of action for libel or slander accrues on the date of publication of the defamatory matter. *Lathrop v. McBride*, 209 Neb. 351, 307 N.W.2d 804 (1981); *Patterson v. Renstrom*, 188 Neb. 78, 195 N.W.2d 193 (1972). Ignorance of the publication of defamatory matter, or of the evidence that would tend to prove such publication, does not toll the statute. *Lathrop v. McBride, supra*; *Patterson v. Renstrom, supra*. Plaintiff alleged in her amended petition that defendant published the defamatory statements on May 27, 1988. We have held:

> If a petition alleges a cause of action ostensibly barred by the statute of limitations and fails to allege some excuse tolling the operation and bar of the statute, the petition fails to allege sufficient facts to constitute a cause of action and is subject to a demurrer.

Olsen v. Richards, 232 Neb. 298, 303, 440 N.W.2d 463, 465 (1989).

Plaintiff did not file her petition until July 19, 1989. Because she did not state, within her petition, facts that would have tolled the operation of the statute of limitations, her petition became subject to a demurrer. The district court did not err in sustaining the demurrer.

Plaintiff also assigns as error the district court's failure to specify its basis for sustaining the demurrer. As stated above, defendant demurred to plaintiff's amended petition on three grounds. We have stated that the trial court should specify the grounds upon which it is sustaining a demurrer when several grounds are stated. *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 452 N.W.2d 746 (1990); *Meyerson v.*

Coopers & Lybrand, 233 Neb. 758, 448 N.W.2d 129 (1989). Such a requirement is primarily for the benefit of the reviewing court. Failure to specify the grounds for sustaining a demurrer does not affect the legal position of the parties in the case. "[T]his 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." *Bert Cattle Co. v. Warren*, 238 Neb. 638, 641, 471 N.W.2d 764, 767 (1991). The district court should have stated its reasons for sustaining the demurrer, but an appellate court will not reverse a trial court's judgment if the trial court's ruling was correct. In this case, the district court's reason for sustaining the demurrer is readily apparent. Since the statute of limitations had run and since no facts were alleged within the petition that would have tolled the operation of the statute, plaintiff failed to state a cause of action.

With regard to plaintiff's third assignment of error, Neb. Rev. Stat. § 25-854 (Reissue 1989) provides that if a demurrer is sustained, "the adverse party may amend, if the defect can be remedied by way of amendment . . . ." We have held that this statute does not provide an absolute right of amendment, nor is it without limitation. *Knoell v. Huff*, 224 Neb. 90, 395 N.W.2d 749 (1986). We also stated in *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 183, 302 N.W.2d 697, 701 (1981), that it is an abuse of discretion by the trial court " ' "to sustain a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment, particularly in the case of an original complaint."...' "

The record in this case does not present a situation which shows there is a reasonable possibility plaintiff can allege facts that would state a cause of action. The trial court knew that plaintiff had already amended her petition in the case before us. The court also knew that plaintiff had stated, during the hearing on the demurrer, that she would reamend her petition, if allowed, to state that she did not learn of the publication until November 1988. Apparently, plaintiff was under the mistaken belief that ignorance of publication tolls the operation of the statute of limitations. Without regard to when the plaintiff learned of the existence of the alleged libelous publication, however, the statute began to run on the date of the publication

of the allegedly defamatory matter. Plaintiff's petitions state that that date was May 27, 1988. At the time she filed her petition under review on July 19, 1989, the statute of limitations had elapsed.

Additionally, while a court must determine the question of sustaining or overruling a demurrer solely from the allegations in plaintiff's petition, *Matheson v. Stork, supra*, and *Weiner v. Hazer, supra*, we have stated it is proper, in considering whether a plaintiff should be granted leave to amend a petition as to which a demurrer has been sustained, to take notice of the records in another case before the same court, which case is so closely interwoven as to be interdependent with the case under consideration. *Fowler v. Nat. Bank of Commerce*, 209 Neb. 861, 312 N.W.2d 269 (1981).

In the present case, the trial court could note the prior action between the same parties on the same issue filed in the district court for Lancaster County. In the record before us, it is shown that on December 5, 1988, plaintiff filed a petition, denominated a "Complaint," in Lancaster County, "Docket 435 Page 221," against defendant. The petition alleged that the action should be considered a defamation action and alleged that defendant was a Lincoln police officer who, on May 27, 1988, "did defame" plaintiff and did publish libelous per se material about the plaintiff. The petition sought money damages and injunctive relief. Plaintiff filed an amended petition in that case on February 28, 1989. Defendant filed a demurrer. On June 5, 1989, plaintiff filed a "Motion for Dismissal" on the grounds that she was unable to engage counsel and was too "emotionally attached" to the case to represent herself. On that same day, the trial court granted the motion and dismissed plaintiff's petition without prejudice.

The trial court in the case before us had also handled plaintiff's case docketed in the Lancaster County District Court as docket 435, page 221. Thus, the trial court not only knew that plaintiff had filed a petition and an amended petition in the case before the court in docket 442, page 262, but also knew that plaintiff had alleged the same facts and had sought the same relief in a petition and an amended petition in an earlier case and that plaintiff had voluntarily dismissed that case.

The trial court did not err in dismissing plaintiff's amended petition in this case without allowing plaintiff a further chance to amend her pleadings.

There is no error in the trial court's action, and the judgment of the trial court is affirmed.

AFFIRMED.

DAVID L. TERRY, 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.

491 N.W.2d 50

Filed October 30, 1992. No. S-89-1494.

1. **Negligence: Minors: Nuisances.** The attractive nuisance doctrine is inapplicable when the victim is old enough and experienced enough to appreciate and avoid the danger involved in the victim's activity.
2. **Trespass: Words and Phrases.** A trespasser is legally defined as one who enters or remains upon premises in the possession of another without the express or implied consent of the possessor.
3. **Negligence: Trespass.** The possessor of land owes a duty to trespassers to refrain from willfully and wantonly injuring them.
4. _____: _____. When the possessor of land takes steps to prevent trespassers from encountering a dangerous condition on the land, the possessor's conduct satisfies the duty he owes to the trespassers.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Affirmed.

E. Terry Sibbernsen, of Welsh & Sibbernsen, for appellant.

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

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

WHITE, J.

David L. Terry appeals the district court's grant of summary judgment in favor of William R. Metzger. Terry, who was injured in a cave-in while on the Metzger property, had sued

Metzger, alleging that Metzger was negligent and liable under the attractive nuisance doctrine and as a possessor of land.

On August 16, 1985, Terry, then 19 years old, and four companions entered Metzger's land while on a camping trip. The five boys camped in an abandoned "cave" that had been created in the late 1800's as a sandstone quarry. During the night, a portion of the roof of the cave collapsed, killing three of the boys and injuring Terry.

Terry brought suit in Cass County District Court for personal injuries under theories of negligence and attractive nuisance. These same theories had been alleged in a companion case brought by the personal representative of the estates of Mark and Michael Wiles, two of the boys killed in the cave-in. In both the Wiles and Terry cases, the district court granted summary judgment for Metzger. The court, in both the Wiles and Terry cases, found that the attractive nuisance doctrine did not apply and that Metzger had not been "willfully and wantonly" negligent so as to warrant recovery by the plaintiffs. Both Terry and the Wiles' personal representative appealed.

Terry argues that the district court erred in (1) finding that the attractive nuisance doctrine did not apply to this case and (2) finding that no fact issue existed as to the willfulness and wantonness of Metzger's conduct.

In 1991, this court ruled on the Wiles appeal. *Wiles v. Metzger*, 238 Neb. 943, 473 N.W.2d 113 (1991). We held (1) that the attractive nuisance doctrine was inapplicable and that summary judgment was proper on that issue, (2) that the Wiles boys had been properly characterized as licensees by the district court and that Metzger had a duty not to injure them through willful and wanton negligence, and (3) that a question of fact existed as to whether Metzger had been willfully and wantonly negligent and that summary judgment on the issue of Metzger's liability as a possessor of land was improper.

Our decision in the *Wiles* case, because of its relation to the present case, provides guidance on many of the issues in Terry's appeal. In particular, our ruling in *Wiles* on the attractive nuisance issue applies to Terry's case. There are, however, discrepancies between the records in the two cases. These differences lead to a contrary result on the issue of Metzger's

liability as a possessor of land. On that issue, as well as the attractive nuisance issue, we affirm the district court's grant of summary judgment.

With regard to the attractive nuisance issue, our decision in *Wiles* shows that the attractive nuisance doctrine does not apply to Terry. In *Wiles* we stated:

> [A]pplicability 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.

Wiles, 238 Neb. at 954-55, 473 N.W.2d at 121.

In *Wiles*, we held as a matter of law that the attractive nuisance doctrine did not apply to the Wiles boys (one of whom was 12 years old), because they were old enough and experienced enough to appreciate and avoid the danger involved in camping in the cave. Clearly, the same holds true for Terry, who was 19 years old at the time and spent much of his time engaged in outdoor pursuits. The district court correctly held that the attractive nuisance doctrine did not apply to Terry and that summary judgment was proper on this issue.

Summary judgment is properly granted only when the movant satisfactorily shows that no genuine issue of material fact appears from the pleadings, admissions, depositions, affidavits, and stipulations in the record or from the reasonable inferences deducible from that evidence and that the movant is entitled to judgment as a matter of law. Once the movant has met this burden, the nonmoving party has the burden of showing that an issue of material fact exists that prevents judgment as a matter of law. *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992); *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992).

On appeal, this court reviews the evidence in a light most favorable to the party against whom summary judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence. *Spittler, supra*; *Barelmann, supra*. We must therefore examine the undisputed

facts, and the reasonable inferences to be drawn from those facts, to determine whether Metzger's liability as an owner of land is precluded as a matter of law.

The district court determined that Terry was a trespasser. This finding was not assigned as error, and therefore, we will only reverse it if it constitutes plain error. See *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992). The district court's finding comports with the definition in *Malolepszy v. Central Market*, 143 Neb. 356, 360, 9 N.W.2d 474, 477 (1943), which states: " 'The word "trespasser" is legally defined as a person who enters or remains upon premises in possession of another without a privilege to do so created by the possessor's consent, either express or implied.' "

The record indicates that Terry never received permission from Metzger to enter the property where the cave was located. In addition, there was uncontroverted evidence that Metzger had placed "no trespassing" signs on the property on several occasions—thus negating any implied consent. In light of these facts, the district court's categorization of Terry as a trespasser was not clearly erroneous.

Because Terry was a trespasser, Metzger owed him a very limited duty with regard to his safety while on the property. Metzger was only obliged to refrain from willfully and wantonly injuring Terry. See, *Bosiljevac v. Ready Mixed Concrete Co.*, 182 Neb. 199, 153 N.W.2d 864 (1967); *Malolepszy, supra*; *Haley v. Deer*, 135 Neb. 459, 282 N.W. 389 (1938). A review of the record shows that no material issue of fact existed as to the willfulness and wantonness of Metzger's conduct.

The requirements for "willful and wanton" conduct are well established:

> 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.) *Guenther v. Allgire*, 228 Neb. 425, 428-29, 422 N.W.2d 782, 785 (1988). Accord, *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987); *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984).

For conduct to be willful or wanton, two criteria must be met. First, the defendant must have actual knowledge of the danger. Metzger met this requirement. In his deposition, he testified that he had seen where debris had fallen from the roof of the cave and that he recognized that it might endanger someone who was beneath the debris when it fell. However, Metzger's conduct did not meet the second requirement for willful and wanton conduct—that the defendant "*intentionally* failed to act to prevent harm which was reasonably likely to result." *Guenther*, 228 Neb. at 428, 422 N.W.2d at 785.

Metzger clearly took action to prevent possible harm. Unlike in the *Wiles* case, where the record was unclear as to the preventative steps taken by Metzger, the record now before us answers many of the questions that kept us from affirming the summary judgment on this issue in *Wiles*. The record shows that fences had been erected around the Metzger property—at least one of which fences the boys crossed on their way to the cave. Additionally, Metzger stated that 1 week before the cave-in he had placed a "no trespassing" sign at an entrance to his property and another such sign at the entrance to the cave where the cave-in occurred. It is immaterial that the sign at the cave entrance may have been torn down by vandals before the boys arrived. Our concern is whether Metzger took steps to alleviate the danger to trespassers. The uncontroverted evidence shows that he did. Whether Metzger could have taken more effective steps is beside the point. The fact that he took measures to prevent trespassers from entering the cave

precludes a finding that he acted with "such reckless disregard of security and right as to imply bad faith." *Guenther*, 228 Neb. at 428-29, 422 N.W.2d at 785.

In *Dotzler v. Tuttle*, 234 Neb. 176, 449 N.W.2d 774 (1990), we were required to determine whether a defendant's conduct was "reckless." We noted that the terms "reckless," "wanton," and "willful" are generally treated as having the same meaning. We then formulated a definition of "recklessness" based on our prior definitions of wantonness and willfulness. Our definition of recklessness now proves useful in addressing whether Metzger's conduct was willful and wanton.

In *Dotzler* we stated:

> Recklessness is the disregard for or indifference to the safety of another or for the consequences of one's act. Conduct is in reckless disregard to the safety of another if the actor intentionally does an act, or intentionally fails to do an act which it is his or her duty to another to do, knowing or having reason to know of facts which would lead a reasonable person to realize not only that his or her conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his or her conduct negligent.

Dotzler, 234 Neb. at 188, 449 N.W.2d at 782.

This language further indicates that Metzger's conduct did not rise to the level of willfulness and wantonness. Because Terry was a trespasser, Metzger was only required to take slight action to protect him. Metzger satisfied this duty by placing warning signs near the cave's opening and elsewhere on the property. Placing signs by the cave, if nothing else, at least shows that Metzger was more than indifferent to the safety of trespassers.

Even if Metzger did not take every appropriate step to safeguard trespassers, his conduct would not rise above mere negligence. The apparent risk of injury from the cave was not substantial enough to warrant a higher burden on Metzger. Willful and wanton conduct requires the actor to know that a danger exists, and that "injury is likely to result from the act done or the omission to act." *Guenther*, 228 Neb. at 428, 422

N.W.2d at 785. The evidence does not show that Metzger's action was so lacking that it created a risk of injury both obvious and likely to occur.

Terry and Metzger both stated that they had not considered the cave to be dangerous. Metzger also stated that he had never heard of anyone being injured in the cave. Metzger cannot be imputed with knowledge that not only was a cave-in likely, but that a "no trespassing" sign and boundary fences would be insufficient to deter the eventual victims. Metzger stated that he allowed livestock to use the cave as a shelter. This alone indicates that Metzger did not consider the cave to pose a substantial danger to occupants of the cave. The record shows that Metzger's conduct did not rise to the level of willfulness and wantonness. Metzger's posting of warning signs adequately fulfilled his duty to trespassers.

"In tort cases of the kind where reasonable minds may differ as to whether an inference of negligence is to be drawn from the given set of facts, [summary judgment] can have no application." *Pfeifer v. Pfeifer*, 195 Neb. 369, 372, 238 N.W.2d 451, 453 (1976). This is not such a case. The evidence in the record and the inferences deducible from that evidence lead to only one conclusion: Metzger refrained from willfully and wantonly injuring Terry. Reasonable minds could not differ on this point. The district court correctly granted summary judgment on both the issue of the applicability of the attractive nuisance doctrine and the issue of Metzger's liability as an owner of land. We affirm both rulings.

AFFIRMED.

CAPORALE, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, v. ROGER A. OBERMIER, APPELLANT.
490 N.W.2d 693

Filed October 30, 1992. No. S-90-1020.

1. **Drunk Driving: Blood, Breath, and Urine Tests: Licenses and Permits.** It is not necessary for the State to introduce into evidence the actual or a certified copy of an individual's state Department of Health permit to perform a blood, breath, or urine test of a suspect arrested for driving while under the influence of alcoholic liquor.
2. **Rules of Evidence.** The best evidence rule applies only if the party offering the evidence is seeking to prove the contents of a writing.

Appeal from the District Court for York County, BRYCE BARTU, Judge, on appeal thereto from the County Court for York County, CURTIS H. EVANS, Judge. Judgment of District Court affirmed.

Joseph H. Murray, of Germer, Murray & Johnson, for appellant.

Charles W. Campbell, Deputy York City Attorney, for appellee.

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

PER CURIAM.

After a trial to the county court, the defendant, Roger A. Obermier, was convicted of driving while under the influence of alcoholic liquor, second offense, and was fined $500, was sentenced to 30 days in jail, and had his license revoked for 1 year. Upon appeal to the district court, the judgment was affirmed.

In this appeal, the defendant contends that the trial court erred in overruling his motion to suppress and in admitting over objection the results of his breath test.

The record shows that shortly after midnight on September 17, 1989, the defendant went to the York Police Department and reported that someone had stolen his pickup truck. He told Officers Scott Jedlicka and Robert Holmes that he had parked his truck in a parking lot at 5th Street and Platte Avenue in York, Nebraska, across from the Chances R restaurant and

lounge, and that when he came out of the lounge he discovered his truck was gone. The defendant was convinced that someone had stolen his truck because he was sure he had parked it in the parking lot.

The defendant also told the officers that he had been in the Chances R lounge, where a dance was being held, and that he had been drinking. Officer Jedlicka observed that the defendant had a fairly strong odor of alcoholic beverage about him, that his face was flushed and his eyes were bloodshot, and that he stuttered somewhat.

Officers Jedlicka and Holmes then left the police station to look for the defendant's truck, and they found it parked in the middle of the block on 6th Street.

When the officers returned to the police station, they were again advised by the defendant that he was positive he had left his truck in the parking lot at 5th and Platte. When the officers told the defendant where they had found his truck, he appeared to recall that he had parked the truck where the officers found it.

Officer Holmes then told the defendant that he was not to drive due to his consumption of alcohol and the condition that he was in, and he was offered a ride home. The defendant agreed to this instruction and said he would walk to his home, which was located one-half block from the police station.

Officer Jedlicka testified that in his opinion, the defendant was intoxicated.

Sgt. Norm Cobb was also present at the police station at the time the defendant reported his truck stolen, and he observed the conversation between the officers and the defendant after the officers had located the defendant's truck and returned to the police station. Sergeant Cobb was aware that the defendant had indicated he was going to return to his vehicle and that the officers had instructed him not to do so because he had had too much to drink to be driving. Sergeant Cobb also understood that the officers had offered the defendant a ride and that the defendant had refused the offer and walked home instead. Sergeant Cobb heard the officers warn the defendant not to drive because he would be arrested for driving while intoxicated.

Sergeant Cobb noted that the defendant's face appeared to be flushed and that his eyes were bloodshot and watery. He also noticed that the defendant's movements at times seemed a little unsteady and that his speech was slightly slurred.

Approximately 30 minutes after the defendant had left the police station, Sergeant Cobb left the station to resume patrol. As he drove south on Platte Avenue, Sergeant Cobb observed a pickup truck proceeding eastbound near the intersection of 6th Street and Platte Avenue. As the truck approached the intersection, Sergeant Cobb saw the truck stop at the stop sign. The driver then covered his face with his hands and turned away from the officer.

Sergeant Cobb continued south on Platte Avenue, passed directly in front of the truck, and then turned into the parking lot. The defendant then backed his truck, pulled into a diagonal parking stall, and slumped over the steering wheel. Sergeant Cobb spoke with the defendant, who indicated he was disgusted with himself. Sergeant Cobb again observed that the defendant's face was flushed and that his eyes were watery and bloodshot. He also noticed a strong odor of alcohol about the defendant's person. The defendant was unsteady while presenting his driver's license, and Sergeant Cobb noticed that when he got out of his truck his balance was unsteady.

Sergeant Cobb arrested the defendant for driving while under the influence of alcoholic liquor and took him to the police station, where field sobriety tests were conducted.

A breath test conducted by Sergeant Cobb at the York County sheriff's office showed that the defendant had a concentration of .151 of 1 gram of alcohol per 210 liters of his breath.

Before trial the defendant filed a motion to suppress the results of the breath test. That motion was overruled. At the trial, the results of the breath test were admitted over the defendant's objection as to foundation. The county court found the defendant guilty of driving while under the influence of alcoholic liquor and, after an enhancement hearing, found that it was the defendant's second offense.

In support of his assignment of error, the defendant relies on *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980), and

argues that the breath test results should not have been admitted into evidence because the State did not produce a copy of Sergeant Cobb's "Class B permit" authorizing him to operate the Intoxilyzer to administer the breath test.

As foundation for introducing the evidence of the breath test results, Sergeant Cobb testified, over the defendant's objection that it was not the best evidence, that he had a Class B permit to operate the Intoxilyzer and that the permit had not been revoked and had not expired or lapsed. The county court overruled the defendant's objection.

It is not necessary for the State to introduce into evidence the actual or a certified copy of an individual's state Department of Health permit to perform a blood, breath, or urine test of a suspect arrested for driving while under the influence of alcoholic liquor. Neither *State v. Gerber, supra*, nor Neb. Rev. Stat. § 39-669.11 (Reissue 1988) sets forth such a requirement. Any suggestion to the contrary in either *Gerber* or *State v. Kolar*, 206 Neb. 619, 294 N.W.2d 350 (1980), is overruled. In *Kolar*, a

> deputy testified that he held a valid permit authorizing him to use the type of equipment which, in fact, was used to administer the breath test on appellant. He did not, however, produce any evidence of that permit at trial but rather advised the court that the permit "was at the office."

Id. at 624, 294 N.W.2d at 353. As we held in *State v. West*, 217 Neb. 389, 394, 350 N.W.2d 512, 517 (1984), "A certificate is merely *one of the methods* whereby the fact that a permit has been issued can be determined." (Emphasis supplied.) It is sufficient if there is relevant admissible evidence that the individual performing the test did, at the time of the test, possess a valid permit for such purpose.

The courts of this state routinely permit expert witnesses such as doctors, engineers, lawyers, scientists, law enforcement officers, and other experts to testify as to their educational backgrounds qualifying them as experts in a particular field, and of their licensure if such is a requirement to practice a particular profession or trade, without producing the actual or a certified copy of educational degrees or licenses. Law

enforcement officers are routinely permitted to testify as to their status as law enforcement officers without producing their commissions. A court-imposed rule that a person holding a valid permit to perform blood, breath, or urine tests should be singled out to produce a permit to perform a test before the holder is permitted to give evidence of the test cannot be justified. The fact that a person is under oath, subject to the penalties of perjury, and undoubtedly would lose his or her job for committing perjury is a sufficient safeguard to deter such a person from lying about whether the person has a permit to perform a blood, breath, or urine test.

The trial court in Obermier's case properly overruled the defendant's best evidence objection to Sergeant Cobb's testifying that he held a Class B permit to operate an Intoxilyzer and that the permit had not been revoked and had not expired or lapsed. Sergeant Cobb did not testify to the *contents* of a written instrument, but only that he held a Class B permit. The best evidence rule applies only if the party offering the evidence is seeking to prove the *contents* of a writing. See *Jackson v. Crews*, 873 F.2d 1105 (8th Cir. 1989). Rule 1002 of the Federal Rules of Evidence is substantially identical to Neb. Evid. R. 1002. See, also, Neb. Evid. R. 1002 cmt. (Tentative Draft 1973).

At Obermier's trial, the issue was not the contents of Sergeant Cobb's permit to conduct a breath test upon the defendant, but whether the officer was qualified and authorized to conduct such tests. Sergeant Cobb's qualifications and authority to conduct a breath test on the defendant existed independent of his permit. At the defendant's trial, Sergeant Cobb's permit could be used only as evidence of the officer's qualifications and authority to conduct such a test. Therefore, as held in *People v. Pelc*, 177 Ill. App. 3d 737, 532 N.E.2d 552 (1988), the best evidence rule did not apply to Sergeant Cobb's testimony concerning his qualifications and authority to conduct a breath test upon the defendant. The officer's testimony in that regard was properly admitted, and therefore, the judgment of the district court, affirming the judgment of the county court, is affirmed.

AFFIRMED.

SHANAHAN, J., concurring.

While the majority properly dispels the mistaken notion that an expert, or other witness to whom the State has issued a certificate or license, must, prefatory to testifying, have presented to a trial court documentation reflecting the witness' field of expertise or specialization, the majority superficially treats Obermier's "best evidence" objection and gives short shrift, actually no shrift at all, to Obermier's "foundation" objection under the Nebraska Evidence Rules.

The State's complaint contained the alternative allegations that Obermier did "operate or have actual physical control of a motor vehicle while under the influence of alcoholic liquor," or "when he had a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath." Police officers, after testifying about their observations of Obermier, expressed opinions that Obermier was under the influence of alcohol while he was driving his truck. There was extensive testimony that the "Intoxilyzer" was properly functioning before and during the breath test administered to Obermier in accordance with state regulations governing the procedure for proper administration of an Intoxilyzer test. Sgt. Paul Vrbka of the York County Sheriff's Department testified that he held certificates issued by the Nebraska Department of Health; one certificate authorized Vrbka's maintenance of the Intoxilyzer used in the Obermier test, while the other certificate, a "Class B permit," authorized Vrbka to operate the Intoxilyzer. Vrbka detailed his maintenance on the Intoxilyzer and the machine's accuracy. Copies of the state regulations specifying the classes of permits, including a Class B permit, to operate breath-testing equipment and the methods for conducting a valid test were received in evidence.

In the direct examination of Sergeant Cobb, a member of the York Police Department and the operator of the Intoxilyzer described by Vrbka which was used for the breath test on Obermier, the following occurred:

> Q. . . . [A]re you certified to operate the intoxilyzer?
>
> A. Yes, sir. I am.
>
> Q. And when did you become certified?

A. I was . . .

[Obermier's lawyer:] Objection. Not the best evidence.

. . .

. . . .

. . . The witness is test — is testifying as to a writing, a public record. I don't believe he can — he can testify as to the contents of that writing unless he complies with 27-1004.

. . . .

THE COURT: . . . I believe he can testify as to the date. You may answer.

A. It was December 22nd of 1984.

When asked "what kind of certificate" he held, Cobb, over Obermier's best evidence objection, testified that his certificate was a "Class B permit," the same type of certificate held by Sergeant Vrbka.

Later in the State's case in chief, without objection, Cobb testified that he observed "the reading" on the Intoxilyzer during Obermier's test, and he was then asked:

Q. And what reading appeared on the intoxilyzer when Mr. . . .

[Obermier's lawyer:] Objection. Foundation.

Q. [State's attorney:] . . . when Mr. Obermeier [sic] produced the breath sample?

. . . .

THE COURT: The Court would overrule. You may answer.

A. It was a .151.

Q. . . . 151 what?

A. Of a gram of alcohol per two ten liters of breath.

In view of Obermier's objections to the preceding excerpts from Sergeant Cobb's testimony, Obermier claims that the trial court erred by admitting "the results of defendant's breath test into evidence at trial, over objection, due to lack of foundation being established for such evidence." Later in his brief Obermier argues that

> the State failed to prove that the officer administering the breath test was qualified to do so and held a valid permit. Officer Cobb, the testing officer, was permitted to testify

> to holding a Class B permit on the date in question. The permit itself or a copy thereof was never offered or received in evidence. Defendant submits that the original or a certified copy of said certificate was required to evidence Officer Cobb's qualifications and that other evidence as to the contents of such certificate (such as Officer Cobb's oral testimony) was inadmissible under Section 27-1004, Nebraska R.R.S.

Brief for appellant at 13.

Neb. Evid. R. 1002 states:

> To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress or of the Legislature of the State of Nebraska or by other rules adopted by the Supreme Court of Nebraska.

Under Rule 1002, to prove material contents of a writing, the original writing must be produced unless that writing is unavailable for some reason other than the proponent's fault—for instance, unavailability due to loss of the writing or the writing's destruction. See Neb. Evid. R. 1004 (admissibility of other evidence concerning contents of a writing). See, also, *Proffitt v. Ricci*, 463 A.2d 514 (R.I. 1983); *Williams v. State*, 386 So. 2d 538 (Fla. 1980).

As we recently stated in *Equitable Life v. Starr*, 241 Neb. 609, 615-16, 489 N.W.2d 857, 862 (1992):

> Thus, the original writing or "original document" rule, expressed in Rule 1002, does not set up a hierarchy for admissibility of evidence, but applies when a party seeks to prove material contents of a writing, recording, or photograph. See, *United States v. Gonzales-Benitez*, 537 F.2d 1051 (9th Cir. 1976); *State v. Lang*, 354 N.W.2d 723 (S.D. 1984); *State v. Stramiello*, 392 So. 2d 425 (La. 1980); *Mitchell v. State*, 84 Wis. 2d 325, 267 N.W.2d 349 (1978). The purpose of Rule 1002 is the prevention of fraud, inaccuracy, mistake, or mistransmission of critical facts contained in a writing, recording, or photograph when its contents are an issue in a proceeding. See, *U.S. v. Yamin*, 868 F.2d 130 (5th Cir. 1989) (original document rule

prevents inaccuracy and fraud in an attempt to prove the contents of a writing); *Williams v. State*, 386 So. 2d 538 (Fla. 1980) (original document rule ensures accuracy in proof of a document's critical contents); *Proffitt v. Ricci*, 463 A.2d 514 (R.I. 1983) (in the absence of a satisfactory explanation for nonproduction of an original document, the original document rule bars admission of secondary evidence to prove the contents of the document); *Crosson v. State*, 268 Ind. 511, 376 N.E.2d 1136 (1978) (original document rule excludes testimony concerning the contents of a document when the document itself is available for examination by the trier of fact). See, also, 2 McCormick on Evidence § 231 (John W. Strong 4th ed. 1992).

In Obermier's case, Sergeant Cobb testified without objection that he held a Nebraska Department of Health certificate to operate the Intoxilyzer used in the test on Obermier. Thus, Obermier's first best evidence objection was directed to information concerning the date on which Cobb's certificate was issued and did not relate to the certificate's contents as a material issue in the case, while Obermier's second best evidence objection pertained to Cobb's identifying a particular category or type of license issued to him by the Nebraska Department of Health. Neither of Cobb's answers, received over Obermier's best evidence objections, was testimony to prove the contents of the certificate or permit as a written expression of Cobb's qualifications and the authorization extended by the State to operate an Intoxilyzer. Rather, Cobb's qualifications and authority from the State to operate the Intoxilyzer existed outside and independent of the Class B permit as a document issued to Cobb. Proof of Cobb's authorization to conduct an Intoxilyzer test and, consequently, his qualification to operate the machine was supplied by Cobb's affirmation that he was "certified to operate the Intoxilyzer" in light of state regulations received in evidence. Consequently, the court correctly overruled Obermier's best evidence objections to the questions asked Cobb and to his answers, since the State was not attempting to prove the contents of an original writing.

Next, Obermier claims that the trial court erred by admitting into evidence, over Obermier's foundation objection, Cobb's

testimony that the digital reading on the administered Intoxilyzer test was ".151."

An appellant claiming reversible error as the result of admission of evidence must have made a timely objection, stating the specific ground of objection, if a specific ground was not apparent from the context. See Neb. Evid. R. 103(1)(a). See, also, *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992). "One function of a proper objection is to direct the court's attention to questioned admissibility of particular evidence so that the court may intelligently, quickly, and correctly rule on the reception or exclusion of evidence." *Id.* at 812, 478 N.W.2d at 357. "[A]n objection on the ground of insufficient foundation is a general objection." *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 911, 464 N.W.2d 343, 350 (1991). See, *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991); *Kennedy v. Woods*, 131 Neb. 217, 267 N.W. 390 (1936). As we observed in *Sherard v. Bethphage Mission, Inc., supra*:

> "The objection 'lack of foundation' is employed at trial in reference to many different situations." M. Graham, Handbook of Federal Evidence § 611.9 at 528 (2d ed. 1986). "If a general objection is overruled the objecting party may not complain on appeal unless: (1) The ground for exclusion was obvious without stating it, or (2) the evidence was not admissible for any purpose." *Gateway Bank v. Department of Banking*, 192 Neb. 109, 112, 219 N.W.2d 211, 213 (1974).

236 Neb. at 911, 464 N.W.2d at 350.

Did Obermier's foundation objection challenge Sergeant Cobb's competency to testify about the digital reading on the Intoxilyzer—for instance, Cobb's inability to observe the digital display on the Intoxilyzer? Was the foundation objection a challenge to the reliability or accuracy of the Intoxilyzer as a measuring device? Did the objection raise a question about validity of procedures for an Intoxilyzer test generally, or, specifically, the validity of the particular procedures employed in the Intoxilyzer test administered to Obermier? Or, did the objection pose the question whether the Intoxilyzer was properly functioning during the test on Obermier? Under the

circumstances, the record does not present an obvious ground apparent from the context of Obermier's foundation objection. Moreover, Cobb's testimony concerning the reading on the Intoxilyzer was relevant to the charge that Obermier was operating a motor vehicle while he "had a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath." Consequently, the trial court properly overruled Obermier's foundation objection as a general objection.

Since the trial court was correct in overruling Obermier's best evidence and foundation objections, there is no merit to Obermier's assignment of error concerning admissibility of evidence under the Nebraska Evidence Rules. Also, quite apart from evidence derived through the Intoxilyzer test, there was ample relevant evidence on the question whether Obermier was drunk or intoxicated while he was driving his truck, that is, whether Obermier was under the influence of an alcoholic beverage when he operated a motor vehicle. For that reason, Obermier's conviction must be affirmed.

STATE OF NEBRASKA, APPELLEE, V. PETER G. HANGER, APPELLANT.

491 N.W.2d 55

Filed October 30, 1992. No. S-91-528.

1. **Convictions: Circumstantial Evidence.** Circumstantial evidence is sufficient to support a conviction if such evidence and the reasonable inferences that may be drawn therefrom establish guilt beyond a reasonable doubt.
2. **Circumstantial Evidence: Motor Vehicles.** Circumstantial evidence may serve to establish the operation or actual physical control of a motor vehicle.
3. **Verdicts: Appeal and Error.** Only when evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

Appeal from the District Court for Sarpy County, RONALD E. REAGAN, Judge, on appeal thereto from the County Court for Sarpy County, ALBERT C. WALSH, Judge. Judgment of District Court affirmed.

Thomas J. Garvey, Sarpy County Public Defender, and Robert C. Wester for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

GRANT, J.

On June 1, 1990, defendant, Peter G. Hanger, was charged by complaint in the county court for Sarpy County with one count of operating a motor vehicle during a period when his operator's license was suspended or revoked. The complaint alleged that he so drove "[o]n or about the 24th day of February, 1990 at or near 84th and Cedardale" in Sarpy County, Nebraska. On December 4, 1990, after trial to the county court, sitting without a jury, defendant was found guilty of the offense of operating a motor vehicle during a period of license suspension. The court sentenced defendant to 60 days in the Sarpy County jail and suspended his operator's license for 1 year.

This order was timely appealed to the district court for Sarpy County, where the order of the county court was affirmed. Defendant has timely appealed to this court, where he assigns a single error: that the trial court erred in finding that the evidence was sufficient to support his conviction. We affirm.

In connection with this case, the State has raised a preliminary contention that must first be disposed of. The State contends that under our holding in *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990), defendant's appeal must be dismissed because defendant, in his appeal to the district court, did not specifically assign the errors he alleges were committed by the county court. In *Erlewine*, we announced a new rule of practice, as follows:

> 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 [March 23, 1990].

State v. Erlewine, 234 Neb. at 857, 452 N.W.2d at 767.

In the case before us, the record shows that defendant was sentenced on February 15, 1991. He filed a notice of appeal to the district court on February 22. This notice did not set out any specific assignments of error. On March 13, defendant filed in the district court a "Statement of Errors," which document set out the specific errors that defendant alleged the county court had committed. The district court's order affirming the county court's judgment was entered on April 18, after a hearing on April 12.

The district court, therefore, had before it the specific errors which were the basis of defendant's appeal. Those assigned errors were not in the notice of appeal, but were before the district court "in the appeal." We determine that defendant complied with the rule set out in *State v. Erlewine, supra*, which rule did not provide for a specific date for the filing of the assignments of error in an appeal from a county court to a district court.

It must be noted, however, that the procedure in appeals from a county court to a district court had been changed by court rule. On February 21, 1991, the Supreme Court adopted Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1992), which provides:

> Statement of errors. Within 10 days of filing a notice of appeal, the appellant shall file with the district court a statement of errors, which shall consist of a separate, concise statement of each error a party contends was made by the trial court. Each assignment of error shall be separately numbered and paragraphed. Consideration of the case will be limited to errors assigned and discussed. The district court may, at its option, notice a plain error not assigned. This rule shall not apply to small claims appeals.

That rule, however, while now fully operative, was not controlling on litigants on February 22, 1991, when defendant appealed to the district court in the case before us. Under the circumstances of this case, we determine that defendant's

appeal is properly before us.

In connection with defendant's single assignment of error, the record shows that on February 24, 1990, Cpl. Steven L. Young of the Papillion Police Department was dispatched to the Kwik Shop at 84th and Cedardale Road to respond to a disturbance or suspicious activity. Upon his arrival at 1:47 a.m., Corporal Young made contact with the two persons who had called the police. Based upon the information provided by these individuals, Corporal Young approached an automobile parked in the Kwik Shop parking lot. The car was occupied by defendant. The officer testified that defendant was alone and was in the driver's seat of the automobile and that the keys were in the ignition of the car.

Upon questioning by the officer, defendant admitted that he had operated the vehicle in the store parking lot, but he denied driving on a public road or highway. Defendant told the officer that his girl friend had driven the car to the Kwik Shop and that she would be returning. The officer questioned a woman who was in the store at the time, but she did not know defendant. The officer waited approximately 45 minutes for the girl friend to come back and retrieve the car, but she never arrived. He then left notice with an employee of the store that the girl friend could pick up her keys at the police station. The officer testified that no one had appeared to claim the car by 7 a.m. at either the Kwik Shop or the police station, and the officer ordered the car impounded.

The first of the two lay witnesses at the scene testified that he saw three vehicles pull off Cedardale Road, a public road, into the Kwik Shop parking lot, and he saw that two of the drivers were female and one was a white male. He testified that the male was alone and was driving a burgundy car. This witness was unable to identify defendant in court.

The second witness testified that he saw a car pull off Cedardale Road into the Kwik Shop parking lot and back up to the telephone booth. He saw only one person in the vehicle, a white male. Neither of these witnesses saw any person leave the burgundy car after it entered the parking lot.

Defendant contends that the trial court erred in finding he had operated a motor vehicle on a public street or highway in

violation of his license suspension. This assignment is without merit, since there was sufficient circumstantial evidence from which the trier of fact could find beyond a reasonable doubt that defendant had been driving on a public street or highway while his operator's license was suspended.

The crime with which defendant has been charged is defined by statute, which provides in relevant part:

> Any resident or nonresident whose operator's license or right or privilege to operate a motor vehicle in this state has been suspended or revoked as provided in this act, shall not operate a motor vehicle in this state . . . during such suspension or after such revocation until a new license is obtained . . . .

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

In *State v. Jost*, 219 Neb. 162, 166, 361 N.W.2d 526, 530 (1985), we held that "[t]he gravamen . . . or the misconduct prohibited . . . is operation of a motor vehicle . . . on the public highways of the State of Nebraska."

Circumstantial evidence is sufficient to support a conviction if such evidence and the reasonable inferences that may be drawn therefrom establish guilt beyond a reasonable doubt. *State v. Fleck*, 238 Neb. 446, 471 N.W.2d 132 (1991); *State v. Cortis*, 237 Neb. 97, 465 N.W.2d 132 (1991). In particular, circumstantial evidence may serve to establish the operation or actual physical control of a motor vehicle. *State v. Baker*, 224 Neb. 130, 395 N.W.2d 766 (1986); *State v. Eckert*, 186 Neb. 134, 181 N.W.2d 264 (1970).

On a claim of insufficiency of evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only when such evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Sherrod*, 237 Neb. 114, 464 N.W.2d 809 (1991); *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990).

When we take the view of the evidence most favorable to the State, it is clear that there is sufficient evidence to sustain defendant's conviction. There was evidence from which the trier of fact could find that defendant had driven on public

roads or highways while his license was suspended. Two witnesses testified that they saw a while male drive a car from a public road into the Kiwk Shop parking lot. When the officer approached defendant at 1:47 a.m., defendant was the sole occupant of the vehicle, and he was sitting in the driver's seat. Testimony from two witnesses stated that the car was one that had pulled off the public road. Further, although defendant told the officer that his girl friend had driven the car into the parking lot and was coming back, no one came back to the car during the 45 minutes that the officer was present, and no one came to the store or to the police station by 7 a.m.

Evidence of the circumstances in the case before us constitutes sufficient evidence to sustain defendant's conviction. While the officer did not observe defendant's driving, the circumstances under which he observed defendant, the testimony of the witnesses, and other circumstantial evidence make it clear that the trier of fact could find beyond a reasonable doubt that defendant had driven a motor vehicle on a public road while his license was suspended.

Defendant's assignment of error is without merit.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DERALD B. WILTSHIRE, APPELLANT.
491 N.W.2d 324

Filed October 30, 1992. Nos. S-91-639, S-91-640.

1. **Drunk Driving: Constitutional Law: Jury Trials.** A defendant charged with third-offense driving while intoxicated, who is subject to a sentence of up to 6 months in jail and a 15-year operator's license suspension, is constitutionally entitled to a jury trial.
2. **Convictions: Constitutional Law: Waiver: Sentences.** A guilty-plea conviction based on an ineffective waiver of rights by the defendant is constitutionally invalid, and its use for sentence enhancement may be challenged if the appropriate procedural steps are followed.

3. **Prior Convictions: Right to Counsel: Collateral Attack.** Enhancement evidence challenges dealing with a lack of counsel do not constitute collateral attacks on the prior conviction and are permissible at the enhancement hearing.
4. **Drunk Driving: Prior Convictions: Right to Counsel: Waiver.** Statute permitting driving while intoxicated enhancement evidence "objections" at the enhancement hearing refers only to challenges based on failure to show that in the prior proceeding the defendant had counsel or voluntarily and intelligently waived his right to counsel.
5. **Prior Convictions: Appeal and Error.** Enhancement evidence challenges that do not deal with lack of counsel may be raised only in a direct appeal from the prior conviction or in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid.

Appeal from the District Court for Lancaster County, WILLIAM D. BLUE, Judge, on appeal thereto from the County Court for Lancaster County, MARY L. DOYLE, Judge. Judgment of District Court reversed, and cause remanded for further proceedings.

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

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

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

WHITE, J.

Derald B. Wiltshire appeals the district court affirmance of his conviction for third-offense driving while intoxicated (DWI), in violation of a Lincoln city ordinance. Wiltshire was sentenced under the city recidivist ordinance to 6 months in jail, a $500 fine, and a 15-year suspension of his operator's license.

Wiltshire was arrested on August 31, 1990, after police observed him driving erratically. Wiltshire failed a Breathalyzer test and was charged with DWI, in violation of Lincoln Mun. Code § 10.52.020. During trial in Lancaster County Court, Wiltshire requested a jury trial. The court denied the motion and convicted Wiltshire of DWI.

At the enhancement hearing, the State offered into evidence two of Wiltshire's prior DWI convictions, seeking to enhance the present conviction to a third offense. Wiltshire's counsel

objected to the offer of a 1982 guilty-plea conviction on the grounds that the conviction was constitutionally invalid. Counsel argued that nothing in the record of the 1982 proceeding indicated that Wiltshire had been informed of or had knowingly, intelligently, and voluntarily waived his rights to confrontation of witnesses and freedom from self-incrimination—two of the "*Boykin* rights" guaranteed an accused by *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Wiltshire was represented by counsel when he pled guilty in the 1982 DWI proceeding.

In addition to objecting to the proffered conviction at the enhancement hearing, Wiltshire's counsel filed a "Petition for Relief in a Separate Proceeding," which attacked the validity of the 1982 conviction. The separate petition asked the county court to declare the 1982 conviction invalid and to refrain from using the 1982 conviction for enhancement purposes.

The county court overruled the objections and overruled and dismissed the separate petition. The court found Wiltshire guilty of third-offense DWI, based in part on enhancement from the 1982 conviction. Wiltshire was sentenced to 6 months in jail, a $500 fine, and a 15-year suspension of his operator's license. The district court affirmed.

Wiltshire assigns as error that the district and county courts erred in (1) denying a jury trial for a conviction involving a sentence of 6 months in jail and a 15-year license suspension; (2) failing to find that the 1982 conviction was constitutionally invalid because the 1982 record does not indicate that Wiltshire was adequately informed of his rights or that he knowingly, intelligently, and voluntarily waived those rights before pleading guilty; (3) failing to allow Wiltshire to challenge the constitutional validity of the 1982 conviction at the enhancement proceeding; and (4) failing to set aside the 1982 conviction and allowing the 1982 conviction to be used to enhance the 1990 conviction to a third offense.

A conflict exists between Nebraska law and federal law as to when a jury trial is mandated for a DWI case. This court has previously held that jury trials are not required in DWI cases, even when the sentence is enhanced due to prior convictions. E.g., *State v. Richter*, 225 Neb. 871, 408 N.W.2d 324 (1987)

(holding no jury trial required for third-offense DWI with a sentence of 180 days in jail, $500 fine, and 15-year license suspension); *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986) (holding no jury trial required for second-offense DWI with a sentence of 30 days in jail, $500 fine, and 1-year license suspension).

This court's denial of jury trials in enhanced DWI cases is based on Neb. Rev. Stat. § 25-2705 (Reissue 1989), which provides, in pertinent part: "Either party to any case in county court, *except criminal cases arising under city or village ordinances,* [*and*] *traffic infractions* . . . may demand a trial by jury." (Emphasis supplied.) We have held that this provision does not provide the county court with discretion to grant a jury trial in cases involving municipal ordinance violations. *State v. Blair*, 230 Neb. 775, 433 N.W.2d 518 (1988).

Since our decision in *State v. Richter, supra*, however, new federal case law that conflicts with our Nebraska decisions has arisen on the jury issue. In *Blanton v. North Las Vegas*, 489 U.S. 538, 109 S. Ct. 1289, 103 L. Ed. 2d 550 (1989), the U.S. Supreme Court clarified the federal constitutional right to a jury trial in a DWI case.

In *Blanton*, one defendant, after being denied a jury trial, was convicted of first-offense DWI. The Nevada sentencing statute provided for a maximum of 6 months in jail, a $1,000 fine, and a 90-day license suspension. The Supreme Court affirmed the judgment of the Nevada courts, holding that this situation did not mandate a jury trial. The Court reasoned that jury trials are required only if the offense is regarded as "serious." The best indication of the seriousness of the offense is the maximum penalty prescribed by the legislature. The Court noted that offenses carrying maximum periods of incarceration of 6 months or less are *presumed* to be petty. However, the Court went on to state:

> A defendant is entitled to a jury trial in such circumstances [where the maximum prison term for the offense is 6 months or less] only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination

'that the offense in question is a "serious" one.
489 U.S. at 543.

Based on the language in *Blanton*, the U.S. Court of Appeals for the Eighth Circuit granted habeas relief to Richter (from *State v. Richter, supra*), holding that a 15-year license suspension sufficiently indicates that the Legislature considers third-offense DWI "serious." *Richter v. Fairbanks*, 903 F.2d 1202 (8th Cir. 1990). The Eighth Circuit concluded that Richter was entitled to a jury trial and that § 25-2705 (then Neb. Rev. Stat. § 24-536 (Reissue 1985)) was unconstitutional because it denied him this right.

The 6th Amendment right to trial by jury applies to the states through the 14th Amendment to the U.S. Constitution. *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). A review of *Blanton* and *Richter v. Fairbanks* convinces us that Nebraska law no longer comports with federal constitutional principles in this area. We believe that, based on our Legislature's dealings with the drunk driving problem, the Eighth Circuit properly applied the *Blanton* "seriousness" test to this situation. We therefore follow that reasoning and overrule our decision in *State v. Richter, supra*, to the extent it is inconsistent with our holding today.

The "seriousness" with which the legislature regards an offense dictates whether the offender is entitled to a jury trial. *Blanton, supra*. Four years before *Blanton* we stated, "We have no difficulty concluding, as did the Legislature, that drunk driving is a serious offense, particularly when the defendant has previously committed the same act." *State v. Michalski*, 221 Neb. 380, 394, 377 N.W.2d 510, 520 (1985). We are no less convinced today. The imposition of a 15-year suspension of driving privileges is such a significant additional penalty that it clearly shows serious legislative concern about this offense.

Neb. Rev. Stat. §§ 39-669.07(2)(c) and 39-669.08(4)(c) (Cum. Supp. 1990) require a 15-year license suspension for anyone convicted of third-offense DWI (at least three convictions within the preceding 10 years) under § 39-669.07, § 39-669.08, or any municipal ordinance enacted pursuant to those sections. We now hold that any such defendant is constitutionally entitled to trial by jury. Section 25-2705 is

unconstitutional to the extent that it requires otherwise.

We further hold, however, that a jury trial is required for DWI cases only when the charge is third offense or greater. Sections 39-669.07(2)(b) and 39-669.08(4)(b) require a 1-year license suspension for second-offense DWI. This "additional penalty" will not require a jury trial if the period of incarceration is less than 6 months. Although the second-offense license suspension is twice the maximum incarceration period, the second-offense suspension does not approach the severity of the third-offense suspension, which is *30* times the maximum jail period. A 1-year suspension, like the 90-day suspension dealt with in *Blanton*, is not so far out of line with the period of incarceration as to require a trial by jury.

Wiltshire contends that his 1982 guilty-plea conviction was invalid under *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), and that his inability to challenge its use for enhancement violated his due process rights under the U.S. and Nebraska Constitutions. The district court found that the 1982 conviction did not comply with *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), or *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), Nebraska cases adopting *Boykin*-type requirements for guilty pleas. Despite this finding, the district court determined that it was bound by *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989), to uphold the conviction for enhancement purposes because the record showed that Wiltshire was represented by counsel in the 1982 proceeding.

The U.S. Supreme Court delineated the requirements for a valid guilty-plea conviction in *Boykin, supra*. In *Boykin*, the Court held that a guilty plea waives certain important constitutional rights: the right to trial by jury, the privilege against compulsory self-incrimination, and the right to confront one's accusers. The Court stated that this waiver must be knowingly and intelligently made or the waiver is ineffective. Concluding, the Court held that such a waiver of the three constitutional rights could not be presumed from a silent record.

The Supreme Court further clarified the guilty-plea requirements in *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). In *Brady*, the Court stated that in

addition to the plea's being voluntary and intelligent, *Boykin* added "the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily." 397 U.S. at 747-48 n.4. See, also, *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

Nebraska has adopted the *Boykin* requirements and added to them. See, *State v. Irish, supra* (stating that the defendant must be informed of his *Boykin* rights as well as the nature of the charge and the right to counsel); *State v. Tweedy*, 209 Neb. at 655, 309 N.W.2d at 98 (stating, "A voluntary and intelligent waiver of these rights [the same rights listed in *Irish*] must affirmatively appear from the record"). It is clear that Wiltshire's 1982 guilty-plea conviction did not meet these requirements.

In *State v. Tweedy*, we reversed a guilty-plea conviction for failure to comply with *Boykin*. The record in *Tweedy* indicated that the defendant had engaged in a limited dialogue with the court as to the nature of his rights and the consequences of a guilty plea. The defendant answered "Yes" or "No" to the judge's questions regarding the defendant's understanding of his rights, and the plea was accepted. We held the conviction invalid because the record did not disclose that the defendant knew of his three *Boykin* rights, much less that he had voluntarily and intelligently waived them.

The record in Wiltshire's 1982 conviction offers even less evidence of a knowing and intelligent waiver than the record did in *Tweedy*. Tapes allegedly containing discussions between Wiltshire and the trial judge have since been erased. Only a sparse transcript and the trial judge's journal entries are before us.

One journal entry shows that the trial judge asked Wiltshire about the voluntariness of his plea and that Wiltshire's attorney informed the judge that he believed Wiltshire to be acting voluntarily and intelligently. The entry then contains a finding by the judge that the plea was made intelligently, voluntarily, and on the advice of counsel.

The record from Wiltshire's 1982 conviction does not affirmatively disclose a voluntary and intelligent waiver of his

rights as required by *Boykin, Tweedy,* and *Irish*. To an even greater degree than in *Tweedy*, where we found the record insufficient to support the plea, the 1982 record fails to show any meaningful exchange between Wiltshire and his counsel or the trial judge. The record contains no evidence of Wiltshire's understanding of his plea or its voluntariness. Wiltshire's 1982 guilty-plea conviction does not conform to the *Boykin-Tweedy-Irish* requirements and is therefore constitutionally invalid.

As we have determined that Wiltshire's 1982 conviction was invalid, one matter remains: the use of the invalid conviction for enhancement. Wiltshire challenged the use of the 1982 conviction at the enhancement hearing by objection and by filing a "Petition for Relief in a Separate Proceeding." Both requests for relief were denied. Although the district court properly affirmed the overruling of Wiltshire's objection at the enhancement hearing, the district court's denial of relief in the separate proceeding was erroneous.

This court has long recognized the right of criminal defendants to challenge the use of constitutionally invalid convictions for sentence enhancement. In *State v. McGhee*, 184 Neb. 352, 358, 167 N.W.2d 765, 769 (1969), we stated, "[I]n a habitual criminal proceeding a prior conviction is subject to attack on constitutional grounds [if raised in a timely manner]." We have followed U.S. Supreme Court precedent recognizing the right to challenge the use of uncounseled convictions for enhancement. *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983) (following *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), and *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980)).

Like an uncounseled guilty plea, an un-*Boykin*ized plea is also constitutionally invalid. *Boykin, supra*. The broad language used by the Supreme Court in *Burgett, supra*, and *Baldasar, supra*, implies that a proffered enhancement conviction based on an un-*Boykin*ized plea is constitutionally challengeable. To hold otherwise would work a second constitutional violation on the defendant—by allowing an invalid conviction to serve as a predicate for a recidivist conviction.

When the constitutionally invalid conviction is used for enhancement, the violation is effectively renewed. See *Burgett, supra*. Additionally, the use of an invalid conviction to satisfy the requirements of a recidivist statute results in a conviction based on insufficient evidence; i.e., the defendant is convicted without the State's having to prove the validity of the requisite underlying convictions. See, *Smith, supra*; *State v. Crane*, 240 Neb. 32, 480 N.W.2d 401 (1992). While there is a clear right to challenge invalid convictions and a sound rationale behind that right, the more problematic point is the proper method for levying the challenge.

Our past decisions have set forth procedural limitations on a defendant's ability to challenge enhancement convictions. These limitations were described in *State v. Oliver*, 230 Neb. 864, 869-70, 434 N.W.2d 293, 297-98 (1989), where we stated that

> it has been the rule in this State that to prove a prior conviction for enhancement purposes, the State need only show that at the time of the prior conviction the defendant had, or waived, counsel. . . .
>
> . . . .
>
> . . .[W]e now expressly disapprove our holding in [*State v. Gonzales*, 218 Neb. 43, 352 N.W.2d 571 (1984),] that a defendant may raise the constitutional invalidity of a prior conviction in an enhancement proceeding, and now hold that such an issue may only be raised in a direct appeal or in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid.

(Citations omitted.) See, also, *State v. Soe*, 219 Neb. 797, 366 N.W.2d 439 (1985); *State v. Smith, supra* (holding that prior convictions cannot be collaterally attacked at the enhancement hearing).

The limitations have since been clarified. In *State v. Crane, supra*, we noted that *Oliver* does not mean that the State can establish the *constitutional validity* of a prior guilty-plea conviction simply by proving that the defendant had or waived counsel at the time of the plea. Unfortunately, *Crane* had not been decided when Wiltshire's case came before the district court, and that court mistakenly determined that despite

violating *Tweedy* and *Irish*, the 1982 conviction was valid for enhancement purposes because Wiltshire had been represented by counsel. That is not what we held in *Oliver*. Rather, *Oliver* set out a procedure for challenging past convictions.

The ability to challenge past convictions at the enhancement hearing is procedurally limited, to prevent relitigation of a conviction every time it is used for enhancement. There are, however, certain constitutional invalidities that automatically render the conviction too unreliable to be used for enhancement. Lack of counsel is such an invalidity. See *Burgett, supra* (holding invalid the use of an uncounseled conviction for enhancement). We have therefore held that the challenge of a prior conviction in which the record is silent as to whether counsel had been afforded or waived is not a collateral attack on the conviction. Such a challenge is permissible at the enhancement proceeding. *State v. Nowicki*, 239 Neb. 130, 474 N.W.2d 478 (1991); *Smith, supra*.

Thus, the first tier of the *Oliver* analysis deals with challenges raised *at the enhancement hearing*. We have stated, "Challenges to prior plea-based convictions for enhancement proceedings may only be made for the failure of the record to disclose whether the defendant had or waived counsel at the time the pleas were entered." *State v. Tejral*, 240 Neb. 329, 333, 482 N.W.2d 6, 9 (1992). See, also, *State v. Partee*, 240 Neb. 473, 482 N.W.2d 272 (1992). In other words, at the enhancement proceeding only those objections dealing with uncounseled pleas may be raised. Our language in *Tejral* makes this apparent: "The record of the [un-*Boykin*ized] 1985 conviction clearly establishes that Tejral was represented by counsel; thus, his *general objection* to its introduction was likewise properly overruled." (Emphasis supplied.) 240 Neb. at 334, 482 N.W.2d at 9-10.

Wiltshire argues that his objection at the enhancement hearing was appropriate under what is now § 39-669.08(5). It is actually § 39-669.07(3) that applies to Wiltshire's case, but the relevant language of the sections is identical. Under § 39-669.07(3), a defendant is entitled to challenge prior DWI convictions used for enhancement. The statute provides that when a prior conviction is being used for enhancement, the

"defendant shall be given the opportunity to . . . make objections on the record regarding the validity of such prior convictions."

We addressed the application of § 39-669.07 to enhancement challenges in *State v. Fraser*, 222 Neb. 862, 387 N.W.2d 695 (1986). In *Fraser*, we noted that the "objections" the statute refers to are those which would now fall in the first tier of *Oliver*: challenges based on failure to show that in the prior proceeding the defendant had counsel or that the defendant had voluntarily and intelligently waived his right to counsel. Accord *State v. Hamblin*, 223 Neb. 469, 390 N.W.2d 533 (1986).

Section 39-669.07(3) provides only for "objections," not the relitigation-type challenges falling within the second tier of *Oliver*. Unlike a lack-of-counsel challenge, which automatically makes the conviction unreliable, a *Boykin* challenge requires a review of the record and a determination of whether the plea was knowing, intelligent, and voluntary. To provide any relief to the defendant, a *Boykin* challenge would have to go beyond the mere "objection" called for by § 39-669.07(3) and rise to the level of a collateral attack. The statute does not provide for this. Wiltshire's reliance on § 39-669.07(3) for his challenge is misplaced.

Enhancement evidence challenges that do not deal with lack of counsel, including *Boykin*-based challenges, fall in the second tier of the *Oliver* analysis: "[S]uch an issue may only be raised in a direct appeal or in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid." 230 Neb. at 870, 434 N.W.2d at 298. See, also, *Nowicki, supra* (stating that "direct appeal" refers to an appeal from the prior conviction).

With regard to Wiltshire's challenges, only one was properly denied. Because the transcript of the 1982 proceeding showed that Wiltshire was represented by counsel, the judge at the enhancement hearing correctly overruled Wiltshire's *Boykin objection*. That was a "second-tier" challenge and improper at the enhancement hearing.

Wiltshire did more than object, however. He also filed a petition in a "separate proceeding," in which he challenged the 1982 conviction and requested that it be set aside because it did

not comport with the requirements of *Boykin* and *Tweedy*.

Although Wiltshire complied exactly with the *Oliver* requirements for challenging a second-tier invalidity, the district court denied relief and dismissed the petition. The court reasoned that the challenges were without merit and were made "approximately nine years after the fact." The dismissal of the petition was error. When the State uses a prior, invalid conviction for enhancement, the original violation is renewed. That is the reason for allowing challenges to invalid convictions. See *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967). Wiltshire's petition was timely, complied with *Oliver*, and raised a constitutional invalidity. The relief requested should have been granted; the 1982 conviction should not have been used for enhancement.

We hold that the denial of Wiltshire's request for a jury was error, as was the use of the invalid 1982 conviction to enhance the 1990 conviction to third-offense DWI. We therefore reverse and remand for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE INTEREST OF T.M.B., D.L.W., P.D.W., AND J.G.W., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. P.D.P. AND U.L.P., APPELLANTS.

491 N.W.2d 58

Filed October 30, 1992. No. S-91-1275.

1. **Juvenile Courts: Parental Rights: Minors: Jurisdiction: Proof.** At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), the State must prove the allegations of the petition by a preponderance of the evidence.
2. **Appeal and Error.** Errors assigned and not argued are generally not considered.
3. **Constitutional Law: Minors.** Child abuse is not a constitutionally protected activity.

4. **Constitutional Law: Statutes: Minors.** Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) is not void for vagueness because the statute is interpreted in light of its common understanding.

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

Richard Douglas McClain for appellants.

Gary E. Lacey, Lancaster County Attorney, Linda Porter, and Nancy R. Wynner for appellee.

Michael L. Cruise, guardian ad litem.

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

WHITE, J.

This is an appeal from an order of the Lancaster County Separate Juvenile Court adjudging T.M.B., D.L.W., P.D.W., and J.G.W. to be children as defined by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) due to lack of proper parental care by reason of the fault of their mother and stepfather.

The natural fathers of the children, though served with notice, did not appear in the juvenile court and have not entered their appearance in this court. The natural mother and stepfather appeal and assign some 14 errors or subparts thereof. The assignments may be classified as follows: The juvenile court erred in not holding that (1) the infliction of punishment by the use of a belt that left welts where the strap touched the flesh of the child or children was lawful, reasonable, and within the rights guaranteed appellants by the common law and the Constitution of the United States and in accordance with the parents' religious beliefs; (2) § 43-247(3)(a) is violative of the Due Process Clause of the U.S. Constitution by being overly broad and inhibiting constitutionally protected conduct; (3) § 43-247(3)(a) is unconstitutionally void for vagueness in not advising parents of prohibited conduct; and (4) the evidence is insufficient to sustain the finding of the court that the children lacked proper parental support. We affirm.

At the adjudication stage, in order for the juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), the

State must prove the allegations of the petition by a preponderance of the evidence. *In re Interest of D.S.*, 232 Neb. 345, 440 N.W.2d 477 (1989); Neb. Rev. Stat. § 43-279.01(3) (Cum. Supp. 1992). The standard of review in this court is de novo on the record. *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991); *In re Interest of D.S., supra*. Our review of the facts discloses the following:

The children at issue are now ages 14, 12, 11, and 8. On July 16, 1991, an officer of the Lincoln Police Department was summoned to the children's residence by a phone call reporting child abuse. Upon arriving at the home, the officer interviewed the 12-year-old, who reported that as punishment for going to a Kwik Shop without permission, her stepfather beat her about the buttocks and arms with a belt. The marks were visible to the officer. No action was taken by the officer. Striking with a belt was not an unusual form of discipline in the household. The evidence establishes that each child received from 40 to 60 blows a week with a belt, administered by the stepfather. The mother approved the use of the belt as an appropriate punishment.

The violence at the family home also included the parents' fighting in the vicinity of the children. On November 19, 1990, the police responded to a call reporting a domestic disturbance involving a possible assault with a knife outside the family residence. The police observed the mother and stepfather in the street in front of the home. The stepfather was bleeding from a finger laceration, and the police report indicated that the mother was going to use the knife to slash the tires on his car. Before she tried to slash the tires, the mother used a hammer to break out the windows on the car. A struggle ensued, and she bit his finger in order to get his hands from her throat. The police officer cited her with assault. Two of the children were present at the scene, and both were emotionally upset and crying as a result of the incident.

Later that evening, the police were contacted by the stepfather. He informed the police that his wife had threatened to kill him with a gun. The police determined that she had taken a cab to a hardware store, and she was found in the shopping center parking lot. The police looked in a sack she was carrying and found a newly purchased Jennings .22-caliber handgun.

The gun was confiscated, and she was arrested for making terroristic threats. During the period she was in jail, the children became aware of the incident.

Following this event, the stepfather also purchased a handgun, which was the same model as the one his wife had purchased. In July 1991, a loaded gun was discharged during another altercation between them. They were parked in the alley behind their house, became embroiled in an argument, and both drew their handguns. The argument was loud enough to bring the babysitter to the door while the children were with her in the house. In the meantime, one of the parties present, possibly a brother-in-law, fired one of the handguns. When police arrived, the mother told the officers that while her husband had grabbed her around the head, he had pointed a loaded pistol at her head.

These events had an adverse effect on the children. For example, D.L.W. frequently expressed fears about violence in her homelife to her teacher throughout the 1990 school year. Among the fears D.L.W. told her teacher was that she was worried about coming home to find someone dead. The school related the child's anxieties to the Nebraska Department of Social Services. In response, a social worker tried to contact the family. The mother called back the same day and refused to meet with a Child Protective Services worker. When the worker told the mother that she would have no choice but to stop by without calling, the mother replied that she would either "shoot" or "boot" the worker out the door and leave the worker to freeze to death. Thereafter, the mother ordered her children not to talk with anyone at school or from Child Protective Services about their homelife.

Based on this evidence, the juvenile court found various allegations of the amended petition and supplemental petition to be true and assumed jurisdiction over the children pursuant to § 43-247(3)(a).

We will consider the errors assigned in order. Although it was assigned as error, the alleged common-law right to inflict punishment by belt was not discussed in the brief, nor was there a discussion of how the First Amendment protection of religious freedom is implicated in a child-beating case. Errors

assigned and not argued are generally not considered. *Carlson v. Zellaha*, 240 Neb. 432, 482 N.W.2d 281 (1992); *State v. Melton*, 239 Neb. 576, 477 N.W.2d 154 (1991).

As to the reasonableness of the punishment, we conclude, as did the trial court, that applying from 40 to 60 strikes with a belt per week to the body of a child is abusive and excessive. As we said in *State v. Sinica*, 220 Neb. 792, 798-99, 372 N.W.2d 445, 447 (1985), "Child abuse is not a constitutionally protected activity." The first assignment of error is without merit.

The second and third assignments of error are not discussed in the brief and will not be considered further.

The juvenile court ordered that the children in this case fell under § 43-247(3)(a) by lack of proper parental care, and the appellants have standing to attack the statute only on those grounds. The other bases of jurisdiction under § 43-247(3)(a) cannot be challenged by the appellants because the court did not rule that they engaged in that conduct. Vagueness of a law cannot be challenged as it applies to the conduct of others. *State v. Pierson*, 239 Neb. 350, 476 N.W.2d 544 (1991); *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987).

It is apparent that § 43-247(3)(a) is not void for vagueness because the statute is interpreted in light of its common understanding. "Proper parental care" was defined by this court well before the court took jurisdiction of the children. See *State v. Metteer*, 203 Neb. 515, 279 N.W.2d 374 (1979). The assignments are without merit.

As to the remaining assignment of error, it is obvious that when we consider only the effect the continuing domestic violence between the parties had on the children, the evidence more than justified the assumption of jurisdiction by the juvenile court. The beating merely emphasizes the lack of parental care.

As no error is present, the judgment of the separate juvenile court is affirmed.

AFFIRMED.

QUINN ARMSTRONG, APPELLANT, V. MARGARET HIGGINS, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

491 N.W.2d 331

Filed November 6, 1992. No. S-89-1257.

Actions: Jurisdiction. Lack of subject matter jurisdiction may be raised sua sponte by a court if necessary.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Reversed and remanded with directions.

David E. Veath for appellant.

Robert M. Spire, Attorney General, and Paul N. Potadle, and, on brief, David Edward Cygan for appellee.

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

FAHRNBRUCH, J.

The only issue in this appeal is whether the district court for Sheridan County correctly held that it lacked jurisdiction to review the revocation of Quinn Armstrong's driver's license by the defendant, Margaret Higgins, director of the Department of Motor Vehicles of the State of Nebraska. We reverse the district court's order of dismissal and remand the cause with directions.

Following a May 3, 1989, hearing, the director entered a written order on June 1, finding (1) that Armstrong was arrested on December 18, 1988, by a Gordon, Nebraska, police officer for operating a motor vehicle while under the influence of intoxicating liquor; (2) that prior to Armstrong's arrest, the arresting officer had reasonable grounds to believe that Armstrong was operating a motor vehicle upon a public highway in this state while under the influence of intoxicating liquor; (3) that Armstrong was informed of Nebraska's implied consent law, Neb. Rev. Stat. § 39-669.08 (Reissue 1988); and (4) that when requested to submit to a chemical test of blood, breath, or urine, Armstrong unreasonably refused to submit to a test.

Section 39-669.08, commonly known as the implied consent

law, provides that any individual who operates or has physical control over a motor vehicle upon a public highway in Nebraska is deemed to have consented to a chemical test of his or her blood, urine, or breath for the purpose of determining alcoholic content of that blood, urine, or breath. This statute authorizes any law enforcement officer to request such a test in various situations if the officer has reasonable grounds to believe an individual has been operating a motor vehicle upon a public highway while under the influence of alcoholic liquor. At all times relevant herein, refusal to submit to such a test subjected a motor vehicle operator to administrative revocation of his or her driver's license, as provided in Neb. Rev. Stat. §§ 39-669.07 to 39-669.09 and 39-669.14 to 39-669.17 (Reissue 1988) and Neb. Rev. Stat. § 39-669.18 (Reissue 1984).

In her June 1 order, Higgins, pursuant to § 39-669.16, revoked Armstrong's motor vehicle operator's license for 1 year.

On June 20, 1989, pursuant to Neb. Rev. Stat. § 60-420 (*Reissue 1984*), Armstrong filed a petition in the district court for Sheridan County, appealing the revocation of his driver's license by Higgins. Higgins filed an answer on July 24, 1989, although service of summons had not yet been made upon her.

On August 8, the district court, on its own motion, issued an order for Armstrong to show cause why his appeal should not be dismissed for lack of jurisdiction because answer day had passed and no transcript had been filed. Lack of subject matter jurisdiction may be raised sua sponte by a court if necessary. See *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991).

On August 21, Armstrong responded by filing a showing of cause and a transcript of the administrative proceedings. He admitted that a praecipe for service upon the defendant had not been filed to commence the running of the answer date time. See Neb. Rev. Stat. § 25-821 (Reissue 1989). Armstrong pointed out that copies of pleadings were sent to the defendant and that the defendant had answered the petition on appeal.

On August 23, the district court found that Armstrong had failed to show cause why his appeal should not be dismissed for lack of jurisdiction. The court found that it had no jurisdiction

to hear Armstrong's appeal and dismissed it. The jurisdictional defect the court relied upon was not set forth in its order of dismissal.

On August 29, Armstrong filed a motion asking the district court to modify its dismissal order or to grant a new trial. A hearing on Armstrong's motion was held on September 12. On September 13, a copy of Armstrong's petition on appeal and a summons were served upon the defendant. On September 19, the district court overruled Armstrong's motion to modify the court's order or to grant him a new trial. Armstrong correctly argues that the provisions of the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 et seq. (*Reissue 1987*), did not apply to appeals of driver's license revocations until July 1, 1989, the effective date of an amendment to § 60-420. The amendment made the Administrative Procedure Act expressly applicable.

Armstrong contends that his appeal should be governed by the rules of civil procedure, that (1) Neb. Rev. Stat. § 25-217 (Reissue 1989) only requires that he serve a summons upon the defendant within 6 months after the filing of his appeal petition, and (2) under § 60-420 (Reissue 1984) and § 25-821, he was only required to file the transcript of the proceedings within 30 days after service of summons upon the defendant.

Higgins contends that the Administrative Procedure Act as it existed at all relevant times herein is applicable to Armstrong's appeal. She argues that under § 84-917(2) (*Reissue 1987*), Armstrong had only 30 days to serve the defendant following the filing of his appeal petition. She claims that the district court was without jurisdiction both because Armstrong had failed to timely serve a summons upon the director and because Armstrong's transcript was not timely filed.

Armstrong appealed his driver's license revocation under the implied consent law pursuant to § 39-669.18 (*Reissue 1984*), the statute in effect at the time of the appeal. That statute provided in part that "[a]ny person who feels himself aggrieved because of such revocation may appeal . . . in the manner prescribed in section 60-420."

Higgins mistakenly relies upon *Leach v. Dept. of Motor Vehicles*, 213 Neb. 103, 327 N.W.2d 615 (1982), as authority that § 60-420 must be read in conjunction with § 84-917(2) to

determine the proper procedure for perfecting an appeal in Armstrong's case. *Leach* was decided under § 84-917 (*Reissue 1981*), which was amended in 1983 and 1987. As § 84-917(7) (Reissue 1987) existed at all relevant times herein, it provided: "The review provided by this section *shall not be available* in any case where other provisions of law prescribe the method of appeal." (Emphasis supplied.) Because of this amendment, § 60-420 provided the exclusive method of appeal in Armstrong's case, and our review is controlled by that section. See *Ernest v. Jensen*, 226 Neb. 759, 415 N.W.2d 121 (1987).

As relevant to Armstrong's appeal, § 60-420 required that (1) a bond for costs be filed in the office of the director within 20 days of the director's final order, (2) a petition be filed in the district court within 30 days of the director's final order, and (3) a transcript of the proceedings concerning the revocation of the license be filed before answer day. At the time of Armstrong's appeal, meeting these requirements was mandatory for a district court to acquire subject matter jurisdiction of an implied consent proceeding. See *Ernest v. Jensen, supra*.

The first two of these jurisdictional requirements are not at issue in this appeal. The record clearly shows that Armstrong timely executed a bond for costs and timely filed an appeal petition in the district court. We need only determine whether Armstrong timely filed a transcript of the proceedings before the director of the Department of Motor Vehicles.

The relevant language of § 60-420 (*Reissue 1984*), which governs Armstrong's appeal, stated:

> The applicant or licensee shall file a petition in such district court within thirty days from the date of filing of the director's final order in the matter *and shall file the transcript before answer day* which shall be the same as provided under the code of civil procedure in section 25-821.

(Emphasis supplied.) Section 25-821 requires a defendant to file an answer within 30 days after service of the summons and petition, and § 25-217 permits service upon a defendant any time within 6 months from the date the petition is filed with the court.

Applying the foregoing civil procedure statutes to the

requirements of § 60-420, Armstrong had 6 months from June 20, 1989, the date he filed his petition, to serve a summons upon the director of the Department of Motor Vehicles. Therefore, the latest possible date for service of summons was December 20, 1989, making the latest possible answer day 30 days later, January 19, 1990.

Assuming, but not deciding, that the director of the Department of Motor Vehicles had the authority to appear voluntarily in Armstrong's appeal, the fact that the director filed an answer on July 24, 1989, without being served a summons is of no consequence in determining whether Armstrong timely filed in the district court a transcript of the proceedings before the director of the Department of Motor Vehicles. To hold otherwise would permit a director of the Department of Motor Vehicles to thwart appeals by filing an answer before an answer date could ever be established, and a director could thereby prevent the timely filing of a transcript by an appellant.

The district court erroneously dismissed Armstrong's appeal for lack of jurisdiction. We, therefore, reverse the district court's order of dismissal and remand this cause for a hearing in the district court on the merits.

REVERSED AND REMANDED WITH DIRECTIONS.

GRANT, J., concurring.

I concur with the judgment of the court, but I do not agree with the statement that "the fact that the director filed an answer on July 24, 1989 . . . is of no consequence . . . ." I believe the director's filing of July 24 constituted a voluntary appearance and was "equivalent to service" within the meaning of Neb. Rev. Stat. § 25-516.01 (Reissue 1989). The fact that that voluntary filing was an answer does not change the application of Neb. Rev. Stat. § 25-821 (Reissue 1989), which, in substance, requires an answer to be "filed within thirty days after service" and thus establishes an "answer day," which may well be different from the day on which an answer is filed.

Under Neb. Rev. Stat. § 60-420 (Reissue 1984), plaintiff was required to "file the transcript before answer day." Answer day in this case would be calculated by counting 30 days from July 24, 1989, the date of service as determined by the date of the

filing of the director's voluntary appearance. That answer day would be August 23, 1989. Plaintiff filed the transcript from the director on August 21, 1989. I believe the district court had jurisdiction of the appeal from the director's order on that basis.

CAPORALE, J., joins in this concurrence.

DENNIS L. BEHM, APPELLANT, AND CITY OF ALLIANCE, A MUNICIPAL CORPORATION, APPELLEE, V. NORTHWESTERN BELL TELEPHONE COMPANY, A CORPORATION, APPELLEE.

491 N.W.2d 334

Filed November 6, 1992. No. S-89-1316.

1. **Jury Instructions: Appeal and Error.** All the jury instructions given must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.
2. **Rules of Evidence.** 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.
3. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial judge.
4. **Proximate Cause.** An efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury. A person is not legally responsible for an injury if it would not have resulted but for the interposition of an efficient intervening cause, which he should not have reasonably anticipated.
5. **Rules of Evidence: Hearsay.** Prior inconsistent sworn statements previously characterized as hearsay available for the purpose of impeachment only are substantive evidence of fact contained in the statement, provided the requirements prescribed by Nev. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1989) are satisfied.
6. _____: _____. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not excluded by the hearsay rule, even though the declarant is available as a witness.
7. **Evidence: Trial: Appeal and Error.** To preserve a claimed error in admission of evidence, a litigant must make a timely objection which specifies the ground of

the objection to the offered evidence.

8. _____: _____: _____. 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.
9. **Records: Appeal and Error.** It is incumbent on the party appealing to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court is to be affirmed.
10. **Negligence: Words and Phrases.** Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

J.L. Zimmerman and Joy Shiffermiller, of Atkins Ferguson Zimmerman Carney, P.C., for appellant.

Joseph K. Meusey and Richard W. Ratz, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., Albert T. Reddish, and Ruth Anne Evans for appellee Northwestern Bell.

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

HASTINGS, C.J.

Plaintiff Dennis L. Behm appeals from an order of the district court overruling his motion for a new trial and a jury verdict in favor of the defendant, Northwestern Bell Telephone Company. This case was previously before this court in *Mundt v. Northwestern Bell Tel. Co.*, 230 Neb. 192, 430 N.W.2d 530 (1988), at which time the court affirmed the district court's previous order granting Northwestern Bell new trials after jury verdicts in favor of the plaintiffs. Most of the essential facts appear in *Mundt, supra.*

Assigned as error are the giving of certain instructions on intervening cause and contributory negligence, the admitting of certain evidence, and the allowing of testimony by defendant's expert witnesses.

"All the jury instructions given must be read together, and if, taken as a whole, they correctly state the law, are not

misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal." *Grote v. Meyers Land & Cattle Co.*, 240 Neb. 959, 973, 485 N.W.2d 748, 759 (1992).

"[I]n 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 . . . ." *State v. Messersmith*, 238 Neb. 924, 936, 473 N.W.2d 83, 92 (1991). Therefore, the admissibility of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial judge.

An issue in *Mundt* involved the giving by the trial court of NJI Civ. 3.41 on proximate cause and the failing to give NJI Civ. 3.43 on intervening cause. We stated as follows:

> Having said this, it is apparent that the issue of an intervening (superseding) cause having been pleaded by Northwestern Bell, facts introduced justifying the instruction having been placed before the jury, and the instruction requested, it was prejudicial error for the trial court not to have given the instruction on an issue raised by the pleadings and evidence. *Reeder v. Rinne*, 183 Neb. 734, 164 N.W.2d 203 (1969).

Mundt, 230 Neb. at 196-97, 430 N.W.2d at 533.

This issue arose because of an incident occurring on June 9, 1983, when Lloyd Prettyman, an employee of the City of Alliance, was painting a warehouse owned by the city, using a "cherrypicker" truck. On an earlier date, Northwestern Bell had attached a telephone cable to the parapet wall of the warehouse, which was a freestanding facade of laid bricks not otherwise secured or braced.

Another employee of the city, Danuel D. Mundt, was on the ground operating the air compressor. Prettyman motioned to Mundt to give him more hose for the spray gun, and Prettyman testified that he raised the bucket to the point where the boom of the cherrypicker touched the cable and raised it "[o]h, quarter of an inch." Mundt enlisted the aid of two fellow

employees, Behm and Lot Curtiss Griffith, who were in the area, to help him move the compressor. After the compressor was moved, Prettyman resumed painting. At a point 5 to 7 minutes after he had moved the bucket, Prettyman felt the truck shake and saw that the wall had collapsed. The collapse of the wall injured Mundt, Griffith, and Behm, who had been standing next to the wall and were hit by falling debris.

At the first trial, see *Mundt*, Rex Perrin testified that he arrived at the scene of the accident shortly after it occurred. He stated that Prettyman told him, "I didn't see the wire and I must have caught it and that's what pulled it from the wall." *Mundt*, 230 Neb. at 194, 430 N.W.2d at 531.

For all intents and purposes, the record in this trial duplicates the evidence found in *Mundt*, although some additional facts will be added as we proceed. Therefore, the basic issue in the two cases is the same.

In *Mundt*, the court instructed the jury on proximate cause in the words of NJI Civ. 3.41 as follows:

> "By 'proximate cause' is meant a moving or effective cause or fault, which, in the natural and continuous sequence, unbroken by an intervening cause, produces the occurrence, and without which the occurrence would not have taken place.
>
> "A 'proximate result' is that result brought about or produced by a proximate cause. It must have been a natural and probable consequence which was, or ought to have been reasonably foreseen or anticipated in the light of attendant circumstances. It is not required, however, that the particular injury, or the happening, was or should have been foreseen."

(Emphasis omitted.) *Mundt*, 230 Neb. at 195, 430 N.W.2d at 532.

During this second trial, Northwestern Bell had also requested that an instruction in the form of NJI Civ. 3.43 be given on intervening cause. NJI Civ. 3.43 reads as follows:

> An efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury. A person is not legally responsible for an injury if it

> would not have resulted but for the interposition of an efficient intervening cause, which he should not have reasonably anticipated.

The trial court did not give this instruction in *Mundt*, but did so in this, the second trial. In *Mundt*, Northwestern Bell had argued that "since the jury did not know what the legal term 'intervening cause' meant, it therefore could not make a determination as to whether Prettyman's act of touching the cable was of sufficient character to break the chain of causation and insulate Northwestern Bell from liability." *Mundt*, 230 Neb. at 196, 430 N.W.2d at 532.

Continuing, as we have previously mentioned, the court in *Mundt* stated,

> Having said this, it is apparent that the issue of an intervening (superseding) cause having been pleaded by Northwestern Bell, facts introduced justifying the instruction having been placed before the jury, and the instruction requested, it was prejudicial error for the trial court not to have given the instruction on an issue raised by the pleadings and evidence.

Mundt, 230 Neb. at 196, 430 N.W.2d at 533.

Concluding, we said:

> In this case we are faced with the fact that the phrase "intervening cause" is mentioned in the proximate cause instruction, but was never defined in any instruction given. We are unable to conclude that the absence of an instruction on intervening (superseding) cause did not affect the jury's deliberations. The trial court did not abuse its discretion in granting the motions for new trial.

Mundt, 230 Neb. at 197, 430 N.W.2d at 533.

Plaintiff seizes upon our language in *Mundt* that at an appropriate time and in an appropriate case perhaps the intervening cause instruction will pass from the scene, but we did not deem that to be either the appropriate time or case. We have not changed our mind, and the trial court in the trial of this case simply followed the directions previously given by the court.

In any event, Behm did not argue at trial that no intervening cause instruction should be given. Rather, he offered two

intervening cause instructions of his own, which merely added language to that of the instruction ultimately given. Behm's only objection to instruction No. 16 was that the district court was "not offering [sic] the intervening cause and the alternative we've proposed." Since Behm did not argue at trial that no intervening cause instruction should be given, he cannot make that argument on appeal.

During this second trial, Northwestern Bell offered into evidence "The Lineman's and Cableman's Handbook" as well as the testimony of various Alliance city employees as to the safe operation of the cherrypicker. The district court admitted the handbook over Behm's relevancy, foundation, and best evidence objections. Behm also objected to the testimony of Bob Best, the city's electrical line foreman for 17 years, regarding the safe use of the cherrypicker, on various foundation and relevancy grounds. Best's testimony was allowed.

Behm also moved in limine at this trial to prevent Oscar Amrhyn, Donald Wandling, Dr. David Kentsmith, Dr. John Goldner, Dr. John Glissman, Ian Chin, and John Seidensticker from testifying as experts for Northwestern Bell. Behm stated that the existence of these witnesses and the subjects of their testimony had not been revealed through answers to interrogatories. The district court denied the motion. Wandling, Glissman, and Chin did in fact testify for Northwestern Bell at the second trial.

Behm argues on appeal that Perrin's former testimony as to Prettyman's statement, "I didn't see the wire and I must have caught it and that's what pulled it from the wall," was improperly admitted. Behm concedes that Perrin's former testimony is not hearsay because it satisfies the requirements of Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1989)—it is the prior sworn testimony of a person testifying in the current proceeding, it is subject to cross-examination, and it is inconsistent with his current testimony. Prior inconsistent sworn statements "previously characterized as hearsay available for the purpose of impeachment only [are now] substantive evidence of fact contained in the statement, provided the requirements prescribed by Rule 801(4)(a)(i) are

satisfied." *State v. Johnson*, 220 Neb. 392, 397, 370 N.W.2d 136, 140 (1985).

Behm argues that Prettyman's statement to Perrin is itself hearsay and would be admissible only to impeach Prettyman. Behm is correct that where an out-of-court statement relates the content of another out-of-court statement—"hearsay within hearsay"—there must be an independent hearsay exception for each statement. See Neb. Rev. Stat. § 27-805 (Reissue 1989) ("[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules"). However, Behm's contention—and this assignment of error—fail for two reasons.

First, Behm's objection does not clearly raise the ground he now urges on appeal. In objecting to the reading of Perrin's former testimony regarding Prettyman's statement, Behm's counsel stated, "He wasn't familiar with what went on or happened. Secondly it's not against Mr. Behm." The first sentence of the objection, although unclear as to whether referring to Perrin or Prettyman, is a foundational, basis-of-knowledge objection. It was properly overruled, since the record elsewhere makes clear that Prettyman was present when the accident occurred and that Perrin was present when Prettyman made his statement. The meaning of the second sentence of the objection is not understandable.

Second, Prettyman's statement is admissible as an "excited utterance" under Neb. Rev. Stat. § 27-803(1) (Reissue 1989). "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is "not excluded by the hearsay rule, even though the declarant is available as a witness." § 27-803. Here, the statement related to a startling event: It was Prettyman's spontaneous explanation of an accident which had injured three of his coworkers. The statement was made "within one minute" of the accident. At the time he made the statement, Prettyman appeared "extremely nervous, shaken, [and] upset." Prettyman's statement was admissible under § 27-803(1), and this assignment of error is therefore without merit.

Behm assigns as error the admission of "The Lineman's and Cableman's Handbook" and city electrical department personnel's testimony on using a Hi-Ranger boom truck around energized lines. The latter is apparently a reference to the testimony of Best, the former city electrical line foreman. Behm argues that the handbook is hearsay outside of any "learned treatise" exception and that the testimony in question was irrelevant, as Best supervised the city's electrical department and Prettyman worked in the city's sewer and water department. Neither argument is sufficient to sustain the assignment of error.

As to the handbook, Behm's purported grounds for appeal were not raised by his objection to the admission of the handbook at trial. Behm objected on relevance, foundation, and best evidence grounds. Now, Behm argues that the handbook was inadmissible hearsay. "To preserve a claimed error in admission of evidence, a litigant must make a timely objection which *specifies the ground* of the objection to the offered evidence." (Emphasis supplied.) *Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 638, 452 N.W.2d 270, 278 (1990). Obviously, where the grounds specified for the objection at trial are different from the grounds advanced on appeal, nothing has been preserved for this court to review.

As to Behm's argument that Best's testimony was irrelevant, Behm has specified no prejudice in the admission of this evidence. Prettyman himself testified that he had been instructed to beware of overhead wires while operating the cherrypicker "because you might break the wire." That advice is the essence of Best's testimony as well. Thus, it matters little whether Prettyman got his instruction in the use of the cherrypicker from the city's electrical department, because he was clearly aware of the danger of pulling down an overhead wire. Best's testimony was, at worse, cumulative, and its admission did not constitute prejudicial error. This assignment of error is without merit.

Behm argues that Northwestern Bell should not have been allowed to present the testimony of Wandling, Glissman, Chin, and William Hime, on the grounds that Northwestern Bell failed to make appropriate disclosures in answers to

interrogatories. The inclusion of Hime on this list is somewhat puzzling, as his name was not included on Behm's motion in limine with response to Northwestern Bell's experts. At any rate, after the district court overruled the motion in limine, Behm did not object to any of the witnesses at the time they testified.

> "When a court overrules a motion in limine to exclude evidence, the movant must object when the particular evidence, previously sought to be excluded by the motion, is offered during trial and cannot predicate error on the admission of evidence to which no objection was made when the evidence was adduced."

State v. Coleman, 239 Neb. 800, 810-11, 478 N.W.2d 349, 356 (1992). Behm has not properly preserved this purported error.

Moreover, the record nowhere includes the allegedly defective answers to interrogatories nor any other proof that the challenged witnesses and their testimony were not properly disclosed. "It is incumbent upon the party appealing to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court is to be affirmed." *In re Interest of R.R.*, 239 Neb. 250, 253, 475 N.W.2d 518, 520 (1991). This assignment of error is without merit.

Behm's final assignment of error is that the trial court erred in instructing the jury as to contributory negligence. Behm argues that the evidence does not warrant such an instruction and attempts to analogize his part in the accident with that of a person on a sidewalk who is struck by an automobile. This analogy is without merit. Behm was not a naive member of the public struck by the falling wall by happenstance, but an electrical lineman trained in the use of the very piece of equipment involved in the accident—the cherrypicker. He was aware of the danger inherent in working under the bucket of the cherrypicker. He testified that where working under the bucket was unavoidable, one person on the ground should act as a lookout. Despite Behm's knowledge and experience, he was working under the boom of the cherrypicker with two other city employees—neither of whom was acting as a lookout—when he was injured.

" 'Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury.' " *Haselhorst v. State*, 240 Neb. 891, 901-02, 485 N.W.2d 180, 189 (1992). Behm's actions, coupled with his knowledge and experience, provide sufficient evidence of contributory negligence to submit the issue to the jury. Therefore, the instruction regarding contributory negligence was proper, and this assignment of error is without merit.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., dissenting.

In my view, the record does not disclose evidence that justified the court's submission of the issue of the appellant Behm's contributory negligence. I therefore dissent.

JESSICA MAACK ET AL., APPELLANTS, V. SCHOOL DISTRICT OF LINCOLN, IN THE COUNTY OF LANCASTER, IN THE STATE OF NEBRASKA, ALSO KNOWN AS SCHOOL DISTRICT NO. 1, LANCASTER COUNTY, NEBRASKA, ET AL., APPELLEES.

491 N.W.2d 341

Filed November 6, 1992. No. S-89-1396.

1. **Moot Question.** Generally, a case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of the litigation.
2. **Moot Question: Appeal and Error.** Mootness does not prevent appellate jurisdiction and consideration of a question or issue which relates to general public interest and will likely recur, but which may elude judicial review as the result of the transitory setting in which the issue or question has arisen.
3. **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.
4. **Schools and School Districts.** Pursuant to Neb. Rev. Stat. § 79-4,177(1)(b) (Reissue 1987), attendance by a public school student at a school where presence

of a dangerous and communicable disease is confirmed, when the student is unimmunized against the disease, is conduct that presents a clear threat to the physical safety of the unimmunized student and other students and allows the unimmunized student's exclusion from school.

5. **Statutes: Legislature: Intent.** As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act, which are in pari materia, may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
6. **Statutes.** To the extent there is a conflict between two statutes on the same subject, a specific statute prevails over a general statute.
7. **Schools and School Districts.** Pursuant to Neb. Rev. Stat. §§ 79-444.01 and 79-4,177(1) (Reissue 1987) taken together, a school board may exclude an unimmunized student from school during presence of a disease specified by § 79-444.01, despite a waiver of immunization in conformity with § 79-444.01.
8. _____. An unimmunized student's right to attend school on presentation of a properly signed immunization waiver pursuant to Neb. Rev. Stat. § 79-444.01 (Reissue 1987) is limited by a school board's authority, under Neb. Rev. Stat. § 79-4,177(1) (Reissue 1987), to exclude the unimmunized student from school during presence of a disease specified by § 79-444.01.
9. **Administrative Law: Equal Protection.** State action, for the purpose of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, may emanate from a ruling of an administrative agency as well as from legislative or judicial action.
10. **Schools and School Districts: Equal Protection.** Action of a school board may implicate the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.
11. **Appeal and Error.** To be considered by an appellate court, an error must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred.

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

John H. Albin for appellants.

James B. Gessford and Gregory H. Perry, of Perry, Guthery, Haase & Gessford, P.C., for appellees.

William F. Austin, Lincoln City Attorney, and Joel D. Pedersen for amicus curiae City of Lincoln.

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

SHANAHAN, J.

Jessica Maack and Melissa Maack, students enrolled at

Lincoln East Junior-Senior High School, were not immunized against rubeola (measles). During an outbreak of measles in Lincoln during May 1989, Jessica and Melissa Maack were excluded from attending classes at Lincoln East for the period from May 10, 1989, until May 20, 1989. Lincoln East is under the jurisdiction of the board of education of School District No. 1 of Lancaster County, Nebraska (Lincoln Public Schools). After a series of administrative appeals within the school system, in which the exclusion was affirmed, Jessica and Melissa Maack, with their parents, Linda Maack and Timothy J. Maack, on June 29, 1989, appealed to the district court for Lancaster County, which affirmed the board of education's exclusionary order.

MOOTNESS

In the absence of any indication to the contrary, we assume that Jessica and Melissa Maack returned to complete their 1988-89 academic year at Lincoln East. As will appear later in this opinion, the Maack children suffered no adverse consequences to their scholastic status as the result of their exclusion from Lincoln East. Ordinarily, if the Maack children returned to school after conclusion of the exclusionary period, the question regarding propriety of their exclusion would be rendered moot inasmuch as the exclusion was terminated, and with such termination any case or controversy concerning correctness in the exclusion personally affecting the Maacks would have resolved itself. Generally, a case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of the litigation. See *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986). However, mootness does not prevent appellate jurisdiction and consideration of a question or issue which relates to general public interest and will likely recur, but which may elude judicial review as the result of the transitory setting in which the issue or question has arisen. See, *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 472 N.W.2d 391 (1991); *State ex rel. Bouc v. School Dist. of City of Lincoln*, 211 Neb. 731, 320 N.W.2d 472 (1982); *Meyer v. Colin*, 204 Neb. 96, 281 N.W.2d 737 (1979).

Our review of this court's decisions indicates that the issues raised by Maacks in reference to a school board's authority to exclude students in a situation involving a dangerous and communicable disease present questions of first impression in Nebraska and are matters of general public interest. Therefore, we proceed to consider the questions raised in Maacks' appeal.

STANDARD OF REVIEW

Pursuant to the student suspension or expulsion act, Neb. Rev. Stat. §§ 79-4,170 to 79-4,205 (Reissue 1987), a party aggrieved by a school board's decision may institute proceedings for review by the district court in the county where the action is taken. See § 79-4,202. A party aggrieved by a district court's final judgment under the student suspension or expulsion act may appeal as provided in the Administrative Procedure Act. See § 79-4,205.

Because Maacks' petition for review in the district court was filed before July 1, 1989, Maacks' appeal is "taken in the manner provided by law for appeals to the Supreme Court in civil cases and shall be heard de novo on the record." Neb. Rev. Stat. § 84-918(2) (Cum. Supp. 1990). Consequently, "[i]n an appeal from a judgment pursuant to the Administrative Procedure Act, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the trial court's findings." *Heithoff v. Nebraska State Bd. of Ed.*, 230 Neb. 209, 210, 430 N.W.2d 681, 682 (1988). See, also, *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985) (Supreme Court's de novo review under Administrative Procedure Act before amendment in 1989).

"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, *Stewart Trucking v. PBX, Inc.*, 238 Neb. 958, 473 N.W.2d 123 (1991); *State ex rel. Gaddis v. Gaddis*, 237 Neb. 264, 465 N.W.2d 773 (1991).

BACKGROUND FOR MAACKS' APPEALS

Parental Waiver.

Jessica and Melissa Maack enrolled and attended classes at

Lincoln East under a parental waiver of student immunization against certain diseases, including measles. Such waiver is authorized by Neb. Rev. Stat. § 79-444.01 (Reissue 1987), which provides:

> Each board of education and the governing authority of each school in this state shall require each student to be protected against measles, mumps, rubella, poliomyelitis, diphtheria, pertussis, and tetanus by immunization . . . unless a parent or guardian of such student presents a written statement that he or she does not wish to have such student so immunized.

While the Maack children were enrolled at Lincoln East, § 79-4,177(1) provided in pertinent part:

> (1) Any student may be excluded from school in the following circumstances[:]
>
> (a) If the student has a dangerous communicable disease transmissible through normal school contacts and poses an imminent threat to the health and safety of the school community; or
>
> (b) If the student's conduct presents a clear threat to the physical safety of himself, herself, or others, or is so extremely disruptive as to make temporary removal necessary to preserve the rights of other students to pursue an education.

Outbreak of Measles.

Since 1981, there had been no reported cases of measles in Lincoln. However, in the spring of 1989, a measles "outbreak" occurred in the Lincoln area. Between April 20 and May 12, 1989, there were 24 confirmed cases of measles in the area. On May 5, a student at Lincoln East was found with a clinically confirmed case of measles. Jane Ford, director of the Lincoln-Lancaster County Department of Health, consulted with Dr. Richard A. Morin, a physician who is a board-certified internist with a subspecialty in the field of infectious diseases. After her conference with Dr. Morin, Ford contacted the administration of Lincoln Public Schools on May 6 and "directed that all unimmunized children be excluded from Lincoln East Junior-Senior High effective 8:30 a.m. Monday

May 8, 1989 for a period of not less than 2 weeks or until they are properly immunized or their immune status confirmed." At Lincoln East there were 79 students, including Jessica and Melissa Maack, who had not been immunized against measles. Also, among the Lincoln East students were some whose physical condition was the basis for special education.

Parents of the 79 unimmunized students were informed that a clinically confirmed case of measles had been found at Lincoln East and that unimmunized children could not attend school "until there are no new cases of measles or until proof of immunization is provided." After Timothy Maack received the message about measles at Lincoln East, he called the school nurse, Janet Zenner, and requested more information. Zenner told Timothy Maack about the clinically confirmed case of measles and that health officials were concerned about the safety of children at Lincoln East, including the Maack children. Timothy Maack told Zenner that his daughters were not, and would not be, immunized against measles. Linda and Timothy Maacks' rejection of immunization for their children was based on personal preference and was not based on religious or medical reasons. Although the Maack children attended school on May 9 and part of May 10, in the afternoon of May 10, Lincoln East Principal Richard Krause conferred by telephone with Timothy Maack. Krause told Timothy Maack that because Maacks' daughters were not immunized against measles, the children presented a clear threat to the physical safety of themselves and other students at Lincoln East. Krause also informed the Maacks that Jessica's and Melissa's absence from school would be excused, their grades or number of credits would not be affected, and, if Maacks desired, tutors would be provided to assist the Maack children in keeping up with their schoolwork during the exclusionary period, which would terminate on May 20 unless new cases of measles were discovered in the interim. If Maacks' daughters were immunized during the exclusionary period, the children could return to school. After the telephonic conference, Krause on May 10 excluded the Maack children from attendance at Lincoln East.

Maacks' Administrative Appeals.

On May 12, Linda and Timothy Maack requested a hearing concerning the exclusion of their daughters, and on May 18, before a hearing officer designated by the superintendent of Lincoln Public Schools, Maacks, with their daughters and an attorney, attended the hearing, which was conducted in accordance with procedures for long-term suspension or expulsion of students. See §§ 79-4,182 to 79-4,195. On May 19, the hearing officer issued a report containing findings of fact and a recommendation that the emergency exclusion of Jessica and Melissa Maack be upheld and continued, because presence of the Maack children posed "a clear threat to the physical safety" of themselves and other students. The superintendent of Lincoln Public Schools, as required by § 79-4,195(2), reviewed the May 18 hearing and notified Maacks that he accepted the hearing officer's findings and recommendation.

Next, pursuant to §§ 79-4,198 to 79-4,200, exclusion of the Maack children was reviewed by a committee of the board of education of Lincoln Public Schools, and after a hearing on May 30, at which Maacks appeared and were represented by counsel, the committee on May 30 issued a decision, upholding exclusion of the Maack children.

Measles and Its Consequences.

A graphic and detailed description of measles and its consequences was given by Dr. Morin at the administrative hearing on May 18, 1989. According to Dr. Morin, an internist who specializes in diagnosing, treating, and preventing infectious diseases, "measles" is synonymous with "rubeola," an acute epidemic and "highly contagious" disease that is contrasted with "rubella," a usually mild disease commonly called German measles. Features of rubeola, or measles, include fever, rash, coryza ("runny nose"), "congestion of nasal mucosa," and conjunctivitis ("pink eye"). Since the measles virus locates in a person's "air way," exposure to measles results from an infected person's coughing or sneezing in the air, spreading the "virus contained in the mucous that has been sprayed in the air." The sprayed virus is "viable for several hours." Measles is especially dangerous, because an infected

person may be "relatively asymptomatic," but can communicate the disease several days before and after the manifested symptoms of measles. Measles is especially dangerous in a community where there has been a long period without reported cases of measles, such as the time during which the Lincoln area had no reported cases of measles, and is "particularly dangerous in those situations in which there are multi-handicapped individuals such as those who attend [Lincoln] East Junior-Senior High School."

Results from laboratory tests to verify presence of measles take as long as 2 weeks and may not necessarily be conclusive; hence, laboratory tests provide no "prompt information" and are impractical as a means to determine whether a student should be excluded from school on account of measles. For a person who is unimmunized against measles, the disease has a "practically 100 percent infection rate." Proper vaccination is generally "95 percent effective" against measles, while vaccination between the ages of 12 months and 15 months has an "85 percent protection rate." Therefore, persons with the highest risk of catching measles are the unimmunized, while those vaccinated have lower risks of acquiring the disease.

Complications from measles include otitis (ear infection), pneumonia, and encephalitis (inflammation of the brain that may result in convulsions, deafness, or mental retardation). Once an individual is infected with measles, there is nothing medically, including treatment with drugs, that prevents further medical problems, which may include death in approximately 1 out of every 3,000 cases of measles.

Dr. Morin concluded that in view of the "community-wide outbreak" of measles and the clinically confirmed case of measles at Lincoln East Junior-Senior High School, without immunization against measles Jessica and Melissa Maack were "a clear threat to the physical safety of themselves and others" at the junior-senior high school. Also, in Dr. Morin's opinion, as previously related to Ford, director of the Lincoln-Lancaster County Department of Health, the clinically confirmed case of measles at Lincoln East required that all unimmunized children be excluded from Lincoln East for a period of 2 weeks or until they were properly immunized or their immune status was

confirmed.

REVIEW BY DISTRICT COURT

Maacks then instituted proceedings in the district court for Lancaster County for review of the exclusionary decision by the school district. The district court concluded that the board of education did not violate Maacks' constitutional rights, such as the right to equal protection under the 14th Amendment to the U.S. Constitution, and that the decision by the board of education was authorized by law.

ASSIGNMENTS OF ERROR

Maacks contend that (1) the school board lacks authority under § 79-4,177(1)(b) to exclude Jessica and Melissa Maack from school; (2) § 79-444.01 authorizes children to attend school, even during a measles outbreak, if their parents have signed a waiver of immunization against the disease; (3) the Maack children's equal protection rights have been violated; and (4) Maacks have not been afforded procedural due process concerning exclusion from school.

STATUTORY AUTHORITY TO EXCLUDE STUDENTS

First, Maacks contend that § 79-4,177(1)(b) does not authorize a student's exclusion from school when the student is not infected with a dangerous communicable disease. Therefore, Maacks argue, since Jessica and Melissa Maack were not shown to have measles, the Maack children could not be excluded from school under § 79-4,177(1). However, a student's "conduct [that] presents a clear threat to the physical safety" of the student or other students may be found in a situation involving a student who is unimmunized against a dangerous and communicable disease and who, nevertheless, attends a school where presence of the disease is confirmed. In that situation, the unimmunized student's presence in school, exposing the student to the contagious disease, poses a clear threat to the student's health, that is, the student's physical safety, especially if there is a strong likelihood that the unimmunized student will contract the dangerous and communicable disease. Therefore, we hold that pursuant to § 79-4,177(1)(b), attendance by a public school student at a

school where presence of a dangerous and communicable disease is confirmed, when the student is unimmunized against the disease, is conduct that presents a clear threat to the physical safety of the unimmunized student and other students and allows the unimmunized student's exclusion from school. In Maacks' case, according to Dr. Morin, there was a "practically 100 percent infection rate" for the unimmunized Maack children, once they were exposed to measles. We need not further reiterate the remainder of Dr. Morin's testimony concerning the dire consequences of measles, conditions, and complications that certainly and clearly constitute a serious threat to one unimmunized against the extremely contagious disease. For that reason, § 79-4,177(1)(b) supplies authority for the Maack children's exclusion from school under the circumstances.

Next, Maacks argue, in substance, that § 79-444.01, the immunization waiver statute, operates in absolute isolation from § 79-4,177(1), the exclusionary statute, so that a child unimmunized against measles may attend school even during an outbreak of measles if there has been the appropriate waiver of immunization. The school district argues that the emergency situation of a measles epidemic authorizes exclusion of an unimmunized student pursuant to § 79-4,177(1)(b) notwithstanding the immunization waiver provision of § 79-444.01. Consequently, Maacks' appeal presents a question of statutory construction, that is, whether § 79-444.01 authorizes children whose parents have signed a waiver of immunization to attend school during a measles outbreak, when their attendance poses a clear threat to themselves, a situation that allows a school board to temporarily exclude students pursuant to § 79-4,177(1)(b). More simply, does § 79-444.01 take precedence over § 79-4,177(1)(b), or vice versa?

In examining the statutes in question, we bear in mind general rules for statutory interpretation. "When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning." *State v. Crowdell*, 234 Neb.

469, 473-74, 451 N.W.2d 695, 699 (1990). Accord *State ex rel. Gaddis v. Gaddis*, 237 Neb. 264, 465 N.W.2d 773 (1991). "To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question." *Spence v. Terry*, 215 Neb. 810, 814-15, 340 N.W.2d 884, 887 (1983). Accord *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb. 191, 444 N.W.2d 312 (1989).

However, neither the language of §§ 79-444.01 and 79-4,177(1)(b) nor the legislative history for those statutes indicates that the Legislature considered the relationship between the two statutes. As Benjamin N. Cardozo noted, a peculiar judicial problem of statutory interpretation occurs " 'when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.' " Benjamin N. Cardozo, The Nature of the Judicial Process 15 (1921) (quoting from John Chipman Gray, Nature and Sources of the Law (1909)).

Sections 79-444.01 and 79-4,177(1)(b) are separated by several statutory sections included under the heading "GENERAL PROVISIONS" pertaining to school districts and boards of education. For that reason, we may characterize §§ 79-444.01 and 79-4,177(1)(b) as statutory parts of an act containing expressions of general authority for school districts and boards of education.

> As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act, which are in pari materia, may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.

Wounded Shield v. Gunter, 225 Neb. 327, 333, 405 N.W.2d 9, 13 (1987). Accord *Indian Hills Comm. Ch. v. County Bd. of Equal.*, 226 Neb. 510, 412 N.W.2d 459 (1987).

Also, when there is no clear indication of legislative intent, traditional maxims of interpretation may be helpful, but " ' "rules of construction are neither ironclad nor inflexible, and must yield to manifestations of contrary intent." ' "

Grosvenor v. Grosvenor, 206 Neb. 395, 399, 293 N.W.2d 96, 99 (1980). According to one such maxim, however, to the extent there is a conflict between two statutes on the same subject, a specific statute prevails over a general statute, or, as expressed in *Kibbon v. School Dist. of Omaha*, 196 Neb. 293, 298-99, 242 N.W.2d 634, 637 (1976):

> It is a well-established rule that special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict. Houser v. School Dist. of South Sioux City, 189 Neb. 323, 202 N. W. 2d 621. 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. Bass v. County of Saline, 171 Neb. 538, 106 N. W. 2d 860.

Accord *Glockel v. State Farm Mut. Auto. Ins. Co.*, 219 Neb. 222, 361 N.W.2d 559 (1985).

Section 79-444.01 allows a student to be admitted to a public school without immunization against certain diseases if the student's parent or guardian signs and presents a statement that the parent or guardian does not wish the child to be immunized. On its face, § 79-444.01 contains nothing that limits the waiver of immunization provision. Similarly, § 79-4,177(1)(b) authorizes schools, without exception, to temporarily exclude a student whose conduct poses a clear threat to the physical safety of the student or other students. Consequently, § 79-444.01 is a general statute pertaining to an ordinary situation of school admission without immunization, but does not deal with an outbreak of a dangerous and communicable disease that threatens students in a school. Section 79-4,177(1)(b) is more specific and expressly deals with an extraordinary or emergency situation. Unlike the general admission requirements of § 79-444.01 that apply to admission of all students, § 79-4,177(1)(b) governs only the small subset of students unimmunized against a dangerous and communicable disease, when their presence in a public school constitutes a clear threat to the unimmunized students or other students. As the result of

specificity, § 79-4,177(1)(b) takes precedence over § 79-444.01.

In the present case, it is difficult to imagine, if not inconceivable, that the Legislature would intend to withhold, withdraw, or shackle a school district's authority to prevent a dangerous and communicable disease from endangering unimmunized students and spreading through classrooms. Consequently, we hold that pursuant to §§ 79-444.01 and 79-4,177(1) taken together, a school board may exclude an unimmunized student from school during presence of a disease specified by § 79-444.01, despite a waiver of immunization in conformity with § 79-444.01. Thus, an unimmunized student's right to attend school on presentation of a properly signed immunization waiver pursuant to § 79-444.01 is limited by a school board's authority, under § 79-4,177(1), to exclude the unimmunized student from school during presence of a disease specified by § 79-444.01. The board of education of Lincoln Public Schools, that is, the board of education of School District No. 1 of Lancaster County, Nebraska, was authorized by § 79-4,177(1)(b) to exclude Jessica and Melissa Maack under the circumstances.

MAACKS' EQUAL PROTECTION ARGUMENT

The Maacks argue that their right to equal protection, guaranteed by the 14th Amendment to the U.S. Constitution, was violated when Lincoln Public Schools excluded unimmunized students at Lincoln East, while students in the following categories were not simultaneously excluded: (1) students at Lincoln East who were insufficiently immunized, namely, those vaccinated between the ages of 12 months and 15 months, and (2) the unimmunized students at the University of Nebraska-Lincoln.

"The Equal Protection Clause [of the 14th Amendment to the U.S. Constitution] does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, ____ U.S. ____, 112 S. Ct. 2326, 2331, 120 L. Ed. 2d 1 (1992). Therefore,

> unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental

> right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.

112 S. Ct. at 2331-32. See, e.g., *New Orleans v. Dukes*, 427 U.S. 297, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976) (ordinance regarding food vendors did not violate equal protection when the ordinance rationally furthered a legitimate state interest); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (a zoning ordinance may violate the Equal Protection Clause of the 14th Amendment if the ordinance is not rationally related to a legitimate state interest); *Willis v. City of Lincoln*, 232 Neb. 533, 441 N.W.2d 846 (1989) (different notice requirements for one suing a political subdivision and one suing a private individual did not violate equal protection because the different requirements rationally related to a legitimate governmental purpose).

State action, for the purpose of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, may emanate from a ruling of an administrative agency as well as from legislative or judicial action. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972). Consequently, action of a school board may implicate the Equal Protection Clause. *Columbus Board of Education v. Penick*, 443 U.S. 449, 99 S. Ct. 2941, 61 L. Ed. 2d 666 (1979) (school board actions which result in racial segregation violate equal protection, even though racial segregation was not mandated by state statute).

Since the classifications about which Maacks complain do not thwart the exercise of fundamental right nor present categories based on a constitutionally suspect characteristic, the classifications in Maacks' case are examined in reference to a rational basis test. When considered under a rational basis test, the classifications of excluded students do not violate Maacks' equal protection rights. The students at Lincoln East who are insufficiently immunized are not in all relevant respects the same as Jessica and Melissa Maack, because the insufficiently immunized, if exposed, have only a 15-percent chance of contracting measles, while unimmunized students, such as the

Macck children, have a 100-percent chance of catching the disease.

The unimmunized students at the University of Nebraska-Lincoln are not in the same category of students or classification as the Maack children. Students at the University of Nebraska-Lincoln, unlike students at Lincoln East, are not under the control of the board of education of Lincoln Public Schools. Since only the school board is a party to this action, classifications created by other state officials are outside the scope of our review.

MAACKS' DUE PROCESS CLAIM

Maacks state that "[a] number of procedural problems in complying with Neb. Rev. Stat. §79-4,170 to 79-4,205 are cited in Plaintiffs/Appellants' Petition." Brief for appellant at 17. To be considered by an appellate court, an error must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred. See, *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 472 N.W.2d 391 (1991); *Federal Land Bank of Omaha v. Victor*, 232 Neb. 351, 440 N.W.2d 667 (1989); *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987); Neb. Ct. R. of Prac. 9D(1)d (rev. 1992).

As far as we can glean from the record, Maacks are trying to raise an issue involving due process relative to notice in the exclusionary action, hearing, and reviews of Lincoln Public Schools. However, Maacks do not argue any due process question in their appellate brief. Therefore, for this reason we do not consider any due process issue in the exclusionary action by the board of education of Lincoln Public Schools.

CONCLUSION

For the foregoing reasons, we find that Jessica and Melissa Maack's conduct in attending school during a measles outbreak without being immunized against measles posed a clear threat to themselves and other students. Consequently, the board of education of Lincoln Public Schools was statutorily authorized to temporarily exclude the Maack children during the measles outbreak, and such exclusion did not violate the equal protection rights of Jessica and Melissa Maack. Therefore, we affirm the judgment of the district court.

AFFIRMED.

PROFESSIONAL SERVICE INDUSTRIES, INC., APPELLANT, V. J. P. CONSTRUCTION, INC., APPELLEE.

491 N.W.2d 351

Filed November 6, 1992. No. S-90-022.

1. **Contracts.** The proper construction of a written contract and an examination of a contract for ambiguity are questions of law.
2. _____. When construction of a contract is necessary, the court must construe the contract as a whole, giving effect to every part thereof if possible.
3. **Contracts: Intent.** The interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence.
4. _____: _____. When a contract is unambiguous, the court must look solely to the contents of the contract to ascertain the parties' intent and not to a party's understanding or belief.
5. _____: _____. Parties are bound by the terms of a contract even though their intent may be different from that expressed in the agreement.
6. **Contracts.** When an estimated figure is a guaranteed maximum or minimum, or when the parties expressly provide otherwise, only then may the court treat the estimate as a fixed amount to which the parties are contractually bound.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded with directions.

Christopher J. Connolly, of Thompson, Crounse, Pieper & Brumbaugh, P.C., for appellant.

Monte Taylor, of Taylor, Connolly & Kluver, for appellee.

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

WHITE, J.

This action arises from an agreement to perform testing services at an estimated cost for a road paving project. Plaintiff, Professional Service Industries, Inc. (PSI), which provided the testing services, appeals the dismissal of its petition and the award of a judgment on the counterclaim filed by appellee, J. P. Construction, Inc., the prime contractor.

PSI asserts on appeal that the trial court erred in determining that there was both a fair intent of the parties and a duty imposed on PSI that PSI would hold close to its estimated cost figure. Furthermore, PSI claims that the court altered the agreement, without finding that an ambiguity existed, by

finding that the stated estimated cost was in fact a fixed price precluding PSI's recovery of certain charges and alternatively awarding J. P. Construction reimbursement for overpayment. We find that the terms of the agreement are sufficiently definite and certain to create a valid and enforceable service requirements contract, and no ambiguity being found, we reverse, and remand.

In the spring of 1986, J. P. Construction obtained a bid for road paving construction at Offutt Air Force Base in Bellevue, Nebraska. Prior to submission of its bid, J. P. Construction received a subcontracting proposal from PSI for various quality control testing services. PSI submitted a written proposal, based on estimated fees, to perform soil compaction, concrete, asphalt, and other similar paving tests at a cost of $71,000. The proposal contained the schedule of unit prices for the various laboratory tests and hourly technical manpower rates which PSI routinely charged.

Once J. P. Construction was awarded the bid, a written "Standard Sub-Contract Agreement" form (the agreement) was signed by both parties. The agreement provided that PSI would supply the required testing services for an estimated $44,000. The original proposal and fee schedules submitted by PSI were stapled to the agreement. No other documents were attached to the agreement.

Aside from the preprinted form language, the pertinent typed language of the agreement reads as follows: "Total Sub-contract (estimated) $44,000.00[.] Invoiced on a Unit Price Basis, either on a cost per hour or a cost per test. PSI Agreement Attached."

The agreement was silent as to costs for retests. However, on the "Schedule of Services" attached to the PSI proposal, the following language, with original emphasis retained, appears: "*Retests*, for non compliance, have not been considered in the estimate. Generally, retesting materials for qualification purposes will require a minor fee. Retesting failures of material placement will require extra field time."

Work commenced in June 1986. PSI provided testing services whenever requested and submitted monthly invoices based on the service rates listed in the proposed schedule of fees.

J. P. Construction initially paid these bills without protest. However, 15 months into the project, J. P. Construction realized the total monthly billings had exceeded the $44,000 estimate and refused to make further payments.

PSI subsequently filed suit, seeking payment of $15,786.68 plus accrued interest for services furnished on open account. Denying that any amounts were due PSI, J. P. Construction counterclaimed for reimbursement of $8,617.64 paid above the estimated amount and for an accounting to determine the improper charges.

At trial, the parties gave conflicting explanations for the variance between the proposed figure and the final written agreement estimate. J. P. Construction asserted that PSI primarily changed its proposal because of a competitor's bid of $45,000. J. P. Construction maintained that PSI agreed to reduce its originally proposed figure because PSI could economize on time and charges due to other concurrent projects PSI had at Offutt Air Force Base. J. P. Construction also claimed that the price was estimated to cover any unforeseen quantity changes in materials, but that, in fact, no surprises occurred that required unforeseen additional work.

Conversely, PSI asserted that after learning of other competitors' proposals, PSI agreed to reduce its price to reflect an estimated amount based on unit prices for each testing service actually requested by J. P. Construction instead of a guaranteed set amount. PSI further asserted that the variance between the $44,000 estimate and the final total charges of $68,404.32 was justified in part because (1) the project was not shut down in the winter months as expected, (2) the project took approximately 3 months longer to complete than scheduled, (3) retests were not taken into consideration in the projected estimate, (4) the project required more retests than normal, and (5) control charts were requested to be prepared which were not part of the original agreement.

The court reviewed the original PSI proposal and calculated the originally anticipated manpower costs. The court then subtracted this manpower cost from the original proposed cost of $71,000 and arrived at an estimated lab testing expense. By comparing this anticipated lab testing expense with the actual

invoiced costs, the court determined that J. P. Construction had received $3,745.84 worth of additional unanticipated laboratory tests.

Finding that the fair intent of the parties was that PSI was to "hold closely to its estimate," the trial court held that PSI had failed in its duty to reduce either the number of hours or the hourly costs to come within the intent of the parties. The court dismissed PSI's claim with prejudice and awarded J. P. Construction a judgment against PSI in the amount of $4,871.80 (the $8,617.64 demand minus the $3,745.84 for additional tests). PSI appealed.

The parties do not dispute, nor do we discern any reason to otherwise hold, that the written agreement is a binding contract. Instead, the center of the present controversy is the proper construction of the contract.

Generally, the proper construction of a written contract and an examination of a contract for ambiguity are questions of law. See, *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992); *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987). Furthermore, in a judgment under review, an appellate court has an obligation to reach a conclusion on questions of law independent of the trial court. *Nebraska Builders Prod. Co. v. Industrial Erectors*, 239 Neb. 744, 478 N.W.2d 257 (1992).

We first note that this contract is for the performance of services, that therefore the Uniform Commercial Code is inapplicable, and that common-law principles of construction or interpretation of a document apply. When construction of a contract is necessary, the court must construe the contract as a whole, giving effect to every part thereof if possible. *Crowley v. McCoy*, 234 Neb. 88, 449 N.W.2d 221 (1989). The court may also consider the conduct of the parties in performing the contract to ascertain the parties' intent regarding their contract. *Wurst v. Blue River Bank*, 235 Neb. 197, 454 N.W.2d 665 (1990).

The contract consists of a preprinted standard subcontract agreement, with typewritten additions, provided by J. P. Construction and signed by both parties. Stapled to and incorporated by reference is the original PSI proposal. While

some testimony at trial indicated that the contract provisions were to be augmented in light of the plans and specifications, it is not apparent if these documents were admitted at trial. Nevertheless, these documents were not included in the record brought up on appeal and therefore are precluded from consideration.

As the PSI proposal predates the agreement by approximately 7 weeks, any conflicting provisions between the two attached documents will be construed in favor of the more recent agreement. We first note that the proposed $71,000 figure is negated by the $44,000 estimate in the agreement. However, there is no language in the entire document to indicate that the estimate is either a guaranteed maximum or minimum figure. There is nothing to manifest that the $44,000 figure is anything more than it states it is: an estimate.

The proposed schedule of fees for field personnel and laboratory testing was not altered, modified, or contradicted by language in the agreement to reflect an intent to change the unit price bases. The express language in the proposal stating that fees for retesting were not taken into consideration in the estimate is not illuminated or negated by any preprinted or typed language in the standard form. Both the agreement and the proposal are silent as to costs for control charts.

Additionally, the objective intent of the parties to contract for services on a per-hour or per-test basis, at the request of J. P. Construction, is emphasized by consistencies between the two documents. For example, the typed language in the agreement reads "[i]nvoiced on a Unit Price Basis, either on a cost per hour or a cost per test." This language corresponds with the language of the proposal which reads, "PSI proposes . . . to accomplish the work on a unit price basis in accordance with the attached Schedule of Services and Fees [to] be determined by the actual amount of technical time expended for this project and the amount of laboratory testing performed."

The express language of the agreement and incorporated schedule of services and fees, when read as a whole, is not ambiguous. Having resolved any perceived conflicts in the contract terms and provisions, we find that the plain language of the resulting instrument is not susceptible to more than one

reasonable interpretation.

This interpretation is further supported by an objective view of the conduct of PSI and J. P. Construction while performing under the contract. We have previously noted that " 'the interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence.' " *International Harvester Credit Corp. v. Lech*, 231 Neb. 798, 803, 438 N.W.2d 474, 478 (1989) (citing *Nowak v. Burke Energy Corp.*, 227 Neb. 463, 418 N.W.2d 236 (1988), and *Marvin E. Jewell & Co. v. Thomas*, 231 Neb. 1, 434 N.W.2d 532 (1989)).

The objective conduct of the parties manifests an intent of the parties to create a service contract for testing-service requirements at the proposed fees and costs. The monthly invoices identify each completed service by a description that corresponds to the proposed schedule lists of field personnel or laboratory fees. The cost for each of these described services is identical to the scheduled fees in the proposal. Furthermore, J. P. Construction paid these clearly identified unit-cost charges, without protest, for 15 months.

"When the terms of a contract and the facts and circumstances that aid in ascertaining the intent of the parties are insufficient to raise an issue of fact, the interpretation of the contract is a matter of law." *International Harvester Credit Corp.*, 231 Neb. at 804, 438 N.W.2d at 478. A fair interpretation of the contract leads to the conclusion that in the absence of allegations and evidence of either bad faith or unconscionability, the contract formed by the parties here is valid, enforceable, and unambiguous as a matter of law. The PSI-J. P. Construction contract clearly provides that the $44,000 figure is an estimate and that the services were to be billed and paid, in compliance with the fee schedules, as the services were requested and completed.

When a contract is unambiguous, the court must look solely to the contents of the contract to ascertain the parties' intent and not to a party's understanding or belief. *Albee v. Maverick Media, Inc.*, 239 Neb. 60, 474 N.W.2d 238 (1991). "Parties are bound by the terms of the contract even though their intent may

be different from that expressed in the agreement." *International Harvester Credit Corp.*, 231 Neb. at 802, 438 N.W.2d at 477. In a few limited instances, a court may properly imply contractual terms not expressly provided for by the parties. However, we find no case law to support the trial court's theory that a duty to hold close to an estimate arises simply because an estimated figure is stated. On the contrary, when an estimated figure is a guaranteed maximum or minimum, or when the parties expressly provide otherwise, only then may the court treat the estimate as a fixed amount to which the parties are contractually bound. See, *Ruzicka v. Petersen*, 213 Neb. 642, 330 N.W.2d 913 (1983); *Griswold & Rauma, Architects v. Aesculapius Corp.*, 301 Minn. 121, 221 N.W.2d 556 (1974).

Having determined that the parties clearly expressed a written intent to contract for a particular result, we find that it was not the province of the trial court to speculate about the subjective intentions of the parties and to rewrite the agreement to provide terms contrary to those expressed. See *Husen v. Husen, ante* p. 10, 487 N.W.2d 269 (1992). Consequently, we find that the district court erred in finding that it was both the intent of the parties and the duty of PSI to hold close to the estimate.

In conclusion, we find that it was error for the district court to order the dismissal of appellant's petition, to independently assess the service costs, and to award the appellee a judgment on its counterclaim. Therefore, the order and judgment are reversed, and the cause is remanded to the district court to enter judgment consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

BURGER DRILLING COMPANY, INC., APPELLANT, V. RALPH BAUMAN, INDIVIDUALLY AND DOING BUSINESS AS BAUMAN OIL & GAS PROPERTIES, ET AL., APPELLEES.

492 N.W.2d 5

Filed November 6, 1992. No. S-90-120.

1. **Actions: Bankruptcy: Debtors and Creditors: Pleadings.** In any civil case pending before the district court in which a party has been named as a debtor in a voluntary or an involuntary bankruptcy petition, a Suggestion of Bankruptcy and either a certified copy of the bankruptcy petition or a copy of the bankruptcy petition bearing the filing stamp of the clerk of the bankruptcy court shall be filed with the court by the party named as a debtor or by any other party with knowledge of the bankruptcy petition.
2. **Actions: Bankruptcy: Pleadings: Proof.** Any civil action pending before the district court in which a Suggestion of Bankruptcy petition has been filed shall be suspended until a showing is made that the automatic stay imposed by 11 U.S.C. § 362 (1988 & Supp. III 1992) does not apply or that the automatic stay has been terminated, annulled, modified, or conditioned so as to allow the case to proceed.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Remanded with instructions.

John D. Hartigan and Michael A. Harsh, of Kennedy, Holland, DeLacy & Svoboda, for appellant.

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

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

GRANT, J.

Plaintiff-appellant, Burger Drilling Company, Inc. (Burger), a Texas corporation, filed an amended petition in the district court for Richardson County, Nebraska, seeking a declaratory judgment determining the rights of plaintiff and defendants to certain real estate in Richardson County and setting aside a deed to that real estate from defendants-appellees Ralph Bauman and his wife to defendants-appellees Marvin Bauman (Ralph's brother) and his wife, on the ground that the transaction was intended to defraud Burger in its capacity as a judgment creditor.

The district court tried the case as one in equity, and after

trial, held that the conveyance by defendants Ralph Bauman and his wife to Marvin Bauman and his wife was not a fraudulent conveyance. The court further found that the judgment lien held by Burger had become dormant.

Plaintiff timely appealed and in this court contends that the district court erred in certain respects. We do not reach the assignments of error presented by appellant, however. As required by the Nebraska Supreme Court rules, this action should have been stayed by the district court until a showing was made that the automatic stay imposed by 11 U.S.C. § 362 (1982) did not apply or that the automatic stay had been terminated, annulled, modified, or conditioned so as to allow the case to proceed. Accordingly, we remand the cause to the district court, where the action will be stayed until such a showing is made.

Rule 1 of the Bankruptcy Rules for Nebraska District and County Courts (rev. 1992) was in effect at the time of the filing of plaintiff's petition herein. That rule is entitled "Civil Cases in Which a Party has been Named as a Debtor in a Voluntary or Involuntary Bankruptcy Petition" and provides:

> In any civil case pending before this court in which a party has been named as a debtor in a voluntary or an involuntary bankruptcy petition, a Suggestion of Bankruptcy . . . and either a certified copy of the bankruptcy petition or a copy of the bankruptcy petition bearing the filing stamp of the clerk of the bankruptcy court shall be filed by the party named as a debtor or by any other party with knowledge of the bankruptcy petition. Upon the filing of the Suggestion of Bankruptcy . . . no further action will be taken in the case by the court or by the parties until it can be shown to the satisfaction of the court that the automatic stay imposed by 11 U.S.C. § 362 does not apply or that the automatic stay has been terminated, annulled, modified, or conditioned so as to allow the case to proceed. . . .

A similar rule, Neb. Ct. R. of Prac. 11G (rev. 1992), is set out in the procedural rules of the Nebraska appellate courts.

In part, § 362 provides:

> (a) Except as provided in subsection (b) of this section, a

> petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of—
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title.

The record before us does not show that the requirements of the applicable procedural rule of the district court were met by either party in the instant case.

Burger pled, in its amended petition, in part:

> 5. On October 26, 1982, Ralph Bauman filed requests for protection under the bankruptcy laws of United States [sic], in actions indexed at Case No. BK 82-1859 and BK 82-01860, before the United States Bankruptcy Court for the District of Nebraska. These actions were subsequently removed to the United States District Court for the District of Nebraska (No. CV-85-0-658 and No. CV-85-0-659), and still later, they were transferred to the United States District Court for the Northern District of Texas (CA3-86-0135-F and CA3-86-00136-D).
>
> 6. Upon information supplied to the plaintiff, it appeared that Bankruptcy Case No. BK 82-1859, No. CV-85-0-658 and CA3-86-0135-F were dismissed on August 7, 1986 by order of the court, and Bankruptcy Case BK 82-1860, No. CV-85-0-659 and CA3-86-00136-D were also dismissed by order of the court in 1986.

While it was asserted by Burger that Ralph Bauman filed for bankruptcy on October 26, 1982, no Suggestion of Bankruptcy petition was filed, and no copy of the bankruptcy petition was submitted to the court by either party to this action. In their answer to this amended petition, Baumans generally denied everything that was contained in the cause of action referring to the bankruptcy "except those allegations which constitute

admissions against the interest of [Burger]."

As to the automatic stay imposed by § 362, Ralph Bauman testified, under oath, that he had never received an order "terminating the automatic stay" from the bankruptcy court or from the "Federal Court down in Texas," that he did not know if his bankruptcy proceedings had been dismissed or terminated, and that he never received an order from the bankruptcy court discharging him from his debts. In answers to plaintiff's "Request for Admission of Fact," Ralph Bauman denied that his bankruptcy proceeding had been dismissed because "Defendant does not have sufficient knowledge at this time to admit the allegation."

Burger contends that it sought to revive its judgment only as a precautionary measure and is not sure if or when the bankruptcy proceedings ended. In an affidavit, plaintiff's attorney alleged, "Upon your [plaintiff's] best information and belief, [Ralph Bauman's] bankruptcy proceedings have been dismissed."

In this state of the record, it is not possible for the trial court or this court to know anything definitive about the bankruptcy proceedings. The proceedings might be pending or might have been dismissed, or Ralph Bauman might have been discharged from certain debts. All that the record shows is that there was a bankruptcy proceeding, and no party has informed the trial court as to the present posture of that proceeding.

Under bankruptcy rule 1, the district court should have stayed the action until one of the parties showed that relief from the automatic stay imposed by § 362 had been granted. Since this procedure was not followed, this action is remanded to the district court for Richardson County, where the matter will be stayed until such time as proof of the termination of the automatic stay in the bankruptcy proceedings of Ralph Bauman is provided and a showing made as to what bankruptcy orders, if any, have been made concerning the debt between Ralph Bauman and plaintiff.

REMANDED WITH INSTRUCTIONS.

BRENDA ALDER ET AL., APPELLANTS, V. FIRST NATIONAL BANK AND TRUST COMPANY OF KEARNEY AND R. L. ADAM, DEFENDANTS AND THIRD-PARTY PLAINTIFFS, AND UNITED STATES OF AMERICA, ON BEHALF OF THE SMALL BUSINESS ADMINISTRATION, THIRD-PARTY DEFENDANT, APPELLEES.

491 N.W.2d 686

Filed November 6, 1992. No. S-90-332.

1. **Contracts: Time.** Instruments made in reference to and as part of a transaction are to be considered and construed together; if the instruments are related to and were part of the same transaction, it is not important that they were made or dated at different times.
2. **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 the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Proof.** The movant for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that if the evidence presented remains uncontroverted, the movant is entitled to judgment as a matter of law.
4. _____: _____. After the movant for summary judgment has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing the existence of an issue of material fact which, as a matter of law, prevents the entry of judgment in favor of the movant.
5. **Contracts: Intent.** In order for those not named as parties to a contract to recover thereunder as third-party beneficiaries, it must appear by express stipulation or by reasonable intendment that the rights and interests of such unnamed parties were contemplated and provision was being made for them.
6. **Records: Proof: Appeal and Error.** In appellate proceedings, unless there is proof to the contrary, the journal entry in a duly authenticated record of the trial court imports absolute verity.
7. **Appeal and Error.** An appellate court does not have a duty to search a record for error.
8. **Records: Appeal and Error.** Factual recitations in a brief supporting a petition for review must be annotated to the record; the lack of such an annotation may lead an appellate court to treat the matter under review as if the represented fact does not exist.

Petition for further review from the Nebraska Court of Appeals, CONNOLLY, IRWIN, and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Buffalo County, DEWAYNE WOLF, Judge. Judgment of Court of Appeals affirmed.

O. William VonSeggern, of Grimminger & VonSeggern, and John B. McDermott, of McDermott, Depue & Zitterkopf, for appellants.

Kenneth F. George, of State, Yeagley & George, for appellee First National Bank.

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

CAPORALE, J.

In their petition for further review, the plaintiffs-appellants, Brenda Alder, Michael, Robert, and Virginia Humiston, and Stewart and Karen Pascoe, individually and as a partnership, doing business as Kearney Roller Rink, and KAPA, Inc., a corporation, claim the Court of Appeals mistakenly affirmed the district court's grant of summary judgment to the defendants-appellees, First National Bank and Trust Company of Kearney and R.L. Adam. More specifically, the plaintiffs assert, in summary, that the Court of Appeals erroneously (1) failed to find that the defendants breached their obligation to the plaintiffs as third-party beneficiaries to agreements between First National and the third-party defendant-appellee, the United States of America on behalf of the Small Business Administration (SBA) and (2) concluded that there exists no genuine issue of material fact. We affirm.

On or before October 29, 1982, the individual plaintiffs formed a partnership for the purpose of having a roller-skating rink built, which they planned to own and operate. Ultimately, the corporate plaintiff succeeded to the interests of the individual and partnership plaintiffs and assumed the obligations of the individual plaintiffs to First National.

On October 29, the individual plaintiffs applied to First National for a loan, to be guaranteed by the SBA. On November 12, 1982, the SBA issued an "Authorization and Loan Agreement," which approves, under certain terms and conditions, the request that the SBA guarantee 90 percent of the loan to be made by First National to the partnership in the amount of $326,000. The authorization also provides: "Prior to the commencement of any construction, [the partnership]

agrees to . . . [s]ubmit evidence that contractor has furnished a 100 percent performance bond executed by a corporate surety approved by Treasury Department naming [the partnership] only as obligee on American Institute of Architects form or comparable coverage." In addition, the authorization recites that the approval is subject to the provisions of the guaranty agreement executed by First National and the SBA on September 29, 1978. Although there is no dispute that First National did on that date enter into a guaranty agreement with the SBA, First National denies the plaintiffs' assertion that this agreement obligates First National to "close and disburse each loan in accordance with the terms and conditions upon which the loan and guaranty were approved." The 1978 agreement was not made a part of the record.

On November 20, 1982, the individual and partnership plaintiffs executed a promissory note payable to the order of First National in the sum of $326,000. The note obligates the plaintiffs to, among other things, "take all necessary steps to administer, supervise, preserve, and protect the Collateral; and regardless of any action taken by [First National], there shall be no duty upon [First National] in this respect."

On November 22, 1982, the corporate plaintiff, through a predecessor in interest, entered into a $307,000 contract with an unrelated party, whereunder the unrelated party built the rink facilities. This contract obligated the builder to furnish a performance bond, if "required by [First National] and [SBA]." The builder did not furnish a performance bond. The construction proved to be defective, and the plaintiffs claim that as a result, they suffered in excess of $300,000 in damages.

In contending that the defendants are liable to them for that loss, the plaintiffs urge that they are the third-party beneficiaries of the requirement of the 1978 guaranty agreement that First National disburse the proceeds in accordance with the "terms and conditions upon which the loan and guaranty were approved" and the provision of the 1982 loan authorization requiring the plaintiffs to submit evidence that the contractor furnished a performance bond. From that premise, they conclude that the combined effect of the two provisions prohibited First National from disbursing the loan

proceeds in the absence of a performance bond.

It is, of course, true that in considering the plaintiffs' theory we must construe the various instruments involved in the loan transaction together. As reaffirmed in *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992), instruments made in reference to and as part of a transaction are to be considered and construed together. If the instruments are related to and were part of the same transaction, it is not important that they were made or dated at different times. Accord *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983).

With that rule in mind, it is appropriate to recall at this point that 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 the ultimate inferences deducible from such fact or facts and that the moving party is entitled to judgment as a matter of law. *Terry v. Metzger, ante* p. 795, 491 N.W.2d 50 (1992); *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992). See, also, *Abboud v. Michals, ante* p. 747, 491 N.W.2d 34 (1992); *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992). The movant has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that if the evidence presented remains uncontroverted, the movant is entitled to judgment as a matter of law. See, *Murphy v. Spelts-Schultz Lumber Co., supra*; *Spittler v. Nicola, supra*. After the movant has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing the existence of an issue of material fact which, as a matter of law, prevents the entry of judgment in favor of the movant. See, *Abboud v. Michals, supra*; *Murphy v. Spelts-Schultz Lumber Co., supra*; *Spittler v. Nicola, supra*.

Assuming, but not deciding, that all the plaintiffs still have an interest in this matter, it is clear that in the absence of the 1978 agreement, the relevant interrelated documents establish only that the plaintiffs had an obligation to provide First National with evidence that the contractor had furnished a performance bond, but that First National had no duty to see that such was done. Under that state of the record, there can be

no question of material fact, and First National consequently is entitled to judgment as a matter of law.

Indeed, First National would have been entitled to judgment as a matter of law even if the plaintiffs had succeeded in getting the 1978 agreement between First National and the SBA into the record. This is so because there is nothing which establishes that the plaintiffs are third-party beneficiaries of that agreement. In order for those not named as parties to a contract to recover thereunder as third-party beneficiaries, it must appear by express stipulation or by reasonable intendment that the rights and interests of such unnamed parties were contemplated and provision was being made for them. See, *Lauritzen v. Davis, supra*; *Dworak v. Michals*, 211 Neb. 716, 320 N.W.2d 485 (1982). Here, there is no proof of a stipulation in the 1978 agreement that borrowers such as the plaintiffs were to be benefited by the language upon which plaintiffs rely, nor does the language relied upon by the plaintiffs suggest that it was intended to do anything more than protect the interests of the SBA.

The plaintiffs also claim that there can be no summary judgment in favor of Adam because he did not file a motion for such. However, the district court's ruling recites that the "matter came on for hearing on [First National's] and [Adam's] Motions for Summary Judgment." (Emphasis supplied.) The controlling rule is that in appellate proceedings, unless there is proof to the contrary, the journal entry in a duly authenticated record of the trial court imports absolute verity. See, *Murphy v. Murphy*, 237 Neb. 406, 466 N.W.2d 87 (1991); *Wonderling v. Conley*, 182 Neb. 446, 155 N.W.2d 349 (1967). Consequently, inasmuch as there are no allegations upon which Adam could be found personally liable on the contractual relationship plaintiffs claim with First National, there can be no question of material fact as to him, and he, too, is entitled to judgment as a matter of law.

We comment as a final matter that the plaintiffs' combined petition and brief for further review contains factual assertions which are not annotated to the record. An appellate court does not have a duty to search a record for error. See *Coyle v. Janssen*, 212 Neb. 785, 326 N.W.2d 44 (1982). In recognition of

that principle, Neb. Ct. R. of Prac. 2F(3) (rev. 1992) now specifically requires that factual recitations in a brief supporting a petition for review be annotated to the record. Accordingly, it might be well to remember that the lack of such an annotation may lead an appellate court to treat the matter under review as if the represented fact does not exist.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARK J. SALAMON, APPELLANT.

491 N.W.2d 690

Filed November 6, 1992. No. S-91-632.

1. **Criminal Law: Trial: Pretrial Procedure: Motions to Suppress: Appeal and Error.** In a criminal trial, after a pretrial hearing and order denying a defendant's motion to suppress evidence, the defendant must object at trial to admission of the evidence which was the subject of the suppression motion in order to preserve an appellate question concerning admissibility of that evidence.
2. **Trial: Evidence: Appeal and Error.** A determination whether evidence is relevant is within a trial court's discretion, and, in the absence of an abuse of discretion, the trial court's ruling on relevance will be upheld on appeal.
3. **Trial: Witnesses.** A witness' credibility and weight to be given to testimony are matters for determination and evaluation by a fact finder.
4. **Trial: Rules of Evidence: Probable Cause.** Existence of probable cause, as a prerequisite determinant for admissibility of evidence obtained by a search or arrest, is a preliminary question for a court as a judicial function without intervention of a jury.
5. **Rules of Evidence: Witnesses: Hearsay.** In the absence of admissibility authorized under the Nebraska Evidence Rules or by other statute, a witness' pretrial statement identifying a defendant as the perpetrator of a crime is hearsay pursuant to Neb. Evid. R. 801(3) and, therefore, is inadmissible as the result of Neb. Evid. R. 802.
6. **Criminal Law: Trial: Juries: Appeal and Error.** Harmless error exists in a jury trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant.

7. **Criminal Law: Trial: Evidence: Convictions: Appeal and Error.** In the trial of a criminal case, erroneous admission of evidence which is not cumulative may constitute harmless error beyond a reasonable doubt, when a defendant's conviction is supported by overwhelming evidence which has been properly admitted or admitted without objection.

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

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

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

SHANAHAN, J.

A jury in the district court for Douglas County found Mark J. Salamon guilty of robbery. Salamon was sentenced and has appealed. We affirm the judgment entered on Salamon's conviction.

BACKGROUND OF ROBBERY AND IDENTIFICATION

Around 4 p.m. on November 15, 1990, a man called at the front door of the Omaha residence of the victim, an 83-year-old woman. After the two talked for a while, the victim opened the door and admitted the man into the house. As the man entered, he grabbed the victim's hands and tied them with strips of cloth. He began ransacking the residence, discovered some money in the victim's wallet and a coin purse, and then left. The victim was able to free herself and go to a neighbor's house, from which police were summoned. The robbery unit of the Omaha Police Division commenced an investigation and, during its investigation, received information from an anonymous source that Salamon was the robber. A police detective brought photographs of eight individuals, including a photograph of Salamon, who had a police record, to the victim at her home. The victim, when asked whether her robber's photograph was among those displayed, selected Salamon's photograph from among the eight while remarking that the man in the selected

photograph "looks like" the man who robbed her. From the photograph, however, the victim was unable to "positively" identify Salamon as the robber. As the result of further investigation, police located Salamon on December 10; proceeded to Salamon's residence; and, without an arrest warrant or Salamon's permission to enter, went into the residence, arrested Salamon, and transported him to police headquarters.

At the police station on the morning of December 11, the police conducted a lineup for the victim's possible identification of her robber. The lineup was separated from a viewing room by a one-way glass to prevent those in the lineup from seeing anyone observing from the viewing room. Before the victim entered the viewing room, she was admonished that although the lineup was used for possible identification of the robber, he might not be among the individuals in the lineup. However, as the victim entered the viewing room, she said to an officer: "I think I see him already," referring to Salamon, who was in the lineup. While Salamon was standing near the one-way glass, the victim, on closer observation of Salamon and further inquiry whether she could identify the man at the glass as her robber, said: "That looks like him. . . . I think that's him, but I can't be totally positive." When an officer asked whether the victim could be "positive" about an identification, the victim responded: "No, but it looks like him."

SUPPRESSION HEARING

Before trial, Salamon filed two suppression motions. Salamon sought suppression of physical evidence obtained as the result of an unreasonable search and seizure, since the police entered his residence without permission and arrested him without a warrant. See, U.S. Const. amend. IV; Neb. Const. art. I, § 7. In his other motion, Salamon attempted to suppress the victim's pretrial identification of him, because the identification resulted from an impermissibly suggestive process leading to the victim's identification of him. See *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967) (confrontation for identification that is unnecessarily suggestive and conducive to irreparable mistaken identification

of a defendant may violate the defendant's right to due process). After the court denied the suppression motions, Salamon's trial commenced on April 2, 1991.

SALAMON'S TRIAL

During Salamon's trial, and as the State's first witness, one of the police officers testified about the victim's pretrial identification of Salamon and described the victim's inability to make a positive identification of Salamon. The officer, over Salamon's objections (relevance and hearsay), recounted presentation of the eight photographs to the victim and her remark, when asked whether she saw the robber's photograph in the group, that the depicted Salamon "looks like" the robber, although she was unable to "positively" state that the man in the photograph was the robber. The officer, again over Salamon's objections (relevance and hearsay), also testified that the victim commented, on entering the lineup viewing room at the police station and observing the lineup for possible identification of the robber: "I think I see him already," and later stated regarding identification of her robber that that "looks like him. . . . I think that's him . . . ."

Next, the victim testified concerning the events surrounding the robbery. A few days before the robbery, a woman came to the front door of the victim's home and said that the woman's car, with her baby inside, was stalled. The woman, who was unknown to the victim, asked to use the victim's telephone to call her husband. After some telephone calls, the woman said that she was in rather dire financial straits. Since it was near Thanksgiving, the victim gave the woman money for cabfare and informed her that rather than repayment, the money could be "passed on" by the woman to anyone else in need. The woman left. A day or so later, the victim received a telephone call from a woman named "Johnston," who identified herself as the woman who had appeared at the victim's house and received the money from the victim. The caller then asked whether the victim would pay the caller's utility bill of $70. The victim agreed to pay the bill. The woman came to the victim's house, got the $70, and assured the victim that the money would be repaid.

The next day, the victim received another call from the "Johnston" woman, who said that her husband was on his way to the victim's house to repay the $70. Around 4 p.m. that day, while there was still daylight, the victim observed a man walking up the driveway to her house. The man rang the doorbell and, when the victim answered and opened the door, said that he wanted to use the victim's phone to call his wife. As the man entered the house, he grabbed the victim's hands; wrestled her to the floor; and, using strips of cloth, proceeded to tie her hands in front of her and then tie her feet. After binding the victim, the intruder blindfolded her with another strip of cloth, but the blindfold was apparently somewhat askew, so that the victim saw the man search near her refrigerator, pull out kitchen drawers, and pick up her wallet, which contained approximately $50. The man also found the victim's coin purse, containing some loose change. Soon after the man left, the victim untied her hands, unbound her feet, removed the blindfold, and ran to a neighbor's house from which police were summoned. When the police arrived, the victim gave them the cloth strips that had been used to bind and blindfold her. When asked at trial whether she saw her robber in the courtroom, the victim stated, while pointing to Salamon: "Well, he looks like him . . . is all I'll say. I, again, I'm not positive."

The State then called Trudie Bruce as a witness. Bruce, also charged with robbing the victim, gave a detailed account of the background for the robbery. Bruce and Salamon were sharing an apartment. After selecting their victim, Bruce and Salamon planned the robbery. Pursuant to their plan, Salamon waited a few blocks from the victim's house, while Bruce went to the victim's home and told a story of misfortune about the stalled car and financial distress, all as related during the victim's testimony. During Bruce's visit with the victim, Bruce was actually on a "scouting mission," reconnaissance to find out where the victim might keep any money. As a result of this visit, Bruce believed that the victim's money might be located on or around the refrigerator in the victim's kitchen or within drawers in that vicinity. After receiving the cabfare from the victim, Bruce rejoined Salamon, who said that the victim must have "lots of money," and the pair returned to Bruce's apartment. To

further carry out the planned robbery, Bruce telephoned the victim the next day, identified herself as "Julie Johnston," a "phony name," and asked for $70 to pay her utility bill. Later that day, Bruce, now identified as "Johnston," went to the victim's home and received $70 from her. That evening, at Bruce's apartment, Salamon used cloth strips, cut from sheets in Bruce's apartment, to bind Bruce's hands and feet in a rehearsal for binding the victim during the prospective robbery. During her testimony, Bruce identified the cloth strips which the victim had delivered to police after the robbery as the cloth strips used in the rehearsal and, also, identified Salamon in court as her accomplice in the robbery.

Bruce further testified that she called the victim the next day with the message that her husband would be coming to the victim's house to repay the money used for the utility bill. Bruce accompanied Salamon to within a few blocks of the victim's home and awaited Salamon's return after the robbery. Some 15 minutes later, Salamon came running toward Bruce and, with Bruce following at a distance, dashed through alleys and yards in the neighborhood. When the two finally stopped together, Salamon said that he had tied up the victim, ransacked the house, and taken around $50 from the victim's wallet. The pair telephoned one of Bruce's friends, who came to a designated location and picked up Bruce and Salamon. Later, Bruce and Salamon jointly spent the money taken from the victim. On December 1, 1990, Bruce was arrested on a charge unrelated to the robbery.

The final witness against Salamon was Allen M. Godbolt, who, at the time of Salamon's trial, was confined in the Douglas County Correctional Center, where Salamon was also confined while awaiting trial. Godbolt, who knew Salamon before the two were confined together in the correctional center, testified that on two or three occasions in mid-February 1991, Salamon had talked with him about the pending robbery charge against Salamon and admitted to Godbolt that he and a woman named "Trudie" had robbed an elderly woman. In talking with Godbolt, Salamon identified the victim by name, that is, by the name of the victim who had just testified in Salamon's trial and identified him in court. According to Godbolt, Salamon had

hoped that the victim was "too old to possibly identify him [Salamon]."

After Salamon declined to testify and offered no evidence, the jury found him guilty of robbing the victim. When the court later imposed sentence for that conviction, Salamon appealed.

SUPPRESSION OF EVIDENCE

Salamon contends that the district court erred in denying his pretrial suppression motions and that, therefore, certain evidence was admitted in violation of his constitutional rights specified in the suppression motions. However, examination of the record discloses that Salamon did not renew his objections based on constitutional grounds when evidence was presented in his trial.

In a criminal trial, after a pretrial hearing and order denying a defendant's motion to suppress evidence, the defendant must object at trial to admission of the evidence which was the subject of the suppression motion in order to preserve an appellate question concerning admissibility of that evidence. See, *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987); *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987).

"If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error." *State v. Archbold*, 217 Neb. 345, 352, 350 N.W.2d 500, 505 (1984). Accord *State v. Roggenkamp, supra*. "In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as a trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court." *State v. Oldfield*, 236 Neb. 433, 438, 461 N.W.2d 554, 559 (1990). Accord, *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991); *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987). "Generally, a constitutional question not properly raised in the trial court will not be considered on appeal." *State v. Oldfield*, 236 Neb. at 439, 461 N.W.2d at 559. Accord *State v. Fleming*, 223 Neb. 169, 388 N.W.2d 497 (1986).

Since none of Salamon's objections to evidence at his trial were based on constitutional grounds, we cannot and, therefore, do not consider Salamon's assignment of error

regarding suppression and exclusion of evidence on constitutional grounds.

RELEVANCE OF VICTIM'S IDENTIFICATION TESTIMONY

In his second assignment of error, Salamon asserts that the police officer's testimony concerning the robbery victim's pretrial identification was irrelevant and, therefore, should have been excluded "because of the lack of positive identification on the part of the victim," brief for appellant at 8, and because such testimony made "it appear as though the victim of this crime had positively identified the Defendant as the perpetrator of this crime," brief for appellant at 7.

"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. Neb. Evid. R. 402 provides in part: "Evidence which is not relevant is not admissible."

> "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. . . ." . . . "[T]he function of the doctrine of relevance is to require that there be some rational connection between the evidence offered by a litigant and the legal rule on which he claims a right to recover. . . . 'Relevancy . . . exists only as a relation between an item of evidence and a matter properly provable in the case.' "

State v. Baltimore, 236 Neb. 736, 740-41, 463 N.W.2d 808, 812 (1990). Accord, *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349

(1992); *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). "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*, 237 Neb. 207, 210, 465 N.W.2d 737, 740-41 (1991). Accord, *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991); *State v. Coleman, supra.*

> [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.

State v. Juhl, 234 Neb. 33, 42, 449 N.W.2d 202, 209 (1989). Accord *State v. Messersmith, supra.* 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, supra* (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). Thus, a determination whether evidence is relevant is within a trial court's discretion, and, in the absence of an abuse of discretion, the trial court's ruling on relevance will be upheld on appeal. See, *State v. Baltimore, supra*; *State v. Reynolds, supra*; *State v. Porter, supra*; *State v. Juhl, supra.*

Because Salamon was charged with robbing the victim, evidence of Salamon's identity as the robber is definitely material and probative and is, therefore, relevant. Although the victim's identification of Salamon as the robber was expressed with less than absolute positiveness or categorical conclusiveness, the degree of certainty and, correspondingly,

uncertainty in the victim and her identification of Salamon were matters of witness credibility and weight of testimony. A witness' credibility and weight to be given to testimony are matters for determination and evaluation by a fact finder. See, *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986); *State v. Robertson*, 223 Neb. 825, 394 N.W.2d 635 (1986).

Consequently, we find no abuse of discretion by the trial court in admitting the victim's identification testimony as relevant evidence in Salamon's trial and, hence, conclude that Salamon's second assignment of error is without merit.

SALAMON'S HEARSAY OBJECTIONS

In his third and final assignment of error, Salamon claims that the police officer's testimony relating the victim's out-of-court statement that she identified Salamon as the robber is hearsay and, pursuant to Salamon's hearsay objection, should have been excluded.

Neb. Evid. R. 801 provides:

> (3) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted; and
>
> (4) A statement is not hearsay if:
>
> (a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with his testimony and is offered to rebut an express or implied charge against him or recent fabrication or improper influence or motive . . . .

Neb. Evid. R. 802 provides: "Hearsay is not admissible except as provided by these rules or by other rules adopted by the statutes of the State of Nebraska."

In Salamon's trial, the police officer testified before the victim took the stand. Consequently, when the officer testified concerning the victim's pretrial identification of Salamon, the victim had not contradicted her previous identification of Salamon, repudiated that pretrial identification, or indicated that she could not recall the identification.

The State argues that the officer's testimony containing the victim's out-of-court identification of Salamon was not hearsay, because the testimony "was offered to explain why [police] went to [Salamon's] home to arrest him and not for the truth of the matter asserted." Brief for appellee at 28. Thus, the State contends that the victim's out-of-court identification of Salamon was admissible through the officer's testimony to show that police had probable cause to arrest Salamon.

In *State v. Smith*, 218 Neb. 201, 352 N.W.2d 620 (1984), we considered the State's contention that results of an "Alco-Sensor" were admissible as substantive evidence to prove a drunk driving charge against the defendant. An Alco-Sensor is an instrument which does not measure a person's blood alcohol level, but may confirm a police officer's suspicion that an individual has been drinking alcohol, and is "used as an ingredient for probable cause to arrest and require a postarrest test of blood, breath, or urine . . . ." 218 Neb. at 206, 352 N.W.2d at 624. In concluding that the result or reading from the Alco-Sensor, as a preliminary breath test, was irrelevant, we stated:

> As a matter involving probable cause, any aspect of the breath test was a matter of law for judicial determination, not evidence for the jury. . . . The result of the preliminary breath test was irrelevant to prove any aspect of the charge against Smith. Under the circumstances it was error to place before the jury any evidence regarding the result from the Alco-Sensor.

218 Neb. at 206, 352 N.W.2d at 624. Thus, existence of probable cause, as a prerequisite determinant for admissibility of evidence obtained by a search or arrest, is a preliminary question for a court as a judicial function without intervention of a jury. See Neb. Evid. R. 104 (preliminary questions concerning admissibility of evidence shall be determined by the judge). Under Rule 104, a trial court makes preliminary determinations in relation to constitutional protection from unreasonable searches and seizures; therefore, whether police had reasonable or probable cause to believe that a felony had been committed or was being committed, whether there was sufficient basis for issuance of a warrant, whether seized

evidence was within the scope of a warrant, and whether there was consent to a search are all preliminary questions of fact to be decided by a judge, who makes the final decision on admissibility outside the hearing of the jury and preferably, even sometimes necessarily, before trial. See 1 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 104[07] (1992).

Under the circumstances, the victim's pretrial identification of Salamon, as an aspect or basis of probable cause to arrest him, fails to justify admissibility contrary to the prohibition against hearsay. Rather, in Salamon's trial the officer testified concerning the victim's pretrial identification of Salamon, the victim's out-of-court statement as an assertion that Salamon was the man who robbed her.

Although several decisions of this court have dealt with constitutional considerations of witness identification relative to a criminal trial, Salamon's appeal appears to be the first occasion when this court has been asked to address the issue of a hearsay objection to evidence of a witness' pretrial or out-of-court identification of a defendant.

The Nebraska Evidence Rules have several counterparts in the Federal Rules of Evidence, or are otherwise patterned on the federal rules. Fed. R. Evid. 801(d) provides: "**Statements which are not hearsay.**—A statement is not hearsay if—(1) **Prior statement by witness.**—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (C) one of identification of a person made after perceiving the person . . . ."

One commentator has made the following observation regarding federal Rule 801(d)(1)(C):

> The theory is that courtroom identification is so unconvincing as practically to impeach itself thus justifying the corroboration. The purpose of the rule is to "permit the introduction of [more meaningful] identifications made by a witness when memory was fresher and there had been less opportunity for influence to be exerted upon him." The circumstances of the prior identification may, of course, be considered by the trier of fact in determining the weight to be accorded.

Michael H. Graham, Handbook of Federal Evidence § 801.13

at 767-68 (3d ed. 1991), quoting from *United States v. Marchand*, 564 F.2d 983 (2d Cir. 1977). See, also, *Gilbert v. California*, 388 U.S. 263, 273 n.3, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967): "[T]he earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind." With the identification provision included in federal Rule 801(d)(1)(C), the Federal Evidence Rules were enacted by Congress in 1975.

In 1973, the Nebraska Supreme Court Committee on Practice and Procedure published the Proposed Nebraska Rules of Evidence. The Nebraska committee compared the then pending or proposed federal rules with the proposed Nebraska rules and, in its comment for proposed Nebraska Rule 801(d)(1), which corresponded with federal Rule 801(d)(1), stated: "**Subdivision (d)(1)(C)** [of the Federal Rules of Evidence] was not recommended by the Nebraska Committee." Rule 801(d)(1) cmt. (Tentative Draft 1973). Thus, the Nebraska committee, in preparing the proposed Nebraska Rules of Evidence, considered the identification provision of federal Rule 801(d)(1)(C), but expressly rejected that provision. After the Nebraska committee's publication of its comments in conjunction with the proposed rules of evidence for Nebraska, the Nebraska Legislature in 1975 enacted the Nebraska Evidence Rules as chapter 27 of the Revised Statues of Nebraska.

Thus, while federal Rule 801(d)(1)(C) classifies a witness' pretrial identification as a nonhearsay statement, Nebraska Rule 801(4)(a) does not contain such classification and provision and, in fact, makes no mention whatsoever concerning witness identification as a nonhearsay statement. None of the other Nebraska Rules of Evidence or other Nebraska statutes authorize admissibility of a witness' pretrial identification of a defendant as a nonhearsay statement or statement otherwise exempted or excluded from the operation and purview of the "hearsay rule," Rule 802, prohibiting admission of hearsay. Consequently, in the absence of admissibility authorized under the Nebraska Evidence Rules or

by other statute, a witness' pretrial statement identifying a defendant as the perpetrator of a crime is hearsay pursuant to Rule 801(3) and, therefore, is inadmissible as the result of Rule 802. This is not to say that a witness' pretrial identification of a defendant may never be admissible. Never say never. A witness' pretrial identification may be admissible in certain circumstances encompassed within the Nebraska Evidence Rules, for example, for the purpose of impeachment. See Neb. Evid. R. 613. Other instances of admissibility of a pretrial identification of a defendant are left to another day in other situations in future cases. See R. Collin Mangrum, *Doesn't Anyone in Nebraska Realize That Pretrial Identification Testimony Raises Hearsay as Well as Constitutional Issues?*, 20 Creighton L. Rev. 335 (1986-87). Whether Rule 801(4)(a) is amended to authorize admissibility of a witness' pretrial identification of a defendant remains to be seen and is a legislative matter involving the Nebraska Evidence Rules. We note that, at last count, 5 state jurisdictions, including Nebraska, have rejected the nonhearsay witness identification provision of federal Rule 801(d)(1)(C), while 25 other states have adopted, verbatim or in substance, the witness identification provision of federal Rule 801(d)(1)(C). 4 Weinstein & Berger, *supra*, ¶ 801(d)(1)(C)[02]. Nonetheless, in Salamon's case, the officer's testimony containing the victim's out-of-court assertion that Salamon was her robber is hearsay and was erroneously admitted.

However, our inquiry does not end with the erroneous admission of hearsay against Salamon. The ultimate question is whether the erroneous admission of hearsay was prejudicial to Salamon.

"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*, 237 Neb. 207, 465 N.W.2d 737 (1991); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992).

"Harmless error exists in a jury trial of a criminal case when

there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant." *State v. Watkins*, 227 Neb. 677, 686, 419 N.W.2d 660, 666 (1988). Accord, *State v. Cox, supra*; *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991); *State v. Coleman, supra*. "In the trial of a criminal case, erroneous admission of evidence which is not cumulative may constitute harmless error beyond a reasonable doubt, when a defendant's conviction is supported by overwhelming evidence which has been properly admitted or admitted without objection." *State v. Coleman*, 239 Neb. at 814, 478 N.W.2d at 358.

The admission of the officer's testimony containing the hearsay in question was harmless error. A brief review of the evidence shows that the victim made an in-court identification of Salamon. More important is the testimony of Trudie Bruce, Salamon's accomplice in the robbery. Bruce's testimony was a detailed corroboration of the victim's account of the robbery, and it supplied considerable damaging evidence against Salamon, including a lengthy description of events before, during, and after the robbery. Additionally, Bruce identified Salamon as the man who was her accomplice in robbing the victim. One cannot ignore Salamon's admissions to Godbolt. Disregarding the hearsay presented through the police officer's testimony, we conclude that the remaining evidence establishing Salamon's guilt of the robbery is overwhelming and that beyond a reasonable doubt, any error in the trial court's admitting hearsay concerning the victim's pretrial identification of Salamon is harmless under the circumstances.

Having found no reversible error in Salamon's trial, we affirm Salamon's conviction.

AFFIRMED.

FIRST NATIONAL BANK, STROMSBURG, NEBRASKA, A CORPORTION, APPELLANT, V. LORETTA HEIDEN, COUNTY TREASURER OF YORK COUNTY, NEBRASKA, ET AL., APPELLEES.

491 N.W.2d 699

Filed November 13, 1992. No. S-90-029.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the trial court.
2. **Taxation: Valuation: Property.** If a person who claims a tax or any part thereof to be invalid for any reason other than the valuation of the property shall have paid the same to the county treasurer or other proper authority in all respects as though the same was legal and valid, he or she may, at any time within 30 days after such payment, demand the same in writing from the county treasurer to whom paid. If the same shall not be refunded within 90 days thereafter, he or she may sue such county treasurer for the amount so demanded.
3. **Words and Phrases.** A person is defined as any number of persons and as any copartnership, association, joint-stock company, corporation, or any other entity that may be the owner of property.
4. **Statutes: Taxation.** Before a taxpayer can recover taxes under a statutory procedure, the taxpayer must substantially comply with the requirements of the statute.

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

Lawayne L. Feit, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellant.

Vincent Valentino, Deputy York County Attorney, for appellees.

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

FAHRNBRUCH, J.

In this appeal, we affirm the ruling of the district court for York County that First National Bank, Stromsburg, Nebraska (FNB), a corporation, lacked standing to sue for the refund of taxes which it paid on personal property it had purportedly acquired and subsequently sold to Farmers Cooperative Grain Association (Farmers).

To fully understand the issue under consideration, a history

of the personal property involved and its taxation is helpful.

Grain processing equipment and a grain elevator on leased land in York County, owned by Benedict Consolidated Industries, Inc. (BCI), were assessed for taxes as personal property. On September 25, 1985, a $17,774.22 distress warrant for delinquent taxes, interest, and fees for the years 1982, 1983, and 1984 was issued to the York County sheriff. The warrant remained unsatisfied, and the sheriff never sold the property for taxes pursuant to the September 25 distress warrant.

It was on June 4, 1985, that FNB obtained a judgment against BCI in the district court for Polk County in the amount of $93,839.15 plus interest. On October 8, the judgment was transcribed to the district court for York County. On December 23, at an execution sale on FNB's judgment, FNB bid $600 for BCI's interest in its York County grain elevator and grain processing equipment.

Objections to confirmation of the December 23 execution sale were filed in the district court for York County. On January 15, 1986, while the objections were still pending, the York County sheriff, apparently in the mistaken belief that the sale had been judicially confirmed, issued and delivered a sheriff's deed to FNB for the subject property. On February 20, the district court removed the proceedings from its active docket because they were automatically stayed when BCI filed a chapter 11 bankruptcy proceeding in federal court on February 19. The appellees were not listed as creditors. Neither were they given any notice of the proceedings.

On June 9, 1986, the president of BCI signed a quitclaim deed transferring all of BCI's interest in the subject personal property to FNB. At the same time, BCI assigned its leasehold interests in related real estate to FNB. Both of these transactions were purportedly pursuant to a stipulation by BCI and FNB which was filed in the bankruptcy court. The stipulation was dated June 9 and was filed in the bankruptcy court on June 12. The bankruptcy court appears to have "sustained" the stipulation on June 13. The validity of the foregoing transactions between FNB and BCI does not control the disposition of this appeal. For the reasons hereinafter set forth, it is FNB's ownership on March 31, 1987, the date it filed

for a refund of the taxes it paid on the subject personal property, that determines whether FNB had standing to seek such a refund. The record reflects that on July 23, 1986, FNB, upon receipt of $190,000, conveyed to Farmers all of its interest in the subject personal property and leasehold interests originally belonging to BCI and, thereafter, had no ownership interest in the property. In the documents FNB gave to Farmers, FNB agreed that it would hold Farmers harmless of the payment of any taxes that had accrued.

On September 23, 1986, a distress warrant was again issued against the subject property, this time for personal property tax in the amount of $25,522.94. This distress warrant represented taxes, interest, and fees for the tax years 1982 through and including 1985. Because of the sale of the subject property to Farmers, taxes for 1986 were accelerated, and on October 30, 1986, another distress warrant was issued, this time in the amount of $30,235.32.

On March 10, 1987, more than 7 months after it had divested itself of any ownership interest it had in the subject property, FNB paid the amount of the October 30 distress warrant in accordance with the clause in its contract to hold Farmers harmless. On March 31, pursuant to Neb. Rev. Stat. § 77-1735 (Reissue 1986), FNB filed a claim with the York County Board of County Commissioners for a tax refund of the money it had paid to satisfy the October 30 distress warrant. In support of its claim, FNB argued that when it satisfied the October distress warrant, there were no valid tax liens against the subject property. FNB's claim was denied, and it filed suit for refund with the district court for York County.

Following a trial, the district court held that FNB was not a real party in interest, that it had voluntarily paid the taxes on behalf of another, and that FNB had no standing to bring a lawsuit under § 77-1735. The district court dismissed FNB's case with prejudice. FNB timely appealed to this court.

SCOPE OF REVIEW

Whether a person who has no ownership interest in personal property, but pays the taxes of another pursuant to a contractual agreement, has standing to sue for recovery of

those taxes under § 77-1735 may be determined by statutory construction. Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the trial court. See, *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990); *Sorensen v. City of Omaha*, 230 Neb. 286, 430 N.W.2d 696 (1988).

ISSUE OF STANDING

FNB argues (1) that its contractual agreement with Farmers rendered payment of the tax involved involuntary and (2) that in any event, § 77-1735, under which FNB seeks a tax refund, does not require that the person seeking the refund be the owner of the property on which the tax was assessed.

The appellees, consisting of governmental subdivisions for whose benefit the taxes were imposed and the treasurer of York County, contend that (1) the hold harmless agreement between FNB and Farmers does not constitute an assignment of Farmers' rights to FNB, (2) FNB is not a real party in interest, (3) FNB paid the taxes on the subject personal property voluntarily, and (4) the threat of a civil action by Farmers for breach of the hold harmless contract does not support a claim of involuntary payment.

In finding that FNB lacks standing to sue for the return of taxes paid on behalf of Farmers, the district court reasoned that when FNB paid the taxes on the subject property, "it was not the owner of the property nor did it have any proprietary interest in the property. It was under no legal compulsion to pay the taxes." For the reasons hereinafter set forth, we agree with the district court's ultimate conclusion that FNB had no standing to seek a refund of taxes under § 77-1735.

To dispose of this appeal, we need consider only FNB's argument that it does not need to be the owner of the property on which the taxes were paid in order to seek a refund of taxes under § 77-1735. That statute at the time FNB filed its lawsuit stated in relevant part:

> *If a person* who claims a tax or any part thereof to be invalid for any reason other than the valuation of the property shall have paid the same to the treasurer or other

> proper authority in all respects as though the same was legal and valid, he or she may, at any time within thirty days after such payment, demand the same in writing from the county treasurer to whom paid. If the same shall not be refunded within ninety days thereafter, he or she may sue such county treasurer for the amount so demanded.

(Emphasis supplied.)

FNB contends that the word "person," as used in § 77-1735, applies to any individual who has paid a tax for any reason. FNB's argument disregards the fact that the Legislature has defined relevant terms for the purpose of chapter 77. See Neb. Rev. Stat. § 77-101 (Reissue 1986).

A "person" is defined as "any number of persons; and any copartnership, association, joint-stock company, *corporation*, or any other entity *that may be the owner of property*." (Emphasis supplied.) Neb. Rev. Stat. § 77-113 (Reissue 1990). This definition clearly contemplates that a "person" (which includes a corporation) as used in § 77-1735 is one with an ownership interest in the property in question.

For the purpose of this appeal, we need not, and do not, determine the ownership of the BCI property after the execution of FNB's judgment against BCI. It is sufficient to note that FNB has neither pleaded nor proved any type of ownership interest in the subject property on the date that FNB paid the taxes or on the date that FNB filed a claim for refund of those taxes. Instead, FNB has mistakenly relied on the common usage of the word "person" to assert its right to a refund.

Before a taxpayer can recover taxes under a statutory procedure, the taxpayer must substantially comply with the requirements of the statute. See, *Svoboda v. Hahn*, 196 Neb. 21, 241 N.W.2d 499 (1976); *Monteith v. Alpha High School District*, 125 Neb. 665, 251 N.W. 661 (1933). FNB is not a "person" with an ownership interest in the subject property within the meaning of §§ 77-113 and 77-1735 and, therefore, fails to meet the most fundamental requirement of § 77-1735.

The district court correctly found that FNB has no standing to sue for a refund under § 77-1735 because of FNB's lack of an

ownership interest in the subject property. The order of the district court dismissing the suit is affirmed.

AFFIRMED.

CAPORALE, J., not participating.

GAS 'N SHOP, INC., A CORPORATION, APPELLEE AND CROSS-APPELLEE, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLANT, AND CITY OF KEARNEY, APPELLEE AND CROSS-APPELLANT.

492 N.W.2d 7

Filed November 13, 1992. No. S-90-158.

1. **Constitutional Law: Statutes.** When an amendatory act is invalid, the previous statute on the subject remains in full force and effect.
2. **Statutes: Time.** While as a general matter changes in procedural statutes apply to pending litigation, they have no retroactive effect upon steps taken in an action before such changes became effective.
3. **Constitutional Law: Equal Protection: Liquor Licenses.** Even in the area of liquor control, a justification for classification must exist; purely arbitrary treatment cannot be sustained.
4. **Constitutional Law: Equal Protection: Sales: Liquor Licenses.** Convenience stores may not be treated differently from other operations which combine the sale of liquor with the sale of other merchandise or services, for the differing treatment bears no reasonable relationship to the State's policy of furthering temperance.

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

Don Stenberg, Attorney General, and Marie C. Pawol; Michael E. Kelley, Kearney City Attorney; and, on brief, Edwin C. Perry and Gregory H. Perry, of Perry, Guthery, Haase & Gessford, P.C., for appellant and for appellee City of Kearney.

Donald L. Dunn and Carl J. Sjulin, of Rembolt Ludtke Parker & Berger, for appellee Gas 'N Shop.

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

CAPORALE, J.

In accordance with the appellee-cross-appellant City of Kearney's recommendation, the appellant Nebraska Liquor Control Commission denied the appellee and cross-appellee Gas 'N Shop, Inc.'s application for a license permitting it to sell beer at retail inside the city's corporate limits for consumption away from the premises at which it currently sells other items. (We note that although the commission and city designate themselves as appellants, the first notice of appeal was filed by the commission. Therefore, the city is not an appellant, but, rather, is an appellee and cross-appellant.) Upon appeal thereto by Gas 'N Shop, the district court reversed the commission's order of denial and directed it to issue the license. In their appeal and cross-appeal to this court, the commission and city assign errors which combine to assert that the district court (1) lacked jurisdiction and (2) erred in reversing the commission's ruling and ordering issuance of the license. We affirm.

In contesting the jurisdiction of the district court to have entertained this matter, the commission and city contend that Gas 'N Shop should have filed its appeal in the district court for Buffalo County, where Kearney is situated. In doing so, they rely on Neb. Rev. Stat. § 53-1,116(4)(b) (Reissue 1988), which provides, in pertinent part, that in instances in which a local governing body has recommended denial of a license, the recommendation shall be binding on the commission, but that the commission's order "may be reversed, vacated, remanded, or modified by the district court of a county in which the local governing body is located . . . . " While recognizing that *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988), declared unconstitutional the legislation which undertook to give local governing bodies the option to make recommendations binding upon the commission, the commission and city nonetheless urge that the above-quoted provision of § 53-1,116(4)(b) controls. They claim this is so because the Legislature changed the statutory scheme of which § 53-1,116(4)(b) is a part after it had enacted the laws involved in *Bosselman*.

However, not only do the changes not relate to venue in any way, they became effective on July 9, 1988 (1988 Neb. Laws,

L.B. 1089, and Neb. Const. art. III, § 27), several months before the *Bosselman* decision was filed on December 2, 1988. Thus, in no sense can the statutory changes on which the commission and city rely be said to have been an effort to cure the constitutional infirmities addressed in *Bosselman*. Indeed, the pertinent language of § 53-1,116(4)(b) (Reissue 1988), concerning the binding nature of the local governing body's recommendation, is identical to that of § 53-1,116(5)(b) (Cum. Supp. 1986), which *Bosselman* ruled to be unenforceable.

When an amendatory act is invalid, the previous statute on the subject remains in full force and effect. *State v. Anderson*, 188 Neb. 491, 197 N.W.2d 697 (1972); *State v. Greenburg*, 187 Neb. 149, 187 N.W.2d 751 (1971); *State ex rel. Baldwin v. Strain*, 152 Neb. 763, 42 N.W.2d 796 (1950). Thus, the controlling language is found in § 53-1,116(5) (Reissue 1984): "Any decision of the commission . . . refusing to grant . . . a license . . . may be reversed, vacated, or modified by the district court of Lancaster County on appeal . . . ." Consequently, Gas 'N Shop invoked the jurisdiction of the proper district court.

The next step is to determine the scope of our review. Current law provides that judicial review of decisions of the commission shall be by proceedings in error. § 53-1,116 (Cum. Supp. 1992). However, on March 17, 1989, when Gas 'N Shop initiated the steps required to invoke the jurisdiction of the district court, the law, as noted earlier, provided that decisions of the commission be reviewed by appeal. § 53-1,116(5) (Reissue 1984).

The scope of this court's review by proceedings in error varies significantly from that accorded appeals arising under § 53-1,116(5) (Reissue 1984). In proceedings in error, the review is limited to determining whether the commission acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. E.g. *Trolson v. Board of Ed. of Sch. Dist. of Blair*, 229 Neb. 37, 424 N.W.2d 881 (1988). See, also, *Flood v. Keller*, 214 Neb. 797, 336 N.W.2d 549 (1983). In the case of appeal, the matter is reviewed de novo on the record. *R.D.B., Inc. v. Nebraska Liquor Control Comm.*, 229 Neb. 178, 425 N.W.2d 884 (1988). See, also, *Donahoo v. Nebraska Liquor Control Comm.*, 229 Neb. 197, 426 N.W.2d 250 (1988).

While as a general matter changes in procedural statutes apply to pending litigation, they have no retroactive effect upon steps taken in an action before such changes became effective. See *State v. Russell*, 194 Neb. 64, 230 N.W.2d 196 (1975). Here, Gas 'N Shop undertook an appeal in accordance with the then existing law. Thus, it follows that what is before us is an appeal, not a proceeding in error. Accordingly, we review the matter de novo on the record.

Having determined earlier that it is the law as it existed prior to *Bosselman* which controls, we next look at Neb. Rev. Stat. § 53-132 (Reissue 1984), which provided, in relevant part:

> (2) A retail license . . . shall be issued to any qualified applicant if it is found by the commission that (a) the applicant is fit, willing, and able to properly provide the service proposed within the city . . . where the premises described in the application are located, (b) the applicant can conform to all provisions, requirements, rules, and regulations provided for in the Nebraska Liquor Control Act, (c) the applicant has demonstrated that the type of management and control exercised over the licensed premises will be sufficient to insure that the licensed business can conform to all provisions, requirements, rules, and regulations provided for in the Nebraska Liquor Control Act, and (d) the issuance of the license is or will be required by the present or future public convenience and necessity.
>
> (3) In making its determination pursuant to subsection (2) of this section the commission shall consider:
>
> (a) The recommendation of the local governing body;
>
> (b) The existence of a citizens' protest made in accordance with section 53-133;
>
> (c) The existing population of the city . . . and its projected growth;
>
> (d) The nature of the neighborhood or community of the location of the proposed licensed premises;
>
> (e) The existence or absence of other retail licenses . . . with similar privileges within the neighborhood or community of the location of the proposed licensed premises;

(f) The existing motor vehicle and pedestrian traffic flow in the vicinity of the proposed licensed premises;

(g) The adequacy of existing law enforcement;

(h) Zoning restrictions;

(i) The sanitation or sanitary conditions on or about the proposed licensed premises; and

(j) Whether the type of business or activity proposed to be operated in conjunction with the proposed license is and will be consistent with the public interest.

Neb. Rev. Stat. § 53-133 (Reissue 1984) required a hearing on the application if, among other things, the city recommended denial of the license or at least three persons residing within the city protested issuance of the license.

The record demonstrates beyond question that Gas 'N Shop, which has operated the 25 licensed premises it presently holds in a lawful manner, satisfies the conditions specified in § 53-132(2)(a), (b), and (c). Thus, we turn our attention to the evidence which bears on condition (2)(d) of § 53-132, the following summary of which has been organized in the order in which the factors to be considered are listed in § 53-132(3).

The record convinces us that the city's recommendation of denial was heavily influenced by its general aversion to licenses of the type in question and to permitting the sale of beer at premises such as the one in question, a facility popularly known as a convenience store, at which a variety of items, including foods and gasoline, are sold. The record also demonstrates that the city was swayed by its longstanding policy, codified into an ordinance, of recommending licensure only of those businesses devoted solely to the sale or dispensing of liquor or those for which the sale or dispensing of liquor constitutes a substantial integral, as distinguished from an incidental, part of the operation. Of the 46 outstanding licenses in the city, not one is of the type requested by Gas 'N Shop; 3 permit the sale of beer for consumption on the premises, 28 permit the sale in their original packages of all types of liquors for consumption either on or off the premises, 9 permit the sale in their original packages of liquors of all types for consumption off the licensed premises, 3 permit the sale of all types of liquors for consumption on the premises, and 3 permit the sale of beer and

wine only for consumption on the premises.

Although none of the three persons filing protests with the commission appeared at the hearing, one was the minister whose congregation plans to build a church some 230 feet from the Gas 'N Shop location. Another of the three was a minister who had presented the city with a document reflecting the opposition of 528 persons, including himself and the first minister mentioned, to the grant of the license. In addition, the Kearney board of education urged denial of the application, and the record reflects as well the opposition of one of those who already possess liquor licenses.

However, it is undisputed that the city's population is growing; the city claims its population to be 22,770, a 4.5 percent increase between 1980 and 1986. The population presently includes 14,117 persons 21 years of age or older, meaning that there exists one liquor license of some type per 306 adults. The area within a 1,200-foot radius of the premises in question is sparsely populated, being occupied by but 133 persons. There presently exists one licensee within the radius who is permitted to sell liquors of all types in their original packages for consumption off the licensed premises. Public senior and junior high school students attend classes at a site located across the street from the Gas 'N Shop location at a distance of approximately 263 feet. There are four liquor licenses between the Gas 'N Shop location and Kearney Catholic High School, which is situated seven blocks east of the high school.

The location is heavily traveled; 5,015 vehicles pass the Gas 'N Shop location daily. While the city asserts that the present turn lanes would be inadequate to accommodate increased traffic and that there may already be a need for a traffic signal, the record does not establish that granting the license would increase traffic.

Although the city's chief of police expressed concern as to whether there existed enough law enforcement personnel to deal with a new licensee, there is no evidence which establishes that illegal activity increases merely because a new license is

issued. Indeed, within 2 days of its recommendation of denial for the Gas 'N Shop application, the city recommended approval of a new license to sell beer only for consumption on the prospective licensee's premises.

There is no evidence that a zoning change would be required to permit the sale of liquor at the subject premises. However, the record does reveal that when Gas 'N Shop negotiated for the purchase of the property, it required a zoning change and represented to the seller that it would not seek a liquor license. Unknown to Gas 'N Shop, the seller reported that representation to the city. The *Bosselman* decision caused Gas 'N Shop to change its position with respect to seeking a liquor license.

The record reveals nothing derogatory about the "sanitation or sanitary conditions" of the premises.

The foregoing evidence does not persuade us that granting the license here sought would be other than in the public interest. The fact that there currently exists in the city no license of the type sought here is of no moment. See *Joe and Al's IGA, Inc. v. Nebraska Liquor Control Commission*, 203 Neb. 176, 277 N.W.2d 693 (1979) (fact no other grocery store within city limits had liquor license did not furnish basis for denying application). Neither is the testimony of the city's expert persuasive that an increase in liquor outlets results in an increase in alcohol consumption and that convenience store outlets tend to more dramatically increase consumption than some other types of outlets. The commission's own statistics demonstrate that while the number of liquor licenses in the state has increased, consumption of alcohol has decreased.

Thus, we finally reach the question of whether the record satisfies condition (2)(d) of § 53-132, that is, whether according to the evidence the issuance of the requested license is or will be required by the present or future public convenience and necessity. As suggested by another of the city's experts, combining the concept of public convenience and necessity with the sale of alcohol, a depressant drug, appears oxymoronic. The availability of alcohol, in his words, is "not absolutely necessary for many functions at all. To the extent that such a substance would be available in a community would probably

meet the necessity . . . ." However, whatever may be the rationality of the specification, the evidence upon which the commission relied does not overcome the other evidence establishing that the public convenience and necessity will be served by issuance of the license. The evidence is that some Gas 'N Shop customers have asked why they could not purchase beer at the location in question, some shoppers prefer to stop only once to purchase several different items, and there are those who prefer to purchase beer at locations other than at full-service liquor stores.

The fact that beer may be purchased elsewhere in the general area of the location in question is not, in and of itself, a lawful justification for refusing to grant a license, for even in the area of liquor control, a justification for classification must exist; purely arbitrary treatment cannot be sustained. See, *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 229 Neb. 530, 427 N.W.2d 784 (1988); *Casey's Gen. Stores v. Nebraska Liq. Cont. Comm.*, 220 Neb. 242, 369 N.W.2d 85 (1985). Accordingly, convenience stores may not be treated differently from other operations which combine the sale of liquor with the sale of other merchandise or services, for the differing treatment bears no reasonable relationship to the State's policy of furthering temperance. See, *Gas 'N Shop v. Nebraska Liquor Control Comm., supra*; *Casey's Gen. Stores v. Nebraska Liq. Cont. Comm., supra*.

AFFIRMED.

GAS 'N SHOP, INC., APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION AND CITY OF NORFOLK, APPELLEES.

492 N.W.2d 12

Filed November 13, 1992. No. S-90-216.

1. **Liquor Licenses.** Belief that there are sufficient liquor licenses in existence, standing alone, does not justify the denial of an otherwise valid application for such.

2. _____. Limiting the number of liquor licenses must be related in some manner with furthering law and order and the well-being of the general public.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded with direction.

Donald L. Dunn and Carl J. Sjulin, of Rembolt Ludtke Parker & Berger, for appellant.

Don Stenberg, Attorney General, and Marie C. Pawol, and, on brief, Edwin C. Perry and Gregory H. Perry, of Perry, Guthery, Haase & Gessford, P.C., for appellee Liquor Control Commission.

David H. Ptak, of Ptak & Schukei, P.C., for appellee City of Norfolk.

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

CAPORALE, J.

Acting in accordance with the recommendation of the appellee City of Norfolk, the appellee Nebraska Liquor Control Commission denied the appellant Gas 'N Shop's application for a license permitting it to sell beer at retail within the city's corporate limits for consumption away from the existing convenience store premises sought to be licensed. Upon appeal thereto by Gas 'N Shop, the district court affirmed. In its appeal to this court, Gas 'N Shop assigns as error the district court's failure to find the commission's order to be arbitrary and capricious. We reverse, and remand with direction.

Gas 'N Shop initiated its appeal to the district court on March 17, 1989. Thus, for the reasons articulated in *Gas 'N Shop v. Nebraska Liquor Control Comm., ante* p. 898, 492 N.W.2d 7 (1992) (case No. S-90-158), released today, the commission's claim that Gas 'N Shop should have invoked the jurisdiction of the district court of the county in which Norfolk is situated, rather than that of the district court of Lancaster County, fails. Also, for the reasons therein enunciated, this appeal is controlled by the substantive law applied in the aforementioned opinion, and the scope of our review is de novo

on the record.

Here, too, the record demonstrates beyond question that Gas 'N Shop satisfies the conditions specified in Neb. Rev. Stat. § 53-132(2)(a), (b), and (c) (Reissue 1984). Resolution of this appeal therefore hinges on whether the record establishes the existence of condition (2)(d) of § 53-132. The following summary of the evidence on that issue is organized in the order in which the factors to be considered in making that determination are listed in § 53-132(3).

The city's recommended denial was influenced by its conviction that there already existed a sufficient number of liquor licenses in the city, that liquor sales should be a distinct and separate business operated apart from other business activities, and that issuing the license in question would set a precedent in contravention of the aforementioned separate and distinct policy. At the commission hearing, the city also introduced the results of a public opinion poll which, among other things, reported that within a 5 percent degree of error, 75 percent of those with an opinion were of the view that the city had enough off-sale liquor outlets, 73 percent thought "gas stations, grocery stores, discount stores, drug stores and convenience stores" should not be allowed to sell alcoholic beverages, and 68 percent said convenience stores should not be allowed to sell beer.

Without deciding whether the citizens' protests were of the type contemplated by the applicable law, we note that four citizens voiced objections to the issuance of the subject license.

It is undisputed that the city is growing. It had a population of 19,500 at the time of the 1980 census and projected a 22,500 population by 1990 and 24,500 by 1995.

The premises in question are located on highway frontage property in a commercial and business district. There exists in the general vicinity of the premises but one liquor license, located approximately 290 feet from the Gas 'N Shop location. That license permits the sale of all types of liquors in their original packages for consumption on or off the licensed premises. A total of 37 liquor licenses exist in the city; none is of the type sought here. Of the outstanding licenses, 28 are of the type just described, 5 permit the sale in their original packages

of all types of liquors for consumption off the licensed premises, 2 allow the sale of beer for consumption on the premises, 1 permits the sale of all types of alcoholic beverages for consumption on the premises, and 1 permits the sale of beer and wine only for consumption on the premises. The holders of two of the outstanding licenses are not currently operating liquor businesses. The record also shows that during the period between 1986 and 1989, the number of licenses permitting off-premises consumption was reduced by one.

According to the Nebraska Department of Roads, 4,575 vehicles pass the location in question daily. The city did not contest Gas 'N Shop's assertion that the addition of a liquor license to its operation will not materially increase the flow of either vehicular or pedestrian traffic.

While the city is concerned about whether it has a sufficient police presence to deal with more liquor licenses, the chief of police acknowledges that Gas 'N Shop has a good record with respect to operating its current liquor licenses within the law. Nonetheless, he is anxious about the potential for further police demands. However, Gas 'N Shop has in place an education program which familiarizes its employees with the liquor laws and regulations, and it trains them in identifying would-be third-party, underage, or intoxicated purchasers. Moreover, it rewards employees who recognize, apprehend, or assist in the prosecution of those attempting to violate the liquor laws and discharges employees who fail to conduct necessary age and identification checks.

Except for the city's aversion to permitting the sale of liquor with other merchandise, the record documents no zoning restrictions which would preclude the issuance of the license in question. Neither does the record reveal anything derogatory about the sanitation or sanitary conditions of the subject premises.

The foregoing evidence does not establish that granting the license sought would be other than in the public interest. The results of the public opinion poll have no more bearing on the legal issues presented by the application than does the city's aversion to the type of license requested or its policy disfavoring the placing of liquor licenses in businesses which sell other

things. Neither is the city's concern over a potential lack of law enforcement personnel persuasive; there are adequate procedures in place to revoke licensed businesses which do not operate within the law. Nor does the city's belief that there are sufficient licenses in existence, standing alone, justify the denial of an otherwise valid application. *McChesney v. City of No. Platte*, 216 Neb. 416, 343 N.W.2d 925 (1984), *overruled on other grounds, R.D.B., Inc. v. Nebraska Liquor Control Comm.*, 229 Neb. 178, 425 N.W.2d 884 (1988). See, also, *Halbert v. Nebraska Liquor Control Commission*, 206 Neb. 687, 294 N.W.2d 864 (1980) (limiting number of liquor licenses must be related in some manner with furthering law and order and well-being of general public).

We thus conclude the record establishes that issuance of the license will serve the present or future public convenience and necessity. Gas 'N Shop receives repeated and ongoing requests for the sale of beer at the location in question by customers who prefer to make multiple purchases with a single stop and by those who prefer to make beer purchases in the environment provided by a convenience store rather than at a full-service liquor outlet. Thus, the record satisfies condition (2)(d) of § 53-132.

Accordingly, we reverse the judgment of the district court and remand the cause with the direction that the district court order the commission to grant Gas 'N Shop's application and issue the license sought.

REVERSED AND REMANDED WITH DIRECTION.

GAS 'N SHOP, INC., APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION AND CITY OF NORFOLK, APPELLEES.

492 N.W.2d 15

Filed November 13, 1992. No. S-90-217.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded with direction.

Donald L. Dunn and Carl J. Sjulin, of Rembolt Ludtke Parker & Berger, for appellant.

Don Stenberg, Attorney General, and Marie C. Pawol, and, on brief, Edwin C. Perry and Gregory H. Perry, of Perry, Guthery, Haase & Gessford, P.C., for appellee Liquor Control Commission.

David H. Ptak, of Ptak & Schukei, P.C., for appellee City of Norfolk.

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

CAPORALE, J.

As in *Gas 'N Shop v. Nebraska Liquor Control Comm., ante* p. 905, 492 N.W.2d 12 (1992) (case No. S-90-216), the appellee Nebraska Liquor Control Commission, acting in accordance with the recommendation of the appellee City of Norfolk, denied the appellant Gas 'N Shop's application for a license permitting it to sell beer at retail within the city's corporate limits for consumption away from the existing convenience store premises sought to be licensed. Upon appeal thereto by Gas 'N Shop, the district court affirmed. In its appeal to this court, Gas 'N Shop assigns as error the district court's failure to find the commission's order to be arbitrary and capricious. We reverse, and remand with direction.

Here, too, Gas 'N Shop initiated its appeal to the district court on March 17, 1989. Thus, again for the reasons articulated in *Gas 'N Shop v. Nebraska Liquor Control Comm., ante* p. 898, 492 N.W.2d 7 (1992) (case No. S-90-158), released today, the commission's claim that Gas 'N Shop invoked the jurisdiction of the wrong district court fails. This appeal, too, for the reasons stated in the last mentioned opinion, is controlled by the substantive law applied therein, and the scope of our review is de novo on the record.

Except for the evidence which relates to the location of the premises in question as outlined hereinafter, the evidence in this case is the same as that summarized in *Gas 'N Shop v. Nebraska Liquor Control Comm., ante* p. 905, 492 N.W.2d 12 (1992) (case No. S-90-216).

The location is in a commercial and business district. According to the Nebraska Department of Roads state highway count, 3,500 vehicles pass the location daily. Within a 1/2-mile radius of the site, there are four licenses which permit the sale in their original packages of all types of liquors for consumption either on or off the premises, two licenses allow the sale of all types of alcoholic liquors for consumption off the premises, one permits the sale of beer only for consumption on the premises, and one permits the sale of beer and wine for consumption on the premises. However, the last described license is held by a restaurant which closed for business prior to the commission's hearing herein.

These differences do not warrant a conclusion other than that the conditions specified in Neb. Rev. Stat. § 53-132(2)(a), (b), (c), and (d) (Reissue 1984) have been met and that Gas 'N Shop's application should therefore be granted.

Accordingly, we reverse the judgment of the district court and remand the cause with the direction that the district court order the commission to issue the license sought.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. ROY K. LYMAN, APPELLANT.

492 N.W.2d 16

Filed November 20, 1992. No. S-91-112.

1. **Postconviction.** An evidentiary hearing on a motion for postconviction relief is not required if the motion alleges only conclusions of fact or law or if the record and files in the case affirmatively establish that the defendant is not entitled to relief.
2. **Pleas: Effectiveness of Counsel: Proof.** In an ineffective assistance of counsel action based on a guilty-plea conviction, the prejudice requirement is satisfied if the defendant shows a reasonable probability that, but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.
3. **Effectiveness of Counsel: Confessions: Evidence.** The failure of counsel to investigate or move to suppress a questionable confession is not per se ineffective assistance of counsel if it can be shown from the record that the evidence is so overwhelming against the defendant that failure to investigate or suppress the

confession was a reasonable strategic move by counsel or that the defendant suffered no prejudice from counsel's inaction.

4. **Effectiveness of Counsel: Appeal and Error.** The strategic merits of asserting a legal defense should be left to legal practitioners, and those strategic decisions, if reasonable, will not be second-guessed by the courts.
5. **Postconviction: Appeal and Error.** Under the procedural bar rule, a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased.
6. **Pleas: Sentences: Time: Appeal and Error.** Although a trial court's failure to inform a defendant of the mandatory consecutive nature of sentences is error, this error will not render a guilty plea invalid if the defendant is informed of the minimum time he will serve in prison and the possible range of his or her sentences.
7. **Effectiveness of Counsel.** One of the things a defendant must show when alleging ineffective assistance of counsel is that the deficient performance prejudiced the defendant by altering the results of the proceeding.
8. **Postconviction: Right to Counsel.** The law does not guarantee the right to counsel in a postconviction proceeding.

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

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

Roy K. Lyman, pro se.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

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

WHITE, J.

Roy K. Lyman appeals the district court's denial of his motion for postconviction relief. See Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989). The district court found that Lyman had failed to meet his burden of showing that his constitutional rights had been denied by his 1987 guilty-plea convictions and therefore denied him relief on the motion. We affirm.

This is Lyman's second appearance before this court. In *State v. Lyman*, 230 Neb. 457, 432 N.W.2d 43 (1988) (*Lyman I*), we affirmed Lyman's convictions of two counts of first degree assault and one count of use of a knife in the commission of a

felony. Lyman had originally been charged with eight felony counts for stabbing his two infant daughters, his ex-wife, and his ex-wife's boyfriend. Pursuant to a plea bargain, the charges were reduced to the three listed above, and Lyman pled guilty. He was sentenced to 5 to 10 years in prison on each count, with the sentences to run consecutively.

After we affirmed his convictions, Lyman filed a motion for postconviction relief in the Douglas County District Court. The district court determined that the 20-page motion, which is not before us, alleged ineffective assistance of counsel, in violation of Lyman's constitutional right to counsel. The motion apparently alleged that counsel had inappropriately (1) failed to investigate the admissibility of Lyman's confession to police; (2) failed to move to suppress the confession; (3) failed to have a hearing on Lyman's competency to plead guilty; and (4) failed to discuss possible defenses, including the insanity defense, with Lyman.

The district court held that Lyman had not met his burden of alleging facts sufficient to show that his rights had been constitutionally violated and thus denied Lyman relief. The court refused to grant an evidentiary hearing on the postconviction motion, and Lyman perfected this appeal.

Through his own pro se brief and the brief of his appellate counsel, Lyman alleges several errors by the district court. Lyman's first assignment of error alleges that the district court erred in failing to find that Lyman had been denied effective assistance of counsel by his original counsel's failure to perform the previously mentioned actions that Lyman had listed in his motion for postconviction relief.

Lyman next alleges that his guilty plea was not knowing and voluntary because (1) counsel failed to advise Lyman of the mandatory consecutive nature of the sentences for the crimes to which he pled guilty, (2) counsel failed to apprise Lyman of the minimum time he would serve in prison, and (3) the trial court inadequately informed Lyman of the possible sentences which could be imposed for the crimes charged. Lyman further alleges that it was error not to grant an evidentiary hearing on the ineffectiveness and voluntariness issues. Finally, Lyman alleges that his rights were violated because the information that

charged Lyman was constitutionally inadequate and because he was not allowed to review and contest his presentence report.

INEFFECTIVE ASSISTANCE OF COUNSEL

The most problematic points raised by Lyman involve the alleged ineffective assistance of his trial counsel. Lyman first alleges that counsel erred by failing to investigate the confession Lyman made to police and by failing to move to suppress the confession. Lyman's second ineffective assistance claim stems from his counsel's failure to have a hearing on Lyman's competency to plead guilty and his counsel's alleged failure to discuss the insanity defense with Lyman. Lyman asserts that the district court erred by refusing an evidentiary hearing on the effectiveness of Lyman's counsel.

Under the Nebraska Postconviction Act, a defendant who moves for relief must allege facts that, if proved, constitute a violation or denial of the defendant's constitutional rights, thereby rendering the judgment against the movant void or voidable. *State v. Start*, 229 Neb. 575, 427 N.W.2d 800 (1988). An evidentiary hearing on a motion for postconviction relief is not required if the motion alleges only conclusions of fact or law or if the record and files in the case affirmatively establish that the defendant is not entitled to relief. *State v. Keithley*, 238 Neb. 966, 473 N.W.2d 129 (1991); *Start, supra*.

Normally, a voluntary guilty plea waives all defenses to a charge. However, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *State v. Russell*, 239 Neb. 979, 479 N.W.2d 798 (1992) (citing *State v. Stranghoener*, 212 Neb. 203, 322 N.W.2d 407 (1982)).

The standard of review for an ineffective assistance of counsel claim is well defined:

> " 'A defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed on appeal unless clearly erroneous. [Citations omitted.]
> " 'When the defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the

attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.' " '

". . . '[T]o sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.' . . ."

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

When a conviction involves a guilty plea, the prejudice requirement is satisfied if the defendant shows a reasonable probability that, but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty. *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *State v. Wakeman*, 231 Neb. 66, 434 N.W.2d 549 (1989). The entire ineffectiveness analysis is viewed with the strong presumption that counsel's actions were reasonable, and even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

We first apply the ineffective assistance analysis to the allegations regarding Lyman's confession. At the plea hearing, after the trial court had meticulously explained Lyman's rights to him, including the fact that a statement made before a suspect's *Miranda* rights are read to him or her is inadmissible, Lyman stated that he had not been read his rights before confessing. The following exchange then occurred:

[The court:] What I'm trying to say is the county attorney had indicated to me that you gave a statement. If

the case went to trial, they would have to show to me out of the presence of the jury that you were properly advised of your rights. I don't know whether you were or not. I was not there. But the point is that by entering a plea of guilty, you are waiving or giving up your right to such a pretrial hearing.

A. Yes.

Q. And you could not raise that again either in this court or on any possible subsequent appeal. In other words, a guilty plea waives all these pretrial matters. Do you understand where I'm coming from?

A. Yes.

Q. At this time, then, I will ask you, how do you plead to the charge set out in Count I, that being the charge of first degree assault on [the older child]? How do you plead?

A. Guilty.

Lyman similarly pled guilty to the other two charges. He now argues that his waiver was involuntary because his counsel neither investigated the admissibility of the confession nor moved to suppress the confession. Because a guilty plea normally waives all defenses, Lyman now has the burden of showing that the ineffectiveness of his counsel rendered the plea invalid.

It is debatable whether the deficiency requirement of the test is even met. There is a strong presumption that counsel acted reasonably. Lyman basically asserts that any competent attorney would have tried to suppress, or at least would have investigated the admissibility of, the confession. There is, however, no per se rule mandating investigation or suppression of questionable confessions. See *Strickland*, 466 U.S. at 691 ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"). As our discussion of the prejudice requirement will indicate, counsel's failure to investigate or suppress the confession was very likely based on sound trial strategy.

Even if Lyman could show that his counsel's representation was deficient, he cannot show that the alleged deficiency prejudiced him. Lyman's burden is to show a reasonable

probability that, but for the errors of counsel, he would have insisted on going to trial rather than pleading guilty. *Lockhart, supra*; *Wakeman, supra*. Lyman claims this is exactly what he would have done. "Had counsel properly assisted the Defendant with regard to said [suppression] Motions [sic], the Appellant in this case would not have plead [sic] guilty." Brief for appellant at 13. Unfortunately, Lyman does not tell us why the results would have been different.

In *State v. Hochstein*, 216 Neb. 515, 519-20, 344 N.W.2d 469, 473 (1984), we stated that "[the defendant] is unable to establish in any meaningful way how those failures [of counsel], if in fact they occurred, prejudiced [him] or, if handled in another manner, would have produced a different result. His claims at best are mere assertions." Likewise, Lyman presents only assertions.

Lyman's only statement as to the prejudicial nature of the confession is that the confession was the "cornerstone" of the State's case. We disagree. As the State correctly points out, the evidence against Lyman was overwhelming. Lyman's ex-wife and her boyfriend were eyewitnesses to the crime and were themselves stabbed. Nothing indicates that they could not testify. In addition, police found Lyman a few blocks from the scene of the crime, covered with blood. On their arrival, Lyman blurted out that he was "responsible for what happened down the street" and asked the officers to take him to jail.

Because the confession goes only to the issue of the identity of the perpetrator, its nonsuppression was hardly prejudicial. As for counsel's failure to move to suppress, a review of the plea bargain shows it to be sound defense strategy. Under the original counts charged against him, Lyman faced up to 205 years in sentences. See Neb. Rev. Stat. §§ 28-105 (Reissue 1985) and 28-201(4)(a), 28-303, 28-308, 28-309, and 28-1205 (Reissue 1989). Based on the plea bargain, Lyman pled guilty to a charge carrying a maximum possible sentence of 60 years. His actual maximum sentence was 30 years. Suppression of the confession would have mattered only at trial, and failure to plead guilty would likely have jeopardized the favorable plea agreement.

Lyman's counsel's decision not to investigate or move to suppress the confession was not prejudicial to Lyman. Nothing

he has shown us shows any probability that, had counsel acted differently, Lyman would have chosen to go to trial.

Lyman's situation is very similar to the one we encountered in *State v. Kerns*, 203 Neb. 278, 278 N.W.2d 348 (1979), in which we also denied postconviction relief. In *Kerns*, as in the case at bar, the trial court explained to the defendant that certain identification evidence would be admissible only after a ruling on the issue and that a guilty plea would waive the right to that hearing. With overwhelming evidence against him, Kerns chose to plead guilty to a reduced charge. Kerns then sought postconviction relief, alleging ineffective assistance of counsel because counsel had not informed him of the reasonable possibility of suppressing the identification evidence. After an evidentiary hearing and denial of relief by the district court, Kerns appealed. We stated:

> In view of the eyewitness identification by the two victims of the crimes, the likelihood of conviction, the favorable plea bargain arranged by counsel, and the patient explanation by the court specifically addressed to the rights of the appellant now raised, the suggestion that the appellant's plea of guilty was somehow either induced by the failure of counsel to move to suppress the eyewitness identification or that such failure to file a *Wade* [suppression] motion indicated a lack of competence of counsel is patently frivolous.

Id. at 281-82, 278 N.W.2d at 350. Lyman's ineffective assistance of counsel arguments based on his confession are similarly without merit. He has made no showing of facts indicating that he is entitled to relief. The failure of the district court to grant an evidentiary hearing on these matters was not clearly erroneous.

Lyman next asserts that his counsel was ineffective for failing to have a hearing on Lyman's competency to plead guilty and for failing to discuss possible defenses, including the insanity defense, with Lyman. Our analysis on these issues is the same as on the confession-based issues, namely, was counsel's performance deficient, and if so, was there a reasonable probability that, but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.

Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *State v. Wakeman*, 231 Neb. 66, 434 N.W.2d 549 (1989). An evidentiary hearing is properly denied on a postconviction motion when the record and files in the case affirmatively establish that the defendant is not entitled to relief. *State v. Keithley*, 238 Neb. 966, 473 N.W.2d 129 (1991).

With regard to the issue of whether a competency hearing should have been held, nothing in this record indicates that Lyman was not competent to plead guilty. "A defendant is competent to plead or stand trial if he has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense." *State v. Painter*, 229 Neb. 278, 283, 426 N.W.2d 513, 517 (1988). At the plea hearing, the court explained the nature of the charges, the possible sentences, and the constitutional rights accorded Lyman. On several occasions, Lyman stated that he understood what was occurring. In addition, both examining psychiatrists stated that Lyman was competent to stand trial and to work with his attorney.

The record indicates that Lyman was competent to stand trial, and nothing indicated the need for a competency hearing. The district court correctly denied an evidentiary hearing on this matter.

Lyman's final ineffective assistance of counsel assignment of error deals with the insanity defense. Lyman assigns as error that his counsel did not discuss this defense with him. His argument, however, focuses on counsel's allegedly inadequate investigation of the defense. Neither claim has merit. The record of the plea hearing contains two lengthy discussions between the court and counsel with regard to the insanity defense. During one of these discussions, Lyman stated that he had discussed the insanity defense with his lawyer. The court also offered Lyman time to reconsider the merits of the defense instead of pleading guilty, to which Lyman responded, "No. I will go with it [the guilty plea]." There is no evidence before us, aside from Lyman's bald assertion, that counsel had not, in fact, discussed the defense with Lyman.

As for counsel's investigation of the insanity defense and his

failure to move for a sanity hearing, the record again shows that counsel's actions were not deficient. Two psychiatrists interviewed Lyman, one on several occasions. Both stated that although Lyman was "mentally disturbed" at the time of the crime, he understood the nature or wrongfulness of his acts and, therefore, would not have passed the test for legal insanity. Although one psychiatrist wrote Lyman a letter stating that there might be a "good argument to consider you legally insane," it is not for psychiatrists to decide the merits of legal arguments; that should be left to those engaged in the practice of law. The same psychiatrist also stated in her reports that Lyman showed no signs of psychosis or psychiatric disorder and that Lyman understood that his acts were deserving of punishment.

Lyman's counsel adequately investigated the insanity issue and, based on psychiatric opinions that Lyman was not legally insane, made a tactical decision not to assert the defense. We will not second-guess reasonable strategic decisions by counsel. As the U.S. Supreme Court has noted:

> The principal value of counsel to the accused in a criminal prosecution often does not lie in counsel's ability to recite a list of possible defenses in the abstract, nor in his ability, if time permitted, to amass a large quantum of factual data and inform the defendant of it. Counsel's concern is the faithful representation of the interest of his client, and such representation frequently involves highly practical considerations as well as specialized knowledge of the law. Often the interests of the accused are not advanced by challenges that would only delay the inevitable date of prosecution . . . or by contesting all guilt
> . . . .

(Citations omitted.) *Tollett v. Henderson*, 411 U.S. 258, 267-68, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1972).

Lyman has failed to meet his burden of alleging facts that show deficient representation and prejudice. The record shows that Lyman was not entitled to relief. The district court correctly denied an evidentiary hearing on the ineffective assistance of counsel claims.

VOLUNTARINESS OF THE PLEA

We can easily dispose of the assignments of error relating to the voluntariness of the guilty plea. The result on each is dictated, directly or indirectly, by our decision in Lyman's original appeal. In *Lyman I*, we held that although the trial court's failure to inform Lyman of the mandatory consecutive nature of his sentences was error, it was not prejudicial because Lyman was informed of his combined minimum sentence. We stated:

> The purpose of the rule requiring that the defendant be advised of mandatory consecutive sentencing is "to apprise the defendant of the minimum time he will serve in prison so that his plea of guilty is given with full knowledge of the consequences." . . . In this case the defendant was advised that the minimum sentence would be 3 years.
>
> . . . Under these circumstances, the error [failure of the court to inform of mandatory consecutive sentences] was not prejudicial and does not require that the judgment be reversed.

(Citations omitted.) *Lyman I*, 230 Neb. 457, 459, 432 N.W.2d 43, 44-45 (1988).

On postconviction, Lyman argues that the district court erred in failing to apprise him of the minimum time he would spend in prison. At the plea hearing, the trial court stated that Lyman could be sentenced to "as high as three to 60 years" of imprisonment. Lyman alleges that he could actually have been sentenced to as high as 20 to 60 years. See Neb. Rev. Stat. § 83-1,105(1) (Reissue 1987) (providing that the minimum term of an indeterminate sentence cannot exceed one-third of the overall maximum allowable sentence). Lyman alleges that this discrepancy misinformed him and rendered his plea involuntary.

The easy answer to this allegation is that this argument should have been raised on direct appeal. "This court has consistently applied the procedural bar rule whereby ' "[a] motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or

rephrased." ' " *State v. Whitmore*, 238 Neb. 125, 130, 469 N.W.2d 527, 531 (1991) (quoting *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991)). Lyman's postconviction sentencing argument was clearly apparent at the time of his direct appeal, because on that appeal Lyman raised a different sentencing argument that involved the same language at issue here. See *Lyman I, supra*.

Lyman's present sentencing argument is also without merit for the same reason his first sentencing argument failed on direct appeal—he suffered no prejudice. While the court's language may not have informed Lyman of the maximum minimum sentence, the court did succeed in informing him of the most important factors: the upper and lower possible limits on his sentence. Because Lyman knew that he could spend 60 years in prison, or 3, or some amount in between, he had the information necessary to make an intelligent and voluntary decision on whether to plead guilty. The district court correctly denied relief on this assignment of error.

Lyman's other postconviction attacks on the voluntariness of his plea raise the same issues as the aforementioned sentencing arguments. The only difference is that he now alleges that it was error for his *counsel*, as opposed to the court, not to inform him of the mandatory consecutive nature of the sentences or the minimum time he would spend in prison.

One of the things a defendant must show when alleging ineffective assistance of counsel is that the deficient performance prejudiced the defendant by altering the results of the proceeding. See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As we have already stated, Lyman was not prejudiced by the trial court's statements or lack of statements. He fails to show how his counsel's actions would render his plea involuntary when the court's actions did not. The record and files in the case show that Lyman was not entitled to relief based on the voluntariness of his plea. The district court was not required to grant an evidentiary hearing, and it correctly denied relief.

Lyman's final assignments of error allege that the trial court erred by failing to find invalid the information that charged Lyman with the crimes and by failing to allow Lyman to review

the presentence report. These allegations could have been raised on appeal and were not. Postconviction is not a substitute for appeal, and we therefore do not consider Lyman's final assignments of error. See, *Whitmore, supra*; *Otey, supra*.

Neither do we agree with Lyman's contention that he should have been afforded counsel to prepare his postconviction petition. Nothing in Nebraska case law guarantees the right to counsel in a postconviction proceeding. It also warrants mention that Lyman was represented by counsel on this appeal. The district court was not required to appoint counsel for Lyman, and the court's refusal to do so was not error.

The district court correctly ruled that Lyman failed to meet his burden of proof to warrant an evidentiary hearing or postconviction relief. We affirm the ruling of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM G. VERMUELE, APPELLANT.

492 N.W.2d 24

Filed November 20, 1992. No. S-91-276.

1. **Appeal and Error.** To be considered by an appellate court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred.
2. **Police Officers and Sheriffs: Search and Seizure: Search Warrants: Proof.** If police have acted without a search warrant, the State has the burden to prove that the search was conducted under circumstances substantiating the reasonableness of such search or seizure.
3. **Constitutional Law: Motor Vehicles: Police Officers and Sheriffs: Investigative Stops: Search and Seizure.** To determine whether any physical evidence is constitutionally inadmissible, a court must first examine the circumstances surrounding the officers' stop of the vehicle, for, if the initial stop was unconstitutional, any subsequent search and evidence obtained through that search are constitutionally inadmissible as the "fruit of the poisonous tree."
4. **Motor Vehicles: Police Officers and Sheriffs: Investigative Stops: Probable Cause: Search and Seizure: Search Warrants.** Police officers who have lawfully stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it may conduct a warrantless search of the vehicle

that is as thorough as a magistrate could authorize by warrant.

5. **Criminal Law: Police Officers and Sheriffs: Arrests: Probable Cause: Evidence.** A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed a felony or a misdemeanor and the officer has reasonable cause to believe that such person may destroy or conceal evidence of the commission of such misdemeanor.
6. **Criminal Law: Police Officers and Sheriffs: Arrests: Probable Cause.** When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant.
7. **Constitutional Law: Criminal Law: Investigative Stops: Probable Cause.** When an anonymous tip has been sufficiently corroborated to furnish reasonable suspicion that a person is engaged in criminal activity, an investigative stop does not violate the Fourth Amendment.
8. **Motor Vehicles: Investigative Stops: Search and Seizure: Probable Cause.** If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.
9. **Probable Cause.** An anonymous tipster's explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles the tip to greater weight than might otherwise be the case.
10. **Motor Vehicles: Search and Seizure: Probable Cause.** The scope of a warrantless search of an automobile is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found.
11. **Motor Vehicles: Search and Seizure.** The distinction between the search of an automobile that coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile has been abolished.
12. **Sentences: Appeal and Error.** 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.

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

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

Don Stenberg, Attorney General, and James A. Elworth for appellee.

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

PER CURIAM.

In this appeal, William G. Vermuele complains that his

convictions for possession of (1) cocaine, (2) marijuana, and (3) drug paraphernalia were obtained through the use of illegally seized evidence. He also complains that his sentence of not less than 20 nor more than 60 months for possession of cocaine is excessive. Vermuele waived a jury trial and was tried and sentenced by a judge of the district court for York County.

Vermuele was fined for possession of marijuana and for possession of drug paraphernalia. He assigns no error in connection with the imposition of those fines. To be considered by an appellate court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred. *State v. Moss*, 240 Neb. 21, 480 N.W.2d 198 (1992).

We affirm Vermuele's convictions and sentences.

In his brief, Vermuele argues only (1) that the district court erred in failing to sustain his motion to suppress evidence relating to cocaine found in his wallet; (2) that his conviction, apparently on the cocaine charge, is contrary to law; and (3) that his prison sentence on the cocaine conviction is excessive.

Vermuele claims that there was no probable cause to search the vehicle in which he was a passenger. He also claims that the warrantless search of his wallet was improper because (1) the search constituted a search of a container within a vehicle, not of the vehicle itself; (2) the officers had no reason to believe that any particular contraband was contained within the wallet; and (3) the search was conducted without proper inventory procedures.

If police have acted without a search warrant, the State has the burden to prove that the search was conducted under circumstances substantiating the reasonableness of such search or seizure. *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992). To determine whether any physical evidence is constitutionally inadmissible, a court must first examine the circumstances surrounding the officers' stop of the vehicle, for, if the initial stop was unconstitutional, any subsequent search and evidence obtained through that search are constitutionally inadmissible as the "fruit of the poisonous tree." See *State v. Thomas, supra* (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)).

The record reflects that in approximately October 1987, the

York Police Department began an ongoing investigation concerning trafficking in controlled substances by Vermuele. The investigation was initiated after an officer had attended a drug intelligence meeting with a Hamilton County deputy sheriff and a member of the Nebraska State Patrol. The officer also learned that Vermuele had been arrested in Polk County for possession of cocaine. The deputy sheriff informed the York police officer that Vermuele was actively engaged in trafficking in controlled substances, mainly cocaine. A second York police officer testified he was also involved in the ongoing investigation concerning "bringing drugs into York, Nebraska."

On the evening of December 30, 1988, an anonymous caller informed the York Police Department that he had personally overheard Vermuele make arrangements with Vermuele's coworkers to sell them cocaine when Vermuele arrived at work the next evening at 7:30 at Consolidated Pet Foods (Consolidated). The informant reported that approximately 70 percent of the employees at Consolidated had cashed their checks and would be waiting for Vermuele. At that time, according to the caller, the defendant would sell them 2 to 3 ounces of 86-percent-pure cocaine. The informant further reported that Vermuele had been selling a minimum of 2-ounce quantities of cocaine on a weekly basis to his fellow employees and that Vermuele was a major source of "incoming cocaine [and] methamphetamine."

The caller advised York police that Vermuele lived in Polk, Nebraska, drove a 1975 black Chevrolet Monte Carlo with the Nebraska license plate number 41-D653, and worked at Consolidated. The informant also gave the police a general description of the defendant, including his race, sex, birth date, height, weight, and hair and eye color. The caller said that the defendant was generally accompanied by James T. Haith of Central City, Nebraska. The informant also gave police a general description of Haith, including various vital statistics, and a description of the automobile driven by Haith.

Approximately one-half hour after the anonymous call was received by the police, York police officer Roger Wolfe stopped a black Chevrolet Monte Carlo with a license plate matching the

description given by the informant. Vermuele was driving the vehicle, and Haith was a passenger. Wolfe testified that his stop was precipitated by a computer check that revealed the license plates on the defendant's car were improper. However, a subsequent check of the car's registration showed the plates had been registered to the Monte Carlo that day and had not yet been entered on the computer. At the time of Officer Wolfe's stop, he was not aware of the anonymous call that had been made to the York Police Department.

In following up on the anonymous call, an independent investigation conducted by the York police officers confirmed the descriptions and vital statistics of Vermuele and Haith as given by the caller and their employment at Consolidated. York police previously had observed Haith driving a vehicle that was somewhat similar to the description given by the informant. Officer Wolfe testified that his investigation, conducted after the anonymous call, revealed that Vermuele had a cocaine addiction problem and that in 1988 Vermuele had been convicted of cocaine possession in Polk County. Vermuele was incarcerated in the York County jail for that crime. This information was supplied to Officer Wolfe by Vermuele's jailer, to whom Vermuele admitted his cocaine addiction. Obviously, the York County jailer would be a reasonably trustworthy source of information.

On the evening of December 31, 1988, police waited for the defendant and Haith near Consolidated on Division Avenue in York. About 7:23 p.m., officers observed a vehicle, known by one of the officers to be Haith's, approaching Consolidated. In addition, the vehicle in several material respects matched the description of Haith's vehicle given by the informant. The officers stopped the vehicle and obtained identification from the driver, Haith, and his passenger, Vermuele. After removing identification from his wallet, Vermuele placed his wallet on the dashboard of the vehicle. The officers conducted a search for weapons and contraband. In the search, marijuana and drug paraphernalia were found on the defendant. A hash pipe was found under the driver's seat, where Haith had been seated. Both the defendant and Haith were arrested.

Vermuele's wallet was removed from the vehicle and taken to

the police station, where it was searched. Inside the wallet, police discovered two razor blades. A substance on the razor blades was subsequently determined to be cocaine. Vermuele was charged with possession of cocaine, a violation of Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 1988), a Class IV felony; possession of marijuana under 1 ounce, § 28-416(6), an infraction; and possession of drug paraphernalia, Neb. Rev. Stat. § 28-441 (Reissue 1989), an infraction.

Following a July 14, 1989, suppression hearing, the trial court on November 7 granted Vermuele's motion to suppress the evidence seized from his person and property on December 31, 1988. A single judge of this court reversed the order in the State's interlocutory appeal, as provided in Neb. Rev. Stat. § 29-824 et seq. (Reissue 1989). *State v. Vermuele*, 234 Neb. 973, 453 N.W.2d 441 (1990). In the subsequent bench trial, the judge took judicial notice of the facts heard at the suppression hearing and overruled Vermuele's objection to the use of evidence seized from the motor vehicle in which Vermuele was riding. At the close of all the evidence and arguments, Vermuele was convicted of all charges filed against him.

Police officers who have lawfully stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it may conduct a warrantless search of the vehicle that is as thorough as a magistrate could authorize by warrant. *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). This "automobile exception" to the Fourth Amendment's warrant requirement, which exception is established in *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925), applies only to searches of vehicles that are supported by probable cause. In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not been obtained. *United States v. Ross, supra.* Thus, an analysis of a warrantless search of a vehicle requires this court to address two issues, (1) the validity of the stop and (2) the existence of probable cause to believe the vehicle contains contraband.

> The issuing magistrate must make a practical, commonsense decision whether, given the totality of the

> circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. . . .
>
> The duty of an appellate court in determining whether probable cause existed at the time a search warrant was issued is to ensure that the magistrate had a substantial basis for concluding that probable cause did in fact exist.

State v. Utterback, 240 Neb. 981, 985, 485 N.W.2d 760, 766 (1992).

A review of the evidence in Vermuele's case reveals that there was probable cause for the officers to stop the vehicle and to search it. Thus, it necessarily follows that the undisputed objective facts in Vermuele's case would justify the issuance of a search warrant.

In addition, Neb. Rev. Stat. § 29-404.02 (Reissue 1985) provides that

> A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed:
>
> (1) A felony; or
>
> (2) A misdemeanor, and the officer has reasonable cause to believe that such person . . . (c) may destroy or conceal evidence of the commission of such misdemeanor
>
> . . . .

When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant. *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992). If the York police had probable cause to arrest Vermuele, the stop was lawful.

Vermuele had previously been convicted of cocaine possession and was the subject of an ongoing criminal investigation for drug trafficking. All of the information given by the anonymous informant, except the actual possession of cocaine by the suspect, was verified by the officers and therefore proven trustworthy. In addition, the defendant was

approaching Consolidated at the approximate time the anonymous caller reported the drug sale would take place. Based on personal knowledge and information reasonably trustworthy under the circumstances, the York police had probable cause to believe that at least one of two felonies was being committed, i.e., possession of cocaine or possession of cocaine with intent to deliver. See § 28-416. The stop by the York police was lawful.

Additionally, " 'a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest.' " *State v. Thomas*, 240 Neb. 545, 554, 483 N.W.2d 527, 534 (1992) (quoting *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). Citing *Terry*, the Court in *Alabama v. White*, 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990), examined the relationship between an informant's reliability and the corroboration necessary to justify an investigative stop based on an informant's tip. The Court concluded that when an anonymous tip has been sufficiently corroborated to furnish reasonable suspicion that a person is engaged in criminal activity, the investigative stop does not violate the Fourth Amendment. *Alabama v. White, supra.* Because the anonymous tip in this case was sufficiently corroborated to furnish reasonable suspicion that Vermuele was engaged in criminal activity, the officers were justified in stopping the car in which he was a passenger. See *State v. Patterson*, 237 Neb. 198, 465 N.W.2d 743 (1991).

We need also decide whether the York police had probable cause to believe that the automobile in which Vermuele was a passenger contained contraband. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. *United States v. Ross, supra.* In this case, if probable cause existed, any expectation of privacy in the vehicle or its contents would be subject to the authority of the officers to conduct a warrantless search, and consequently, the evidence found in Vermuele's wallet would be admissible. See, *id.*; *United States v. Johns*, 469 U.S. 478, 105 S. Ct. 881, 83 L. Ed.

2d 890 (1985).

The concept of probable cause is not readily, or even usefully, reduced to a neat set of legal rules. *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). " ' "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. . . ." ' " *Illinois v. Gates*, 462 U.S. at 231-32 (quoting *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981)). An officer need only have a reasonable belief, based on personal knowledge and other trustworthy information, that an offense has been or is being committed. *State v. Coleman, supra.*

Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability and must be weighed in the totality of the circumstances to determine whether probable cause exists. *Illinois v. Gates, supra.* The U.S. Supreme Court, commenting on the requirement of credibility of anonymous informants, stated that "[anonymous] tips, particularly when supplemented by independent police investigation, frequently contribute to the solution of otherwise 'perfect crimes.' " *Illinois v. Gates*, 462 U.S. at 237-38. While a conscientious assessment of the basis for crediting such tips is required by the Fourth Amendment, a standard that leaves virtually no place for anonymous citizen informants is not. *Illinois v. Gates, supra.* According to Neb. Rev. Stat. § 29-404.03 (Reissue 1989), an anonymous tip may be considered along with other facts and circumstances.

Given the totality of the circumstances, the officers had probable cause to believe that cocaine would be found in the vehicle in which Vermuele was a passenger. The anonymous caller informed police he personally overheard Vermuele make plans to unlawfully deliver cocaine to a specific class of people in a specified amount at a specified time and place. An anonymous tipster's "explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles [the] tip to greater weight than

might otherwise be the case." *Illinois v. Gates*, 462 U.S. at 234.

At the time police stopped the vehicle in which the defendant was riding, it was headed, near the specified time, toward the place where the defendant was heard to say he would deliver the cocaine. Before the stop, every facet of the information given by the anonymous caller, except the actual possession by the defendant of the cocaine, had been personally verified by the officers, including a description of two vehicles Vermuele would likely be traveling in and the approximate time that the defendant would be going to Consolidated to make the cocaine sale and delivery. In addition, the officers knew that Vermuele had been a cocaine addict, that he had been found guilty of a cocaine possession charge in the past, and that he had previously been linked with the delivery of drugs in York County. Under the totality of the circumstances, the officers had reasonable grounds to believe the remaining unverified bit of the informant's information to be true, that Vermuele would have cocaine in his possession. See *Illinois v. Gates, supra*.

Vermuele contends that the wallet was improperly searched because it was incapable of containing 2 to 3 ounces of cocaine. However, an officer testified that he expected to find such a quantity of cocaine contained in several small packages. At the suppression hearing, the officer testified that the wallet was searched "[b]ecause cocaine and amphetamines can be placed in small plastic containers or wrapped in paper and hidden in a wallet." Vermuele presented no evidence which contradicted this testimony.

Vermuele also argues that the search of his wallet was a search of a container found within a vehicle and thus does not fall within the exception outlined by *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). We disagree. The court in *Ross* stated that

> [t]he scope of a warrantless search of an automobile . . . is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found.

United States v. Ross, 456 U.S. at 824.

The distinction between "the search of an automobile that

coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile" has been abolished recently by the U.S. Supreme Court. *California v. Acevedo*, ____ U.S. ____, 111 S. Ct. 1982, 1991, 114 L. Ed. 2d 619 (1991).

> The protections of the Fourth Amendment must not turn on such coincidences. We therefore interpret *Carroll* as providing one rule to govern all automobile searches. The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.

California v. Acevedo, 111 S. Ct. at 1991. There being probable cause to believe the vehicle contained contraband, the police were entitled to search both the vehicle in which Vermuele was riding and his wallet found inside the vehicle.

Vermuele argues that the wallet search was conducted without proper inventory procedures. However, the search is governed by the *Carroll/Ross* "automobile exception," and Vermuele's attempt to characterize it as an inventory search is not valid.

Vermuele's assignments of error that his motion to suppress should have been sustained and that his conviction is contrary to law are without merit.

Finally, Vermuele argues that his prison sentence for possession of cocaine is excessive in view of the small amount of cocaine found on the razor blades and because of his attempts at rehabilitation. He was ordered to serve not less than 20 months nor more than 60 months for the offense of possession of cocaine. This is within the statutory limits. 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. Crowdell, ante* p. 216, 487 N.W.2d 273 (1992).

The trial judge, in sentencing Vermuele, stated:

> I think there is a likelihood that you will continue to break the law, given your past record. Even though, apparently, you've made attempts to . . . turn your life around. I've concluded, nevertheless, that you're not a suitable

candidate for probation because I think to grant a probation additionally in this kind of case simply promotes this kind of activity and disrespect for the law.

Vermuele's sentence is within statutory limits and does not constitute an abuse of discretion by the trial court. His final assignment of error has no merit.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHRISTOPHER M. GARZA, APPELLANT.

492 N.W.2d 32

Filed November 20, 1992. No. S-91-283.

1. **Confessions: Proof.** The State has the burden to establish by a preponderance of the evidence that a defendant's statement was voluntary and not given as the result of coercion.
2. **Confessions: Police Officers and Sheriffs: Due Process.** Coercive police conduct is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the 14th Amendment.
3. **Confessions: Proof.** Factors to be taken into consideration in determining whether there was coercive action, thus negating the voluntariness of a defendant's statement, include that (1) defendant is in custody at the time of the statement, (2) defendant is alone and unrepresented by counsel, (3) the promise or inducement is initiated by prosecuting officials as opposed to defendant or someone acting on his or her behalf, (4) defendant is aware of his or her constitutional and other legal rights, (5) the potentially incriminating statement is part of an abortive plea bargain, (6) the promise or inducement leading to the statement is fulfilled by prosecuting authorities, and (7) defendant is subjected to protracted interrogation or evidence appears on the record to show that coercion precludes the statement from being knowing and intelligent.
4. **Confessions.** The voluntariness of a statement is determined by considering all the circumstances.
5. **Confessions: Police Officers and Sheriffs: Self-Incrimination.** The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of a defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.
6. **Police Officers and Sheriffs.** Custodial interrogation takes place by questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way.

7. **Miranda Rights.** If the defendant is in fact in custody or his or her movement is restricted, the procedural safeguards under *Miranda* require the defendant to be told that (1) he or she has the right to remain silent, (2) anything said can and will be used in court, and (3) he or she may consult an attorney, retained or appointed, and has a right to have one present during interrogation.
8. _____. The *Miranda* safeguards come into play whenever one in custody is subjected to either express questioning or its functional equivalent.
9. **Miranda Rights: Police Officers and Sheriffs: Words and Phrases.** The term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.
10. **Confessions.** Whether a statement is voluntary or the result of State coercion or promise is a question of fact.
11. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous.
12. _____: _____. In deciding whether a trial court's ruling on a motion to suppress is erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed the witnesses testifying in regard to such motion.
13. **Confessions: Appeal and Error.** A trial court's preliminary determination that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong.
14. **Confessions: Police Officers and Sheriffs: Miranda Rights: Waiver.** The admissibility of a conversation between an accused and the police after the accused's earlier invocation of the rights to counsel and to remain silent is determined by whether the accused initiated the conversation and, if so, whether the accused knowingly and intelligently waived those rights.
15. **Criminal Law: Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** An appeal from the denial of a transfer of a criminal case to juvenile court is reviewed for an abuse of discretion.
16. **Criminal Law: Courts: Juvenile Courts: Jurisdiction.** There is no arithmetical computation or formula required in a court's consideration of the statutory criteria or factors for transferring a criminal case to the juvenile court.
17. **Criminal Law: Courts: Jurisdiction: Minors.** For retention of a criminal case against a juvenile, the district court need not resolve every factor against the juvenile; neither are there any weighted factors.
18. **Criminal Law: Courts: Juvenile Courts: Jurisdiction.** The statutory criteria or factors specified by Neb. Rev. Stat. § 43-276 (Reissue 1988) to transfer a criminal case to the juvenile court impose a balancing test by which public protection and societal security are weighed against practical and not problematical rehabilitation of the juvenile.
19. **Constitutional Law: Juries: Discrimination: Proof.** In order to establish a prima facie violation of the fair-cross-section requirement under the Sixth

Amendment, a defendant must show (1) that the group alleged to be excluded is a distinctive group in the community, (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

20. **Equal Protection: Discrimination: Proof.** In equal protection challenges the burden is on a defendant to prove the existence of purposeful discrimination.
21. **Juries: Discrimination: Proof.** Purposeful discrimination may be established by proof of a disproportionate impact, which is demonstrated by showing that a defendant's cognizable racial group has not been summoned for jury service over an extended period of time or that his or her group is substantially underrepresented on the venire and that the venire was chosen under a practice providing the opportunity for discrimination.
22. **Juries.** A defendant has no right to a petit jury composed in whole or in part of members of his or her race.
23. **Juries: Discrimination.** The absence of members of a defendant's race on the jury, standing alone, does not support a claim of improper racial composition.
24. **Constitutional Law: Equal Protection: Juries: Discrimination: Proof.** A defendant cannot, under either a Sixth Amendment or an equal protection challenge, simply allege that no minorities are on the jury, but has the burden of establishing systematic exclusion and purposeful discrimination.
25. **Juror Qualifications.** A state may exclude aliens from jury service.
26. **Due Process: Convictions: Proof.** In order to comport with the Due Process Clause of the 14th Amendment, criminal convictions may be had only upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which a defendant is charged.
27. **Due Process: Jury Instructions.** When a trial court improperly defines reasonable doubt in its jury instructions, due process is not achieved.
28. **Trial: Appeal and Error.** An objection to the prosecutor's argument made after the jury has been instructed and has retired is untimely and will not be reviewed on appeal.

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

Michael T. Levy, of Levy & Lazer, P.C., for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

Pursuant to a verdict, the defendant-appellant, Christopher

M. Garza, was adjudged guilty of first degree murder, in violation of Neb. Rev. Stat. § 28-303 (Reissue 1989), and of using a firearm during the commission of a felony, in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1989). He was thereafter sentenced to life imprisonment for the murder and to imprisonment for a period of not less than 6⅔ nor more than 20 years for the use of the firearm, the sentences to run consecutively. Garza assigns seven errors, which combine to assert that the district court (1) wrongly failed to suppress his statements, (2) wrongly failed to transfer the case to the juvenile court, (3) wrongly failed to quash the jury panel, (4) wrongly instructed the jury, and (5) wrongly failed to grant a new trial because of the prosecutor's conduct. We affirm.

II. FACTS

When she was killed on March 21, 1990, the victim, Christina O'Day, was a 17-year-old high school senior. Garza, having been born on May 23, 1973, was then 16 years old, and Wayne K. Brewer, the other individual involved, see *State v. Brewer, ante* p. 24, 486 N.W.2d 477 (1992), was then 18 years old.

Beginning in March 1989, the victim's employer started working the night shift and thus arranged for the victim to spend the night at her house to take care of her 8-year-old daughter. The victim would drive to the employer's house between 10:45 and 11:10 p.m. and park her automobile in the garage; the employer would then go to work. On Mondays, the employer usually attended a university class from 7 to 9:45 p.m. and would go to work directly from the university.

Garza had met Brewer in February 1990 at a local fast-food restaurant where they both worked. Shortly thereafter, the two became friends and began to do things together on a regular basis.

Garza claimed that on Monday, March 19, 1990, he and Brewer went to visit with Garza's mother. Since it appeared that his mother was asleep, Garza drove out of the area, but missed a turn and ended up on the street where the victim was babysitting. He then saw the victim pulling into her employer's driveway and decided to stop and visit with her. Brewer, however, testified that the victim had not just pulled into her

employer's driveway, but that Garza had actually driven by the employer's house before turning around and stopping. Garza knew the victim from school and claimed to have been a former boyfriend. He also knew the victim babysat overnight during the week.

At 11:10 p.m., Garza and Brewer rang the employer's doorbell and the victim answered. She asked Garza what he was doing and told him to leave. Brewer and Garza then left. The employer, who happened to be home on this particular Monday night, had heard the doorbell ring; thinking it strange that someone would come to the house that late at night, she stood at the top of the steps in order to see who was at the door and was thus able at trial to identify Garza as the person who had been at her door.

The following Tuesday night, March 20, or early Wednesday morning, March 21, while driving to the area, Garza asked Brewer if he wanted to "rob" the employer's house. Brewer agreed to the plan, knowing full well that the victim and her employer's daughter would be in the house. Brewer and Garza then returned to the employer's house at approximately 2:30 on the morning of the 21st, with stealing as the avowed purpose.

After cutting the outside telephone line, Garza broke in through a basement window and let Brewer in through the front door. Brewer claims he immediately began looking for things to steal in the living and dining rooms. Brewer stated that sometime thereafter, he "heard the door open . . . looked down the hall and [saw] Garza and [the victim] go into the [employer's daughter's] room and told her to go back to sleep." Thus, it appears that Garza had gone to the upper level of the house, as Brewer then states that sometime later, Garza went downstairs and told Brewer, " 'Go have some fun.' " Brewer asserts that he originally refused to go upstairs, but after Garza mocked him, he went to the victim's bedroom. He found the victim on the bed. Her hands were tied over her head, and she was gagged with a scarf and hat but had no injuries. Brewer claims he was in the room for only 5 to 10 minutes, during which time he sexually assaulted the victim.

Brewer then went back downstairs and sat on the couch. Garza returned to the bedroom, then went back downstairs and

into the kitchen to get a 14-inch knife, and returned to the bedroom. As Garza went back upstairs, Brewer asked him what he was doing but received no response. Apparently a few seconds later, Brewer went upstairs and stood in the bedroom doorway where he saw Garza pulling away from the victim and "blood spurting in the air." Garza and Brewer went back downstairs and left the house.

According to Brewer, he and Garza then went in the victim's automobile to a location where the stolen items were placed in Garza's automobile. The victim's automobile was then taken to and pushed into the Missouri River. The stolen items were later discarded.

The employer's daughter testified that she woke up at 2:30 a.m. because she heard crying coming from the bedroom where the victim slept, but that when her door was opened, she only saw one man. The daughter stated that for the next 3 hours, she "heard whispering [and] crying [and her] birdcage door slam and [the] bird squeaking." She also "heard footsteps . . . the door slam when they were leaving, and . . . the garage, the garage open and shut."

When Dr. Blaine Roffman, an Omaha pathologist and coroner, was taken into the employer's house, he saw the victim's body lying partially out of the bed in a face-down position:

> [The body] was underneath the comforter when I first walked into the bedroom. And when the comforter was removed, the body was face down on the abdomen and the back being visible.
>
> . . . .
>
> . . . [T]here was a blue electrical cord wrapped around the neck, along with a blue scarf and a white hat.
>
> And the blue scarf and white hat initially were over the mouth and nose.
>
> And there was also pantyhose and a red strap of some type bound around both lower — both feet.

The autopsy evidenced numerous injuries: a deep "traumatic laceration" on the left side of the forehead; a "large area of swelling over the right forehead"; a deep blunt injury "between the eyebrows and upper portion of the nose"; "petechial

hemorrhages" around the neck caused by the electrical cord; a "laceration on the . . . inside surface, of the left upper lip"; a blackened left eye "which is a result of hemorrhaging in that soft tissue that surrounds the eye"; injuries caused by vaginal and anal penetration; two dark linear-pattern bruises on the right back side; a bruise on the left shoulder; and a bruise over the right hip. According to Roffman, all of these injuries, which were not life threatening, were inflicted, as evidenced by the bruising and hemorrhaging, while the victim was still alive.

There was also a large, gaping laceration on the right wrist which extended to the bone, severing all of the superficial tendons, as well as producing a 90-percent laceration of the radial artery and a nick in the ulnar artery. In addition, there were seven superficial lacerations on the wrists. Roffman reported that the large wrist laceration was inflicted while the victim was alive and continued to bleed profusely until she died.

In Roffman's opinion, the victim died as a result of three injuries, any one of which, alone, could have killed her: bleeding to death from the laceration on her wrist; strangulation as a result of the scarf, hat, and electrical cord tightly wrapped around her neck; or asphyxiation caused by the scarf and hat covering her mouth and nose and also by the position of her body lying halfway out of the bed with her face turned against the carpet. Roffman pointed out that after any of these injuries, the victim would have been conscious at least 3 to 5 minutes and then died. Roffman also stated that the victim could have been saved by simply untying the cord around her neck, changing the position of the body and removing the blockage to the mouth and nose, or placing a tourniquet on the arm, depending on which injury had been inflicted at the time.

Thus, if Brewer's testimony that he and Garza left the house immediately after Garza inflicted the wrist laceration and the daughter's testimony that the two left at 5:30 a.m. are accurate, the victim would have suffered for almost 3 hours before she finally died.

Garza has given three separate stories regarding his whereabouts on the morning of the murder. He gave his first version on the day of the murder. During the late morning on March 21, Garza received a telephone call from his brother's

girl friend, who told Garza that the police were looking for him in connection with the murder. Before noon, Garza's mother went home in order to take her son to the police station, as she, too, had discovered that the police were looking for him. Shortly thereafter, Garza and his mother went to the Omaha Police Division, arriving there just after noon.

At the police station, Garza told Officer Frank O'Connor that he and Brewer had been with each other on the 20th and 21st and that he stayed the night at Brewer's house. O'Connor testified that Garza said he knew the victim, had dated her a "couple times," and had seen her on the 19th. Garza also told O'Connor that he and Brewer had visited several friends in Omaha and Council Bluffs Tuesday evening and early Wednesday "and then returned to Brewer's residence where they stayed the rest of the night."

After talking to O'Connor, Garza traveled with Deputies Gary Kratina and Sam Christiansen to the office of the Douglas County sheriff for further questioning. Once there, Garza was read his *Miranda* rights and signed a rights advisory form waiving those rights. Kratina testified that Garza admitted knowing the victim and seeing her on March 19. Garza told Kratina that on the morning of the murder, he was at Brewer's house. Thereafter, Garza agreed to give saliva, fingernail, and hair samples, and to have his photograph taken. Kratina and O'Connor both saw scratches on Garza's arms. Since Garza was then not under arrest, he left the station. That evening Brewer went to the sheriff's department and discussed the killing.

Garza had disappeared but was located and arrested on April 6. After processing, Garza was taken to an interview room where O'Connor and Deputies Craig Madsen and James Westcott of the sheriff's office were present. When asked whether he wanted to talk to the officers, Garza responded "[Y]es." According to O'Connor, "He was quite adamant about that, he did want to, yes, he did want to talk to us." At this time, Westcott left the room to telephone his office with the information that Garza was going to make a statement. O'Connor began to read Garza his *Miranda* rights from a rights advisory form. When Garza was told he had a right to an

attorney and to have one present, he stated that he wanted his attorney, and questioning ended.

Madsen then left the room in order to inform the sheriff's office of that development. However, O'Connor remained in the interrogation room with Garza. At the suppression hearing, O'Connor testified that after sitting there several minutes, he, upon Garza's inquiry as to whether Brewer had "spilled his guts," told Garza that Brewer had taken his opportunity to tell his side of the story and had implicated Garza. O'Connor also told Garza that the tests being conducted on blood and semen at the scene would reveal who had been there, when in fact O'Connor did not know whether such tests were then being conducted. Garza then declared that he had been with Brewer but that he, Garza, had not killed the victim. At this point, Madsen returned to the interrogation room, and O'Connor asked Garza whether what he was saying was being said of his own free will. Garza replied that yes, he had been there, but that he had not killed the victim. O'Connor then asked Garza whether he would like to tell his side of the story, and Garza said they had gone to the house to "rob" it; that he had cut the screen and crawled in, entered the house, looked around, tied up the victim, and then gone downstairs, getting a videocassette recorder and other items while Brewer remained upstairs. Garza admitted having sexual intercourse with the victim, after which he went back downstairs, collected some items, put them in the automobile, and left. As he and Brewer were in the automobile, Brewer said he had killed the victim. In reply to O'Connor's question, Garza said that yes, he was "there when it happened." When asked whether he would be willing to give a tape-recorded statement, Garza repeated several times that it was first degree murder and "it don't make no difference," but would not permit a recorded statement.

O'Connor further testified that no promises, threats of force, or coercion was used, and Garza appeared "to be rational and understand the rights" explained to him. Madsen's testimony regarding Garza's statement harmonized with that given by O'Connor. Madsen also testified that no promises, threats, or coercion was used in an attempt to coerce Garza to give a statement.

The third and final version of Garza's whereabouts on the night of the murder occurred when he testified on his own behalf at trial. On that occasion, Garza denied ever having made any incriminating statements on April 6 and testified that he was out with Brewer on the 20th and early morning of the 21st, but that he finally dropped Brewer off at his house. Garza then went home and to bed.

Garza also testified that Brewer woke him up "early morning sometime" and told him that he had "robbed" the employer's residence and stolen the victim's automobile. Garza agreed to Brewer's request to transfer all of the stolen goods into Garza's automobile. The two then dumped the victim's automobile into the Missouri River. Thereafter, they returned to Garza's house, where Garza's grandmother told them that a babysitter had been killed. Garza claimed that he questioned Brewer about the murder, and Brewer, for the first time, confessed to the killing.

Garza's girl friend, Donna Coffin, testified that on Monday, March 19, Garza had shown her a picture of the victim and told her that he was mad at the victim. The girl friend also stated that a day before the murder Garza had asked her to provide an alibi for him in the event the police were looking for him. The girl friend did not know whether Garza was serious or in regard to what matter she might be questioned. When Garza went to the girl friend's house in April prior to being arrested by the police, Garza told her that he had seen the victim the night of the murder and that he and Brewer had broken into the house through the basement window in order to steal. Garza further told the girl friend that it was not until after they left the employer's residence that Brewer told him he had killed the victim. The girl friend's sister, Chris Coffin, also testified that Garza told her he had broken into the employer's house through a basement window and "robbed" it, but denied killing the victim.

Garza testified that the Coffins, Brewer, Madsen, and O'Connor all lied and committed perjury in their testimony, and expressed the view that he was the casualty of a conspiracy to convict him, as only he was telling the truth.

III. ANALYSIS

Before proceeding to a consideration of the summarized assignments of error, it is appropriate to recall that under the provisions of § 28-1205, one who uses a knife to commit a felony which may be prosecuted in this state, or who possesses a knife during the commission of any such felony, commits the felony of "using firearms to commit a felony." Under the provisions of § 28-303, one commits the prosecutable felony of murder in the first degree if, among other ways, one kills another "in the perpetration of or attempt to perpetrate any sexual assault in the first degree . . . robbery . . . or burglary . . . ."

One who overcomes another "by force, threat of force, express or implied, coercion, or deception" and subjects that other to "sexual penetration" commits the prosecutable felony of first degree sexual assault. Neb. Rev. Stat. § 28-319 (Reissue 1989). The prosecutable felony of robbery is committed if one, "with the intent to steal . . . forcibly and by violence, or by putting in fear, takes from the person of another any . . . personal property of any value whatever." Neb. Rev. Stat. § 28-324 (Reissue 1989). One who "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" commits burglary, itself a prosecutable felony. Neb. Rev. Stat. § 28-507 (Reissue 1989).

1. Nonsuppression

The first summarized assignment of error asserts the district court incorrectly refused to suppress Garza's statements because they were extracted in violation of his *Miranda* rights and were involuntary.

There is no question that the State has the burden to establish by a preponderance of the evidence that a defendant's statement was voluntary and not given as the result of coercion. *State v. Brewer, ante* p. 24, 486 N.W.2d 477 (1992). See, also, *State v. Phelps, ante* p. 707, 490 N.W.2d 676 (1992).

In *State v. Haynie*, 239 Neb. 478, 490, 476 N.W.2d 905, 913 (1991), we observed that "[c]oercive police conduct is a necessary predicate to the finding that a confession is not

voluntary within the meaning of the due process clause of the 14th amendment." Factors to be taken into consideration in determining whether there was coercive action, thus negating the voluntariness of a defendant's statement, include that

> (1) defendant is in custody at the time of the statement, (2) defendant is alone and unrepresented by counsel, (3) the promise or inducement is initiated by prosecuting officials as opposed to defendant or someone acting on his behalf, (4) defendant is aware of his constitutional and other legal rights, (5) the potentially incriminating statement is part of an abortive plea bargain, (6) the promise or inducement leading to the statement is fulfilled by prosecuting authorities, and (7) defendant is subjected to protracted interrogation or evidence appears on the record to show that coercion precludes the statement from being knowing and intelligent.

Id. at 487, 476 N.W.2d at 912. In any event, voluntariness is determined by considering all the circumstances. *Id.*

The U.S. Supreme Court, in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), proclaimed that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Custodial interrogation takes place by " 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' " *State v. Twohig*, 238 Neb. 92, 108, 469 N.W.2d 344, 355 (1991). If a defendant is in fact in custody or his or her movement is restricted, the procedural safeguards under *Miranda* require the defendant to be told that (1) he or she has the right to remain silent, (2) anything said can and will be used in court, and (3) he or she may consult an attorney, retained or appointed, and has a right to have one present during interrogation. *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989).

Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), instructs that an accused, "having expressed his desire to deal with the police only through

counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." See, also, *Minnick v. Mississippi*, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990) (waiver of Fifth Amendment right occurs when accused has initiated conversation or discussions with the authorities). Thus, once *Miranda* rights have been invoked, they must be respected unless later waived.

In *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980), the U.S. Supreme Court concluded that the *Miranda* safeguards

> come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Since its decision in *Innis*, the U.S. Supreme Court, in *Oregon v. Bradshaw*, 462 U.S. 1039, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983), established a two-part test to determine the admissibility of a conversation between an accused and the police after the accused had earlier invoked his right to counsel. First, the further conversation must have been initiated by the accused as required by *Edwards v. Arizona, supra*. If the accused initiated the further conversation, the next question is whether there was a valid waiver of the right to counsel and the right to silence, that is, whether, under all the circumstances, there can be found to have been a knowing and intelligent waiver of those rights. On the issue of initiating the further conversation, the *Bradshaw* Court noted that

> [t]here are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an

> accused or a police officer, relating to routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense in which that word was used in *Edwards*.

462 U.S. at 1045. The *Bradshaw* Court then concluded that the accused's question, asking what was going to happen to him, although ambiguous, was nonetheless more than a mere necessary inquiry arising out of the incidents of the custodial relationship. Rather, it evinced a willingness and a desire for a generalized discussion about the investigation. The *Bradshaw* Court thus concluded that the accused had indeed initiated the conversation which followed, during which he acknowledged that he understood he did not have to talk. The officer then suggested the accused might help himself by taking a polygraph examination. The next day, after the accused waived in writing his *Miranda* rights, he submitted to a polygraph examination. After the examiner told the accused that the examiner did not believe the accused had told the truth, the accused recanted his earlier story and made inculpatory statements which were admitted at trial. In reversing the state's reversal of the conviction, the U.S. Supreme Court wrote that there existed no reason to dispute the trial court's finding that the inculpatory statements were voluntary and the result of a knowing waiver of the accused's right to remain silent.

In considering these matters, we wrote in dictum that an inculpatory statement made after the accused was shown police reports of other crimes in which he was thought to have been implicated and after he had invoked his right to remain silent was inadmissible. *In re Interest of Durand. State v. Durand*, 206 Neb. 415, 293 N.W.2d 383 (1980). We reasoned therein that showing the reports raised the specter of other prosecutions, placing the accused under a compulsion to speak, and thus rendered the statement involuntary. In *State v. Joy*, 218 Neb. 310, 353 N.W.2d 23 (1984), an officer told the accused after she had said her attorney had told her to remain silent that she could trust the officers and that if she knew anything, it would be best for her to cooperate and truthfully tell what she knew. In ruling that the accused's later inculpatory statement must be suppressed, we declared that once an accused invokes his or her

constitutional rights to remain silent and to the services of an attorney, the authorities must refrain from initiating further conversations and must scrupulously honor the accused's request.

However, here, unlike the situation in *Durand*, there was no threat of prosecution of unrelated crimes, nor, unlike the situation in *Joy*, did O'Connor initiate further conversations. Garza originated the conversations by asking, in effect, what Brewer had said. The situation at hand is more like that presented in *State v. Pittman*, 210 Neb. 117, 313 N.W.2d 252 (1981). Therein, after the accused had asked to talk to his attorney, police officers stopped questioning him and prepared to leave the room. The accused then remarked that he was being "railroaded" by an accomplice, and an officer responded by stating that they had only one side of the story and would be happy to hear the accused's side. Thereafter, the accused began to discuss the matter with the officers and responded to their questions. In affirming the conviction, we noted that *Miranda* does not protect an accused, even though he has requested counsel, from a spontaneous admission made under circumstances not induced by the investigating officers or during a conversation not initiated by the officers.

Whether a statement is voluntary or the result of State coercion or promise is a question of fact. *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991). Moreover, in determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Coleman, ante* p. 731, 490 N.W.2d 222 (1992); *State v. Phelps, ante* p. 707, 490 N.W.2d 676 (1992); *State v. Brewer, ante* p. 24, 486 N.W.2d 477 (1992); *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992). Additionally,

> in deciding whether a trial court's ruling is erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed the witnesses testifying in regard to such motion.

Brewer, ante at 28, 486 N.W.2d at 480. Accord *State v.*

Coleman, supra. Thus, a trial court's preliminary determination that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong.

The district court here found that Garza had confessed voluntarily, and thus denied Garza's suppression motion. We cannot say the district court's ruling is clearly wrong. By asking whether Brewer had "spilled his guts," Garza demonstrated a willingness and desire for a generalized discussion about the case. He then, after demonstrating that he knew and understood his rights to counsel and to remain silent by having once invoked them, chose to discuss the case with the police. See *U.S. v. Risnes*, 912 F.2d 957 (8th Cir. 1990). Although after Garza asked his question the police said that tests would reveal who was present, they neither threatened Garza nor promised him anything.

2. NONTRANSFER TO JUVENILE COURT

The next summarized assignment of error asserts that the district court improvidently refused to transfer jurisdiction over Garza to the juvenile court.

Neb. Rev. Stat. §§ 43-245(5) and 43-247 (Reissue 1988) provide that in cases involving felony offenders under the age of 18, the juvenile court and the district court shall have concurrent jurisdiction. Whether the case should be transferred is determined by considering (1) the type of treatment that would benefit the defendant; (2) whether the alleged offense included violence or was committed in an aggressive and premeditated manner; (3) the motivation for the commission of the offense; (4) the age of the defendant and circumstances of any others involved in the crime; (5) the prior history of the juvenile; (6) the sophistication and maturity of the juvenile; (7) whether there are facilities or programs within the juvenile system to rehabilitate the juvenile; (8) whether the best interests of the juvenile and security of the public require custody; and (9) any other matters relevant to the decision. Neb. Rev. Stat. § 43-276 (Reissue 1988).

An appeal from the denial of a transfer to juvenile court is reviewed for an abuse of discretion. *State v. Doyle*, 237 Neb. 60, 464 N.W.2d 779 (1991); *State v. Phinney*, 236 Neb. 76, 459

N.W.2d 200 (1990). With respect to the factors by which transfer is determined, we have stated:

> There is no arithmetical computation or formula required in a court's consideration of the statutory criteria or factors. For retention of the proceedings as a prosecution of a criminal offense, the court need not resolve every factor against the juvenile. Also, there are no weighted factors, that is, no prescribed method by which more or less weight is assigned to each factor specified in the statute. [Citations omitted.]
>
> The statutory criteria or factors of [§ 43-276] disclose a balancing test by which public protection and societal security are weighed against practical and not problematical rehabilitation of the juvenile. [Citations omitted.] "Rehabilitation has traditionally played a key role in the treatment of young offenders. . . . Nevertheless, the concept of deterrence and the need to balance individual justice with the needs of society—a balancing process that is basic and fundamental to the general scheme of the criminal law—also have a place in the juvenile justice system."

State v. Alexander, 215 Neb. 478, 486, 339 N.W.2d 297, 301 (1983).

The district court entertained Garza's motion to transfer the case to juvenile court on August 23, 1990. By that time, the district court had heard the evidence on Garza's suppression motion; had, at Garza's request, taken judicial notice of the evidence it heard 2 days earlier on Brewer's motion to suppress certain evidence in his case; and had before it the affidavit describing the crime upon which the warrant for Garza's arrest was issued. The parties had also stipulated to Garza's date of birth. At the conclusion of the hearing, the district court denied the transfer motion and, in an order dated September 27, 1990, wrote:

> 1. There is evidence that the alleged offense included violence and was committed in an aggressive manner.
>
> 2. The motivation for the commission of the offense.
>
> 3. The age of the defendant and the age of the co-defendant allegedly involved in this offense.

4. The best interests of the defendant and the security of the public may require that the defendant continue in custody for a period extending beyond his minority.

The record clearly supports the district court's conclusion to retain jurisdiction of the case, and the ruling thus cannot be said to have constituted an abuse of discretion. Although Garza was but 16, he was charged with violent adult crimes; he was an obvious threat to the public and, if convicted, could not easily be rehabilitated in the juvenile correctional system nor properly punished for the atrocities he would be adjudged to have committed.

3. Preservation of Jury Panel

In the third summarized assignment of error, Garza complains that (a) the district court should have quashed the jury panel because its makeup violated his Sixth Amendment right to be tried by a jury fairly representative of the community and violated his equal protection right to have members of his particular discernible minority group represented, and (b) the requirement of Neb. Rev. Stat. § 25-1601 (Reissue 1989), that jurors be citizens of the United States and read, speak, and understand the English language, contributes to discrimination against Hispanics.

As a result of the pretrial publicity, Garza and the plaintiff-appellee, State of Nebraska, agreed to have the jury selected in North Platte, Lincoln County, and driven to Omaha for the trial. Before accepting this agreement, the district court reviewed with Garza his right under Neb. Const. art. I, § 11, to a "speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." Garza expressly waived his right to a Douglas County jury and agreed to a jury selected from Lincoln County, basically from North Platte.

Nonetheless, prior to the selection of the jury, Garza moved to quash the jury panel, arguing that "the panel contains no blacks or other persons of color or Hispanics, with the exception of the two panel Mexican-Americans . . . ." The motion to strike the jury panel was renewed after the jury had been selected. In support of his motion, Garza offered in

evidence a list of the potential jurors and the juror qualification forms. Contrary to Garza's assertion, the juror forms do not reveal the ethnic background of the potential jurors. Moreover, we have not been directed to anything in the record which establishes that Garza is a member of any cognizable group of the population. Nonetheless, his arguments assume that he is Hispanic and that, as such, he is a member of a distinctive and cognizable racial group; we, for the purpose of this analysis, assume the same.

(a) Sixth Amendment and Equal Protection

In *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979), the U.S. Supreme Court observed that in order to establish a prima facie violation of the fair-cross-section requirement under the Sixth Amendment, a defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community, (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

The U.S. Supreme Court has stated that in equal protection challenges the burden is on a defendant to " 'prove the existence of purposeful discrimination.' " *Batson v. Kentucky*, 476 U.S. 79, 93, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Purposeful discrimination may be established by proof of a disproportionate impact, which is demonstrated by "showing that the defendant's cognizable racial group has not been summoned for jury service over an extended period of time; or that his group is substantially underrepresented on his venire and that the venire was chosen under a practice providing the opportunity for discrimination." *U.S. v. Garcia*, 836 F.2d 385, 388 (8th Cir. 1987). See *State v. Perez*, 235 Neb. 796, 457 N.W.2d 448 (1990).

In reliance upon those rules, the defendant in *State v. Perez, supra*, argued that the State had unconstitutionally engaged in the "systematic and unconstitutional exclusion of persons of Spanish descent" in the jury selection. *Id.* at 803, 457 N.W.2d at 454. In support of his argument, the defendant proffered two

affidavits. The first cited a 1980 census report which disclosed a total of 38,344 people in Scotts Bluff County, including 4,714 persons of Hispanic descent. The second affidavit was from an official who reviewed the process by which the court compiled the venire list for the defendant's trial. The *Perez* court, in concluding that the defendant had failed to show discrimination, recited the standards set by the U.S. Supreme Court in cases involving jury selection challenges under the Sixth Amendment and Equal Protection Clause, stating: "On appeal, defendant merely argues that an underrepresentation exists. He completely fails to address the issues of systematic exclusion and purposeful discrimination. On this basis his argument on appeal must be rejected." *Id.* at 806-07, 457 N.W.2d at 456.

We have consistently held that a defendant has no right to a petit jury composed in whole or in part of members of his or her race, *State v. Pratt*, 234 Neb. 596, 452 N.W.2d 54 (1990); *State v. Venable*, 233 Neb. 309, 444 N.W.2d 907 (1989); *State v. Kitt*, 231 Neb. 52, 434 N.W.2d 543 (1989), and that the absence of members of the defendant's race in the jury, standing alone, does not support a claim of improper racial composition, *State v. Falkner*, 224 Neb. 490, 398 N.W.2d 708 (1987). A defendant cannot, under either a Sixth Amendment or an equal protection challenge, simply allege that no minorities are on the jury, but has the burden of establishing systematic exclusion and purposeful discrimination.

Like the defendant in *Perez*, Garza has not met the threshold obligation of establishing a prima facie case and thereby shifting the burden to the State. Garza's sole evidence is the fact that two members of the venire had Hispanic surnames and neither was placed on the jury. The U.S. Court of Appeals for the Second Circuit has stated that for purposes of determining whether the defendant has been denied a cross-section of the community, "[s]tereotypical ethnic or religious characterizations of surnames are unreliable and only tenuous indicia of a jury's makeup." *U.S. v. Gelb*, 881 F.2d 1155, 1161-62 (2d Cir. 1989), *cert. denied* 493 U.S. 994, 110 S. Ct. 544, 107 L. Ed. 2d 541. Certainly, evidence that two potential jurors had Hispanic surnames, by itself, is not convincing.

Neb. Rev. Stat. §§ 25-1627 and 25-1628 (Reissue 1989) require that the jury commissioner, in the presence of a judge, select a key number, which is then used to select a jury panel from voter registration and licensed driver lists. "The proposed juror list shall be derived by selecting from the master list the name of the person whose numerical order on such list corresponds with the key number and each successive tenth name thereafter." § 25-1628. Once the names are chosen, the proposed jurors are mailed a juror qualification form, and at some point they are summoned to appear for jury duty. Neb. Rev. Stat. § 25-1629 (Reissue 1989). This process has repeatedly been found valid and racially neutral under the Nebraska Constitution. *State v. Fallis*, 205 Neb. 465, 288 N.W.2d 281 (1980); *State v. Addison*, 198 Neb. 442, 253 N.W.2d 165 (1977); *State v. Wright*, 196 Neb. 377, 243 N.W.2d 66 (1976); *State v. Casados*, 188 Neb. 91, 195 N.W.2d 210 (1972). As written in *State v. Gutierrez*, 187 Neb. 383, 385, 191 N.W.2d 164, 166 (1971):

> It is difficult to conceive of a fairer or more practical method of selecting jurors than that used in Nebraska. The names are drawn by lot from lists of voters or registrants. The system is clearly within constitutional limits and renders impossible an intentional exclusion of any element of the population in a state or county where the privilege of voting is open to all who have attained the age required of an elector.

Moreover, the use of voter registration lists as a means of selecting jurors has been approved by courts throughout the country. See, e.g., *United States v. Daly*, 573 F. Supp. 788 (N.D. Tex. 1983); *State v. Pittman*, 569 S.W.2d 277 (Mo. App. 1978); *U.S. v. Cecil*, 836 F.2d 1431 (4th Cir. 1988); *State v. Tillman*, 750 P.2d 546 (Utah 1987); *State v. Sellers*, 39 Wash. App. 799, 695 P.2d 1014 (1985).

Garza offers no statistical evidence of racial makeup in the community or of substantial underrepresentation of any cognizable racial group, nor does he suggest in any fashion how the State systematically discriminated against an identifiable group. Furthermore, Garza's claim that the juror questionnaire forms require race identification is wrong. As has been

articulated, the absence of diverse racial representation on a jury, without evidence of intentional discrimination, is insufficient to uphold a constitutional challenge.

(b) Language and Citizenship Requirements

In connection with this second aspect of the third summarized assignment of error, Garza asserts that migrant farmworkers in Lincoln County, who are mostly Hispanic, are excluded from jury service, although they represent a discernible group of the population, because they neither read, speak, nor understand the English language, nor are they citizens of the United States. However, as the U.S. Supreme Court wrote in *Foley v. Connelie*, 435 U.S. 291, 296, 98 S. Ct. 1067, 55 L. Ed. 2d 287 (1978):

> It is no more than recognition of the fact that a democratic society is ruled by its people. Thus, it is clear that a State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions. . . . *Similar considerations support a legislative determination to exclude aliens from jury service.*

(Emphasis supplied.)

In *Perkins v. Smith*, 370 F. Supp. 134 (D. Md. 1974), *aff'd* 426 U.S. 913, 96 S. Ct. 2616, 49 L. Ed. 2d 368 (1976), the plaintiff claimed a violation of equal protection rights under both the 5th and 14th Amendments, arguing that 28 U.S.C. § 1865(b) (1988), which prohibits aliens from serving on a jury and requires potential jurors to be able to read, write, and understand English, is discriminatory. The court, however, ruled that the exclusion of aliens from petit and grand jury service in both state and federal courts did not deny the aliens equal protection. "[T]he state has a compelling interest in the restriction of jury service to those who will be loyal to, interested in, and familiar with, the customs of this country." 370 F. Supp. at 138. The *Perkins* court emphasized that a trial by jury is one of the principal foundations of our nation and that service on such should be reserved to those individuals who are citizens. See, also, *United States v. Toner*, 728 F.2d 115, 130 (2d Cir. 1984) ("neither due process nor equal protection of the

law is involved in the time-honored federal system of drawing petit and grand jurors only from citizens of this country"). See, *United States v. Gordon-Nikkar*, 518 F.2d 972 (5th Cir. 1975); *United States v. Armsbury*, 408 F. Supp. 1130 (D. Or. 1976). The Massachusetts Supreme Court has accurately noted that "it is undeniable that some aliens do not possess these requisite attributes [of citizenship] and jury service is too critical to the just operation of the court system to place it in the hands of those who are not able to carry out the duties of such service." *Commonwealth v. Acen*, 396 Mass. 472, 482, 487 N.E.2d 189, 196 (1986).

Except for the exclusion of aliens from positions intimately related to the process of democratic self-government, state law that discriminates on the basis of alienage can be sustained against equal protection attack only if it can withstand strict scrutiny by advancing a compelling state interest by the least restrictive means available. *Bernal v. Fainter*, 467 U.S. 216, 104 S. Ct. 2312, 81 L. Ed. 2d 175 (1984). As was therein explained:

> The rationale behind the political-function exception is that within broad boundaries a State may establish its own form of government and limit the right to govern to those who are full-fledged members of the political community. Some public positions are so closely bound up with the formulation and implementation of self-government that the State is permitted to exclude from those positions persons outside the political community, hence persons who have not become part of the process of democratic self-determination.

467 U.S. at 221. Consequently, minimum scrutiny is required when a political function is involved. *Id.* See, *Foley v. Connelie, supra* (police may be required to be citizens); *Ambach v. Norwick*, 441 U.S. 68, 99 S. Ct. 1589, 60 L. Ed. 2d 49 (1979) (states may require teachers to be citizens); *Cabell v. Chavez-Salido*, 454 U.S. 432, 102 S. Ct. 735, 70 L. Ed. 2d 677 (1982) (states may require probation officers to be citizens). As observed in *Commonwealth v. Acen*, 396 Mass. at 481, 487 N.E.2d at 195: "Jury service clearly lies at the heart of Anglo-Saxon democratic self-government and falls within the *Bernal* political function exception." Without further

discussion, it is sufficient that the U.S. Supreme Court, in *Foley v. Connelie, supra*, has acknowledged in dictum a state's right to restrict aliens from participating in the jury process. Nebraska's statute serves a reasonable interest in restricting potential jurors to those individuals who understand the American form of government and are committed to the interests of this nation. Accordingly, citizenship is a legitimate prerequisite to jury duty.

Furthermore, allegations of denying noncitizens the right to serve as jurors also fail under a Sixth Amendment analysis. As noted earlier, the *Duren* three-prong test requires a showing of underrepresentation of a suspect group in a cross-section of the community. As it has been shown that a state may restrict noncitizens from serving as jurors, the cross-section requirement is not invoked.

Like citizenship, the requirement that judicial affairs be in English has also been found both reasonable and important in other jurisdictions. *Acen, supra*; *United States v. Benmuhar*, 658 F.2d 14 (1st Cir. 1981); *Miranda v. United States*, 255 F.2d 9 (1st Cir. 1958). In *State v. Jett*, 111 N.M. 309, 805 P.2d 78 (1991), the New Mexico Supreme Court held that it was necessary for the jurors to speak English. " 'It is self-evident that a juror who does not possess a working knowledge of English would be unable to serve because he cannot possibly understand the issues or evaluate the evidence to arrive at an independent judgment as to the guilt or innocence of the accused.' " *Id.* at 313, 805 P.2d at 82, quoting *State v. Gallegos*, 88 N.M. 487, 542 P.2d 832 (N.M. App. 1975), *cert. denied* 89 N.M. 6, 546 P.2d 71. The Idaho Supreme Court, in holding that individuals lacking the capability to converse in and understand English could not sit as jurors, remarked:

> It would be patently unreasonable for this Court to require the state of Idaho to utilize jurors who are not proficient in the English language, unable to understand testimony, directions of the court, or read exhibits and instructions. It is not difficult to perceive that the State has a significant interest in the integrity of the jury system, and that that interest is manifestly and primarily advanced by limiting jurors to those who are capable of

> understanding the proceedings. As long as the qualification is equally administered as to all foreign language speakers there is no constitutional infirmity in the requirement that jurors be competent in English.

State v. Paz, 118 Idaho 542, 552, 798 P.2d 1, 11 (1990).

As the New Mexico court observed, the requirement that jurors speak English also promotes efficiency within the judicial system, as "allowing an unqualified juror to serve in a criminal case may constitute a constitutional violation" and lead to further litigation. *State v. Jett*, 111 N.M. at 313, 805 P.2d at 82. See *United States v. Rouco*, 765 F.2d 983 (11th Cir. 1985) (defendant alleged juror was not proficient in English and therefore he was denied a fair and impartial jury).

Section 25-1601 promotes the interests of the state's judicial process by assuring that jurors can understand the proceedings.

The trial court's findings that there was no discrimination in the selection of a jury are not to be reversed on appeal unless clearly erroneous. *State v. Venable*, 233 Neb. 309, 444 N.W.2d 907 (1989). The district court was not clearly wrong in concluding that there was no discrimination during the jury selection.

4. Jury Instruction

In the fourth summarized assignment of error, Garza contends that the district court erred in instructing the jury as to the meaning of reasonable doubt. The questioned instruction reads as follows:

> A reasonable doubt is one based upon reason and common sense after careful and impartial consideraion [sic] of all the evidence. Proof beyond a reasonable doubt is proof so convincing that you would rely and act upon it without hesitation in the more serious and important transactions of life. However, proof beyond a reasonable doubt does not mean proof beyond all posssible [sic] doubt.

Garza argues that the questioned instruction is misleading "in that it combines definitions of two separate terms, i.e. 'reasonable doubt' and 'proof beyond a reasonable doubt.' " Brief for appellant at 38. In place of the questioned instruction,

Garza proposed that the district court advise the jury that "[a] 'reasonable doubt' is one based upon reason after careful and impartial consideration of all the evidence."

In order to comport with the Due Process Clause of the 14th Amendment, criminal convictions may be had only upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which a defendant is charged. *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991). Accordingly, when a court improperly defines reasonable doubt in its jury instructions, due process is not achieved. *Id.* See, *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

In *Cage*, the U.S. Supreme Court held that an instruction which at one point instructed that in order to convict, guilt must be established beyond a reasonable doubt, but which equated a reasonable doubt with a " 'grave uncertainty' " and an " 'actual substantial doubt' " and required a " 'moral certainty' " that the defendant was guilty, suggested a higher degree of doubt than required under the reasonable doubt standard permitted by the Due Process Clause. 498 U.S. at 41. 329.

Following that holding, we, in *State v. Morley, supra*, approved an instruction reading:

> "'**Reasonable doubt**' is such a doubt as would cause a reasonable and prudent man, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond reasonable doubt and yet be fully aware that possibly you may be mistaken. The jury may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the

> evidence, from the facts and circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture."

Id. at 154-55, 474 N.W.2d at 669-70. We reasoned that this definition merely advised that "a reasonable doubt is such as would cause a person 'to pause and hesitate' when considering one of the 'graver and more important transactions of life,' " and required jurors to "vote for acquittal unless convinced to a moral certainty that no reasonable doubt exists." *Id.* at 155, 474 N.W.2d at 670.

The questioned instruction in this case does not attempt to compare reasonable doubt to actual or substantial doubt, nor does it complicate the definition of reasonable doubt by referring to moral certainty, as did the instruction in *Cage*. Thus, the questioned instruction avoids the deficiencies which caused the U.S. Supreme Court to reject the *Cage* definition of reasonable doubt. Indeed, the questioned instruction concisely and clearly defines reasonable doubt, requiring the jury to carefully and impartially consider all the evidence, and instructing that if the evidence is so convincing that one would rely and act upon it in important matters, the proof is adequate to convict, notwithstanding that the matter is not free of all possible doubt. The questioned instruction thus accurately defines the requisite standard of proof without minimizing the due process rights of Garza. That being so, we need not concern ourselves with the adequacy of Garza's proposed instruction on the issue.

5. Prosecutor's Conduct

In connection with the fifth, and last, summarized assignment of error, Garza contends that certain of the prosecutor's statements during closing arguments require the granting of a new trial.

At least one difficulty with this contention is that we are not directed to, nor do we find, any objection in the bill of exceptions to the allegedly improper argument; neither are we directed to, nor do we find, any motion for a mistrial based

upon an improper argument by the prosecutor. An objection to the prosecutor's argument made after the jury has been instructed and has retired is untimely and for that reason will not be reviewed on appeal. *State v. Greeno*, 230 Neb. 568, 432 N.W.2d 547 (1988). See, also, *Harmon Cable Communications v. Scope Cable Television*, 237 Neb. 871, 468 N.W.2d 350 (1991); *State v. Keithley*, 227 Neb. 402, 418 N.W.2d 212 (1988); *State v. Baker*, 201 Neb. 579, 270 N.W.2d 922 (1978); *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985); *Lemmon v. State*, 173 Neb. 387, 113 N.W.2d 525 (1962). As Garza's improper argument claim was raised for the first time in his motion for a new trial, long after the jury had been instructed and had retired, the claim cannot be considered.

IV. JUDGMENT

There being no merit to the summarized assignments of error, we, as first stated in part I, affirm the judgment of the district court.

AFFIRMED.

HARRY A. ECCLESTON, APPELLANT AND CROSS-APPELLEE, V. DAVID H. CHAIT, APPELLEE AND CROSS-APPELLANT.

492 N.W.2d 860

Filed December 4, 1992. No. S-89-1352.

1. **Rules of the Supreme Court: Appeal and Error.** The proper filing of an appeal shall vest in an appellee the right to cross-appeal against any other party to the appeal. The cross-appeal need only be asserted in the appellee's brief as provided by Neb. Ct. R. of Prac. 9D(4) (rev. 1992).
2. **Motions to Dismiss.** A party against whom a motion to dismiss is directed is entitled to have all relevant evidence accepted or treated as true, every controverted fact as favorably resolved, and every beneficial inference reasonably deducible from the evidence.
3. **Directed Verdict.** A court cannot decide an issue as a matter of law unless the facts adduced on an issue are such that reasonable minds can draw but one conclusion from the evidence. In a jury trial, when evidence compels but one reasonable conclusion regarding an issue or question in the litigation, a court can properly direct a verdict on such issue or question.

4. **Malpractice: Negligence: Informed Consent: Expert Witnesses: Proof.** In a medical malpractice or negligence action, expert testimony is required to prove the standard of care in an informed consent case.
5. **Physician and Patient: Malpractice: Negligence: Informed Consent.** The standard of care in a medical malpractice or negligence action based on inadequate information for a patient's consent to an operation, treatment, or procedure is not determined by a defendant physician's personal or customary routine, but, rather, is based on information which physicians ordinarily supply to patients in like circumstances in the locality or similar localities.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded with direction.

James R. Welsh, of Welsh & Sibbernsen, for appellant.

Joseph F. Bataillon, of Sodoro, Daly & Sodoro, for appellee.

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

SHANAHAN, J.

Harry A. Eccleston appeals from the judgment on a verdict for Dr. David H. Chait in a medical malpractice action based on inadequacy of information for an informed consent to a stapedectomy. In his appeal, Eccleston claims that he is entitled to a new trial as the result of misconduct during the jury's deliberations. Chait cross-appeals and contends that the district court for Douglas County, pursuant to Chait's motion, should have directed a verdict for Chait at the conclusion of all evidence in the trial.

Chait has asserted his cross-appeal under Neb. Ct. R. of Prac. 1E (rev. 1992), which states: "Cross-Appeal. The proper filing of an appeal shall vest in an appellee the right to a cross-appeal against any other party to the appeal. The cross-appeal need only be asserted in the appellee's brief as provided by rule 9D(4)." We note that in *Atokad Ag. & Racing v. Governors of Knts. of Ak-Sar-Ben*, 237 Neb. 317, 325, 466 N.W.2d 73, 79 (1991), we state that a party "not aggrieved by [a] judgment . . . cannot appeal." See, also, *Federal Dep. Ins. Corp. v. Swanson*, 231 Neb. 148, 150, 435 N.W.2d 659, 660 (1989): "Only a party aggrieved by an order or judgment can

appeal; one who has been granted that which he or she sought has not been aggrieved." In light of Rule 1E, the current rule allowing a cross-appeal, we overrule *Atokad Ag. & Racing v. Governors of Knts. of Ak-Sar-Ben, supra*, and *Federal Dep. Ins. Corp. v. Swanson, supra*, insofar as those decisions, and any other similar decision of this court, express the principle that only an aggrieved party can cross-appeal in an appeal otherwise perfected to the Nebraska Supreme Court or the Nebraska Court of Appeals. Therefore, although Chait obtained a judgment on a verdict favorable to him, he is allowed, nevertheless, to maintain a cross-appeal under the circumstances.

Consequently, as a logical starting point, we first examine the merit of Chait's cross-appeal, for if the case should not have been submitted to the jury, consideration of questions about misconduct during jury deliberations is unnecessary for disposition of the present appeal.

STANDARD OF REVIEW

> A party against whom a motion to dismiss is directed is entitled to have all relevant evidence accepted or treated as true, every controverted fact as favorably resolved, and every beneficial inference reasonably deducible from the evidence. . . .
>
> "A court cannot decide an issue as a matter of law unless the facts adduced on an issue are such that reasonable minds can draw but one conclusion from the evidence. . . . In a jury trial, when evidence compels but one reasonable conclusion regarding an issue or question in the litigation, a court can properly direct a verdict on such issue or question."

Burns v. Veterans of Foreign Wars, 231 Neb. 844, 850, 438 N.W.2d 485, 489-90 (1989) (quoting from *Anderson v. Union Pacific RR. Co.*, 229 Neb. 321, 426 N.W.2d 518 (1988)). Accord, *Dale v. Thomas Funeral Home*, 237 Neb. 528, 466 N.W.2d 805 (1991); *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987).

ECCLESTON'S HEARING PROBLEM AND SURGERY

Since 1983, Eccleston had a hearing problem in his left ear

and wore a hearing aid. In 1985, Eccleston was referred to Chait, an otolaryngologist, that is, a physician who specializes in the medical and surgical treatment of problems involving the head and neck, including ears, nose, and throat. Chait diagnosed Eccleston's ear problem as otosclerosis, a degenerative pathological condition of spongy bone that adversely affects the stapes bone within the ear and results in loss of hearing.

The stapes is the innermost of three bones located in the middle ear. After entering the ear and proceeding down the ear canal, sound waves produce vibrations in the eardrum. These vibrations activate an adjacent bone, the malleus, or "hammer," which articulates with another bone, the incus, or "anvil," transmitting vibrations to the stapes, or "stirrup," the small bone that imparts the vibrations to the membrane of the inner ear containing a fluid. The vibrations, thus transmitted, then set the inner ear's fluid in motion so that the vibrations are received by nerve endings for transmission by the auditory nerve to the brain.

In otosclerosis, the stapes, or stirrup, has been immobilized by bony growth so that on receiving vibrations transmitted from the incus and malleus, the stirrup is unable to "wiggle and transmit sound" into the adjoining fluid chamber of the inner ear for transmission to the brain. A stapedectomy is the only medically recognized surgical procedure to eliminate otosclerosis. During a stapedectomy, a surgeon removes the stapes, or stirrup, and replaces it with a prosthesis that conducts vibrations to the inner ear.

On September 5, 1985, in Omaha, Chait performed a stapedectomy on Eccleston's left ear. As the result of the surgery, Eccleston sustained a total loss of hearing in his left ear.

In his negligence action against Chait, Eccleston claimed that Chait had failed "to inform and advise the plaintiff of the risks of a left stapedectomy to include a total loss of hearing." Notwithstanding Chait's motion for a directed verdict at conclusion of all the evidence, the case was submitted to the jury, which returned a verdict for Chait. Eccleston sought, but the court denied, a new trial as the result of alleged misconduct during jury deliberations. Eccleston appeals; Chait

cross-appeals.

EVIDENCE DURING TRIAL

Eccleston testified that in a visit before the surgery, Chait told Eccleston that there was a "95 percent or 90 percent success rate" and a "5 percent failure rate" in stapedectomies, but did not tell Eccleston that loss of hearing was a risk and possible result of the operation.

In his case in chief, Eccleston introduced Chait's deposition, in which the physician acknowledged that he "routinely" informed a stapedectomy patient that "the operation on occasion is not successful and that the hearing may be lost," although Chait did not recall giving Eccleston the foregoing information before the stapedectomy. Eccleston also called Chait as a witness regarding the standard of care in Omaha for physicians' informing patients about the risks of a stapedectomy. During direct examination of Chait, the following exchange occurred:

> Q. Back in September of 1985, wasn't it the standard in Omaha for physicians to advise the patients that they could lose their total hearing in the ear that you were doing a stapedectomy on?
>
> A. Yeah. I think that the standard in '85 was that the physician should advise the patient that the operation was not without risk and that there could be failures.
>
> Q. All right. And these failures would include the loss of hearing to the ear of the surgical ear?
>
> A. Those failures would include that, yes.
>
> . . . .
>
> Q. And by 'failure,' you mean the loss of hearing of the ear?
>
> A. By 'failure' that's what I am referring to, yes.

Chait further testified that even in a surgically correct stapedectomy, a loss of hearing may occur because the auditory nerve "cannot tolerate the energy of the operation and it essentially dies."

Dr. James Werth, an ear, nose, and throat specialist practicing in the Omaha area, testified for Chait concerning the standard of care and information imparted to a prospective

surgical patient for a stapedectomy in 1985. According to Werth, all necessary information was communicated by conversation with a prospective patient "so that an intelligent decision could be made as to whether or not the individual wanted to have this procedure done." Regarding a stapedectomy, Werth testified that the standard of care required that the physician "explain to the patient that there is a failure rate" of 5 percent, and he testified that a physician's telling a patient that there is "a five percent risk of failure" in stapedectomies is "consistent" with the standard of care concerning an informed consent for a stapedectomy. Finally, Werth expressed his opinion that Chait "did meet the standard of care in the stapedectomy surgery" and that Chait obtained informed consent for the surgical procedure performed on Eccleston.

At conclusion of all the evidence, Chait moved for a directed verdict on the basis that there was no evidence that the standard of care in Omaha required that a physician, before a stapedectomy, inform the patient concerning the possibility of loss of hearing as a result of the stapedectomy. The court refused to direct a verdict for Chait and submitted the case to the jury, which returned its verdict for Chait.

INFORMED CONSENT

Nebraska's statutory standard for "informed consent," as a part of the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§ 44-2801 to 44-2855 (Reissue 1988), is § 44-2816, which states:

> Informed consent shall mean consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities. Failure to obtain informed consent shall include failure to obtain any express or implied consent for any operation, treatment, or procedure in a case in which a reasonably prudent health care provider in the community or similar communities would have obtained an express or implied consent for such operation, treatment, or procedure under similar circumstances.

As pointed out in Prosser and Keeton on the Law of Torts § 32 at 190 (5th ed. 1984):

> The informed consent doctrine is based on principles of individual autonomy, and specifically on the premise that every person has the right to determine what shall be done to his own body. Surgeons and other doctors are thus required to provide their patients with sufficient information to permit the patient himself to make an informed and intelligent decision on whether to submit to a proposed course of treatment or surgical procedure. Such a disclosure should include the nature of the pertinent ailment or condition, the risks of the proposed treatment or procedure, and the risks of any alternative methods of treatment, including the risks of failing to undergo any treatment at all. Thus, although the procedure be skillfully performed, the doctor may nevertheless be liable for an adverse consequence about which the patient was not adequately informed.

There are two different theories regarding the extent of a physician's duty to disclose the risks of a particular treatment or procedure, namely, the "material risk" theory and the "professional" theory.

> The "professional" theory holds that the duty is measured by the standard of the reasonable medical practitioner under the same or similar circumstances, and must be determined by expert medical testimony establishing the prevailing standard and the defendant practitioner's departure therefrom. On the other hand, the "material risk" theory holds the duty to disclose is measured by the patient's need for information to balance the probable risks against the probable benefits in making the decision to either undergo or forgo the treatment proposed. Although under this theory expert medical testimony may be necessary to establish the undisclosed risk as a known danger of the procedure, expert testimony is not required to establish the physician's duty to disclose, and the fact finder can decide, without the aid of a medical expert, whether a reasonable person in the patient's position would have considered the risk significant in making his or

her decision.

Smith v. Weaver, 225 Neb. 569, 573-74, 407 N.W.2d 174, 178 (1987).

The material risk theory protects a patient's "right of physical self-determination [because it] mandates that the scope of a physician's duty to disclose therapeutic risks and alternatives be governed by the patient's informational needs." *Sard v. Hardy*, 281 Md. 432, 442, 379 A.2d 1014, 1021 (1977). Also, the professional theory "paternalistically leaves the right of choice to the medical community, in derogation of the patient's right of self-determination." Prosser and Keeton, *supra* at 191. Nevertheless, as the result of § 44-2816, "Nebraska has therefore been committed by its Legislature to the 'professional' theory, under which expert evidence is indispensable to establish what information would ordinarily be provided under the prevailing circumstances by physicians in the relevant and similar localities." *Smith v. Weaver*, 225 Neb. at 574, 407 N.W.2d at 179. Thus, notwithstanding voluminous criticism of the professional theory of informed consent, this court is bound by § 44-2816 as a statutory standard and prescription for an informed consent.

In a medical malpractice or negligence action, expert testimony is required to prove the standard of care in an informed consent case. See, *Turek v. St. Elizabeth Comm. Health Ctr., ante* p. 467, 488 N.W.2d 567 (1992); *Jones v. Malloy*, 226 Neb. 559, 412 N.W.2d 837 (1987); *Smith v. Weaver, supra*.

The crucial question in Eccleston's case is whether Chait, in supplying information for Eccleston's consent to the stapedectomy, was required to specifically tell Eccleston that a stapedectomy included the risk of a possible total loss of hearing in the ear involved in the operation.

In visiting with Eccleston, Chait did not mention the possibility of a loss of hearing as a result of the prospective stapedectomy, although Chait usually, or "routinely," mentioned such possibility to his stapedectomy patients. However, the standard of care in a medical malpractice or negligence action based on inadequate information for a patient's consent to an operation, treatment, or procedure is not

determined by a defendant physician's personal or customary routine, but, rather, is based on information which physicians ordinarily supply to patients in like circumstances in the locality or similar localities. See § 44-2816. Consequently, although Chait usually, or routinely, informed stapedectomy patients concerning the possibility of a hearing loss resulting from the surgical procedure, Chait's personal standard regarding information for a patient's consent is irrelevant as a standard for evaluating Chait's medical conduct in relation to Eccleston's medical negligence claim. Rather, the issues in Eccleston's case are: (1) In conformity with the standard of care in the locality, what information do physicians supply to prospective surgical patients regarding risk involved in a stapedectomy? and (2) did Chait impart to Eccleston the information required under the applicable standard of care?

Both Chait and Werth testified that the standard of care concerning an informed consent for a stapedectomy required that a physician tell a surgical patient that there was a 5-percent risk of failure in stapedectomies. According to Chait and Werth, elaboration or specification of the exact nature of any aspect of risk is not part of the information required to be given by a physician for informed consent of a stapedectomy patient. Thus, as testified by Chait and Werth, who were the only witnesses concerning the standard of care regarding an informed consent for a stapedectomy in Omaha during 1985, a physician's telling a patient that there was a 5-percent failure rate in stapedectomies satisfied the standard of care concerning information for an informed consent to a stapedectomy. Therefore, under the standard of care prevailing when Chait visited with Eccleston about the prospective stapedectomy, a physician was not required to tell a patient that the 5-percent failure rate included a possible loss of the patient's hearing. This standard of care places a patient, who more than likely lacks a medical background or training, in the precarious position of exploring and inquiring about adverse consequences of a surgical procedure. Nonetheless, that is precisely the position of a patient under the professional theory of informed consent expressed in § 44-2816 as acknowledged by *Smith v. Weaver*, 225 Neb. 569, 407 N.W.2d 174 (1987).

In the final analysis, Eccleston's evidence on the applicable standard of care concerning information required to be given to a patient for an informed consent to a stapedectomy showed Chait's medical conduct conformed with the standard of care in Omaha during 1985. Conversely, Eccleston failed to present evidence that Chait's conduct did not meet the standard of care. Consequently, Eccleston failed to establish a prima facie case of medical negligence by Chait. "A 'prima facie case' means that evidence sufficiently establishes elements of a cause of action and, notwithstanding a motion for a directed verdict in a jury trial or a motion to dismiss in a nonjury trial, allows submission of the case to the fact finder for disposition." *Dale v. Thomas Funeral Home*, 237 Neb. 528, 529, 466 N.W.2d 805, 807 (1991). Accord, *State v. Jasper*, 237 Neb. 754, 467 N.W.2d 855 (1991); *Chapman v. Union Pacific Railroad*, 237 Neb. 617, 467 N.W.2d 388 (1991). For that reason, Chait's motion for a directed verdict should have been granted, and Eccleston's negligence action against Chait should have been dismissed and not submitted to the jury.

We, therefore, reverse the judgment of the district court and remand this matter to the district court with direction to dismiss Eccleston's action against Chait. Under the circumstances, it is unnecessary to discuss Eccleston's assignments of error, since the assigned errors involve aspects of a case which should not have been submitted to the jury in the first instance.

REVERSED AND REMANDED WITH DIRECTION.

LORETTA F. BALLARD, APPELLEE, V. GILTNER PUBLIC SCHOOLS, SCHOOL DISTRICT NO. 2, HAMILTON COUNTY, NEBRASKA, APPELLANT.

492 N.W.2d 855

Filed December 4, 1992. No. S-90-036.

1. **Res Judicata: Proof.** For use of res judicata, a litigant must affirmatively raise the issue and prove the factual basis for application of res judicata.
2. **Breach of Contract: Words and Phrases.** Breach of contract is a contractual

party's failure, without legal excuse, to perform a promissory obligation which forms the whole or part of a contract.

3. **Breach of Contract: Proof.** As an affirmative defense, breach of contract must be pleaded and proved by the party having the burden of proof for the defense.
4. **Employer and Employee: Words and Phrases.** For the purpose of an employer-employee relationship, insubordination is an employee's willful or intentional disregard of, or refusal to obey, an employer's reasonable order, rule, or regulation, which is expressed or implied and is given or promulgated under lawful authority related to the employment.

Appeal from the District Court for Hamilton County, WILLIAM H. NORTON, Judge, on appeal thereto from the County Court for Hamilton County, CURTIS H. EVANS, Judge. Judgment of District Court affirmed.

John F. Recknor, of Barlow, Johnson, DeMars & Flodman, for appellant.

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

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

SHANAHAN, J.

PROCEDURAL BACKGROUND

In the county court for Hamilton County, Loretta F. Ballard sued Giltner Public Schools, School District No. 2 of Hamilton County, Nebraska (School District), for breach of their written employment contract. In its answer, the School District pled res judicata, based on a decision by the Nebraska Appeal Tribunal which determined that Ballard was disqualified from receiving unemployment compensation benefits, and alleged that Ballard had breached her employment contract as the result of employee misconduct.

The trial court concluded that the School District had breached the employment contract because Ballard's dismissal from employment was unjustified, and awarded Ballard a judgment of $4,558 against the School District, after credit for Ballard's receipt of 1 month's salary ($522) and $1,184 in unemployment compensation benefits to which Ballard was unentitled. Ballard does not contest use of unemployment compensation benefits as a credit in determining the amount of the damages judgment awarded to Ballard. Cf. *Bang v.*

International Sisal Co., 212 Minn. 135, 4 N.W.2d 113 (1942) (receipt of unemployment compensation benefits is not allowable as a credit against damages recovered in an employee's action for breach of employment contract). Cf., also, *Dehnart v. Waukesha Brewing Co.*, 21 Wis. 2d 583, 124 N.W.2d 664 (1963) (receipt of unemployment compensation benefits is allowable as a credit against damages recovered in an employee's action for breach of employment contract). The School District appealed to the district court, which affirmed the county court judgment.

BALLARD'S DISMISSAL FROM EMPLOYMENT

Ballard had been employed by the School District as an assistant cook for 8 years pursuant to annual written agreements. Ballard's most recent agreement, which was denominated "School Employee Contract," stated that the period of her employment was August 29, 1983, to May 24, 1984, at an annual salary of $6,264 paid in monthly installments. The contract also stated that Ballard's employment could exist during the contract period "as long as [she] render[ed] satisfactory service."

On the morning of September 29, 1983, just 1 month after commencement of her work as a cook for the School District under the contract in issue, Ballard was called into the office of Douglas Bandemer, school principal, to discuss the misconduct of her son, an eighth grade student at the same school where Ballard worked. At the conclusion of the conference, and as Ballard was leaving the principal's office, the principal's secretary heard Ballard, in a Shakespearean aside, say that the principal was a "dumb bastard." After the secretary told the principal what Ballard had said, the principal fired Ballard that same afternoon.

Ballard applied for unemployment compensation benefits pursuant to the Employment Security Law, Neb. Rev. Stat. § 48-601 et seq. (Reissue 1988), but was later disqualified from benefits when the Department of Labor determined that Ballard's employment was terminated as a result of work-related misconduct. In Ballard's appeal to the Nebraska Appeal Tribunal, the tribunal determined that Ballard's remark

"was such as to disregard the standards of behavior which an employer has a right to expect of its employees on the business premises and thereby jeopardized the employer/employee relationship." Ballard did not appeal the tribunal's decision.

STANDARD OF REVIEW

An action for damages resulting from a breach of contract is a law action.

> 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, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

Broekemeier Ford v. Clatanoff, 240 Neb. 265, 267, 481 N.W.2d 416, 418 (1992). Accord, *Albee v. Maverick Media, Inc.*, 239 Neb. 60, 474 N.W.2d 238 (1991); *Justice v. Hand*, 227 Neb. 856, 420 N.W.2d 704 (1988); *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

RES JUDICATA

The School District contends that as the result of Ballard's proceeding under the Employment Security Law, the doctrine of res judicata precludes relitigation of the employee misconduct issue decided by the Nebraska Appeal Tribunal. According to the School District, because the Nebraska Appeal Tribunal determined that termination of Ballard's employment resulted from work-related misconduct, the trial court in Ballard's contract action was bound by the Nebraska Appeal Tribunal's determination under the Employment Security Law.

In *NC+ Hybrids v. Growers Seed Assn.*, 228 Neb. 306, 310-11, 422 N.W.2d 542, 545 (1988), we stated:

> The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. . . .
>
> Res judicata is founded on a policy favoring

> termination of an action by preclusion or prevention of subsequent litigation on the same cause.

For use of res judicata, a litigant must affirmatively raise the issue and prove the factual basis for application of res judicata. See, *DeCosta Sporting Goods, Inc. v. Kirkland*, 210 Neb. 815, 316 N.W.2d 772 (1982); *Tedco Development Corp. v. Overland Hills, Inc.*, 205 Neb. 194, 287 N.W.2d 49 (1980); *State ex rel. Weasmer v. Manpower of Omaha, Inc.*, 163 Neb. 529, 80 N.W.2d 580 (1957). See, also, *Grand Lodge I.O.O.F. v. Marvin*, 220 Neb. 197, 369 N.W.2d 54 (1985) (use of the specific phrase "res judicata" is unnecessary when the facts alleged supply a basis for assertion of res judicata).

The School District did plead and offered to factually establish the decision of the Nebraska Appeal Tribunal in which the tribunal concluded that Ballard's remark about the principal was employee misconduct which disqualified Ballard from receiving unemployment compensation benefits. However, § 48-636 of the Employment Security Law specifically provides:

> Except insofar as reconsideration of any determination is had under sections 48-630 to 48-632, any right, fact, or matter in issue, directly passed upon or necessarily involved in a determination or redetermination which has become final, or in a decision on appeal which has become final, *shall be conclusive for all the purposes of the Employment Security Law* as between the Commissioner of Labor, the claimant, and all employers who had notice of such determination, redetermination, or decision. Subject to appeal proceedings and judicial review as provided in sections 48-633 to 48-644, *any determination, redetermination, or decision as to rights to benefits shall be conclusive for all the purposes of such law and shall not be subject to collateral attack by any employer.*

(Emphasis supplied.)

In *White v. Ardan, Inc.*, 230 Neb. 11, 430 N.W.2d 27 (1988), we determined that conclusiveness of findings pursuant to the Employment Security Law is limited by § 48-636. In *White*, the plaintiffs sued their former employer for breach of their employment contracts. When Ardan asserted that termination

of the plaintiffs' employment was based on employee misconduct, the plaintiffs responded by showing that prior proceedings under the Employment Security Law had concluded with a finding that the plaintiffs were not guilty of misconduct in their employment with Ardan; hence, according to the plaintiffs in *White*, the doctrine of res judicata legally prevented Ardan's showing any employee misconduct to preclude the plaintiffs' subsequent contract action. This court disagreed by noting that § 48-636 (Cum. Supp. 1986) specifically provides that "any determination made under the Nebraska Employment Security Law is *conclusive for the purpose of that law*." (Emphasis in original.) 230 Neb. at 22, 430 N.W.2d at 34. Because *White* did not involve a claim for unemployment benefits, but, rather, involved a claim based on breach of contract, the doctrine of res judicata was unavailable in the employees' subsequent contract action for damages.

The School District argues that pursuant to our later holding in *Scott v. Mattingly, ante* p. 276, 488 N.W.2d 349 (1992), we should limit *White*. In *Scott*, we stated, "An unreviewed administrative hearing can preclude later litigation of the same issues," *id.* at 281, 488 N.W.2d at 351-52, but also acknowledged that " '[c]ourts do not, of course, have free rein to impose rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand. In this context, *the question is not whether administrative estoppel is wise but whether it is intended by the legislature*,' " *id.* at 282, 488 N.W.2d at 352 (emphasis supplied) (quoting *Astoria Federal Sav. and Loan Ass'n v. Solimino*, ____ U.S. ____, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991)).

Section 48-636 is clear on its face; a determination made pursuant to the Employment Security Law is conclusive only for the purpose of proceedings governed by the Employment Security Law. Ballard's suit is a claim and action based on the common law of contracts, not the statutory provisions found in the Employment Security Law. Therefore, the doctrine of res judicata is unavailable to the School District in Ballard's contract action.

BREACH OF CONTRACT

The School District also asserts that the county court erred in determining that the School District lacked justification for termination of Ballard's employment.

Breach of contract is a contractual party's failure, without legal excuse, to perform a promissory obligation which forms the whole or part of a contract. See, *Davenport Hosp. Assn. v. Hospital Service*, 261 Iowa 247, 154 N.W.2d 153 (1967); *National City Bank v. E. & Sons, Inc.*, 158 Ohio St. 450, 110 N.E.2d 598 (1953); *Friedman vs. Katzner*, 139 Md. 195, 114 A. 884 (1921). See, also, 11 Samuel Williston, A Treatise on the Law of Contracts § 1290 (3d ed. 1968). As an affirmative defense, breach of contract must be pleaded and proved by the party having the burden of proof for the defense. See *Peters v. Wilks*, 151 Neb. 861, 39 N.W.2d 793 (1949).

Ballard's case may appear to be somewhat similar to *Poore v. City of Minden*, 237 Neb. 78, 464 N.W.2d 791 (1991), which involved a sanitation worker's suit under the Employment Security Law when Poore was disqualified from unemployment compensation benefits because he had, by unauthorized appropriation, obtained water and electricity from his city-employer. However, Ballard's action is based on an employer's breach of a contract for employment. "Work-related misconduct" that may justify denial of unemployment compensation benefits under the Employment Security Law is not synonymous with "just cause" for termination of an employment contract. See *Great Plains Container Co. v. Hiatt*, 225 Neb. 558, 407 N.W.2d 166 (1987). Therefore, the issue is whether the School District's discharge of Ballard from her employment was a repudiation of their employment contract.

The School District claims that Ballard breached her employment contract by violating school board policy. However, the trial court found that Ballard was never informed of school board policy asserted as a basis to justify Ballard's employment. We must accept that factual determination by the trial court and decide whether Ballard's conduct constituted just cause for termination of employment under the provisions of the written contract between the parties. The agreement

specifically provides that Ballard would be employed "as long as the employee render[ed] satisfactory service" as a school cook. Thus, under the employment contract, Ballard's employment could be validly terminated if she failed to render "satisfactory service" as a cook for the School District.

Although Ballard was never informed of school board policy, the School District contends that her "insubordinate" behavior justified termination of Ballard's employment. For the purpose of an employer-employee relationship, we have defined insubordination as "an employee's willful or intentional disregard of, or refusal to obey, an employer's reasonable order, rule, or regulation, which is expressed or implied and is given or promulgated under lawful authority related to the employment." *Wadman v. City of Omaha*, 231 Neb. 819, 828, 438 N.W.2d 749, 755 (1989).

Ballard was called to the principal's office as a parent, not as an employee, and was fired as the result of her remark after meeting with the principal regarding her son's behavior. Her comment was heard by the principal's secretary and, ostensibly, was related to the conference just concluded concerning the behavior of Ballard's son. The meeting between Ballard and the principal was completely unrelated to her job in the school cafeteria. As the secretary testified, "[T]he whole thing had nothing to do with her [Ballard's] work at the school in the kitchen." Moreover, the School District has never asserted that Ballard's job performance was anything less than satisfactory.

Bandemer, the school's principal, testified concerning Ballard's work:

> Q. Did you at anytime find her work to be unsatisfactory?
>
> A. No.
>
> Q. She had been a loyal employee for going on nine years. Did her immediate supervisor, Mrs. Miller ever communicate to you any — any problem with Mrs. Ballard and her work?
>
> A. No.
>
> Q. So, based upon what a secretary told you that someone else said, you terminated an employee that had a contract of employment and had nearly a full school year

for that contract to run, and had been a loyal employee for over eight years, is that correct?

A. That's correct.

Thus, in the present case, no evidence indicates that the principal issued a work-related order to Ballard and that Ballard willfully failed to carry out such order. Rather, the termination of Ballard's employment was based solely on a comment that she made as a parent after meeting with the principal about the behavior of Ballard's son; hence, the subject of the meeting between Ballard and the principal was unrelated to Ballard's conduct as a school cook. Because the evidence fails to establish that Ballard had breached her employment contract, that is, unsatisfactorily performed her contract duties as a school cook, the School District has failed to establish justification for its terminating Ballard's employment under the contract.

Consequently, we affirm the district court's judgment which affirmed the county court's judgment for Ballard.

AFFIRMED.

SARPY COUNTY, NEBRASKA, APPELLEE, V. CITY OF SPRINGFIELD, NEBRASKA, ET AL., APPELLANTS.

492 N.W.2d 566

Filed December 4, 1992. No. S-90-052.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the trial court.
2. **Summary Judgment: Appeal and Error.** When reviewing a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from that evidence.
3. **Final Orders: Words and Phrases.** An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in Neb. Rev. Stat. ch. 25 (Reissue 1989). Neb. Rev. Stat. § 25-1902 (Reissue 1989).

4. **Final Orders: Appeal and Error.** An order is final and appealable when the substantial rights of the parties to the action are determined, even though the cause is retained for the determination of matters incidental thereto.
5. **Final Orders: Words and Phrases.** To be final, an order must dispose of the whole merits of the case and must leave nothing for the further consideration of the court. Thus, when no further action of the court is required to dispose of a pending cause, the order is final. However, if the cause is retained for further action, the order is not final.
6. **Administrative Law: Licenses and Permits.** The Nebraska Department of Environmental Control shall have the power and duty to exercise exclusive general supervision of the administration and enforcement of the Environmental Protection Act and all rules and regulations and orders promulgated thereunder and to issue, continue in effect, revoke, modify, or deny permits, under such conditions as the director may prescribe, to prevent, control, or abate pollution, or for the discharge of wastes into the air, land, or waters of the state, and for the installation, modification, or operation of disposal systems or any parts thereof. Neb. Rev. Stat. § 81-1504(1) and (11) (Reissue 1987).
7. **Administrative Law: Zoning: Jurisdiction: Counties: Municipal Corporations.** Before the director of the Nebraska Department of Environmental Control shall approve a new solid waste disposal area, it shall be approved by the county board of the county if the area is outside the zoning jurisdiction of a city or village, or by the city council or board of trustees if within the zoning jurisdiction of a city or village. Neb. Rev. Stat. § 81-1518(1) (Reissue 1987).
8. **Municipal Corporations: Zoning: Boundaries.** The zoning authority of a city of the second class extends to an area within 1 mile of its corporate limits. Neb. Rev. Stat. § 17-1001 (Reissue 1991).
9. **Statutes: Legislature: Intent.** When asked to interpret a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. It is the court's duty to discover, if possible, legislative intent from the statute itself.
10. **Statutes: Intent.** In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
11. **Municipal Corporations: Zoning: Jurisdiction.** The Nebraska Environmental Protection Act has limited the influence of the city council of a city of the second class to the approval of a solid waste disposal area located within its zoning jurisdiction.
12. **Statutes: Municipal Corporations.** Statutes granting powers to municipalities are to be strictly construed, and where doubt exists, such doubt must be resolved against the grant.

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

William E. Seidler, Jr., and Philip J. Mahoney, of Ryan & Seidler, for appellants.

William F. Hargens and Robert J. Bothe, of McGrath, North, Mullin & Kratz, P.C., for appellee.

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

HASTINGS, C.J.

The City of Springfield has appealed a summary judgment granted in favor of the plaintiff, Sarpy County, in this declaratory judgment action. The county had sought to have Springfield's landfill licensing ordinances Nos. 306 and 311 declared invalid and to enjoin their enforcement.

Sarpy County proposed to build a solid waste disposal facility 1 1/2 miles northwest of the corporate limits of Springfield, Nebraska, in Sarpy County. Neb. Rev. Stat. § 23-379 (Reissue 1991) provides that "[e]ach county may purchase, construct, maintain, and improve garbage disposal plants, systems or solid waste disposal areas . . . and may lease or take land in fee . . . for the construction and operation of such . . . solid waste disposal areas. . . ."

On December 6, 1988, the Sarpy County Board of County Commissioners voted to seek an option on appropriate property for what is now called the Fairview Road facility, and later entered into a written purchase agreement for this property. The county then notified the Nebraska Department of Environmental Control (NDEC) of its intent to develop the site into a solid waste disposal area. By letter dated May 17, 1988, the NDEC preliminarily approved the site as appropriate for a solid waste disposal area. The Sarpy County board voted on July 11, 1989, to issue a special use permit for a solid waste disposal area at the Fairview Road facility.

On March 28, 1989, the City of Springfield passed ordinance No. 306, which requires a city license before any person, governmental subdivision, or agency could operate, maintain, or construct a solid waste disposal area within 5 miles of the corporate limits of Springfield if the solid waste disposal area would be located over a ground water source that supplied

drinking water to the residents of Springfield. The ordinance requires that an application contain the applicant's name and residence and be accompanied by a $5,000 filing fee and "such other information as is deemed necessary by the City Council." The ordinance also provides that the city council shall hold a hearing within 45 days after the filing of the application, but imposes no time limits for the mayor and council to arrive at a decision as to whether to grant the license.

On March 30, 1989, the city notified Sarpy County by letter of its landfill licensing ordinance. The Sarpy County board replied on April 11, 1989, that it would not apply for a Springfield landfill license, on the ground that the Nebraska Environmental Protection Act, Neb. Rev. Stat. § 81-1501 et seq. (Reissue 1987) (NEPA), had preempted the field of water pollution control from local regulation.

Sarpy County then filed its declaratory judgment action against Springfield, its mayor, and its city council, alleging that the city had no statutory authority for the enactment of its landfill licensing ordinance and that the ordinance was "invalid, unenforceable and/or inapplicable" to the proposed site. The county further requested an injunction to restrain the city from enforcing the ordinance.

In November 1989, and prior to the hearing on the motion for partial summary judgment, Springfield amended ordinance No. 306 by adopting ordinance No. 311. Ordinance No. 311 contains essentially the same requirements as ordinance No. 306 except that ordinance No. 311 requires the hiring by the city council of an independent engineering firm to review the application and adds some other requirements not essential to a determination of this litigation.

At the hearing on the motion for summary judgment, certain portions of various depositions were offered, together with detailed engineering studies and affidavits, much of which had been in support of the county's application before the NDEC for the issuance of a landfill permit. The district court ordered the motion sustained, ordered that ordinances Nos. 306 and 311 are invalid as applied to the county's solid waste facility, and further ordered that the City of Springfield had no authority to enact either ordinance as applied to the proposed Fairview

Road facility "or any other ordinance purporting to regulate or prohibit plaintiff's ownership, construction and operation of its proposed Fairview Road facility."

In support of its claim of error in the court's granting of summary judgment, Springfield alleges that the trial court erred in holding that the city had no power to regulate the operation of a solid waste disposal area within 5 miles of its corporate limits under the circumstances existing and in holding that the NDEC has exclusive general supervision for the licensing of solid waste disposal areas. We affirm.

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the trial court. *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990); *Sorensen v. City of Omaha*, 230 Neb. 286, 430 N.W.2d 696 (1988).

When reviewing a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from that evidence. *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992); *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991).

At the outset, Sarpy County claims that the issuance of a partial summary judgment was not a final, appealable order. A final order has been statutorily defined thus:

> An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter.

See Neb. Rev. Stat. § 25-1902 (Reissue 1989).

This court has stated that an order is final and appealable when the substantial rights of the parties to the action are determined, even though the cause is retained for the determination of matters incidental thereto. *In re 1983-84 County Tax Levy*, 220 Neb. 897, 374 N.W.2d 235 (1985);

Dorshorst v. Dorshorst, 174 Neb. 886, 120 N.W.2d 32 (1963).

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 not final. *Lewis v. Craig*, 236 Neb. 602, 463 N.W.2d 318 (1990). See, also, *Voyles v. DeBrown Leasing, Inc.*, 222 Neb. 250, 383 N.W.2d 36 (1986).

Sarpy County alleges that the trial court did not try the county's claims that the ordinances were arbitrary, capricious, and discriminatory; that the ordinances were vague and deprived Sarpy County of due process; that Springfield was guilty of laches and should be estopped from attempting to enforce the ordinances; and that Sarpy County is entitled to permanent injunctive relief.

These contentions are without merit for the most obvious of reasons. Since the trial court found for the county on the threshold issue that the city lacked authority to regulate or prohibit the construction, operation, and maintenance of a new solid waste disposal area beyond its zoning jurisdiction, there was no need to reach any of the other claimed defects of the ordinances. If the city did not have the authority to act and the activity was declared invalid, no further action was required to dispose of the cause pending, and hence, the order was final.

Solid waste disposal areas in Nebraska are regulated by NEPA, § 81-1501 et seq. The NDEC, created by the act, shall have the power and duty "[t]o exercise exclusive general supervision of the administration and enforcement of the Environmental Protection Act and all rules and regulations and orders promulgated thereunder" and

> [t]o issue, continue in effect, revoke, modify, or deny permits, under such conditions as the director may prescribe, . . . to prevent, control, or abate pollution, or for the discharge of wastes into the air, land, or waters of the state, and for the installation, modification, or operation of disposal systems or any parts thereof.

§ 81-1504(1) and (11).

Section 81-1518(1), which was repealed in 1992, provided in

part:

> Before the director shall approve a new solid waste disposal area, it shall be approved by the county board of the county, if the area is outside the zoning jurisdiction of a city or village, or by the city council or board of trustees if within the zoning jurisdiction of a city or village.

The zoning authority of a city of the second class extends to an area within 1 mile of its corporate limits. Neb. Rev. Stat. § 17-1001 (Reissue 1991). The Fairview Road facility is located 1 1/2 miles northwest of the city limits, and therefore § 81-1518(1) on its face grants to the county rather than to the city the authority to approve a waste disposal area. There was no authority under § 81-1518(1) for the City of Springfield to control the approval of a solid waste disposal site.

However, the City of Springfield argues that NEPA does not preempt the city's power to regulate a solid waste area, citing us to §§ 81-1529 and 81-1516. Section 81-1529 provides as follows: "Nothing in the Environmental Protection Act shall be construed to: . . . (3) Supersede or limit the applicability of any law or ordinance relating to sanitation, industrial health, or safety." Section 81-1516 stated:

> No person shall dispose of any refuse, garbage, or rubbish at any place except a disposal area licensed as provided by the Environmental Protection Act. *Nothing in the act nor any act of the director shall usurp the legal right of a local governing body to develop and enforce local ordinances, codes, or rules and regulations on solid waste disposal equal to or more stringent than the provisions of the act*, nor shall the provisions of the act relieve the applicant from obtaining a license from a local governing body when required or relieve the person owning or operating a disposal area from responsibility for securing proper zoning permits or complying with all applicable local ordinances, codes, or rules and regulations not in conflict with the provisions of the act.

(Emphasis supplied.)

The county maintains that § 81-1516 must be read in conjunction with § 81-1518(1), previously cited, which required that before the director approves a solid waste disposal area, "it

shall be approved by the county board of the county, if the area is outside the zoning jurisdiction of a city or village, or by the city council or board of trustees if within the zoning jurisdiction of a city or village. . . ."

As the governing body which must approve the solid waste disposal site, the county claims that its power precludes enactment and enforcement of the city's ordinance. In its brief, the county argues that "[t]he construction of the NEPA proffered by Springfield would . . . result in overlapping jurisdiction of different governmental entities and conflicting regulations over the same site." Brief for appellee at 24. To a limited extent, § 81-1518(3) did address the issue of overlapping jurisdiction:

> Upon receipt of the application, the director or his or her designated representative shall inspect the proposed site and if the proposed operation *complies with the provisions of the Environmental Protection Act* and the rules and regulations adopted under such act and the *ordinances of a city or village regulating the disposal of solid wastes* and *has been approved by the governmental subdivision where the area is to be located* and if the director finds that the applicant is a responsible and suitable person to conduct the business, the director shall issue a license to the applicant upon filing by the applicant with the director proof of financial responsibility pursuant to subdivision (21)(a) of section 81-1505.

(Emphasis supplied.)

However, the emphasized language must be read in conjunction with the rest of the section. Subsection (1) of § 81-1518 stated in part:

> Before the director shall approve a new solid waste disposal area, it shall be approved by the county board of the county, if the area is outside the zoning jurisdiction of a city or village, or by the city council or board of trustees if within the zoning jurisdiction of a city or village.

Subsection (2) of § 81-1518 states in part:

> Before the county board, city council, or board of trustees shall approve such area, notice shall be given at least ten days before the hearing. . . . If the county board, city

> council, or board of trustees deems such an area suitable for a solid waste disposal area, such fact shall be certified to the director.

When asked to interpret a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. It is the court's duty to discover, if possible, legislative intent from the statute itself. *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985). In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *State v. Seaman*, 237 Neb. 916, 468 N.W.2d 121 (1991).

Section 81-1518 very carefully required that the governing body of the governmental subdivision having zoning jurisdiction over the proposed solid waste disposal area approve such application and area, i.e., the county board, the village board, or the city council. Therefore, the only logical explanation for requiring in subsection (3) compliance with "ordinances of a city or village regulating the disposal of solid wastes" is that it applied only to such ordinances affecting waste disposal areas within the limit of authority of the city or village. The authority of the city was as limited by § 81-1518(1), to approve a solid waste disposal area "if within the zoning jurisdiction of a city or village."

As stated in *Agnew v. City of Culver City*, 51 Cal. 2d 474, 477, 334 P.2d 571, 573 (1959), when a city tried to invoke its ordinance requiring a license fee of an electrician holding a state license, the license fee

> limit[ed] the right of a contractor holding a state license to contract in Culver City unless he pays the city the prescribed fee and obtains a permit from the city; the requirement for the payment of a fee and the obtaining of a permit nullifies the permission given a contractor by the general law to conduct his business at any place in the state.

Whether it is called preemption or some other label is employed, it is apparent that the Legislature, by passage of NEPA, has limited the influence of the city countil of a city of the second class to the approval of a solid waste disposal area located within its zoning jurisdiction. The area which is the subject of this litigation is outside that jurisdiction of the City of Springfield, and its city council was without authority to impose a licensing requirement.

The city also relies upon Neb. Rev. Stat. §§ 17-535, 17-536, and 17-114 (Reissue 1991) to support its claim for authority to require licensing of a solid waste disposal facility in this instance.

Section 17-535 authorizes a city to construct and maintain a water supply and to "go beyond its territorial limits" to obtain property for this purpose.

Section 17-536 grants jurisdiction to a city "to prevent any pollution or injury to the stream or source of water for the supply of such waterworks, [which] shall extend fifteen miles beyond its corporate limits."

Finally, § 17-114 provides that the mayor of a city of the second class has jurisdiction, as may be vested in him by ordinance, over all places within 5 miles of the corporate limits, for the enforcement of health and quarantine ordinances.

"Statutes granting powers to municipalities are to be strictly construed, and where doubt exists, such doubt must be resolved against the grant." *Briar West, Inc. v. City of Lincoln*, 206 Neb. 172, 176, 291 N.W.2d 730, 732 (1980). In view of our discussion of the NEPA and its limitation over the powers of a city to approve an area for waste disposal purposes, we find no authority in the last-cited statutes which grants to the city any authorization to enact and enforce ordinances Nos. 306 and 311 as they apply to the present case.

The judgment of the district court is affirmed.

AFFIRMED.

RICHARD L. ASHBY, APPELLEE, V. CIVIL SERVICE COMMISSION OF DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLANTS.

492 N.W.2d 849

Filed December 4, 1992. No. S-90-149.

1. **Administrative Law: Appeal and Error.** In reviewing an administrative agency decision on a petition in error, both the district court and the Supreme Court review the decision of the administrative agency to determine whether the agency acted within its jurisdiction and whether the decision of the agency is supported by sufficient relevant evidence.
2. _____: _____. The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.
3. **Administrative Law: Due Process: Jurisdiction: Notice: Evidence: Appeal and Error.** A court reviewing an order of an administrative agency must determine whether there has been due process of law; and this includes an inquiry into the jurisdiction of the agency, whether there was reasonable notice and an opportunity for fair hearing, and whether the finding was supported by evidence.
4. **Constitutional Law: Legislature: Courts.** The power to declare an act of the Legislature unconstitutional is a judicial power reserved solely to the courts under the division of powers between the legislative, executive, and judicial branches of government set forth in the Nebraska Constitution.
5. **Constitutional Law: Administrative Law: Legislature: Intent: Appeal and Error.** A plain reading of Neb. Rev. Stat. §§ 23-2511 and 23-2515 (Reissue 1991) and 25-1901 to 25-1908 (Reissue 1989), which govern the appeal process from a county commission, does not reveal an express or implied legislative intent to limit objections on appeal to those claims presented to the administrative tribunal.
6. **Administrative Law: Due Process: Waiver: Appeal and Error.** Although appeals through administrative channels are preferred and encouraged, procedural due process defenses should not be waived if timely raised in the first judicial tribunal to review the administrative action.
7. **Administrative Law: Due Process: Records.** When the record discloses that the elements of due process exist with respect to the findings and actions of an administrative agency or tribunal, further judicial action is neither permitted nor required.
8. **Employer and Employee: Due Process: Notice.** When state-created property interests in continued employment are involved, due process requires that an employee be entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Ronald L. Staskiewicz, Douglas County Attorney, and Edwin T. Lowndes for appellants.

M.H. Weinberg, of Weinberg & Weinberg, P.C., for appellee.

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

WHITE, J.

This is an appeal from a district court decision which reversed and vacated the findings and order of the Civil Service Commission of Douglas County (the Commission). The Commission had upheld a decision by the managing engineer for the Douglas County engineer's office to discipline appellee, Richard L. Ashby, for taking an excessive lunch break.

By the summer of 1989, Ashby had been a civil service employee for over 20 years as a heavy equipment operator in the Douglas County engineer's office. On July 25, 1989, Ashby allegedly took a lunch break in excess of the union contract allotted time. As a consequence of this contract violation, the supervising managing engineer sent a letter to Ashby on August 3. The letter notified Ashby that he was to be disciplined for being in neglect of duty because he took an excessive lunch break. The letter informed Ashby that he was thereby suspended for 10 days without pay effective August 14 through August 25, 1989, and that he was also being placed on 6 months' probation effective August 28.

Pursuant to Neb. Rev. Stat. § 23-2511 (Reissue 1987), Ashby appealed the disciplinary order on August 11. He requested that any hearing before the Commission be delayed until sometime after his scheduled return from vacation on August 24. The Commission heard the appeal on September 21 and upheld the disciplinary decision by a 2-to-2 split vote.

Ashby timely filed a petition in error with the district court for Douglas County to review the Commission's order. In his petition, Ashby alleged for the first time that the engineer's office violated his due process rights. The due process claim, based on the U.S. Supreme Court decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), asserted that before Ashby could be

disciplined, he had the right (1) to be notified of the disciplinary action, (2) to have knowledge as to the specifics of the charges so as to have an effective right to rebut them, and (3) to present his side after a reasonable time to develop his case.

Applying both state and federal constitutional law, the district court found that due process mandated a predisciplinary hearing in which Ashby was to be given a simple opportunity to respond to both the notice of the charges against him and the nature of the employer's evidence, as well as an opportunity to present his side of the story. The court concluded, based on the record, that the engineer's office had failed to provide Ashby with a *Loudermill* predisciplinary hearing and that the Commission had committed error by failing to maintain these due process rights for Ashby. Accordingly, the court reversed the decision of the Commission and vacated the suspension order. The Commission filed a motion to reconsider, which was subsequently overruled, and this appeal followed.

The Commission summarily asserts that the district court order should be reversed and vacated because the court erred in (1) not sustaining the Commission's order after finding that the Commission had jurisdiction and that the findings of the Commission were supported by the record, (2) making independent findings of fact on a petition in error, and (3) finding the employee was denied due process because he was denied a presuspension hearing.

In reviewing an administrative agency decision on a petition in error, "both the district court and the Supreme Court review the decision of the administrative agency to determine whether the agency acted within its jurisdiction and whether the decision of the agency is supported by sufficient relevant evidence." *Wagner v. City of Omaha*, 236 Neb. 843, 844, 464 N.W.2d 175, 178 (1991). Accord *Olson v. City of Omaha*, 232 Neb. 428, 441 N.W.2d 149 (1989). The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact. *Wagner v. City of Omaha, supra*; *Olson v. City of Omaha, supra*; *Coffelt v. City of Omaha*, 223 Neb. 108, 388 N.W.2d 467 (1986).

The Commission's first assignment of error relies on two district court findings: that the Commission acted within its statutory jurisdiction even though the hearing was not conducted within 2 weeks after the notice of appeal as provided by § 23-2511 and that the record contained sufficient evidence to support the Commission's finding that the disciplinary action was warranted. The Commission argues that, having made these two determinations, the district court was required to affirm the Commission's order based on the court's limited scope of review. We find this argument to be without merit. This reasoning ignores the complete findings of the lower court and too quickly disposes of the jurisdictional limitations of an administrative agency.

The jurisdiction of a proceeding before an administrative agency is restricted not only by the language of its enabling statutes, but also by the mandates of the state and federal Constitutions. The district court's determination that the actions of the Commission were permissible within the statutory language of § 23-2511 was only the beginning of the jurisdictional inquiry and was not wholly dispositive of the review on which the Commission hopes to rely. As we have previously recognized, a court reviewing " 'an order of an administrative agency [must] determine whether there has been due process of law; and this includes an inquiry into the jurisdiction of the agency, whether there was reasonable notice and an opportunity for fair hearing, and whether the finding was supported by evidence.' " *In re Appeal of Levos*, 214 Neb. 507, 511, 335 N.W.2d 262, 266 (1983).

The second alleged error claims that the district court improperly made independent findings of fact when, for the first time, on appeal to the district court, Ashby raised the issue that the engineer's office deprived him of due process by not affording him a presuspension hearing. The Commission argues that by failing to present a complaint or allegation of a due process violation at the hearing before the Commission, Ashby was precluded from raising the claim for the first time on a petition in error. The Commission relies on case law which holds that existing constitutional issues not raised before a trial *court* cannot later be asserted on appeal.

We have previously recognized instances where an appeal from an administrative agency to a judicial tribunal may raise constitutional issues for the first time. In *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966), the objectors questioned the constitutionality of a legislative act for the first time in their direct appeal to the Supreme Court from an order of the director of water resources. We noted that "the power to declare an act of the Legislature unconstitutional is a judicial power reserved solely to the courts under the division of powers between the legislative, executive, and judicial branches of government set forth in the Nebraska Constitution." *Id.* at 791, 140 N.W.2d at 632. We concluded by holding that

> in an appeal from an order of an administrative agency direct to the Supreme Court, the question of constitutionality of the act, under which the administrative agency assumes its authority, can be first raised in the Supreme Court since it is the first time afforded to raise such an issue before a judicial tribunal.

Id. at 792, 140 N.W.2d at 633.

The rule on administrative waiver of claims later raised before the courts is a flexible one. See *Rana v. U.S.*, 812 F.2d 887 (4th Cir. 1987) (citing with approval Kenneth C. Davis, Administrative Law Text, *Exhaustion* § 20.06 (3d ed. 1972)). When an administrative statute expressly provides that objections not urged before an administrative agency may not be considered by the reviewing court, courts have barred the argument presented for the first time on review. See, *Swaggart Ministries v. Cal. Bd. of Equalization*, 493 U.S. 378, 110 S. Ct. 688, 107 L. Ed. 2d 796 (1990); *Power Plant Div., Brown & Root v. O. S. H. R. C.*, 673 F.2d 111 (5th Cir. 1982). However, even in the presence of such express statutory language, the court may permit review if the circumstances are novel, are extraordinary, or compel a flexible application based on overriding public policy. See, *Swaggart, supra*; *Rana, supra*.

The Commission does not argue that this appeal is restricted by express statutory language which bars objections on appeal if not properly raised at the administrative agency. A plain reading of § 23-2511 and Neb. Rev. Stat. §§ 23-2515 (Reissue

1991) and 25-1901 to 25-1908 (Reissue 1989), which govern the appeal process from a county commission, does not reveal an express or implied legislative intent to limit objections on appeal to those claims presented to the administrative tribunal. Furthermore, although appeals through administrative channels are preferred and encouraged, procedural due process defenses should not be waived if timely raised in the first judicial tribunal to review the administrative action. See, generally, *In re Appropriations D-887 and A-768*, 240 Neb. 337, 482 N.W.2d 11 (1992) (noting the practice of this court to consider constitutional questions when raised on direct appeal to the Supreme Court). See, also, *Abbott v Howard*, 182 Mich. App. 243, 451 N.W.2d 597 (1990), *appeal denied* 436 Mich. 874, 461 N.W.2d 210.

We recently noted that " 'once the record discloses that those elements of due process existed with respect to the findings and action of an administrative agency or tribunal, further judicial action is neither permissible nor required.' " *Geringer v. City of Omaha*, 237 Neb. 928, 935, 468 N.W.2d 372, 377 (1991) (quoting *States v. Anderson*, 219 Neb. 545, 364 N.W.2d 38 (1985)). However, when evidence of the requisite due process procedures is absent from an administrative record, the first judicial tribunal to hear the appeal may review the constitutionality issue.

Contrary to the Commission's assertions, the presuspension due process review conducted by the district court neither addressed new evidence nor reweighed the credibility of the evidence offered at the hearing. Rather, the lower court simply reviewed the pleadings, testimony, and exhibits which were before the Commission at the initial hearing. From these records, the district court determined that there was no showing that prior to the 10-day suspension, Ashby had been given either oral or written notice of the charges against him or of the nature of the employer's evidence, nor had Ashby been advised that he had an opportunity to present his side of the story.

The Commission's third assignment of error alleges that even if the due process issue was properly before the district court, the court erroneously determined that Ashby was denied due process because the engineer's office failed to give him a

presuspension hearing. The U.S. Supreme Court addressed the necessary due process requirements for a termination of an employee's property interest in continued employment in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). Although the *Loudermill* decision pertained to a termination, instead of a temporary suspension, of a public employee, a temporary suspension may be a sufficient deprivation to invoke the same constitutional considerations. See, e.g., *Bailey v. Kirk*, 777 F.2d 567 (10th Cir. 1985). Article 12 of the collective bargaining agreement between the Commission and Ashby's local union states that "[d]isciplinary action may be imposed on an employee only for just cause," and then it defines the disciplinary procedures to be followed. The language of the agreement, therefore, established that Ashby had a state-created property interest entitling him to maintain continuous employment in the absence of sufficient reason.

The essential requirement of the due process clause is that " 'an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.' " (Emphasis in original.) *Loudermill*, 470 U.S. at 542 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971)). When state-created property interests in continued employment are involved, due process requires that an employee be "entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Loudermill*, 470 U.S. at 546.

We concur with the district court's judgment that the record fails to indicate that Ashby was given a *Loudermill* hearing prior to his suspension. The language of the August 3 letter does not offer an explanation of the evidence against Ashby, nor does it give Ashby an opportunity to present his side of the story prior to his suspension. At the hearing before the Commission, the managing engineer for the engineer's office testified that he had directed another employee to discuss the excessive lunch break with Ashby. However, as conceded by the Commission at oral argument, neither the record nor the Commission's witnesses could verify when or if this alleged presuspension

hearing took place. Assuming that the Commission chose to believe that an informal meeting did occur, the substance and extent of the conversation are completely absent from the record.

Based on the record which was before the Commission, we conclude that Ashby was denied a presuspension hearing in violation of his due process rights as defined in *Loudermill, supra*. Finding none of the assignments of error asserted by the Commission to be meritorious, we affirm the judgment of the district court in all respects.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRANK J. GRAHAM, APPELLANT.
492 N.W.2d 845

Filed December 4, 1992. No. S-91-604.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's findings of fact unless those findings of fact are clearly erroneous.
2. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed witnesses testifying in regard to such motion.
3. **Constitutional Law: Search and Seizure: Waiver.** The right to be free from an unreasonable search and seizure, as guaranteed by the Fourth Amendment to the U.S. Constitution and by article I, § 7, of the Nebraska Constitution, may be waived by the consent of the citizen.
4. **Search and Seizure: Duress.** In order for a consent to search to be effective, it must be a free and unconstrained choice and not the product of a will overborne, and consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological.
5. **Search and Seizure.** The determination of whether a consent to search is voluntarily given is a question of fact to be determined from the totality of the circumstances surrounding the giving of the consent.
6. **Search and Seizure: Search Warrants: Motor Vehicles.** The mere fact that a

defendant felt his vehicle would be searched in any event after a warrant was obtained does not, of itself, render defendant's consent to such search involuntary.

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

Brian C. Bennett, of Dunlap & Bennett, P.C., for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

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

GRANT, J.

On November 7, 1990, defendant, Frank J. Graham, was charged in an information filed by the county attorney of Seward County, Nebraska, with the offense of theft by unlawful taking, in violation of Neb. Rev. Stat. § 28-511 (Reissue 1989), a Class III felony. After trial, a jury determined that defendant was guilty of theft by unlawful taking, a Class IV felony. Defendant was sentenced to imprisonment for 20 to 60 months in the custody of the Nebraska Department of Correctional Services. His sole assignment of error is that the district court erred in overruling his motion to suppress certain evidence and statements made by defendant. We affirm.

The record before us shows the following facts: On November 7, 1990, defendant was working for Merle's Garden Center in Seward, Nebraska (the Center). The Center is primarily involved in selling garden and planting supplies, and also does some landscaping work. In the early afternoon of that day, the Center's office personnel discovered that a bank bag containing checks and cash was missing from the office safe. After the management made an unsuccessful search of the office area, Marlin Sturgis, chief of the Seward Police Department, was called. Sturgis made a preliminary investigation, searching the premises again and then searching the vehicles of three of the Center's employees, after receiving their permission. He did not locate the bank bag.

Earl Graves, the owner of the Center, then assembled the rest of his employees and, with Sturgis, asked for their permission

to search their vehicles. It was indicated that if permission was not given, search warrants would be procured and the cars would be searched. The employees present all agreed to allow their cars to be searched, and when Sturgis asked for volunteers, defendant held out the keys to his vehicle.

Sturgis then accompanied defendant to defendant's vehicle and proceeded to search the passenger compartment of the car. While the interior of the car was being searched by Sturgis, defendant went to the back of the vehicle and voluntarily unlocked the trunk.

Defendant then assisted Sturgis in the search of the trunk by moving a spare tire and other items in the trunk. The missing bank bag was found under the carpet in the trunk. Upon discovery of the bank bag by Sturgis, defendant exclaimed, "Shit!"

After the owner confirmed that the bank bag was in fact the missing one, defendant asked if the theft could be kept between the parties. Defendant was on parole for felony theft at the time. The only reply by Sturgis to this inquiry was to ask the defendant to follow him to the police station, where defendant was arrested and given his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). These rights were given both verbally and in a written statement which was signed by defendant. Within minutes of being advised of his rights, defendant admitted that he had taken the bank bag that afternoon. The bag contained $698 in cash and $948 in checks.

Defendant contends that the search was not voluntarily consented to, but, rather, was obtained by psychological duress and coercion, and that any incriminating statements he made following the search should have been considered fruits of the unlawful search and should have been suppressed by the district court pursuant to *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The State contends that the trial court properly overruled defendant's motion to suppress because defendant's consent to search was voluntary and any evidence obtained therefrom was properly admissible.

Prior to trial, pursuant to Neb. Rev. Stat. § 29-822 (Reissue 1989), defendant moved to suppress any and all evidence gained by means of the search of defendant's vehicle, on the basis that

the consent given for the search was not voluntary. Defendant also objected to the admission of the incriminating remark he made during the search and the admission of his confession made following his arrest, on the basis that his statements were fruits of an unlawful search. The district court denied defendant's motion to suppress and later, during the trial, overruled defendant's objection to the admission of the bank bag and its contents.

The validity of the search of defendant's automobile trunk depends upon whether defendant's consent was given voluntarily. Sturgis did not have a search warrant, and the search was not incident to an arrest. In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's findings of fact unless those findings of fact are clearly erroneous. *State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991); *State v. Gibbs*, 238 Neb. 268, 470 N.W.2d 558 (1991). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed witnesses testifying in regard to such motion. *State v. Walker*, 236 Neb. 155, 459 N.W.2d 527 (1990).

Defendant contends that his consent was not voluntarily given because "it is obvious that both express and implied psychological duress and coercion were brought to bear on [defendant]." Brief for appellant at 8. The right to be free from an unreasonable search and seizure, as guaranteed by the Fourth Amendment to the U.S. Constitution and by article I, § 7, of the Nebraska Constitution, may be waived by the consent of the citizen. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202 (1989). In order for the consent to search to be effective, however, it must be a free and unconstrained choice and not the product of a will overborne, and consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological. *State v. Juhl, supra*. The determination of whether a consent to search is voluntarily given is a question of

fact to be determined from the totality of the circumstances surrounding the giving of the consent. *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990). In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. *Schneckloth v. Bustamonte, supra.* The burden is upon the state to prove that the consent to search was voluntarily given. *State v. Prahin, supra.*

The evidence supports the district court's finding that defendant voluntarily consented to the search of his automobile. Defendant was not singled out by Sturgis, but, rather, was in a room with his fellow employees when the request was made to allow the chief to search the vehicles. The employer testified that the employees were not ordered, threatened, or coerced into giving consent, but were simply asked to do so.

There is no evidence in the record that Sturgis or defendant's employer overtly or implicitly coerced, threatened, or made promises to defendant in order to induce him to consent to the search. The record shows, rather, that defendant not only voluntarily consented to the search, but that he in fact participated in the search by opening the trunk without being requested to do so and by moving objects to assist Sturgis in searching the trunk.

Defendant contends that he cooperated with Sturgis because he felt that the vehicle would be searched anyway. We have held that the mere fact that defendant felt his vehicle would be searched in any event after a warrant was obtained does not, of itself, render defendant's consent involuntary. In *State v. Shepardson*, 194 Neb. 673, 678, 235 N.W.2d 218, 222 (1975), we said:

> "Defendant does not deny he gave consent to the search. He merely implies he did so because he felt it would do no good to object. Even if this is not a mere afterthought, it is not of itself sufficient to indicate coercion under the circumstances in light of the defendant's background and experience. . . ."

See, also, *State v. Prahin, supra.*

There is no evidence that in order to obtain defendant's

consent, Sturgis took unlawful advantage of the fact that defendant was on parole. See, *United States v. Jones*, 475 F.2d 723 (5th Cir. 1973), *cert. denied* 414 U.S. 841, 94 S. Ct. 96, 38 L. Ed. 2d 77 (1973). There is no evidence that Sturgis or defendant's employer promised anything in exchange for defendant's consent.

Nor does the statement by Sturgis that if consent were not given voluntarily a search warrant would be procured make defendant's permission invalid. A statement that a warrant may be obtained is not grounds in and of itself to disqualify an otherwise valid consent. In *State v. Rathburn*, 195 Neb. 485, 239 N.W.2d 253 (1976), Rathburn contended that he did not consent to a search of his automobile's trunk because he had originally refused to open the trunk and that he consented only after a police officer said that he would get a warrant. We rejected Rathburn's claim that the officer's statement was coercive and stated:

> In situations where the searching officer has stated that he could obtain or was in the process of getting a warrant, the courts have never found such a statement coercive per se. Rather, the courts have generally looked at the statement made by the officer to determine if it was coercive in the particular factual situation.

195 Neb. at 490, 239 N.W.2d at 256.

We have held that the voluntariness of the consent to search should be determined from the totality of the circumstances surrounding it. *State v. Garcia*, 216 Neb. 769, 345 N.W.2d 826 (1984). As stated above, the findings of fact in this respect will not be set aside on appeal unless they are clearly erroneous. In making that determination, this court will take into consideration the advantage of the district court in having heard the oral testimony. *State v. Garcia, supra*; *State v. Billups*, 209 Neb. 737, 311 N.W.2d 512 (1981). In this instance, the findings of the district court cannot be said to be clearly erroneous.

The evidence shows that defendant's consent was voluntarily given. Both the physical evidence and defendant's statements were properly received in evidence. Defendant's sole assignment of error is without merit. The judgment is affirmed.

AFFIRMED.

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