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STATE OF NEBRASKA, APPELLEE, V. RICKY J. COSTANZO, APPELLANT.

495 N.W.2d 904

Filed February 19, 1993. No. S-90-912.

Postconviction. The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989), requires that a prisoner seeking relief under the act must be in actual custody in Nebraska under a Nebraska sentence.

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

J. Mark Barnett, of Jewell, Gatz, Collins, Dreier & Fitzgerald, for appellant.

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

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

FAHRNBRUCH, J.

On December 16, 1986, Ricky J. Costanzo was found guilty of assault in the first degree by a Douglas County District Court jury. He received an indeterminate sentence of 5 to 10 years' imprisonment. Costanzo's conviction and sentence were affirmed by this court on February 12, 1988. *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988).

Thereafter, Costanzo filed a petition seeking (1) a new trial because of newly discovered evidence and (2) postconviction relief because of alleged (a) ineffectiveness of counsel, (b) failure by the State to disclose exculpatory evidence, and (c) prosecutor misconduct. In *State v. Costanzo*, 235 Neb. 126, 454 N.W.2d 283 (1990), this court affirmed the trial court's denial of the defendant's motion for new trial. We did, however, reverse the trial court's denial of postconviction relief and remand that issue to the trial court for findings of fact and conclusions of law. Upon remand, the trial court, after making findings of fact and conclusions of law, again denied Costanzo postconviction relief, which ruling Costanzo has appealed to this court.

At oral argument on appeal to this court, Costanzo

acknowledged that he had been imprisoned on the assault charge, that he had been paroled and subsequently had been discharged from parole, and that he was no longer in the State's custody. Because of these facts, Costanzo's appeal has become moot.

Costanzo instituted his postconviction action pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989). This court has held that "the Nebraska Postconviction Act, §§ 29-3001 et seq., requires that a prisoner seeking relief under the act must be in actual custody in Nebraska under a Nebraska sentence." *State v. Harper*, 233 Neb. 841, 843, 448 N.W.2d 407, 408 (1989). Accord *State v. Whitmore*, 234 Neb. 557, 452 N.W.2d 31 (1990).

Since Costanzo is no longer in actual custody in Nebraska under a Nebraska sentence, his appeal is moot and must be dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. STEPHEN W. VAN ACKEREN, APPELLANT.

495 N.W.2d 630

Filed February 19, 1993. No. S-91-394.

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 evidence or resolve conflicts therein, but takes into consideration that the trial court has observed the witnesses testifying in regard to the motion to suppress.
3. **Police Officers and Sheriffs: Investigative Stops: Search and Seizure: Arrests: Probable Cause.** The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but, rather, the voluntary cooperation of the citizen is elicited through noncoercive questioning. This type of contact does not rise to the level of a seizure and therefore is outside the realm of Fourth Amendment protection. The second category, the investigative stop, is limited to brief, nonintrusive detention during a frisk for weapons or preliminary questioning. This type of encounter is considered a "seizure" sufficient to

invoke Fourth Amendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. The third type of police-citizen encounters, arrests, are characterized by highly intrusive or lengthy search or detention. The Fourth Amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime.

4. **Police Officers and Sheriffs: Search and Seizure: Words and Phrases.** A seizure occurs when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.
5. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** An investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances—the whole picture—must be taken into account.
6. _____: _____: _____. Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal activity.
7. **Police Officers and Sheriffs: Investigative Stops.** An officer is not required to wait until a crime has occurred before making an investigative stop.
8. **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.
9. _____: _____: _____. Probable cause for a warrantless arrest is to be evaluated by the collective information of the police engaged in a common investigation.
10. **Arrests: Search and Seizure.** An arrest may not be used as a pretext to search for evidence.
11. **Arrests: Appeal and Error.** The determination of whether an arrest is pretextual is a question of fact for the trial court. An appellate court will not reverse a trial court's finding on this question unless the finding is clearly erroneous.
12. **Jury Instructions: Appeal and Error.** Issues not properly presented and passed upon by the trial court may not be raised on appeal. The failure to object to a jury instruction after it has been submitted to counsel for review generally precludes raising an objection on appeal.
13. _____: _____. If the jury instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

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

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

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

HASTINGS, C.J.

Following a jury trial, the defendant, Stephen W. Van Ackeren, was found guilty of the offenses of burglary, use of a firearm in the commission of a felony, and felon in possession of a firearm. At an enhancement hearing, the court found the defendant not guilty of being a habitual criminal. He was sentenced to serve consecutive terms of imprisonment of not less than 6²/₃ years nor more than 20 years for burglary, of not less than 20 months nor more than 5 years for use of a firearm in the commission of a felony, and of not less than 20 months nor more than 5 years for felon in possession of a firearm.

Defendant appeals, asserting (1) that the district court committed reversible error in denying the defendant's motion to suppress the fruits of a Fourth Amendment seizure of his person; (2) that even if the court determines that the Fourth Amendment seizure was not an arrest but, rather, an investigative stop, the evidence obtained as a result of the search of the defendant should still have been suppressed because the State lacked reasonable articulable circumstances sufficient to sustain a *Terry*-type stop; (3) that the seizure of the defendant's automobile without probable cause and in violation of the federal and state constitutional provisions against unlawful search and seizure is inseparable from the de facto seizure of the defendant's person and that the search of the defendant is the fruit of the original unlawful seizure of his vehicle; (4) that the search of the defendant was unreasonable and a violation of the Fourth Amendment in that the stop of the defendant was a pretext to effectuate a full-blown search of the defendant; and (5) that Nebraska's pattern jury instruction, NJI 14.08 (reasonable doubt), is a violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution. 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. Coleman*, 241 Neb. 731, 490 N.W.2d 222 (1992); *State v. Melton*, 239 Neb. 790, 478 N.W.2d 341 (1992). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh evidence or resolve conflicts therein, but takes into consideration that the trial court has observed the witnesses testifying in regard to the motion to suppress. *State v. Coleman, supra*; *State v. Melton, supra*.

On January 16, 1986, the burglary unit of the Omaha Police Division set up a police surveillance of Van Ackeren. Officer Larry Roberts testified that the surveillance came about as a result of a lengthy investigation by Officer Michael Hoch of the burglary unit, along with additional input from other officers in the unit. It was the position of the burglary unit that during November and December 1985 and the first half of January 1986, there had been 47 burglaries with significant similarities in police districts 120 and 130 of southwest Omaha. Based on a review of burglary reports, the police were able to establish a pattern, or modus operandi, in a large number of these burglaries. It was determined that a large number of burglaries occurred on Thursdays, with a significant number reported after 7 p.m., indicating that the burglaries were probably occurring between 5:30 and 7:30 in the evening, when the victims were away from home. The police also found that the method of entry for a majority of the burglaries involved the use of a prying type of instrument at the rear door or rear patio door and the types of items stolen were primarily easily concealable, such as jewelry, cash, coin collections, and other items of that nature.

The defendant, Van Ackeren, was known to the Omaha Police Division as an established burglar and convicted felon. Officer Roberts testified that the defendant had indicated to the police in 1968 that he had been involved in approximately 264 burglaries in the city, and in 1976 had admitted involvement in 36 burglaries in a 5-day period. See, e.g., *State v. Van Ackeren*, 200 Neb. 812, 265 N.W.2d 675 (1978); *State v. Van Ackeren*,

194 Neb. 650, 235 N.W.2d 210 (1975).

Based on prior interviews with the defendant, police records, field interrogation cards, information reports, and current burglary investigations, the burglary unit concluded that the previous criminal activities of the defendant had occurred in the same general vicinity as the current burglaries; the modus operandi used by the suspect in their current investigations was similar to that used by the defendant; and the types of items taken were also very similar.

Officer Roberts testified that in a previous interview with burglary officers, the defendant had indicated that he preferred to enter residences between 5:30 and 7:30 in the evening when people were out; that he would enter through the rear door primarily, normally using a prying instrument; and that he took items of value which could be easily concealed and easily fenced.

The burglary unit devised a plan to place the defendant under surveillance on a Thursday between the hours of 4 and 6 p.m., the day and time most of the burglaries were thought to have occurred. Surveillance of his home in Council Bluffs, Iowa, began at approximately 4 p.m. on January 16, 1986. Seven unmarked cars and an aircraft were used to observe his activities. Police officers observed a car registered to the defendant leave the area of his home at approximately 6:05 p.m. Officer William Connelly, who observed the vehicle from the aircraft, testified that the car made numerous turns for several minutes in the immediate neighborhood, then proceeded south on a highway near the Manawa exit, entered Interstate 80 at that point, and proceeded west toward Omaha. Officer Connelly observed that the car varied its speed from 40 to 80 miles an hour, accelerating and decelerating suddenly. Officer Connelly also testified that he tracked the vehicle after it exited the Interstate at 72d Street, and observed that the vehicle's lights were turned off at 74th Street, turned on again after a minute or two, then turned off again at Vinton Street.

Officer Paul Cook, assigned to assist with the surveillance team and record the times of the activities which took place, testified that he was in contact with the other police units by radio and charted these activities by documenting them on a

tape recorder. Officer Cook testified that at approximately 6:23 the defendant stopped his vehicle at 7400 Hascall Street and turned off his lights for a short period of time, then moved again with the lights on; at 6:27 he stopped at Rogers Road and turned his lights off, then turned them on again when he moved; at 6:30 he was observed at 74th and Wright Streets, where the lights went off again; the lights went on again, and the vehicle moved and was spotted at 6:35 at 7400 Vinton, where the defendant exited the vehicle. Police officers then attempted to locate the defendant, who remained out of visual contact for 40 minutes.

Officer Pitmon Foxall testified that when he arrived at the area of the defendant's vehicle at approximately 7 p.m., he assisted an Officer Frock in flattening the two passenger-side tires of what was believed to be the defendant's car. Officer Foxall stated that this was done in order to prevent the defendant from leaving and to prevent any possible problems, such as eliminating any dangerous situation that might arise if the defendant attempted to flee. Foxall also testified that the defendant was to be detained in the area and questioned.

Officer Joseph Davitt testified that he had followed the defendant's vehicle from the Lake Manawa entrance on Interstate 80 for up to 10 minutes. Due to a sudden deceleration of the defendant's vehicle as it exited at 72d Street, Officer Davitt had to keep going on the Interstate in order to keep his identity from being discovered. He next saw the defendant's vehicle parked, unoccupied, on Vinton Street.

Officer Davitt took up surveillance across the street in a church parking lot. He observed the defendant walking back toward his vehicle, coming across the edge of the yard at 74th and Vinton. Officer Davitt saw the defendant walk past his car, about 5 feet off the left front fender. The police officer approached the defendant, and when they were approximately 50 feet apart he told the defendant to "hold it a minute." The defendant stopped, and when Officer Davitt was only 3 or 4 feet away he announced that he was a police officer. The defendant then ran north into a yard on the northwest corner of 74th and Vinton, where he was apprehended. Officer Davitt testified that the defendant was tackled by Officers Frock and

Foxall; he and Officer Hoch then arrived, and it took all four of the officers to get the defendant to stop struggling and fighting. Davitt stated that in order to secure the situation for the officers' safety, as well as the defendant's, the defendant was handcuffed. Officer Davitt observed Officer Hoch remove a handgun from the waist area of the defendant.

Officer Foxall testified that a screwdriver, a glove, and a set of car keys were recovered from the grassy area where the struggle with the defendant occurred. A Mazda key on the keyring was later found to fit the car registered to the defendant.

The defendant was transported to Central Police Station and placed under arrest. He was searched, and items found on his person included several penlights, a pink purse containing various items of jewelry, a specific amount of cash and coin, a sock, and a jar of Vaseline, in addition to personal jewelry which the defendant was wearing at the time.

Officer Cook testified that after the defendant had been secured, the officer searched the area to see if he could locate a place that had possibly been burglarized, and approximately 15 minutes after the defendant was taken into custody, he located a crime scene at 7277 Frederick. At that location, he found a rear door to the residence that had been forced open. The owner of the residence, Helen Olson, was out of town at the time of the burglary. She was later contacted, and identified several of the items which were recovered from the defendant as her property.

The first question is whether the trial court committed reversible error by denying the defendant's motion to suppress the fruits of a Fourth Amendment seizure of his person.

In his brief, the defendant submits that there were three actions initiated by the Omaha Police Division which may be construed as Fourth Amendment seizures: (1) when, having lost sight of the defendant, the police flattened the tires on his car to deny his ability to leave the area; (2) when, as the defendant approached his car, he was ordered to stop by a police officer, and momentarily complied; (3) when the defendant was physically restrained by tackling and handcuffing. The defendant maintains that a Fourth Amendment seizure occurred either at the time the police effectively took control of

his car or, at the latest, when the police ordered him to stop. The defendant further argues that his initial contact with the Omaha police officers was not an investigatory stop, but, rather, a full-blown arrest necessitating probable cause. The State concedes that probable cause did not exist at the time of the defendant's initial confrontation with the police but contends that the confrontation involved an investigative stop.

The three levels of police-citizen encounters were discussed by the court in *United States v. Armstrong*, 722 F.2d 681, 683-84 (11th Cir. 1984):

> In a recent *en banc* case, *United States v. Berry*, 670 F.2d 583 (5th Cir.1982) (Unit B), this court set definitive guidelines for applying the fourth amendment requirements to airport stops and searches of criminal suspects by law enforcement officials. The court concluded that there are three distinct tiers of police-citizen encounters, each triggering a different analysis of the balance which should be struck between the government's need to search and the invasion of privacy interests which such a search entails.
>
> The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but rather the voluntary cooperation of the citizen is elicited through non-coercive questioning. This type of contact does not rise to the level of a seizure and therefore is outside the realm of fourth amendment protection. *Id.* at 591. The second category, the investigative stop, is limited to brief, non-intrusive detention during a frisk for weapons or preliminary questioning. This type of encounter is considered a "seizure" sufficient to invoke fourth amendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. *Id.* The third type of police-citizen encounters, arrests, are characterized by highly intrusive or lengthy search or detention. The fourth amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a

crime.

The second tier, or investigative stop, has been defined by *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and the cases which followed. In *Terry*, the Supreme Court stated:

> It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.

392 U.S. at 16.

In *Florida v. Royer*, 460 U.S. 491, 499-500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983), the Court noted that while not all seizures of the person must be justified by probable cause to arrest for a crime, *Terry* and its progeny nevertheless created only limited exceptions to the general rule that seizures of the person do require probable cause to arrest:

> Detentions may be "investigative" yet violative of the Fourth Amendment absent probable cause. In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects. Nor may the police seek to verify their suspicions by means that approach the conditions of arrest. . . .
>
> . . . .
>
> The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. . . . It is the State's burden to demonstrate that the seizure it seeks to

> justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.

(Citations omitted.)

Asserting that the degree of intrusion upon the citizen's freedom of movement would be paramount in determining whether a police-citizen encounter was an investigatory stop or a full-blown arrest, the defendant argues that it is pertinent that the police had predetermined to seize him and disable his automobile; that 13 police officers, 7 unmarked cars, and an airplane were used in surveillance; that officers surrounded his car and awaited his return to force an encounter; and that he was confronted by a "confluence of armed police." Brief for appellant at 15.

The burglary unit's surveillance plan included a notation that the defendant's vehicle was to be disabled if he forcibly entered a residence. The defendant was observed driving into the area of police districts 120 and 130, but the police had lost sight of him by the time he had left his vehicle on Vinton Street. While the police continued their search for him, the defendant was out of visual contact for 40 minutes and the police did not observe a forced entry. Officers testified, however, that his vehicle had been disabled in order to avoid any dangerous situation which might arise if he attempted to flee, and also because they wanted the opportunity to question him. The defendant argues that the disabling of his car is indicative of police intent to arrest rather than stop. In support of this assertion, the defendant points to the preliminary hearing testimony of Officer Hoch, who stated then that the defendant was arrested for failure to stop and that "it would have been a loitering and prowling offense, knowing him and that area." This testimony referred to events which transpired after the defendant ran from the police, and is therefore not indicative of a predetermined plan. The police surveillance plan is contained in the record and only reveals an intent to arrest if the defendant forcibly entered a residence. Officer Cook testified that if he saw the defendant in the area the police were to confront him and "[t]ry to talk to him and figure out as to why he was in the area." Officer Davitt stated that the defendant was to be detained for questioning.

Officer Foxall similarly testified that the defendant was to be detained and questioned. Police Lt. Larry Roberts, who had approved the surveillance plan, was questioned about what orders he had given in regard to that plan:

> Q. If he was observed entering a residence, isn't it true that you ordered that he be arrested?
>
> A. That's correct.
>
> Q. What if he wasn't observed entering a residence, did you issue any orders in that respect?
>
> A. They would have to rely on their own expertise at that time and the circumstances surrounding the incident.
>
> Q. Is that the order that you gave them?
>
> A. I didn't tell them this is an order. We discussed what we would do.
>
> Q. If I can paraphrase it, and please correct me, you told them obviously if you see him breaking into a house wait until he comes out and catch him, place him under arrest; is that a fair statement?
>
> A. That is a fair statement.
>
> Q. That is really what you hoped would happen?
>
> A. That's right.
>
> Q. Secondly, you said if that doesn't happen, and some other circumstance arises, use your own judgment?
>
> A. I didn't say specifically. We discussed in the briefing before we went out what to do if certain things did occur. And one in particular, if he were to go into a residential area to get out of his car and leave, that we would attempt to follow him on foot and determine what type of activity he was involved in. And if sufficient reasonable grounds existed, he would be stopped and checked.
>
> Q. Stopped and checked, or arrested?
>
> A. Stopped and checked.
>
> Q. You didn't order that he be arrested in the event that he was in an area on foot, even though you hadn't observed him break into any houses, did you order that he be arrested?
>
> A. If there was no probable cause to arrest, how could I order it?

Although the testimony of the police officers would tend to

support the proposition that an investigative stop was intended, the defendant argues that by their actions in disabling his vehicle and ordering him to stop as he approached the car, a de facto arrest was made. In *U.S. v. Hardy*, 855 F.2d 753, 758-59 (11th Cir. 1988), *cert. denied* 489 U.S. 1019, 109 S. Ct. 1137, 103 L. Ed. 2d 198 (1989), the Eleventh Circuit Court of Appeals examined the issue of when an investigative stop is sufficiently limited in scope and duration so that it does not ripen into a full-scale arrest requiring probable cause:

> Consideration of this issue requires reference to a line of Supreme Court cases culminating in *United States v. Sharpe*, 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985), and to our own decision in *United States v. Espinosa-Guerra*, 805 F.2d 1502 (11th Cir. 1986).
>
> *Sharpe* teaches that in distinguishing a true investigative stop from a *de facto* arrest, we must not adhere to "rigid time limitations" or "bright line rules," 470 U.S. at 685, 105 S.Ct. at 1575, but must use "common sense and ordinary human experience." *Id.; accord United States v. Place*, 462 U.S. 696, 709, 103 S.Ct. 2637, 2645, 77 L.Ed.2d 110 (1983) (declining to adopt "outside time limitation" for permissible *Terry* stop). Several issues and circumstances are deemed relevant to the analysis, including the law enforcement purposes served by the detention, the diligence with which the police pursue the investigation, the scope and intrusiveness of the detention, and the duration of the detention. *See Sharpe*, 470 U.S. at 685-86, 105 S.Ct. at 1575; *Espinosa-Guerra*, 805 F.2d at 1510; *see also United States v. Alpert*, 816 F.2d 958, 964 (4th Cir. 1987) (relying on similar list of factors).
>
> Turning first to the law enforcement purposes served by the detention of appellants, the most important factor is whether the police detained appellants to pursue a method of investigation that was likely to confirm or dispel their suspicions quickly, and with a minimum of interference. *See Sharpe*, 470 U.S. at 686, 105 S.Ct. at 1575. A *Terry* stop is justified to give the police an opportunity to engage in brief and non-intrusive investigation techniques, such as noncustodial questioning of the detained person. *See*

id. (suspect was detained for 20 minutes so he could be questioned by more experienced drug enforcement agent).

In *Hardy*, the appellants were detained in their car while a trained narcotics dog was located and brought to the site of the stop to "sniff" the car for the presence of drugs. The court found that a canine sniff was the kind of minimally intrusive investigative technique that may justify a *Terry* stop and that the police had been diligent in locating the dog and its handler. Although the appellants retained the keys to their car, the government conceded that they were not free to leave. The court disagreed with their assertion that the detention in their own car was equivalent to custodial arrest. Although the court was troubled by the 50-minute length of the detention, on the facts of the case, the length of the stop alone did not invalidate the detention.

In *United States v. Jones*, 759 F.2d 633 (8th Cir. 1985), *cert. denied* 474 U.S. 837, 106 S. Ct. 113, 88 L. Ed. 2d 92 (1985), police officers, suspecting that the defendant was acting as a lookout for a burglary, gave chase when he ran to his vehicle, and parked their police car behind his. Although the district court had found that the car in which he was sitting had not been blocked by the police car, the circuit court was of the opinion that the defendant was, in a practical sense, at least blocked in. Assuming that the officers had effectively blocked the defendant's car, the court concluded:

> We do not believe that any blocking by itself could have converted the stop into an arrest. The test is not, as argued by Jones, whether a reasonable person would have felt free to leave under the circumstances: That concern marks the line between a fourth amendment seizure of any degree and a consensual encounter which does not require any minimal objective justification. *Immigration & Naturalization Service v. Delgado*, ____ U.S. ____, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247 (1984); *United States v. Mendenhall*, 446 U.S. 544, 553-54, 100 S.Ct. 1870, 1876-77, 64 L.Ed.2d 497 (1980). Nor is the test whether a citizen's freedom of movement in fact actually has been restricted: Even the investigative stop in the seminal *Terry* decision involved some use of physical force, as the officer

grabbed Terry and spun him around. 392 U.S. at 7, 88 S.Ct. at 1872; *see Michigan v. Summers*, 452 U.S. 692, 698 n. 7, 101 S.Ct. 2587, 2592 n. 7, 69 L.Ed.2d 340 (1981); *but see Terry*, 392 U.S. at 19 n. 16, 88 S.Ct. at 1879 n. 16. The Supreme Court since has explicitly stated,

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. * * * A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at that time." *Adams v. Williams*, 407 U.S. 143, 145-46, 92 S.Ct. 1921, 1922-23, 32 L.Ed.2d 612 (1972) (citation omitted).

Relying in part on this passage, *United States v. Patterson*, 648 F.2d 625, 632, 633 (9th Cir.1981), recognized that to hold that any complete, though brief, restriction of liberty was an arrest would defeat the purpose of investigative stops and make illusory much of the police flexibility acknowledged as desirable by the Supreme Court in *Terry*. Officers would have few alternatives to consensual encounters short of arrest. *See Terry*, 392 U.S. at 10-11, 88 S.Ct. at 1874-1875. Several circuits thus conclude that an officer may impose a momentary restriction on freedom of movement "to maintain the status quo while making an initial inquiry, provided the force displayed is not excessive under the circumstances." *Patterson*, 648 F.2d at 633.

Jones, 759 F.2d at 637-38. The *Jones* court concluded that blocking generally will be reasonable when a suspect is in a vehicle and could flee upon the approach of police, with resulting danger to the public as well as to police officers. Although in the instant case the defendant was not in his vehicle when the tires were flattened, the intention was similarly to prevent the defendant's flight and possible danger to the public.

In *State v. Burgess*, 43 Wash. App. 253, 716 P.2d 948 (1986), officers discovered an abandoned pickup truck about a block from an animal clinic which had sounded a silent alarm. From running a registration check, they discovered that the pickup belonged to the defendant and that he had burglarized the same animal clinic on a previous occasion. The officers flattened the vehicle's tires in order to secure it while they continued their investigation. The defendant argued that the officers had made an unreasonable "seizure" by deflating the tires of his truck. The Washington Court of Appeals found that

> the detention of the truck in this manner was valid as a reasonably limited intrusion into Burgess's right "to be secure" in his "effects" protected by the Fourth Amendment against "unreasonable searches and seizures." Warrantless seizures may be justified where police officers are faced with emergencies or exigencies which do not permit reasonable time and delay for a judicial officer to evaluate and act upon an application for a warrant. [Citations omitted.] Here, the officers deflated the truck tires during the time when several of them were in pursuit of a burglary suspect they believed was Burgess. The deflation of his truck tires, unaccompanied by any exploratory search at that time, was reasonably restricted in time and place and necessary to prevent the suspect from fleeing the scene of the burglary. If the officers had not deflated the tires, they would have been faced with the possibility that Burgess would remove the truck, taking its contents with him. The officers did not obtain any evidence from this seizure. The search of the automobile did not occur until they possessed additional incriminating information, justifying a more extensive intrusion.

Burgess, 43 Wash. App. at 259-60, 716 P.2d at 952. Similarly, in the instant case, the purpose of disabling the defendant's vehicle was to prevent him from fleeing, and not for obtaining evidence. Following the defendant's arrest, his vehicle was towed to Omaha Central Police Station's garage. Officer Hoch testified that prior to the time it was towed to the garage, it had not been searched. Officer Davitt, who initially confronted the defendant, testified that if he had questioned the defendant and

had been satisfied with his responses, the police tow truck would have been called to put air back into the tires so that the defendant could drive his vehicle away.

The fact that police officers deflated two of the tires on the defendant's vehicle is not sufficient to sustain his contention that the disabling constituted a de facto arrest. In applying the factors delineated in *U.S. v. Hardy*, 855 F.2d 753 (11th Cir. 1988), to the facts of the instant case, the detention of the defendant's vehicle by deflating his tires would have allowed a brief investigatory period of questioning, which could have quickly confirmed or dispelled the officers' suspicions in regard to the defendant's activities. Public safety concerns also provide justification for a brief detention. Officer Davitt confronted the defendant immediately upon his return to the vehicle and, if given the chance, could have concluded the questioning expeditiously. Although prolonged detention of the vehicle could have transformed the stop into a full-scale arrest, the defendant's flight and subsequent arrest for possession of a firearm obviates any determination of how long the detention could reasonably have been sustained. Citing an Eighth Circuit Court of Appeals decision, *United States v. Rose*, 731 F.2d 1337 (8th Cir. 1984), the defendant also argues that an action tantamount to arrest has taken place if the officers' conduct is more intrusive than necessary for an investigative stop. Although arguably the police could have devised a plan which involved less intrusive means, the Supreme Court noted in *United States v. Sokolow*, 490 U.S. 1, 11, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989), that

> [t]he reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques. Such a rule would unduly hamper the police's ability to make swift, on-the-spot decisions . . . and it would require courts to "indulge in 'unrealistic second-guessing.' "

(Citations omitted.)

Thus, the defendant's contention that the disabling of his vehicle constituted a de facto arrest is without merit. Similarly without merit is the assertion that he was under arrest at the time he was first confronted by Officer Davitt. Officer Davitt

testified that when he approached the defendant, from a distance of about 50 feet, the first thing he said was "hold it a minute." Davitt stated that the defendant stopped and seemed puzzled. The officer testified that he did not draw his gun and did not say anything else until he was about 3 or 4 feet from the defendant, when he identified himself as a police officer. The defendant then ran north for 25 or 35 feet before he was apprehended. The defendant recalled a different sequence of events when he testified at the hearing on the motion to suppress. In reference to the confrontation, he stated:

> Davitt also came off the street towards my direction, and he approached and he said hold it a minute, and then he identified himself as a police officer. At that point in time I stopped, I just kind of stood there for a few - just a very brief moment, and his arm went into his jacket and he started withdrawing a gun out, and at that point I backed away. And then at that point he said halt. And almost instantaneously I turned around and started walking back around towards the back of the car. And I was a few feet from the curb itself and the person identified as Frock came out of the bushes with his gun drawn and told me to freeze. And almost simultaneously the person identified as Foxall is the one who said stop, police, and it all happened very quickly. At the moment that Frock said freeze, that's when I started running, that's when I broke.

In *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991), the Supreme Court considered whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. The Court held that it does not. The defendant in *Hodari D.*, being pursued by police, tossed away a small rock which proved to be crack cocaine. In moving to suppress the evidence, he relied on the proposition that "a seizure occurs 'when the officer, by means of physical force *or show of authority*, has in some way restrained the liberty of a citizen.' *Terry v. Ohio*, 392 U. S. 1, 19, n. 16 (1968) (emphasis added)." *Hodari D.*, 499 U.S. at 625. The Court found that the language of the Fourth Amendment could not sustain the defendant's contention:

> The word "seizure" readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. . . . It does not remotely apply, however, to the prospect of a policeman yelling "Stop, in the name of the law!" at a fleeing form that continues to flee. That is no seizure. . . . An arrest requires *either* physical force (as described above) *or*, where that is absent, *submission* to the assertion of authority.

Hodari D., 499 U.S. at 626.

Thus, Officer Davitt's initial show of authority did not constitute a seizure; under either Officer Davitt's or the defendant's version of events, the defendant failed to effectively submit to the officer's assertion of authority.

Defendant next claims that the evidence obtained as a result of the search of the defendant should have been suppressed because the State lacked reasonable articulable circumstances sufficient to sustain a *Terry*-type stop.

Investigative stops are statutorily authorized in Nebraska under Neb. Rev. Stat. § 29-829 (Reissue 1989), which states in part:

> A peace officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and may demand of him his name, address and an explanation of his actions. When a peace officer has stopped a person for questioning pursuant to this section and reasonably suspects he is in danger of life or limb, he may search such person for a dangerous weapon. If the peace officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

In discussing the application of the statute in *State v. Longa*, 211 Neb. 356, 363-64, 318 N.W.2d 733, 738-39 (1982), this court noted that

> Neb. Rev. Stat. § 29-829 (Reissue 1979) permits officers to make stops short of an arrest in order to

determine the name and address of the person stopped, and receive an explanation of that person's actions. While such "investigative stops" are governed by the fourth amendment as well, it is clear that "in appropriate circumstances the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime." *United States v. Brignoni-Ponce*, 422 U.S. 873, 881, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975).

. . . .

This lesser standard for investigative stops was recently articulated by this court in *State v. Ebberson*, 209 Neb. 41, 305 N.W.2d 904 (1981), and reiterated in *State v. Nowicki*, 209 Neb. 640, 309 N.W.2d 89 (1981). Therein, relying on *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981), we determined that " 'an investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances — the whole picture — must be taken into account.

" 'Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, *as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior.* See, *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979).' " (Emphasis in original.) 209 Neb. at 645, 309 N.W.2d at 92-93.

An officer is not required to wait until a crime has occurred before making an investigative stop. *State v. Rein*, 234 Neb. 917, 453 N.W.2d 114 (1990).

Applying these standards to the facts of the instant case, the totality of the circumstances provide sufficient justification for

the investigatory stop. The burglary unit had reviewed burglary reports and determined that a large number of burglaries with significant similarities had been occurring in police districts 120 and 130 of southwest Omaha. The police officers concluded that in many of the burglaries, small, easily concealable items had been taken and that many had occurred on Thursdays and were reported after 7 p.m., with entry of the residence achieved by prying open a rear door. The officers considered this information in connection with their knowledge of the defendant's methods of operation, based on police reports and prior interviews with the defendant himself. The circumstances were sufficiently similar to justify surveillance of the defendant on a Thursday between the hours of 4 and 6 p.m., the day and time that the police suspected the criminal activity would most likely begin. The defendant was observed leaving his home at 6:05 p.m. on Thursday, January 16, 1986, driving with sudden speed accelerations and decelerations as he headed toward Omaha, and turning his lights briefly off and on again at several stops. He arrived at a residential neighborhood within the area of districts 120 and 130 and was away from his car for approximately 40 minutes. Upon returning to the vicinity of his car, the defendant ran when confronted by police. While flight from a police officer alone is insufficient to warrant an investigatory stop, see *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992), here reasonable articulable suspicion for an investigative stop existed prior to the defendant's flight. The defendant not only fit the "profile" of a burglary suspect, but also engaged in specific activities which, by virtue of the time and place they occurred, reasonably aroused the suspicions of the police. As stated in *U.S. v. Malone*, 886 F.2d 1162, 1164-65 (9th Cir. 1989): "In evaluating the validity of the detention . . . we consider 'the totality of the circumstances.' . . . Even if each of the factors viewed alone is consistent with innocent activity, viewed together they may support a finding of reasonable suspicion. . . . Wholly lawful conduct may justify a reasonable suspicion of criminal activity."

The defendant relies on an Eighth Circuit Court of Appeals decision, *U.S. v. Crawford*, 891 F.2d 680 (8th Cir. 1989), in which the court ruled that an investigatory stop of a defendant

was not supported by reasonable suspicion. The defendant asserts that the facts of *Crawford* are strikingly similar to those of the instant case, in that the police were engaged in a preplanned surveillance operation. Police became suspicious when they observed the defendant enter and reenter a building, carrying out bundles which he placed in a parked car. As the defendant drove away, he was followed by an unmarked police car. After he pulled to the right to let the unmarked car pass and then drove faster and made several right turns, he was stopped by the police. This case is easily distinguished, however, because the surveillance of the building was established to observe another resident of that building who had been arrested earlier that day for transporting cocaine. Police were waiting for a warrant to search the apartment of the suspect when they happened to observe the defendant's activities. The police did not have any knowledge of a connection between the drug trafficker and the defendant; the activities they observed were therefore insufficient to warrant an investigative stop.

However, in the instant case, the reasonable articulable suspicions of the burglary unit warranted a brief detention of the defendant. Once the defendant ran and four officers were required to subdue him, it was also reasonable for the police to pat him down for a weapon under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and § 29-829.

We turn next to the defendant's claim that the flattening of the tires of his automobile amounted to a seizure of the automobile without probable cause and was inseparable from a de facto seizure of the defendant's person.

The defendant argues that it could not be said that at the time of the seizure of his automobile, probable cause or reasonable suspicion existed to justify such seizure. However, as previously discussed, a brief detention—in this case, of the defendant's automobile—is justified where police officers have reasonable articulable suspicion that a crime has been or is about to be committed, and does not require probable cause. See, e.g., *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989) (law enforcement officers may briefly detain a traveler and his luggage, based on a reasonable suspicion that a crime is being committed); *U.S. v. Mondello*, 927 F.2d 1463 (9th

Cir. 1991) (30-minute detention of suspect who had already boarded private plane did not exceed bounds of investigative stop); *United States v. Jones*, 759 F.2d 633 (8th Cir. 1985) (blocking a vehicle, by itself, could not have converted stop into an arrest); *United States v. Patterson*, 648 F.2d 625, 633 (9th Cir. 1981) (a valid stop is not transformed into an arrest merely because law enforcement agents momentarily restrict a person's freedom of movement; "[t]he Constitution does not require them [police officers] to have given him [suspect] a head start. . . . Blocking the car was a reasonable precaution to ensure that the inquiry would not be terminated prematurely"); *United States v. Anderson*, 663 F.2d 934 (9th Cir. 1981) (boarding of a private plane to ask passengers questions may be considered an investigative stop); *United States v. Vargas*, 633 F.2d 891 (1st Cir. 1980) (boxing-in of vehicle and command that occupants raise their hands not inconsistent with investigative stop under the circumstances).

While unnecessary at the time of the initial confrontation, probable cause for arrest did arise, based on police knowledge that the defendant was a convicted felon, when he was searched and a weapon was located on his person. 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). Probable cause for a warrantless arrest is to be evaluated by the collective information of the police engaged in a common investigation. *State v. Nowicki*, 209 Neb. 640, 309 N.W.2d 89 (1981).

Thus, a brief detention of the defendant's vehicle was justified and not inconsistent with an investigative stop, and the defendant's third assignment of error is without merit.

Next we must ask whether the search of the defendant was unreasonable and a violation of the Fourth Amendment in that, as claimed by the defendant, the stop of the defendant was a pretext used to effectuate a full-blown search of his person.

An arrest may not be used as a pretext to search for evidence. *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990); *State v.*

Vann, 230 Neb. 601, 432 N.W.2d 810 (1988). The determination of whether an arrest is pretextual is a question of fact for the trial court. This court will not reverse a trial court's finding on this question unless the finding is clearly erroneous. *State v. Vann, supra*.

This court noted in *State v. Vann, supra*, that the word "pretext" is defined in Webster's Third New International Dictionary, Unabridged 1797 (1981), as "a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs." The defendant asserts that the facts of this case clearly show a manipulation of circumstances by the police to create their own probable cause because they had no legal basis on which to even stop the defendant. Although the defendant argues that the sole purpose of the seizure of his automobile was to effectuate a stop and that the sole purpose of the stop was to conduct a search of the defendant's person to look for evidence of a burglary, this allegation is unsupported by the facts. As a result of its investigation of a large number of burglaries in southwest Omaha, the burglary unit decided to set up a surveillance of the defendant.

Members of the surveillance team testified that they intended to arrest the defendant if he forcibly entered a residence. The record reflects that when the police lost visual contact with the defendant, a determination was made that he would be detained and questioned. As soon as Officer Davitt identified himself as a police officer, the defendant fled. The defendant was not arrested until he was found to be armed. Although he was later charged and prosecuted for burglary and use of a firearm in the commission of a felony, he was also prosecuted for the offense of felon in possession of a firearm, the offense for which he was initially arrested. There is nothing pretextual in a burglary unit's investigation of a burglary suspect.

Police officers testified that they intended to arrest the defendant if he was observed forcibly entering a residence. Absent that occurrence, there is nothing in the record to indicate that the unit intended to arrest the defendant before he ran and the weapon was discovered.

The trial court's finding that the investigative stop and

subsequent arrest of the defendant were proper considering the totality of the circumstances is not clearly erroneous, and the defendant's fourth assignment of error is without merit.

Finally, defendant claims that Nebraska's pattern jury instruction NJI 14.08 (reasonable doubt) violates the Due Process Clause of the 14th Amendment to the U.S. Constitution by equating reasonable doubt with substantial doubt and grave uncertainty, and "beyond a reasonable doubt" with moral certainty, contrary to the ruling of the U.S. Supreme Court in *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990).

Issues not properly presented and passed upon by the trial court may not be raised on appeal. The failure to object to an instruction after it has been submitted to counsel for review generally precludes raising an objection on appeal. If the jury instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error. *State v. Beins*, 235 Neb. 648, 456 N.W.2d 759 (1990).

The defendant concedes that no objection was made at trial to NJI 14.08, defining reasonable doubt, but asserts that "such objection would have been futile in light of the Nebraska Supreme Court rule and its continued adherence to the reasonable doubt instruction. However, the Nebraska Supreme Court has the power to notice and correct plain error on the record." Brief for appellant at 37, citing *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988). We therefore examine the record for plain error.

Defendant asserts that NJI 14.08 suffers from the same infirmities as those condemned by the U.S. Supreme Court in *Cage v. Louisiana, supra*. In *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991), this court considered the same assignment of error with regard to a reasonable doubt jury instruction in light of *Cage*. The jury instruction considered in *Morley* was essentially the same as the questioned instruction in the instant case:

> "Reasonable doubt" is such a doubt as would cause a reasonable and prudent person, 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 a reasonable doubt and yet be fully aware that possibly you may be mistaken. You 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 or 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.

In comparing the questioned instruction in *Morley* with the *Cage* instruction which was found to be a violation of the Due Process Clause of the 14th Amendment, this court concluded:

> It is true that both the *Cage* instruction and the questioned instruction tell the jury that, in effect, a reasonable doubt is an actual and substantial one. But while the *Cage* instruction also equates a reasonable doubt with a grave one, the questioned instruction does not. The questioned instruction merely advises 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." Moreover, while a reasonable reading of the *Cage* instruction leads to the conclusion that an accused is to be convicted unless such doubt rises to the level of a moral certainty, the questioned instruction permits conviction only if the lack of such doubt is established to a moral certainty. In other words, under the *Cage* instruction a juror is to vote for conviction unless convinced to a moral certainty that there exists a reasonable doubt, whereas under the questioned instruction a juror is to vote for acquittal unless convinced

> to a moral certainty that no reasonable doubt exists. Those are two very different instructions; indeed, one contradicts the other. We therefore conclude that the questioned instruction in these cases does not lessen the State's burden of proof below the requisite reasonable doubt standard; the questioned instruction thus does not run afoul of the due process requirements of U.S. Const. amend. XIV.

Morley, 239 Neb. at 155, 474 N.W.2d at 670. See, *State v. Drinkwalter, ante* p. 40, 493 N.W.2d 319 (1992); *State v. Lewis*, 241 Neb. 334, 488 N.W.2d 518 (1992).

This last assignment of error is also without merit. The judgment of the district court is affirmed.

AFFIRMED.

DOLORES MCCURRY, PERSONAL REPRESENTATIVE OF THE ESTATE OF DANETTE ROBIN MCCURRY, DECEASED, APPELLANT, V. SCHOOL DISTRICT OF VALLEY, A POLITICAL SUBDIVISION, APPELLEE.

496 N.W.2d 433

Filed February 26, 1993. No. S-89-1480.

1. **Pleadings.** Amendment of a petition is not a matter of right.
2. _____. The decision to grant or deny amendment to a pleading rests in the discretion of the trial court.
3. **Pleadings: Summary Judgment.** In the absence of some mitigating factor which would justify the raising of new issues by a party after a motion for summary judgment has been heard and submitted, it is not an abuse of discretion to deny a motion to amend pleadings.
4. **Actions: Pleadings.** While it is not necessary to state a cause of action in any particular form, and in actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader, proper pleading nonetheless requires a petition to state in logical and legal form the facts which constitute the cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute.
5. _____: _____. It is the facts well pleaded, not the theory of recovery or legal conclusions, which state a cause of action.
6. **Trial: Pleadings: Pretrial Procedure: Summary Judgment.** When it is asserted in a motion for summary judgment that an opposing party has failed to state a

cause of action, the motion may be treated, as far as that issue is concerned, as one for judgment on the pleadings.

7. **Summary Judgment.** Summary judgment is properly granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record show there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and the movant is entitled to judgment as a matter of law.
8. **Principal and Agent: Independent Contractor: Negligence.** Whereas under the respondeat superior doctrine the negligence of an agent is imputable to the principal, unless the person engaging the services of an independent contractor failed to exercise due care in selecting the contractor, or the duty to be performed is nondelegable, the negligence of the contractor is not imputable to the person engaging the contractor.
9. **Principal and Agent: Words and Phrases.** An agent is a person authorized by the principal to act on the principal's behalf and under the principal's control.
10. **Independent Contractor: Words and Phrases.** An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the method or means used.
11. **Independent Contractor: Agents.** The determination of whether one is an independent contractor or an agent is one of fact.
12. **Independent Contractor.** The common-law test for determining whether an independent contractor status exists includes the consideration and weighing of many factors, no one of which is conclusive.
13. _____. The criteria for making the determination as to whether one is an independent contractor include a consideration of who has the right of control, who provided the tools, the degree of supervision exerted over the one performing the work, the method of payment, and the contractual understanding between the parties.
14. **Agency.** Whether an agency relationship exists between two parties depends on the facts underlying the association, irrespective of how the parties describe or characterize their connection.
15. **Agency: Intent.** An agency may be implied from the words and conduct of the parties and the circumstances of the particular case evidencing an intention to create the relationship.
16. **Actions: Tort-feasors: Releases.** Whereas a release extinguishes the cause of action as to all joint tort-feasors, a covenant not to sue does not extinguish the cause of action and does not release other joint tort-feasors even if it does not specifically reserve rights against them.
17. **Principal and Agent: Releases.** While a release differs from a covenant not to sue, in the principal-agent setting it matters not how the settlement was reached; whether by release or covenant not to sue, settlement with the agent constitutes a settlement with the principal, no matter what the parties may have intended.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Daniel G. Dolan for appellant.

Thomas A. Otepka and Susan E. Norris, of Gross & Welch, P.C., for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

In this suit joining an action for the wrongful death of Danette Robin McCurry with an action on behalf of said decedent's estate, the personal representative of the estate and mother of the decedent, the plaintiff-appellant, Dolores McCurry, challenges the district court's grant of summary judgment to the defendant-appellee, School District of Valley. In so doing, the personal representative asserts, in summary, that the district court erred in (1) refusing her leave to amend her petition, (2) determining there were no genuine issues of material fact, and (3) treating the settlement agreement she had reached with another as relevant to her suit against the school district. We affirm.

II. FACTS

The school district arranged a 1988 ski trip for its students, as had been done since 1970. School district officials planned to depart on the evening of February 12, ski on the slopes of Winter Park, Colorado, and return in the early morning hours of February 16.

Depending on the number of students wishing to participate and the resulting cost, the school district planned to either charter a bus or rent or use school vans for transportation. Because of the level of interest shown in the trip, it became necessary to charter a bus and to arrange for additional transportation.

In December 1987 or January 1988, while at a nonschool function, school district teacher Bob Harper remarked to Scott Nielsen, a local resident but not a school district employee, that there were more students than there was room on the chartered bus. Nielsen told Harper to contact him if he needed help with the ski trip. Approximately 1 week later, Harper called Nielsen

and asked him to drive his (Nielsen's) van on the trip, which Nielsen agreed to do without wage or salary. However, the school district was to pay for Nielsen's gas and lodging, and he was to cover his own expenses for food and skiing.

Albeit unknown to the school district, for it did not inquire as to Nielsen's driving record, Nielsen was a licensed motor vehicle operator whose license had not been suspended at any time.

Two days before the trip, Nielsen decided to take his daughter along to visit her aunt in Denver, and he obtained authorization from Harper to do so.

While school district employees did not tell Nielsen what route to take nor what stops to make, he had no control over who was to be riding in his van. Instead, Harper assigned who would ride in Nielsen's van, and Nielsen was informed on the evening of February 12 who his passengers would be.

Nielsen and Harper agreed that it would be best if Nielsen's van departed at approximately 7 p.m., or 2 hours ahead of the bus, thus allowing the van to make stops, whereas the bus would drive straight through, except for stops to change drivers. Nielsen estimated that the 600-mile trip would take 12 to 13 hours. The van and the bus were to meet at the slopes in Winter Park at approximately 8:30 the next morning.

Nielsen worked during the day of February 12 at his job with the Omaha Public Power District. After leaving work early, at "[a] little after 4:00," he arrived home at 4:30 p.m. and immediately went to bed. He awakened at 6:45 p.m.

With Nielsen driving, the van departed from the school gymnasium in Valley, Nebraska, on February 12. Whether the van left around 7 p.m. or sometime after 8 p.m. is in dispute.

Nancy Berg, a home economics teacher, and her family were expected to ride in the van with Nielsen. However, they instead rode on the bus after a group of students approached Harper and asked permission to ride in the van. Riding in Berg's place was Bill Leggitt, who had expressed interest in riding in the van because his daughter was one of the passengers.

Including Nielsen, nine individuals occupied the van, notwithstanding that it was designed to seat only eight occupants; there were thus not enough seat belts for all the occupants. Neither Nielsen nor Leggitt instructed the students

to use seat belts.

Nielsen had driven to the Colorado ski areas "many times," an estimated 10 to 12 times previously. However, he had not been to Winter Park before, and this was his first trip transporting students.

Nielsen set the cruise control at 55 miles per hour. After leaving a rest area near Lexington, Nebraska, Nielsen slowed down to 50 miles per hour because the wind was "blowing real hard" and he had observed slick spots on the road surface. The wind velocity was corroborated by Leggitt. Nielsen stated that he drove in the inside lane because it appeared to be drier and traffic was lighter. However, Leggitt stated that he did not recall Nielsen driving in the inside lane. Moreover, Leggitt stated that Nielsen was sitting on one of his legs while driving, thereby relying on the cruise control for acceleration.

Nielsen had the van's radio on and was conversing with Leggitt, who did not expect to share in the driving responsibilities because he was "anticipating sleeping as much as [he] could on the way to Winter Park." However, Leggitt denies telling Nielsen that he did not wish to drive. Nielsen, on the other hand, claims that Leggitt told him at one point that he (Leggitt) did not wish to drive. This surprised Nielsen somewhat, for he assumed one of Leggitt's functions was to assist with the driving. Nielsen decided that if he became drowsy, he would ask Leggitt to drive "whether he wanted to or not." At least one trip organizer also assumed that Leggitt would share the driving responsibility. In past trips, the vans each had two drivers "for the safety of the kids."

Approximately 4 miles east of Brady, Lincoln County, Nebraska, on Interstate 80, the van was involved in a single-vehicle accident. Nielsen stated how the accident occurred:

> Just after going under an overpass heading west there was a curve in the road, which curved to the left, a gradual curve. And right at the end of the curve it was like somebody just took their hand and pushed the whole van to the side. The van went down into the median right to the side.

As the cruise control was still engaged, Nielsen immediately

tapped his brakes to disengage it. According to Nielsen, the van was traveling at 50 miles per hour at the time of the accident. However, Trooper Dan Kuhn stated that according to his notes from a postaccident interview with Nielsen, Nielsen stated that he was traveling at 60 miles per hour.

While traveling through the median, Nielsen steered to the left to miss a turnaround road. In an attempt to avoid a culvert and to stop, Nielsen steered the van up onto the eastbound lane. The van rolled over and landed on the passenger side.

What happened next is in dispute. Nielsen claims that it was he who pushed the front windshield out of the van and helped the students exit. However, Leggitt, who has been a friend of the McCurry family since 1981 and whose daughter was a good friend of the decedent, states that it was he who pushed out the windshield.

It was after counting heads outside the van that the group became aware that the decedent was missing. She was found lying outside the van partially pinned under it.

Nielsen stated that he did not know why the van left the road. He told Kuhn that it "must have been ice or could have been ice." One of the student passengers told a school district teacher who helped organize the trip that she had been listening to Nielsen and Leggitt conversing when the van began swerving. However, Leggitt stated that he was asleep until awakened by a "lurch" and a "screech."

Trooper Dana Korell investigated the accident and found no ice on the Interstate and stated that the wind "was not blowing to speak of." No skid marks or tire marks were found in the westbound lanes, nor were skid marks found in the median. Korell and Kuhn thought that Nielsen fell asleep while driving the van. However, Nielsen was not given a traffic citation.

The personal representative alleged that the school district "negligently entrust[ed] the transportation" of the decedent to Nielsen and that the school district, through its agent Nielsen, was negligent in the operation of the van.

Although the suit originally named Nielsen as a party defendant, he and the personal representative later, on January 30, 1989, entered into an agreement labeled a "*COVENANT NOT TO SUE*," which, in relevant part, recites that in

consideration of the payment of $95,000 by Nielsen, the personal representative "covenant[s] not to sue" him for any claims arising out of the subject accident. Moreover, the "compromise agreement" states that the personal representative knew Nielsen was "not paying" the "full amount of damages as would be paid if all persons, including the [school district] were settling said action . . . ." The agreement concludes by declaring that the instrument "is a covenant not to sue . . . and is not a release."

III. ANALYSIS

1. Denial of Leave to Amend

The personal representative first urges that the district court erred in refusing to grant her leave to amend her petition. In this connection, the record tells us only that on the day the school district's motion for summary judgment was submitted, the personal representative moved to "allege a new allegation of negligence" and that the motion was overruled because the motion for summary judgment had been taken under advisement.

Amendment of a petition is not a matter of right. *Omaha Nat. Bank v. Koliopoulos*, 204 Neb. 752, 285 N.W.2d 496 (1979). Rather, the decision to grant or deny an amendment to a pleading rests in the discretion of the trial court. *Nebraska Equal Opp. Comm. v. State Emp. Retirement Sys.*, 238 Neb. 470, 471 N.W.2d 398 (1991). In the absence of some mitigating factor which would justify the raising of new issues by a party after a motion for summary judgment has been heard and submitted, it is not an abuse of discretion to deny a motion to amend pleadings. *Yunghans v. O'Toole*, 199 Neb. 317, 258 N.W.2d 810 (1977).

The record shows no mitigating factor to justify an amendment to the pleadings after the motion for summary judgment had been submitted. Therefore, we cannot say the district court abused its discretion in denying the motion to amend the petition.

Nonetheless, the personal representative argues that what she meant by alleging that the school district negligently entrusted the decedent's transportation to Nielsen is that the

school district failed "to select a safe plan of transportation" for her. While it is not necessary to state a cause of action in any particular form, *Waite v. Samson Dev. Co.*, 217 Neb. 403, 348 N.W.2d 883 (1984), and in actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader, *Hutmacher v. City of Mead*, 230 Neb. 78, 430 N.W.2d 276 (1988), proper pleading nonetheless requires a petition to state in logical and legal form the facts which constitute the cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute, *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984), and Neb. Rev. Stat. § 25-804 (Reissue 1989). It is the facts well pleaded, not the theory of recovery or legal conclusions, which state a cause of action. *Moore v. Puget Sound Plywood*, 214 Neb. 14, 332 N.W.2d 212 (1983).

Pleading the conclusion that the school district negligently entrusted the decedent's transportation to Nielsen, without more, simply does not do what is required of a petition. As a consequence, the petition fails to state a negligent entrustment cause of action, whatever that cryptic phrase may have been intended to mean in the context of this case.

We have recently held that when it is asserted in a motion for summary judgment that an opposing party has failed to state a cause of action, the motion may be treated, as far as that issue is concerned, as one for judgment on the pleadings. *Ruwe v. Farmers Mut. United Ins. Co.*, 238 Neb. 67, 469 N.W.2d 129 (1991). But see *Naidoo v. Union Pacific Railroad*, 224 Neb. 853, 402 N.W.2d 653 (1987) (affirming grant of summary judgment on ground petition failed to state cause of action). Applying the rule announced in *Ruwe*, it follows that the district court correctly entered judgment on the pleadings in favor of the school district on the issue of the nature of the transportation it provided to the decedent.

2. Issues of Fact

Thus, the success of the personal representative in this appeal rests on the viability of her claim that the school district, through Nielsen as its agent, negligently operated the van in which the decedent was riding. It is appropriate to recall at this

juncture that summary judgment is properly granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record show there is no genuine issue concerning any material fact or the ultimate inferences deducible from such fact or facts and the movant is entitled to judgment as a matter of law. *Jaramillo v. Mercury Ins. Co., ante* p. 223, 494 N.W.2d 335 (1993); *Howard v. Blue Cross Blue Shield, ante* p. 150, 494 N.W.2d 99 (1993).

There can be no question that whether Nielsen drove in a negligent manner presents genuine issues of material facts with respect to whether he failed to keep a proper lookout or to maintain reasonable control over his vehicle, as the personal representative pled. That circumstance, however, avails the personal representative nothing unless Nielsen's negligence, should the trier of fact determine such to have existed, is imputable to the school district.

Whereas under the respondeat superior doctrine the negligence of an agent is imputable to the principal, unless the person engaging the services of an independent contractor failed to exercise due care in selecting the contractor, or unless the duty to be performed is nondelegable, the negligence of the contractor is not imputable to the person engaging the contractor. See *Greening v. School Dist. of Millard*, 223 Neb. 729, 393 N.W.2d 51 (1986). Thus, it becomes important to determine Nielsen's status vis-a-vis the school district. An agent is a person authorized by the principal to act on the principal's behalf and under the principal's control. See *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990). An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used. *Wausau Ins. Co. v. Schake*, 220 Neb. 802, 373 N.W.2d 669 (1985).

The determination of whether one is an independent contractor or an agent is one of fact. See, *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991); *Professional Recruiters v. Wilkinson Mfg. Co.*, 222 Neb. 351, 383 N.W.2d 770 (1986); *T. S. McShane Co. v. Great Lakes Pipe*

Line Co., 156 Neb. 766, 57 N.W.2d 778 (1953). The common-law test for determining whether an independent contractor status exists includes the consideration and weighing of many factors, no one of which is conclusive. *Eden v. Spaulding*, 218 Neb. 799, 359 N.W.2d 758 (1984). See, also, *Professional Recruiters v. Wilkinson Mfg. Co., supra*. The criteria for making the determination include a consideration of who has the right of control, who provided the tools, the degree of supervision exerted over the one performing the work, the method of payment, and the contractual understanding between the parties. *Professional Recruiters v. Wilkinson Mfg. Co., supra*; *Rudolf v. Tombstone Pizza Corp.*, 214 Neb. 276, 333 N.W.2d 673 (1983); *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983).

Moreover, whether an agency relationship exists between two parties depends on the facts underlying the association, irrespective of how the parties describe or characterize their connection. See *Gottsch v. Bank of Stapleton, supra*. Moreover, an agency may be implied from the words and conduct of the parties and the circumstances of the particular case evidencing an intention to create the relationship. *Saffer v. Saffer*, 133 Neb. 528, 274 N.W. 479 (1937), *overruled on other grounds, Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985).

Here, Nielsen was asked by a school employee to drive; notwithstanding that Nielsen was driving his daughter for a purpose of her own, the trip also furthered the interests of the school district; although Nielsen was not told what route to take, how many, if any, stops to make, nor the speed at which he was to drive, he was given a destination and an approximate departure and arrival time; except for the presence of his daughter, he had no control over who rode in his van; and while he was not being paid wages or a salary to drive, certain of his expenses were being defrayed by the school district.

Under such circumstances, reasonable minds could differ as to whether Nielsen was an agent of the school district. Thus, unless the settlement agreement with Nielsen forecloses the personal representative from pursuing her action against the school district, the grant of summary judgment would have

been improvident.

3. Effect of Settlement Agreement

Thus, we reach the third and final assignment of error, in which the personal representative asserts that the district court erred in considering the settlement she had effected with Nielsen.

(a) Historical Background

Although this case does not involve joint tortfeasors, a review of the rules applicable to settlements with such is helpful to an understanding of the rule to be applied in the situation here presented. The traditional common-law rule provided that the release of one joint tortfeasor was a complete surrender of any cause of action against any other joint tortfeasor and a bar to any suit against the other without regard to the sufficiency of the consideration actually received or the intent of the parties. The basis for this rule was the ancient theory of unity of the injury and the fact that the injured party is entitled to only one compensation, thus making it impossible for the injured party to release one tortfeasor without discharging the other. Annot., 24 A.L.R.4th 547 (1983).

This court first adopted the traditional rule in *Neligh v. Bradford*, 1 Neb. 451 (1871). However, 40 years later, in *Fitzgerald v. Union Stock Yards Co.*, 89 Neb. 393, 131 N.W. 612 (1911), this court held that settlement with one of several joint wrongdoers and payment of damages is not a defense to an action against another unless it is agreed that the settlement was full compensation for damages suffered. See, also, *Hauth v. Sambo*, 100 Neb. 160, 158 N.W. 1036 (1916).

As we shall see, the giving of a release is but one means of effecting a settlement. Consequently, the traditional rule with regard to joint tortfeasors has not been without its detractors. The *Fitzgerald* court insightfully noted that

> [i]f some of the wrongdoers are willing to adjust the matter by paying their reasonable proportion of the damage done, and the injured party can accept such payment and still reserve his claim against the more stubborn ones, such a construction of the law would seem to facilitate settlement and tend to avoid litigation.

Fitzgerald, 89 Neb. at 400, 131 N.W. at 614.

As one venerable commentator has observed:

> This result has been justly condemned because it compels the plaintiff either to forego any opportunity of obtaining what it is possible to get from one defendant without suit, or to give up the entire claim against the other without full compensation. . . . A surrender of one therefore should not on any reasonable basis discharge the other, except to the extent that there has been full compensation.

W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 49 at 333 (5th ed. 1984).

Currently, the standard for determining the effect of an agreement purporting to operate as a "release" under Nebraska law is controlled by two factors: (1) whether the injured party has received full satisfaction and (2) whether the parties intended that the release be in full satisfaction of the injured party's claim. *Scheideler v. Elias*, 209 Neb. 601, 309 N.W.2d 67 (1981) (apparently adopting Restatement (Second) of Torts § 885 (1979), held that where successive, rather than joint, tortfeasors are involved, release of the tortfeasor responsible for the original injury does not, absent a showing of intent to the contrary, preclude action against the provider of subsequent medical treatment for the injury).

(b) Release Distinguished from Covenant Not to Sue

Some courts began to recognize the covenant not to sue as a means of limiting the application of the traditional rule. Other jurisdictions opted for modification or abrogation of the traditional rule by way of statute. At least 19 states repudiated the common-law rule and its deleterious effect upon unsuspecting plaintiffs by enacting some version of the Uniform Contribution Among Tortfeasors Act (UCATA). Unif. Contribution Among Tortfeasors Act § 1, 12 U.L.A. 63 (1975). Nebraska is not among the states adopting that act. But see Neb. Rev. Stat. § 25-21,185.11 (Cum. Supp. 1992), which became effective February 8, 1992, and affects the operation of certain releases, covenants not to sue, and similar agreements.

Apparently because the distinction between the two types of

instruments was not considered important to the resolution of the case then at hand, we have, on more than one occasion, referred to releases and covenants not to sue as if they were the same. See, e.g., *Pioneer Animal Clinic v. Garry*, 231 Neb. 349, 436 N.W.2d 184 (1989); *Mayer v. Howard*, 220 Neb. 328, 370 N.W.2d 93 (1985); *Roy v. Morford*, 216 Neb. 818, 346 N.W.2d 392 (1984); *Stetina v. State Farm Mut. Auto. Ins. Co.*, 196 Neb. 441, 243 N.W.2d 341 (1976). But cf. *Scheideler v. Elias, supra*, which distinguishes between the two.

The genesis of our equivocal treatment of these two very different instruments can be traced to *Dickey v. Meier*, 188 Neb. 420, 197 N.W.2d 385 (1972). There, we said, "Where the doctrine of respondeat superior has been involved, many cases make no distinction between releases and covenants not to sue." *Id.* at 423, 197 N.W.2d at 387. Leaving aside for the moment how the doctrine of respondeat superior affects the operation of releases and covenants not to sue, it is clear that the two devices are not the same.

As the Nevada Supreme Court noted in *Van Cleave v. Gamboni Constr.*, 99 Nev. 544, 665 P.2d 250 (1983), "A 'release' extinguishes the cause of action as to all joint tortfeasors. On the other hand, a 'covenant not to sue' does not extinguish the cause of action and does not release other joint tortfeasors even if it does not specifically reserve rights against them." *Id.* at 547, 665 P.2d at 252, citing *Whittlesea v. Farmer*, 86 Nev. 347, 469 P.2d 57 (1970).

> " ' "A covenant not to sue is not a release, but it is to be distinguished from a release, and the distinction, although technical or artificial, is clear. The difference is one of intent and grows out of the construction placed on the terms of the instrument, since a covenant not to sue is not a present abandonment or relinquishment of a right or claim but merely an agreement not to enforce an existing cause of action, and, although it may operate as a release between the parties to the agreements, it will not release a claim against joint obligors or joint tortfeasors." . . .' "

Crim v. Jones, 204 Ga. App. 289, 291, 419 S.E.2d 130, 131 (1992), quoting *Ga. R. Bank &c. Co. v. Griffith*, 176 Ga. App. 198, 335 S.E.2d 417 (1985). For other sources distinguishing the

effect of a release from that of a covenant not to sue in either the joint tortfeasor or master-servant context, see, e.g., *Fetz v. E & L Truck Rental Co.*, 670 F. Supp. 261 (S.D. Ind. 1987) (applying Indiana law); *Hall v. Schulte*, 836 P.2d 989 (Ariz. App. 1992); *Cox v. Pearl Invest. Co.*, 168 Colo. 67, 450 P.2d 60 (1969); *Brunswick Corp. v. Concorde Yachts, Inc.*, 370 So. 2d 102 (Fla. App. 1979); *Brown v. Timpte Inc.*, 137 Ill. App. 3d 1053, 485 N.E.2d 488 (1985); *Menzel v. Morse*, 362 N.W.2d 465 (Iowa 1985); *Cullen v. Atchison, T. & S. F. Rly. Co.*, 211 Kan. 368, 507 P.2d 353 (1973); *Lincoln v Gupta*, 142 Mich. App. 615, 370 N.W.2d 312 (1985); *Colton v. New York Hospital*, 53 A.D.2d 588, 385 N.Y.S.2d 65 (1976); *Waden v. McGhee*, 274 N.C. 174, 161 S.E.2d 542 (1968); *Levi v. Montgomery*, 120 N.W.2d 383 (N.D. 1963); *Imark Industries v. Arthur Young & Co.*, 148 Wis. 2d 605, 436 N.W.2d 311 (1989); Restatement (Second) of Contracts § 285(1) (1981); Restatement (Second) of Torts § 885 (1979).

However, at least one source of commentary views the distinction between releases and covenants not to sue as artificial, obscuring what in the commentator's view should be the real issue: the intent of the parties.

> The only desirable rule would seem to be that a plaintiff should never be deprived of a cause of action against any wrongdoer when the plaintiff has neither intentionally surrendered the cause of action nor received substantially full compensation. If the statutes are taken into account, this is now the rule actually applied in most American jurisdictions. Where there has been such full satisfaction, or where it is agreed that the amount paid under the release is so received, no claim should remain as to any other tortfeasor; but these are questions of fact, and normally to be determined by the jury, where the amount of the claim is unliquidated. The release, however, may very well be taken as a prima facie acknowledgment of satisfaction, and the burden placed upon the plaintiff to prove that it is not.

W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 49 at 335 (5th ed. 1984).

Indeed, the U.S. Supreme Court has expressed its preference

for determining the effect of a release or covenant not to sue in accordance with the intention of the parties. In the antitrust case of *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 347, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971), *reh'g denied* 401 U.S. 1015, 91 S. Ct. 1247, 28 L. Ed. 2d 552, the Court, citing Restatement (Second) of Torts § 885 (Tentative Draft No. 16, 1970), held that "[t]he straightforward rule is that a party releases only those other parties whom he intends to release."

(c) As Applied to Principal and Agent

This jurisdiction has applied a distinctive rule to torts committed in the principal-agent context. In *Dickey v. Meier*, 188 Neb. 420, 197 N.W.2d 385 (1972), the plaintiff was injured when an employee-agent of the employer-principal backed a truck into another vehicle, pinning the plaintiff between the vehicles. Following the accident, both the employer-principal and the employee-agent died. The plaintiff filed claims against the estates of both. While the cases were pending on appeal to the district court, the plaintiff and employee-agent's estate executed for a consideration a " 'special and restricted release and indemnifying agreement.' " *Id.* at 421, 197 N.W.2d at 386. The agreement specifically reserved any and all claims the plaintiff might have against the employer-principal.

Citing *Fitzgerald v. Union Stock Yards Co.*, 89 Neb. 393, 131 N.W. 612 (1911), Restatement of Torts § 885(1) (1939), and Restatement (Second) of Torts § 885 (Tentative Draft No. 16, 1970), the plaintiff in *Dickey* argued that the employee-agent and employer-principal were joint tortfeasors, and in such a situation release and discharge of one of such tortfeasors was not a defense to an action against the other unless it was agreed between the parties to the settlement that such payment was in full satisfaction of all damages suffered.

However, the *Dickey* court distinguished the situation therein presented from that presented in *Fitzgerald, supra*, on the basis that "[the employee-agent] and [employer-principal] were not joint tort-feasors under the facts" in *Dickey* because "the liability of the employer-principal arises only by virtue of the doctrine of respondeat superior, and not through any independent negligence of the employer-principal." *Dickey* at

423, 197 N.W.2d at 387. Although noting that "[c]ourts generally have not made this distinction or have followed rules applicable to true joint tort-feasors even though recognizing the distinction," *id.*, citing Annot., 92 A.L.R.2d 533 (1963), the *Dickey* court declared that "in a tort action based exclusively on the alleged negligence of an employee or agent, a valid release of that employee-agent releases the employer or principal from liability, even though the release specifically reserves all claims against the employer-principal." *Dickey* at 424, 197 N.W.2d at 388, citing Annot., 20 A.L.R.2d 1044 (1951); *Bacon v. United States*, 321 F.2d 880 (8th Cir. 1963) (applying Missouri law); *Max v. Spaeth*, 349 S.W.2d 1 (Mo. 1961).

Thus, the *Dickey* court distinguished between settlements involving joint tortfeasors and those involving vicarious liability arising out of the respondeat superior doctrine. We have since maintained this distinction. See, *Wicker v. City of Ord*, 233 Neb. 705, 447 N.W.2d 628 (1989); *Pioneer Animal Clinic v. Garry*, 231 Neb. 349, 436 N.W.2d 184 (1989); *Mallette v. Taylor & Martin, Inc.*, 225 Neb. 385, 406 N.W.2d 107 (1987); *Ericksen v. Pearson*, 211 Neb. 466, 319 N.W.2d 76 (1982). See, also, *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991).

This state has not been alone in its adherence to the rule that a covenant not to sue the agent operates to release the principal from liability. See, e.g., *Copeland v. Humana of Kentucky, Inc.*, 769 S.W.2d 67 (Ky. App. 1989); *Horejsi by Anton v. Anderson*, 353 N.W.2d 316 (N.D. 1984) (interpreting version of UCATA); *Mid-Continent Pipeline Co. v. Crauthers*, 267 P.2d 568 (Okla. 1954); *Craven v. Lawson*, 534 S.W.2d 653 (Tenn. 1976) (interpreting version of UCATA). See, also, *Atkinson v. Wichita Clinic, P.A.*, 243 Kan. 705, 763 P.2d 1085 (1988).

Cogent reasons, perhaps expressed best by the Supreme Court of Utah in *Holmstead v. Abbott G.M. Diesel, Inc.*, 27 Utah 2d 109, 493 P.2d 625 (1972), exist for continuing to do so. The plaintiff in *Holmstead* brought suit against the employer, alleging that its employee, while operating his motor vehicle within the scope of employment, negligently collided with plaintiff's vehicle. The employee procured a covenant not to sue from plaintiff. The employer moved for summary judgment on

the ground that the plaintiff's covenant not to sue the employee operated to release the employer from liability. The trial court denied the motion.

On appeal, the Supreme Court of Utah held that the covenant not to sue the employee exonerated the employer from liability. In so doing, it stated that were it to hold otherwise,

> the covenant not to sue would be wholly abortive of its intended object and purpose if it went no further than to protect the employee against a direct action by the injured party but afforded no protection against an action over by his employer. If the covenant be so narrowly construed, the payment made as consideration would constitute no more than a credit on the amount which the injured person might ultimately recover under a judgment, and the employee would remain liable for the remainder.

Holmstead, 27 Utah 2d at 114, 493 P.2d at 628.

Notwithstanding that the rule enunciated in *Holmstead* was superseded when Utah adopted a version of the UCATA, *Krukiewicz v. Draper*, 725 P.2d 1349 (Utah 1986), we find wisdom in the reasoning of the *Holmstead* court.

In so writing, we are not unmindful that in at least two cases, *Mallette v. Taylor & Martin, Inc., supra*, and *Ericksen v. Pearson, supra*, we quoted with seeming approval an antipodal statement found in 76 C.J.S. *Release* § 50 (1952). According to that source of commentary, the purpose of the rule that settlement with the agent constitutes settlement with the principal is that "if the rule were otherwise, [the principal] would be liable without having recourse against the [agent] primarily liable, the latter having been released . . . ." *Id.* at 689.

As support for the quoted statement, C.J.S. cites *Hillyer v. City of East Cleveland*, 94 N.E.2d 216 (Ohio App. 1950), a decision of the Ohio Court of Appeals. Therein, the plaintiff sued the city for injuries she sustained when she fell as the result of a defective sidewalk known by the city to be such. The Court of Appeals, relying on the premise that the city was primarily liable and the abutting property owner secondarily liable, held that the plaintiff's acceptance of payment from the abutting property owner in partial satisfaction of her claim entitled the

city to a pro tanto satisfaction of its liability. In distinguishing the situation then before it from those in which the abutting property owner, rather than the city, had primary liability, the Court of Appeals opined that in the latter situation, the release of the property owner as the party primarily liable would defeat the "right of the city to be subrogated to the rights of the injured party and to recover over its loss from the property owner." *Id.* at 219. Whatever significance the Ohio Court of Appeals' dictum may have had under the law of Ohio, it does not alter our view of the reasoning used by the *Holmstead* court. Moreover, the ruling of the Court of Appeals was reversed by the Supreme Court of Ohio in *Hillyer v. E. Cleveland*, 155 Ohio St. 552, 99 N.E.2d 772 (1951), which determined that as the sidewalk on which the plaintiff fell was constructed for the property owner, it was the owner who was primarily liable and the city which was secondarily liable, and that having settled with the property owner, the plaintiff was barred from recovering from the city. The Supreme Court did not comment on the reason the Court of Appeals gave for the rule with which we are concerned.

Thus, at least until we are called upon to consider the impact, if any, of § 25-21,185.11 upon the situation, we reaffirm that in the principal-agent setting, it matters not how the settlement was reached; whether by release or covenant not to sue, settlement with the agent constitutes a settlement with the principal, no matter what the parties may have intended.

IV. JUDGMENT

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

CAPORALE, J., participating on briefs.

SHANAHAN, J., dissenting.

Early in its opinion, the majority, with its judicial pencil, strokes a line between a "release" and a "covenant not to sue," and then, without explanation or hesitation, turns the pencil around and erases that distinctive line. As a consequence, a release and a covenant not to sue become inseparable, indistinguishable, and, therefore, identical as an agreement for settlement of a tort claim. Because I believe that a covenant not

to sue is essentially different from a release and that settlement through a covenant not to sue an agent does not discharge the principal from liability for the same harm involving the agent, I dissent.

Scott Nielsen; his wife, Cynthia Nielsen; and Nielsens' insurance company, State Farm Mutual Automobile Liability Insurance Company, entered into an agreement with Dolores McCurry, personal representative of the estate of Danette Robin McCurry, which was titled "*COVENANT NOT TO SUE*." The agreement provided that in exchange for $95,000, the McCurry estate "covenant[s] not to sue" Scott Nielsen, Cynthia Nielsen, and State Farm "for any and all liability, actions, causes of action, claims, demands known or unknown, upon or by reason of any damage, loss or injury . . . sustained by the [McCurry estate]" concerning the automobile accident which caused the death of Danette Robin McCurry.

The covenant also stated that

> the undersigned [personal representative] knowing that the Settling Parties [Nielsens and State Farm] are not paying the total of the undersigned's full amount of damages as would be paid if all persons, including the School District of Valley (hereinafter "Valley") were settling said action or cause of action and all claims for damages of the undersigned herein, does hereby credit and satisfy that portion of the total amount of damages that the undersigned has suffered and will suffer because of the aforesaid accident which has been caused by the negligence, if any, of . . . the Settling Parties . . . it being the act and intention of the undersigned to covenant not to sue, and the undersigned does hereby so covenant for that fraction and portion and percentage of the total cause of action and claim for damages against all parties . . . for which any or all of the Settling Parties hereto are found to be liable and responsible . . . and the undersigned does hereby reserve, save, maintain and preserve against other parties the balance of the whole cause of action of the undersigned against said other parties, which balance of said cause of action is not released hereunder.

Additionally, the McCurry estate's settlement agreement

contained a provision to indemnify Nielsens and State Farm:

> In further consideration of the aforesaid payment to the [McCurry estate] by the Settling Parties hereto for the damages, injuries and claims of the undersigned, the [McCurry estate] hereby indemnifies and agrees to indemnify and save harmless the said Settling Parties and State Farm, their agents, employees, successors, assigns and insurers, for a sum up to and not to exceed $95,000.00 that they will or may be required to pay upon any judgment obtained against them by a joint tortfeasor or any other party to said action or any other party for contribution in any way arising out of any damages . . . resulting from said accident . . . .

The settlement agreement or covenant not to sue, signed by the personal representative, concludes with the following: "It is understood and agreed by the parties that this instrument is a covenant not to sue as to the above-mentioned parties and is not a release."

As characterized by one commentator, a release is "a surrender of the cause of action" and a covenant not to sue is an agreement "by which the plaintiff does not surrender the cause of action, but merely agrees not to enforce it." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 49 at 332, 334 (5th ed. 1984). Similarly, according to the Michigan Supreme Court:

> "A covenant not to sue is to be distinguished from a release in that it is not a present abandonment or relinquishment of the right or claim but is merely an agreement not to sue on an existing claim. It does not extinguish the cause of action. As between the parties to the agreement, the final result is the same in both cases. The difference is primarily in the effect as to third parties, and is based mainly on the fact that in the case of a release there is an immediate release or discharge, whereas in the other case there is merely an agreement not to prosecute a suit."

Theophelis v Lansing Hospital, 430 Mich. 473, 492 n.14, 424 N.W.2d 478, 486 n.14 (1988) (quoting from 66 Am. Jur. 2d *Release* § 2 (1973)).

This court has said that "in a tort action based exclusively on the alleged negligence of an employee or agent, a valid *release* of that employee-agent releases the employer or principal from liability, even though the *release* specifically reserves all claims against the employer-principal." (Emphasis supplied.) *Dickey v. Meier*, 188 Neb. 420, 424, 197 N.W.2d 385, 388 (1972). Accord, *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991); *Wicker v. City of Ord*, 233 Neb. 705, 447 N.W.2d 628 (1989); *Pioneer Animal Clinic v. Garry*, 231 Neb. 349, 436 N.W.2d 184 (1989); *Mallette v. Taylor & Martin, Inc.*, 225 Neb. 385, 406 N.W.2d 107 (1987); *Ericksen v. Pearson*, 211 Neb. 466, 319 N.W.2d 76 (1982). The rule expressed in *Dickey* is based on the rationale that a principal's liability under the doctrine of respondeat superior is secondary to or derived from and dependent on the agent's liability for a harm. Therefore, if the agent is released from liability, a legal link in the chain of the principal's liability is broken, and the principal is discharged from liability for the harm originating with the agent.

Logic requires a different rule and result when a covenant not to sue is utilized for settlement of claims arising out of the principal-agent relationship. If a plaintiff covenants not to sue an agent, but does not release the agent from liability, the link in the chain of liability is not broken; hence, the principal's derivative liability is left intact. Many courts have applied the foregoing rationale in holding that a covenant not to sue an agent does not discharge the principal from liability; for instance, see, *Atkinson v. Wichita Clinic, P.A.*, 243 Kan. 705, 763 P.2d 1085 (1988); *Dworak v. Olson Const.*, 191 Colo. 161, 551 P.2d 198 (1976); *Holve v. Draper*, 95 Idaho 193, 505 P.2d 1265 (1973); *Lincoln v Gupta*, 142 Mich. App. 615, 370 N.W.2d 312 (1985); *Bartrand v C & O R Co*, 87 Mich. App. 466, 274 N.W.2d 822 (1978); *Thomas v Checker Cab Co*, 66 Mich. App. 152, 238 N.W.2d 558 (1975); *Centala v Navrude*, 45 Mich. App. 282, 206 N.W.2d 544 (1973); and *Henry B. Steeg and Associates v. Rynearson*, 241 N.E.2d 888 (Ind. App. 1968).

Other courts have held that a covenant not to sue an agent will not discharge a principal from liability so long as the parties to the settlement agreement intend to preserve an action against the principal. An illustrative decision is *Stewart v. Village of*

Summit, 114 Ill. 2d 23, 499 N.E.2d 450 (1986), wherein the Supreme Court of Illinois held that a covenant not to sue an agent, without the express reservation of the right to sue other parties, discharges the agent's principal, but a covenant not to sue which reserves the right to prosecute a claim against others who are not parties to the settlement agreement does not discharge the principal from liability. The court said in *Stewart*:

> [I]t [is] clear that the claim against an employer, although based on *respondeat superior*, if reserved, survives the covenant not to sue. This is consistent with the long-established rule that the agreement is the controlling factor and the governing fact to be determined is the intent of the parties. [Citations omitted.]
>
> We conclude that the parties intended that plaintiff's right to sue all persons or entities other than [the employee] survive the execution of the covenant, and in allowing defendant's motion for summary judgment, the circuit court erred.

(Emphasis in original.) 114 Ill. 2d at 30, 499 N.E.2d at 453. Accord, *Hall v. Schulte*, 836 P.2d 989 (Ariz. App. 1992); *Ledesma v. Cannonball, Inc.*, 182 Ill. App. 3d 718, 538 N.E.2d 655 (1989); *Ray Korte Chevrolet v. Simmons*, 117 Ariz. 202, 571 P.2d 699 (Ariz. App. 1977); *Hovatter v. Shell Oil Company*, 111 Ariz. 325, 529 P.2d 224 (1974).

To prevent a double recovery, whatever payment has been received for the plaintiff's covenant not to sue may be applied to reduce pro tanto an eventual recovery against any defendant determined to be liable for the plaintiff's injury. See, *Cullen v. Atchison, T. & S. F. Rly. Co.*, 211 Kan. 368, 507 P.2d 353 (1973); *Whittlesea v. Farmer*, 86 Nev. 347, 469 P.2d 57 (1970); *Henry B. Steeg and Associates v. Rynearson, supra*.

Under current Nebraska common law, when a principal is free from active wrongdoing but is vicariously liable for injuries caused by the principal's agent, the principal has an action against the agent for indemnification of the principal's loss. See *Warner v. Reagan Buick*, 240 Neb. 668, 483 N.W.2d 764 (1992) (indemnity is available to one free from wrongdoing whose liability was vicariously imposed). See, also, *City of Wood River v. Geer-Melkus Constr. Co.*, 233 Neb. 179, 444 N.W.2d

305 (1989). Looking to the possibility of indemnification from an agent, the majority places much stock in *Holmstead v. Abbott G. M. Diesel, Inc.*, 27 Utah 2d 109, 493 P.2d 625 (1972), in which the Supreme Court of Utah held that a covenant not to sue an employee released the employer because, without the effective release, the employee might be subjected to the employer's suit for indemnification notwithstanding that the employee, as a recipient of a covenant not to sue, had intended to obtain protection from all liability arising out of the incident in which the plaintiff-covenantor was injured.

However, in McCurry's case, the parties to the covenant not to sue expressly and very definitely acknowledged the possibility of an indemnificatory action by the School District of Valley. The covenant not to sue contained a specific provision for the McCurry estate's indemnification of Nielsens and State Farm to the extent of $95,000 payable on any judgment against Nielsens and State Farm as the result of the auto accident which caused the death of Danette Robin McCurry. Consequently, the concerns and rationale expressed in *Holmstead* are irrelevant to McCurry's case. Also, this court's majority loses sight of the fact that the covenant not to sue, as a settlement agreement, is between the McCurry estate, Nielsens, and State Farm. The School District of Valley is not a party to that agreement. Whatever may have been their motivation, Nielsens and State Farm accepted the covenant not to sue as a means to compromise and settle the tort claim by the McCurry estate. Scott Nielsen's exposure to possible indemnification, dependent on a future judgment for the McCurry estate against the School District of Valley, supplies no legal basis to bar the estate's action against the school district.

Returning to the *Holmstead* decision, it is fortunate that the Utah Legislature recognized and eliminated the inequity of the *Holmstead* rule by enacting Utah Code Ann. § 78-27-42 of the Utah comparative negligence act in 1973, legislation that, in its effect, is quite similar to Neb. Rev. Stat. § 25-21,185.11(1) (Cum. Supp. 1992), which states:

> (1) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall discharge that person from all liability to the claimant but

shall not discharge any other persons liable upon the same claim unless it so provides. The claim of the claimant against other persons shall be reduced by the amount of the released person's share of the obligation as determined by the trier of fact.

Even a cursory examination of the covenant not to sue involved in the McCurry case discloses that none of the parties contemplated that the School District of Valley would be released from liability as a consequence of the settlement agreement. No matter how many times one reads the covenant not to sue, the settlement agreement remains a clear expression that the McCurry estate would not sue Nielsens or State Farm. Through the McCurry estate's expressly reserving rights against the School District of Valley, the settlement agreement shows on its face that the covenant not to sue was never intended to release the school district from liability. In the final analysis, the settlement agreement between the McCurry estate, Nielsens, and State Farm is the only evidence of intent concerning the covenant not to sue and, as an unambiguous expression, must be construed in accordance with the parties' manifest intent as shown by the language of the settlement agreement. Moreover, the majority acknowledges that the difference between a release and a covenant not to sue is the intent underlying the settlement agreement and, to support that distinction, quotes from *Crim v. Jones*, 204 Ga. App. 289, 291, 419 S.E.2d 130, 131 (1992), which stated: " ' " 'The difference [between a release and a covenant not to sue] is one of intent and grows out of the construction placed on the terms of the instrument . . . .' " ' " Later, the majority approves of the Prosser and Keeton insight that the real issue is the intent of the parties, that is, "a plaintiff should never be deprived of a cause of action against any wrongdoer when the plaintiff has neither intentionally surrendered the cause of action nor received substantially full compensation." Keeton et al., *supra*, § 49 at 335.

Finally, the majority mouths the standard expressed by the U.S. Supreme Court in *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 347, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971), which stated: "The straightforward rule is that a party releases only those other parties whom he intends to release."

Yet, in infinite irony, the majority concludes: "[I]t matters not how the settlement was reached; whether by release or covenant not to sue, settlement with the agent constitutes a settlement with the principal, no matter what the parties may have intended." So much for intent as an important and determinative factor in ascertaining whether a settlement agreement is actually a release.

Until this court construes § 25-21,185.11(1) to change the unjust and absolutely inequitable result in McCurry's case, today's decision will undoubtedly have a dramatic and undesirable impact on tort litigation based on vicarious liability. Tort claims involving a principal and agent will have to proceed to resolution through a trial, lest a covenant not to sue, as a settlement agreement with an agent, terminate any issue of a principal's liability. Severely curtailing settlements is hardly a sound and steady step toward practical resolution of disputes.

In summary, there is no showing that the covenant not to sue, as a settlement agreement, was intended to discharge the School District of Valley from liability for the death of Danette Robin McCurry. Rather, the settlement agreement between the McCurry estate, Nielsens, and State Farm is permeated with the intent that the covenant not to sue discharged only Nielsens and State Farm from liability for the death of Danette Robin McCurry and that the estate reserved its right to proceed against the School District of Valley. The majority concedes that a fact question exists concerning Scott Nielsen's agency relationship with the School District of Valley, that is, "unless the settlement agreement with Nielsen forecloses the personal representative from pursuing her action against the school district, the grant of summary judgment would have been improvident." The summary judgment against the McCurry estate was not only "improvident," but downright wrong. Since the summary judgment is incorrect as a matter of law, this court should have reversed the summary judgment and remanded this cause to the district court for further proceedings.

GLENN W. ASHBY, JR., APPELLEE, V. FIRST DATA RESOURCES, INC., A CORPORATION, APPELLANT, AND PORTER-TRUSTIN-CARLSON CO., A CORPORATION, ET AL., APPELLEES.

497 N.W.2d 330

Filed February 26, 1993. No. S-90-165.

1. **Principal and Agent: Master and Servant: Negligence: Liability.** Under the derivative liability that arises under the doctrine of respondeat superior, the negligent acts of an agent or servant done in obedience to the express orders or directions of the master are imputed to the principal or master, who is held liable.
2. **Principal and Agent: Independent Contractor: Workers' Compensation: Negligence: Liability: Releases.** When an agent or independent contractor is primarily liable, either directly, vicariously, or through the carelessness or negligence of a plaintiff employee, the protection of the workers' compensation laws that form the sole remedy against that agent or independent contractor also releases the principal or general contractor from liability.
3. _____: _____: _____: _____: _____: _____. In order for the principal to be released along with the agent through the payment of workers' compensation benefits, the liability of the principal must be derived solely from the liability of its agent. But when the principal is primarily liable, through acts or omissions of persons unconnected to the agent, the principal's liability is not derivative from the agency-employment relationship, and the doctrine of respondeat superior does not apply. Similarly, when the negligent acts or omissions which injure an employee of an independent contractor's are attributable to persons directly and separately employed by the general contractor, the payment of workers' compensation arising from the independent contractor's employment does not release the general contractor from liability.
4. **Summary Judgments: Torts: Negligence.** Summary judgment may be altogether inapplicable in tort cases of a kind where reasonable minds may differ as to whether an inference of negligence can be drawn from a given set of facts.
5. **Trial: Expert Witnesses: Physicians and Surgeons.** Testimony of qualified medical doctors cannot be excluded simply because they are not specialists in a particular school of medical practice. Instead, experts or skilled witnesses will be considered qualified if, and only if, they possess special skill or knowledge respecting the subject matter involved so superior to that of persons in general as to make the expert's formation of a judgment a fact of probative value.
6. **Verdicts: Appeal and Error.** As a general rule, in determining sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
7. _____: _____. A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact.
8. _____: _____. A jury verdict may not be set aside unless clearly wrong, and it is

sufficient if there is any evidence presented to the jury from which it could find for the successful party. Nor will a jury verdict be set aside on appeal as excessive unless it is clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was a result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded evidence or rules of law.

9. **Appeal and Error.** Absent plain error, an appellate court will not address issues that are not both assigned as error and discussed in the brief of the party alleging prejudicial error.

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

James D. Sherrets and, on brief, Mark A. Weber, of Sherrets Smith & Gardner, for appellant.

Michael L. Smart and Steven Lefler, of Kavan, Smart & Kampfe, for appellee Ashby.

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

WHITE, J.

This action arises from a claim of negligence asserted against appellant, First Data Resources, Inc. (FDR), for temporary and permanent injuries sustained by appellee Glenn Ashby, Jr. After a jury trial, FDR was found liable to Ashby in the amount of $375,000. The trial court overruled FDR's subsequent motion for judgment notwithstanding the verdict and alternative motion for new trial. Asserting that various errors were committed at the lower court level, FDR appeals the jury verdict and award of damages. We affirm, finding that the issues involved in this appeal are without merit or involve questions of fact properly left to the province of the jury.

Assuming, as we must, a version most favorable to the prevailing party, the facts are that appellee Glenn Ashby, Jr., is a carpenter who incurred a back-related injury in 1973. Because of this injury, he had back surgery in 1975 and a surgery to increase circulation to his legs in 1976. A doctor advised Ashby not to return to work, but after prolonged rehabilitation, Ashby began working part time in 1980 and was back to full-time status by 1981.

In September 1983, FDR contracted with Porter-

Trustin-Carlson Co. (Porter), Ashby's employer, to have an electric garage door installed on the premises of FDR's place of business in Omaha, Nebraska. The door was to be installed between two rooms which were connected by a gravity-driven conveyor roller system and a passageway. In preparing to install the door, Ashby placed a "Do Not Use" sign on the conveyor opening to warn FDR's employees not to use the conveyor system. The room where the sign was placed is the only entry point where boxes could be placed on the conveyor system.

Ashby stood on the conveyor assembly and upon a pipe railing approximately 5 feet above the floor of the passageway as he began installing the door. While Ashby was standing in this position, an employee of FDR's sent a box down the conveyor. The box struck Ashby in the left leg and foot and caused him to fall partially through the conveyor assembly, injuring his leg. Ashby then fell backward over the conveyor, striking the floor below. As a result of the fall, Ashby experienced ongoing back, buttock, and leg pain that eventually prevented him from working.

Ashby filed this action in 1987, alleging that by and through its employees, FDR was negligent by removing or failing to obey the "Do Not Use" sign or by sending the box down the conveyor system despite his presence. FDR denied the allegations and raised the affirmative defenses of contributory negligence and assumption of risk. The affirmative defense was based, in part, on FDR's claim that Ashby could have safely used a ladder instead of standing on the conveyor system. After both sides introduced evidence, the court submitted the issues of negligence and damages to the jury. Finding that FDR caused Ashby to fall and that the fall proximately resulted in Ashby's injuries and damages, the jury returned a verdict in favor of Ashby and against FDR.

In its brief, FDR requests that the judgment and verdict be reversed, dismissed, or remanded for a new trial because the following summarized errors occurred at trial: (1) The trial court erroneously refused to hear FDR's motion for summary judgment; (2) Ashby's medical expert was improperly allowed to testify; (3) the evidence was insufficient on the issues of negligence, injury, aggravation of a preexisting injury, future

earnings loss, diminished earning capacity, and damages; (4) statements of an FDR employee were improperly admitted; (5) the award was excessive and influenced by passion and prejudice; (6) the court improperly refused to allow a construction supervisor to testify for FDR; and (7) the court improperly refused to grant FDR's motion for a view of the premises.

At oral argument on appeal, FDR renewed its demurrer, motion for directed verdict, and motion for summary judgment, asserting that Ashby's suit was barred because of this court's decision in *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991). FDR claims that, under *Plock*, an employee who obtains a settlement in full satisfaction of a workers' compensation claim against an independent contractor is barred from asserting a claim against the general contractor. FDR contends that the decision in *Plock* establishes that a workers' compensation claim is the sole remedy available for an employee of an independent contractor's who is injured in the course and scope of employment. We find that this argument misconstrues the issues and holding in *Plock*.

Under the derivative liability that arises under the doctrine of respondeat superior, the negligent acts of an agent or servant done in obedience to the express orders or directions of the master are imputed to the principal or master, who is held liable. *Id.* But when a statute bars such a claim against an agent, the statute equally protects the principal, on whose behalf the agent has acted. *Id.* As applied in *Plock*, the workers' compensation benefits system which barred any further action by the plaintiff employee against a management service equally protected the principal, the defendant owners of a mall, from the derivative liability arising from the acts or omissions of another employee of the management service's.

One of the most important factors in the analysis of *Plock* is the negligence of the agent or the independent contractor. When the agent or independent contractor is *primarily* liable, either directly, vicariously, or through the carelessness or negligence of the plaintiff employee, the protection of the workers' compensation laws that form the sole remedy against the agent or independent contractor also releases the principal or general

contractor from liability. See *id.*

The facts of the present situation are significantly distinguishable from those presented in *Plock*. Porter was an independent contractor, and Ashby was a direct employee of Porter's. FDR does not assert that the complained-of injuries resulted because either Porter or another employee of Porter negligently acted or failed to act. The jury determined that Ashby himself was not contributorily negligent sufficient to bar recovery and that Ashby did not assume the risk of his injuries. More to the point, the complained-of negligence was that of a direct employee of FDR's whose employment was not associated with Ashby or Porter.

As illustrated in *Plock*, in order for the principal to be released along with the agent through the payment of workers' compensation benefits, the liability of the principal must be derived solely from the liability of its agent. But when the principal is primarily liable, through acts or omissions of persons unconnected to the agent, the principal's liability is not derivative from the agency-employment relationship, and the doctrine of respondeat superior does not apply. Similarly, when the negligent acts or omissions which injure an employee of an independent contractor's are attributable to persons directly and separately employed by the general contractor, the payment of workers' compensation arising from the independent contractor's employment does not release the general contractor from liability. Therefore, Ashby's suit against FDR is not barred by the workers' compensation settlement Ashby received on behalf of Porter.

Approximately 3 months before trial, FDR timely filed a motion for summary judgment. The motion was set for hearing in early October and then reset until December 1, 1989. The trial court overruled the motion, refusing to allow FDR to argue, introduce supporting evidence, or make an offer of proof. FDR asserts that it was entitled to a chance to be heard on the motion pursuant to Neb. Rev. Stat. § 25-1332 (Reissue 1989) and that the court's action in refusing FDR the opportunity to argue or introduce evidence was reversible error.

Without addressing the propriety of the court's actions, we fail to see how FDR was prejudiced by the court's actions. FDR

was not precluded from otherwise arguing and offering supporting evidence at the jury trial that ensued. FDR was given the opportunity to demonstrate its belief that there was no genuine issue of a material fact and to request a directed verdict at the appropriate times.

It is well settled that the primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of those cases where there is no genuine claim or defense. *Draemel v. Rufenacht, Bromagen & Hertz, Inc.*, 223 Neb. 645, 392 N.W.2d 759 (1986). However, summary judgment may be altogether inapplicable in tort cases of a kind where reasonable minds may differ as to whether an inference of negligence can be drawn from a given set of facts. See *Pfeifer v. Pfeifer*, 195 Neb. 369, 238 N.W.2d 451 (1976). In light of the jury verdict, supported as it is by sufficient evidence, finding in favor of Ashby, FDR is hard pressed to now argue that there were indeed no genuine issues of material fact and that FDR should have been entitled to a judgment as a matter of law. " '[E]rror without prejudice provides no ground for appellate relief.' " *In re Interest of R.R.*, 239 Neb. 250, 254, 475 N.W.2d 518, 521 (1991). We find that the decision of the trial court to overrule FDR's motion for summary judgment without allowing FDR to argue or offer supporting evidence is not reversible error entitling FDR to relief on appeal.

FDR argues that the court erred in admitting the testimony of Dr. David Baras, Ashby's sole medical expert, because (1) the doctor's area of expertise was insufficient to render him an expert, (2) the foundation was inadequate, (3) the testimony was based wholly upon speculation and conjecture, and (4) the testimony failed to delineate causation of Ashby's injuries or determine the degree of aggravation of Ashby's preexisting injuries.

A trial court has discretionary power to admit or exclude the testimony of expert witnesses, and the trial court's ruling will be reversed only when there has been an abuse of discretion. *Zarp v. Duff*, 238 Neb. 324, 470 N.W.2d 577 (1991).

FDR claims that because the doctor was a general practitioner who was board certified in physical medicine and rehabilitation, but who did not practice in orthopedics or

neurology, he lacked the requisite expertise to testify on Ashby's behalf.

Testimony of qualified medical doctors cannot be excluded simply because they are not specialists in a particular school of medical practice. *Harris v. Smith*, 372 F.2d 806 (8th Cir. 1967). Instead, experts or skilled witnesses will be considered qualified if, and only if, they possess special skill or knowledge respecting the subject matter involved so superior to that of persons in general as to make the expert's formation of a judgment a fact of probative value. *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991).

Dr. Baras is a licensed and practicing board-certified specialist in physical medicine and rehabilitation. The doctor's area of specialization involves the evaluation, management, and treatment of individuals who have suffered a disability, either acute or chronic, which may be of musculoskeletal origin involving areas such as the back, neck, and shoulders. Although Dr. Baras expressly stated that he does not manage fractures or manage conditions that require surgical intervention, FDR has failed to demonstrate how the lower back and buttock pain involved in Ashby's injuries was not within the doctor's expertise.

FDR additionally argues that even if the doctor was qualified to testify as an expert, Ashby failed to demonstrate that Dr. Baras considered sufficient objective data from which to diagnose the cause of Ashby's injuries, and that Dr. Baras instead relied entirely upon the history given by Ashby in forming his opinion. This assertion is not supported by the record. Dr. Baras' testimony reveals that he relied on objective findings such as observable limited movement of the spine upon physical examination, various x rays and computerized tomography scans, and assorted reports of objective findings compiled by other physicians and specialists who treated Ashby.

FDR further assumes that since Dr. Baras had no expertise in the area of diagnosing causation and based his opinion on the comments of another medical expert and the statements of Ashby, the doctor's testimony was based on speculation and conjecture and should have been excluded. Finding that Dr.

Baras was indeed a qualified medical expert and recognizing that medical experts often must base their opinions on reports, opinions, and recommendations of other medical personnel, we find that Dr. Baras' opinion regarding causation did not fall to the level of speculation or conjecture.

Lastly, FDR argues that Ashby failed to show, through Dr. Baras' testimony, that the accident caused his injury and contends that Ashby failed to distinguish the disability attributable to the September 1983 accident as opposed to the prior disability. This assertion is also contradicted by the record, wherein Dr. Baras expressly stated that Ashby's disability was an aggravation of his previous injury. Dr. Baras determined that Ashby had a 19-percent permanent disability rating of the whole body, 5 percent of the disability attributable to Ashby's previous injury in 1973 and 14 percent attributable to the September 1983 accident on FDR's premises.

Based on the foregoing findings, we conclude that there is no evidence to suggest that the trial court abused its discretion in admitting the expert medical testimony of Dr. Baras.

FDR further alleges that the court erred in refusing to allow the rebuttal testimony of Mark Nielsen, FDR's maintenance supervisor, on the issue of Ashby's contributory negligence and assumption of risk. FDR made an offer of proof that, if allowed, Nielsen would testify that a ladder could be placed to bridge the conveyor in the area where Ashby was working when he fell. In refusing to allow the testimony, the trial court noted that FDR failed to indicate in the pretrial interrogatories that Nielsen was going to testify. Furthermore, the testimony was cumulative to that of Leland Walker, a supervisor for FDR, who testified on behalf of FDR that he had observed Nielsen place two different-sized ladders in the area. Under the state of the record, we hold that it was not an abuse of discretion for the trial court to exclude the testimony.

FDR summarily argues that the evidence was insufficient to support the judgment and award. FDR claims that the evidence on future earnings loss, diminished earning capacity, damages, causation, and degree of aggravation from a preexisting injury was insufficient to be sent to the jury. FDR also maintains that its motions for a directed verdict at the end of trial, for

judgment notwithstanding the verdict, for reconsideration, and for a new trial should have been granted because the damages were excessive, were due to the influence of passion and prejudice, and were left to the speculation and conjecture of the jury. Lastly, FDR argues that the court should have granted FDR's motion for directed verdict at the close of Ashby's case and at the close of all the evidence because Ashby failed to prove negligence, injuries, or aggravation of injuries.

As a general rule, in determining sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990).

A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. *Blanchette v. Keith Cty. Bank & Trust Co.*, 231 Neb. 628, 437 N.W.2d 488 (1989).

Considering the evidence in the light most favorable to Ashby, there is sufficient evidence in the record to support Ashby's claim of negligence, causation, and resulting injuries. In addition to evidence previously discussed, the record reveals the following: Ashby's wife testified that she picked her husband up at a hospital the day of the accident and that he was complaining of leg and buttock pain. A physical therapist and Dr. Baras testified to Ashby's statements given for medical purposes wherein Ashby related that he had injured his back when he fell while installing a door as he stood on a conveyor belt. An employee of FDR's who worked near the area where Ashby was installing the door in September 1983 testified to hearing about a worker who was injured when a box was pushed down the conveyor system, and another FDR employee admitted, in his deposition testimony, to hearing about a worker who fell off a conveyor in September 1983.

Evidence relating to causation was also received. According to testimony and medical records received through Dr. Baras, Ashby had a herniated L5 disk, his back and buttock pain was

consistent with this radiological finding, and this herniated disk was unrelated to Ashby's prior back injuries. Dr. Baras testified that in his professional opinion, Ashby's disability was an aggravation and intensification of a preexisting medical condition resulting from the injury that occurred in September 1983. Dr. Richard Pitner, a physician who began treating Ashby shortly after the fall in 1983 and who had last treated Ashby in 1985, was called to testify on behalf of the defense. Dr. Pitner stated that the fall Ashby sustained in September 1983 could have aggravated a preexisting back condition, that Ashby was temporarily disabled by the time of his last visit in March 1985, and that there was a good possibility that Ashby's complaints when he was last seen in Dr. Pitner's office were related to back problems.

Several witnesses presented evidence relating to Ashby's injuries, disability, and damages. The physical therapist, who testified to performing various tests and to observing signs of decreased mobility in Ashby's lower back, recommended that Ashby limit his work to the light or light-to-medium category. Dr. Baras testified that Ashby would not be able to return to the type of work that he was doing and that the medical expenses already incurred were reasonable and necessary. Testimony was received indicating that the union contract wages for a journeyman carpenter ranged from $14.67 in 1980 to $15.07 in June 1989. A vocational rehabilitation counselor testified to sedentary or light jobs Ashby would presently be able to do if Ashby could successfully complete a recommended program in light of his disability and stated that these jobs would pay around $3.35 to $6 an hour. This counselor also testified that, in his opinion, Ashby was not employable because of his physical disability, functional limitations, depression, and pain. The "Commissioners 1980 Standard Ordinary Mortality Table" was also referred to in order to demonstrate that Ashby had a continued life expectancy of 23.3 years.

When considered in conjunction with Ashby's own testimony regarding the events surrounding his fall and subsequent injuries, the evidence was not insufficient as a matter of law to support the findings of negligence, causation, injuries, and future damages.

FDR further alleges that the following factors encouraged the jury to award a judgment based on passion and prejudice: the unqualified expert testimony of Dr. Baras, the failure to delineate the degree of disability attributable to this accident, the failure to address the aggravation of Ashby's injury, the causation based on history and speculative review of opinions of other physicians who did not testify, the refusal of the trial court to allow the testimony of rebuttal witness Mark Nielsen, the admission into evidence of testimony concerning Ashby's recent heart attack despite FDR's pretrial motion to exclude, and the amount of the verdict in light of the evidence presented and in comparison to similar case law.

The majority of these assertions have already been determined to be without merit. As for the admission into evidence of testimony concerning Ashby's recent heart attack, FDR did not object when the physical therapist mentioned the heart attack at trial, when Ashby himself testified about his cardiac problems, or when the vocational rehabilitation counselor testified about Ashby's history of heart problems. A party's failure to make a timely objection or motion to strike will ordinarily bar a party from later claiming error in the admission of testimony. *Zarp v. Duff*, 238 Neb. 324, 470 N.W.2d 577 (1991). Furthermore, at the pretrial hearing on the motion to exclude testimony regarding the heart attack, FDR argued that the 1989 heart problem was irrelevant to the injuries received in 1983, but was unobjectionably relevant for other purposes. FDR does not refer to, nor could we find, any testimony attempting to relate the heart attack to the 1983 injury on FDR's premises in keeping with the nature of the evidence sought to be restricted by the motion in limine.

A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is any evidence presented to the jury from which it could find for the successful party. *McClymont v. Morgan*, 238 Neb. 390, 470 N.W.2d 768 (1991). Nor will a jury verdict be set aside on appeal as excessive unless it is clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was a result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded evidence or

rules of law. See, *Williams v. Monarch Transp.*, 238 Neb. 354, 470 N.W.2d 751 (1991); *Bay v. House*, 226 Neb. 521, 412 N.W.2d 466 (1987).

Finding that the jury verdict is supported by relevant and sufficient evidence; is proportionate to Ashby's injuries; and is not a result of passion, prejudice, or mistake, we conclude that the verdict is not excessive under the record before us.

FDR's next assignment of error alleges that an FDR employee was improperly allowed to testify about an out-of-court statement she made to Ashby. The employee testified that she was employed in the area where Ashby was installing the door in 1983 and that she made a statement to a worker who was injured by a box on the conveyor system. The statement was, in essence, an apology in case she had been the one who pushed the box down the conveyor, which box knocked the worker over. FDR asserts that this was reversible error because the statements were introduced solely for the purposes of inflaming the jury and were without any probative value upon the issues at trial.

In the answer filed with the district court, FDR specifically denied that Ashby was injured, alleged that Ashby's injuries were directly or indirectly caused by others over whom FDR had no direction or control, and generally denied that a box was sent down the conveyor when FDR's employees had knowledge of the potential injury to Ashby. Therefore, the statement of the employee was admissible and relevant on the issues of FDR's knowledge of Ashby's accident and as a statement of an agent of a party opponent that had a tendency to substantiate Ashby's account of the accident. "If the evidence is otherwise admissible, as a general rule, it is within the trial court's discretion to admit and exclude evidence on the basis of relevancy, and such rulings will be upheld on appeal absent an abuse of discretion." *McCune v. Neitzel*, 235 Neb. 754, 760, 457 N.W.2d 803, 808 (1990). Recognizing that counsel for FDR had ample opportunity to cross-examine the witness, we find that the court did not abuse its discretion in admitting the employee's statement.

At trial, FDR asserted that the nature of how Ashby's accident took place, in addition to the general description of the

area involved, indicated that a view of the premises would be helpful to the jury. Counsel for Ashby indicated that they had no objection, but they did not in fact stipulate to the defendant's request. The trial court refused to grant the motion, noting that there was a dispute as to whether the conveyor had been changed since the time of the accident. FDR now argues that the trial court's refusal to grant the motion was error.

A drawing of the accident location was offered into evidence, without objection, by Ashby. Additionally, FDR marked, but did not offer, a diagram of the conveyor system and surrounding area, which diagram was used for demonstrative purposes in front of the jury. Based on these facts and the questionable change in appearance of the area, it was not an abuse of the trial court's discretion to refuse to grant the motion for a view of the subject area.

FDR argues, but does not assign as error, the trial court's refusal to give a requested jury instruction on premises liability. Noting that Ashby's claim was based on the negligent acts of an FDR employee and not on an assertion that the conveyor system constituted an unreasonable hazard, we find that this does not constitute plain error. Absent plain error, an appellate court will not address issues that are not both assigned as error and discussed in the brief of the party alleging prejudicial error. *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992).

Finding all properly assigned errors to be without merit, we affirm the judgment and verdict of the district court.

AFFIRMED.

JOHN S. SPEER III, APPELLANT, V. M. DAVID DEALY, APPELLEE.

495 N.W.2d 911

Filed February 26, 1993. No. S-90-359.

1. **Demurrer: Pleadings: Appeal and Error.** In reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts well pled and the factual and legal inferences which may reasonably be deduced from such facts, but does not accept conclusions of the pleader.
2. **Actions: Alienation of Affections: Criminal Conversation.** The common-law actions of alienation of affections and criminal conversation have been barred in Nebraska by statute. Neb. Rev. Stat. § 25-21,188 (Reissue 1989).
3. **Torts: Contracts: Actions: Marriage.** The tort of intentional interference with a contract is not available as a cause of action in situations arising out of a marital relationship.
4. **Torts: Actions: Marriage.** The tort of intentional infliction of emotional distress is unavailable when it is predicated on conduct which leads to the dissolution of marriage, as such actions are barred by statute. Neb. Rev. Stat. § 25-21,188 (Reissue 1989).

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

Mark J. Milone, of Schmid, Mooney & Frederick, P.C., Mark S. Cohen, and, on brief, Charles I. Scudder, Jr., for appellant.

Edward D. Hotz and Edith T. Peebles, of Zweiback, Hotz & Lamberty, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and HOWARD, D.J., Retired.

HOWARD, D.J., Retired.

This is an appeal from the dismissal of the plaintiff's petition following the sustaining of a general demurrer. The plaintiff, John S. Speer III, had alleged two causes of action, intentional interference with contract and intentional infliction of emotional distress, based on the following allegations:

The plaintiff married Jolynne Speer on March 1, 1983. The plaintiff and his wife were employees of the Union Pacific Railroad, and the defendant, M. David Dealy, was an executive officer of the railroad with supervisory status over the plaintiff and his wife.

On January 10, 1989, and continuing thereafter, the

defendant began sending the plaintiff's wife flowers, money, and other gifts. He also began arranging business trips upon which the plaintiff's wife accompanied him. It was at approximately this time that the alleged affair between the defendant and the plaintiff's wife began.

Solely because and as a direct result of the defendant's actions and the extramarital affair, the plaintiff and his wife experienced marital difficulties. The two separated, with the plaintiff's wife establishing a separate household, and the plaintiff's standard of living was thereby reduced by the loss of his wife's income. He claims lost income tax benefits, moving expenses, child-care expenses, and counseling expenses and claims that as a result of the defendant's actions, he was deprived of the benefit of his spouse's services, comfort, society, companionship, and consortium, all to his general damage.

The plaintiff additionally asserts that, unaware of the defendant's involvement with his wife, he turned to the defendant for advice on his marital difficulties. The defendant gave comforting advice.

On August 15, 1989, the affair between the defendant and the plaintiff's wife was revealed. As a result, the plaintiff suffered severe emotional distress, depression, and suicidal preoccupation, all of which required his hospitalization. He has required psychiatric and psychological counseling, which will continue. His children have required individual and family counseling.

The assignments of error may be summarized as contending that the court erred in finding that the plaintiff's claims were essentially for criminal conversation and alienation of affections. Neb. Rev. Stat. § 25-21,188 (Reissue 1989) provides: "No cause of action for (1) alienation of affections or (2) criminal conversation shall be allowed to commence after January 9, 1986."

"In reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts well pled and the factual and legal inferences which may reasonably be deduced from such facts, but does not accept conclusions of the pleader." *Balfany v. Balfany*, 239 Neb. 391, 392, 476 N.W.2d 681, 683 (1991).

For his first theory of recovery, the plaintiff alleged interference with contract. It is evident from the plaintiff's petition that the damages he seeks for this first cause of action stem from loss of consortium with his wife. Although the plaintiff's first theory of recovery is characterized as an action for tortious interference with a marital contract, it is, in essence, one for alienation of affections and is barred by § 25-21,188. Courts in a number of jurisdictions have addressed this situation and have so held.

Typical of these cases is *Pickering v. Pickering*, 434 N.W.2d 758 (S.D. 1989), where a wife became romantically involved with her coworker. A suit claiming alienation of affections, tortious interference with a marital contract, and intentional infliction of emotional distress was brought by her husband against both the wife and the coworker. The wife and the coworker claimed that the nature of the interference with contract complaint was one for alienation of affections, which the court had already dealt with. The court held:

> [The husband] invokes an analogy to an action for intentional interference with the performance of a contract in a commercial setting. We believe that the cause expressed is more accurately characterized as one for alienation of affections. . . .
>
> We find no South Dakota case that has held the tort of intentional interference with a contract to be available as a cause of action in situations arising out of a marital relationship and further note that other courts have also refused to recognize this cause of action in similar settings. *See Howton v. Avery*, 511 So.2d 173 (Ala.1987) . . . *Arnac v. Wright*, 163 Ga.App. 33, 292 S.E.2d 440 (1982); *Kunau v. Pillers, Pillers & Pillers, P.C.*, 404 N.W.2d 573 (Iowa App.1987). Those courts held the actions alleging tortious interference with a marital contract were really actions for alienation of affections, a tort which had been abolished in their respective jurisdictions. The courts refused to allow these attempts to circumvent the judicially or legislatively abolished causes of action by disguising the suits as other types of torts.

434 N.W.2d at 762.

Another such case is *Weaver v. Union Carbide Corp.*, 180 W. Va. 556, 378 S.E.2d 105 (1989). There, a husband seeking counseling became romantically involved with his counselor. His wife subsequently brought suit against the counselor based on a claim of intentional interference with the marital relationship. The court held:

> We must look to the substance of the plaintiff's complaint and not merely to its form. It is clear that the plaintiff seeks only damages that relate to the impairment of her marriage and to her eventual divorce. . . . To allow her suit would also run counter to the policies underlying the legislative abolition of suits for alienation of affections.
>
> . . . The claim for intentional interference with the marital relationship is, in its essence, one for alienation of affections and is barred by W.Va.Code, 56-3-2a.

180 W. Va. at 560, 378 S.E.2d at 109.

For his second theory of recovery, the plaintiff in this case alleged intentional infliction of emotional distress. This court set forth the elements of intentional infliction of emotional distress in *Dale v. Thomas Funeral Home*, 237 Neb. 528, 531, 466 N.W.2d 805, 807-08 (1991), as follows:

> The elements of a cause of action for intentional infliction of emotional distress are (1) the defendant's intentional or reckless conduct (2) which is so outrageous and so extreme that the conduct goes beyond all possible bounds of decency and is regarded as atrocious and utterly intolerable in a civilized community and (3) which causes emotional distress so severe that no reasonable person is expected to endure that severe emotional distress.

In support of his claim, the plaintiff here relies on the same facts as in his first theory of recovery. Specifically, he alleges that the defendant used his supervisory position at Union Pacific to arrange business trips for himself and the plaintiff's wife; that the defendant sent her various gifts; that marital discord ensued; that the defendant hid his relationship from the plaintiff and acted in such a way as to make the plaintiff think he was befriending him; and that the plaintiff's discovery of the relationship between the defendant and his wife caused him to require hospitalization and psychiatric treatment, which will

continue into the future. The plaintiff asked for special damages for his hospitalization and psychiatric treatment as well as general damages in this second cause of action.

The problem here, as with the plaintiff's first cause of action, is that he is alleging nothing which would distinguish this claim from one for alienation of affections or criminal conversation. As set forth earlier, claims for alienation of affections and criminal conversation have been abolished in this state by statute.

As stated in a comment by Christopher J. Whitesell, *Loss of Consortium and Intentional Infliction of Emotional Distress: Alternative Theories to Alienation of Affections*, 67 Iowa L. Rev. 859, 876 (1982), "The approach adopted by most jurisdictions that have addressed the issue of allowing emotional distress actions to substitute for alienation claims has been that of the New York Court of Appeals in *Weicker v. Weicker*," 22 N.Y.2d 8, 237 N.E.2d 876, 290 N.Y.S.2d 732 (1968). In *Weicker*, the plaintiff's husband obtained an illegal Mexican divorce, remarried, and held another woman out as his wife. The plaintiff sued her husband and the other woman for damages for mental pain and suffering, humiliation, and other relief. The New York Court of Appeals held that even if the law permitted recovery for intentional infliction of emotional distress " 'without proof of the breach of any duty other than the duty to refrain from inflicting it,' " strong policy considerations weighed against applying this area of the law to a dispute arising from matrimonial differences. *Id.* at 11, 237 N.E.2d at 876, 290 N.Y.S.2d at 733. The court reasoned that "[t]o sustain the claim for damages would result in a revival of evils not unlike those which prompted the Legislature in 1935 to outlaw actions for alienation of affections and criminal conversation." *Id.* at 11, 237 N.E.2d at 877, 290 N.Y.S.2d at 734.

The Supreme Court of South Dakota took the same approach when it addressed a similar issue in *Pickering v. Pickering*, 434 N.W.2d 758 (S.D. 1989). In *Pickering*, the plaintiff brought an action against his estranged wife and her coworker, alleging, among other things, intentional infliction of emotional distress. The claim was based upon the wife's

affair with the coworker and her pregnancy that resulted therefrom. The South Dakota court, in a concise holding, stated: "We believe the tort of intentional infliction of emotional distress should be unavailable as a matter of public policy when it is predicated on conduct which leads to the dissolution of marriage." *Id.* at 761.

The Supreme Court of Wisconsin so held in *Koestler v. Pollard*, 162 Wis. 2d 797, 471 N.W.2d 7 (1991), where a husband brought an action against the biological father of his wife's child. The plaintiff sought damages for the intentional infliction of emotional distress, alleging that the defendant had intentionally concealed the child's paternity. The court found that while the plaintiff pled facts beyond those required for criminal conversation, the cause of action "flow[ed] directly from the facts constituting criminal conversation." *Id.* at 803, 471 N.W.2d at 9.

The Supreme Court of Ohio has also so held. In *Strock v. Pressnell*, 38 Ohio St. 3d 207, 527 N.E.2d 1235 (1988), the plaintiff claimed intentional infliction of emotional distress because of the defendant's affair with the plaintiff's wife. The defendant was a minister who was providing marriage counseling services to the plaintiff and his wife. The court opined:

> In recognizing the independent tort of intentional infliction of emotional distress, we did not intend to revive the abolished torts of alienation of affections and criminal conversation. We believe the General Assembly intended to eliminate these common-law actions regardless of the title they are given or the severity of the alleged misconduct.
>
> . . . .
>
> Therefore, we hold that the torts of alienation of affections and criminal conversation, which were abolished by R.C. 2305.29, are not revived by the recognition of the independent tort of intentional infliction of emotional distress.

38 Ohio St. 3d at 215-16, 527 N.E.2d at 1242-43.

Neither theory of recovery survives § 25-21,188, and the dismissal must be affirmed.

AFFIRMED.

CAPORALE, J., not participating.

WHITE, J., concurring.

A cause of action in our law is a set of facts for which the law affords relief. *First Nat. Bank of Omaha v. State*, 241 Neb. 267, 488 N.W.2d 343 (1992). A cause of action is not the legal theory which seeks to justify the relief sought. The Legislature has abolished causes of action for alienation of affection and criminal conversation. See Neb. Rev. Stat. § 25-21,188 (Reissue 1989). Therefore, however described, the conduct complained of is no longer grounds for relief.

SHANAHAN and FAHRNBRUCH, JJ., join in this concurrence.

JOAN BARRETT, APPELLEE, V. CITY OF BELLEVUE, BOARD OF ADJUSTMENT, APPELLANT.

495 N.W.2d 646

Filed February 26, 1993. No. S-90-742.

1. **Zoning: Ordinances.** Neb. Rev. Stat. § 19-910 (Reissue 1991) empowers a board of adjustment to grant a variance from a zoning regulation only if strict application of the regulation, because of the unusual physical characteristics of the property existing at the time of the enactment of the regulation, would result in peculiar and exceptional practical difficulties to or exceptional and undue hardships upon the owner.
2. **Zoning: Evidence: Appeal and Error.** In an appeal from a board of adjustment to a district court, the district court may disturb the board's decision only if the decision was illegal or not supported by the evidence, and was thus arbitrary, unreasonable, or clearly wrong.
3. **Zoning: Courts: Appeal and Error.** On appeal from a district court's review of a decision of a board of adjustment, an appellate court is to decide if the district court abused its discretion or made an error of law; where competent evidence supports the district court's factual findings, the appellate court will not substitute its factual findings for those of the district court.

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

John W. Herdzina, Bellevue City Attorney, of Abrahams, Kaslow & Cassman, for appellant.

James C. Cripe for appellee.

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

PER CURIAM.

Asserting, in summary, that the district court misconstrued the authority of a board of adjustment, the defendant-appellant, City of Bellevue, Board of Adjustment, challenges the reversal of its refusal to grant the plaintiff-appellee, Joan Barrett, a zoning variance. We affirm.

Barrett's property abuts that of Frank Semin and sits 6 feet higher than his property. Semin's occupancy of his property predates 1980, when Barrett purchased her property. In 1989, Semin lowered the grade of his lot "at least a foot and left [Barrett] hanging with one foot of dirt." As a result, Barrett had a retaining wall built to "hold [her] dirt in." The height of the retaining wall appears to be approximately even with the height of Barrett's land.

Semin has, since late 1989, maintained on his property several spotlights and cameras. Some of the lights are activated by motion, such that even a moving animal turns them on. Lights also go on at other times, such as when Barrett leaves for work at 5 o'clock in the morning and when guests arrive at the Barrett house. In addition, Semin has told the occupants of the Barrett house and visitors that he has them on video. Because at least some of the lights are suspended from the eaves of Semin's garage and the Barrett property sits above the Semin property, these lights, when on, shine into the windows of the Barrett bedrooms and at night disturb the sleep of the occupants. As a consequence of all the foregoing, Barrett feels intimidated and as if she is under surveillance; she has lost 50 pounds due to the stress and tension caused her.

Although the record establishes the presence of an animus between these two neighbors, Semin claims that he maintains the lights and cameras for reasons of security.

Barrett seeks a variance so that she may erect an 80-inch-high wooden fence adjacent to and at the level of her retaining wall and between the two properties in order to shield her house from Semin's lights and cameras. The relevant zoning

regulation limits the fence height to 42 inches; in addition, the regulation requires the fence to be set back 50 feet from the front lot line, and Barrett wishes to set her fence back only 24 feet.

The board urges that its power does not extend to the granting of a variance to resolve this type of dispute between neighbors and that Barrett's remedy, if any, lies elsewhere in the law.

The controlling statute is found at Neb. Rev. Stat. § 19-910 (Reissue 1991). It reads, in relevant part:

> The board of adjustment shall . . . have only the following powers: . . . (3) where by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the enactment of the zoning regulations, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any enacted regulation . . . would result in peculiar and exceptional practical difficulties to or exceptional and undue hardships upon the owner of such property, to authorize, upon an appeal relating to the property, a variance from such strict application so as to relieve such difficulties or hardship, if such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of any ordinance or resolution. No such variance shall be authorized by the board unless it finds that: (a) The strict application of the zoning regulation would produce undue hardship; (b) such hardship is not shared generally by other properties in the same zoning district and the same vicinity; (c) the authorization of such variance will not be of substantial detriment to adjacent property and the character of the district will not be changed by the granting of the variance; and (d) the granting of such variance is based upon reason of demonstrable and exceptional hardship as distinguished from variations for purposes of convenience, profit or caprice. No variance shall be authorized unless the board finds that the condition or situation of the property

> concerned or the intended use of the property is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the zoning regulations. . . .

The most recent application of the foregoing statute is found in *Bowman v. City of York*, 240 Neb. 201, 482 N.W.2d 537 (1992), wherein we held that since the evidence failed to establish that a strict application of the setback requirement there at issue would have produced undue hardship for the owner of the property, the district court correctly reversed the grant of a variance. In doing so, we noted that § 19-910 empowers a board of adjustment to grant a variance from a zoning regulation only if strict application of the regulation, because of the unusual physical characteristics of the property existing at the time of the enactment of the regulation, " 'would result in peculiar and exceptional practical difficulties to or exceptional and undue hardships upon the owner . . . .' " *Id.* at 213, 482 N.W.2d at 545. See, also, *Frank v. Russell*, 160 Neb. 354, 70 N.W.2d 306 (1955).

Bowman reaffirmed that in an appeal from a board of adjustment to the district court, the district court may disturb the board's decision only if the decision was illegal or not supported by the evidence, and was thus arbitrary, unreasonable, or clearly wrong. *Bowman* also determined that on appeal from a district court's review of a decision of a board of adjustment, the appellate court is to decide if the district court abused its discretion or made an error of law; where competent evidence supports the district court's factual findings, the appellate court will not substitute its factual findings for those of the district court.

The evidence here establishes that strict application of the subject zoning regulation would indeed, because of the higher elevation of the Barrett property, result in undue hardship to Barrett and that the hardship is not of the type generally shared by other properties in the same zoning district and vicinity.

The nature of the variance is such that the district court neither made an error of law nor abused its discretion in implicitly finding that the variance would not create a substantial detriment to the adjacent property, that the

character of the district would not be changed, and that the variance would not produce a substantial detriment to the public good or substantially impair the intent and purpose of the zoning regulation.

Although there is no direct evidence that Barrett's property sat at least 6 feet higher than the Semin property when the zoning regulation was adopted, the difference in elevation of the two properties is so great that we cannot say the district court made an error of law or abused its discretion in impliedly finding that Barrett's property was in that regard substantially in its present condition at the time the regulation was adopted.

Accordingly, we affirm the judgment of the district court.

AFFIRMED.

CAPORALE, J., dissenting.

I respectfully dissent, for it seems to me that the majority has decided this case not on the basis of the trial record which was made, but on the basis of a trial record it assumes could have been made. The fact of the matter is that the trial record presented to us develops virtually none of the evidence required by Neb. Rev. Stat. § 19-910 (Reissue 1991) for the grant of a variance.

Not only do we not have any evidence of when the zoning ordinance in question was adopted, we have no evidence that the disparity in the elevations of the Barrett and Semin properties is at all unusual in the pertinent zoning area. All the record tells us in this regard is that the Barrett property is the highest one in the block and that the land slopes downward toward the Semin property.

Nor do I understand how in the face of a silent record the majority can conclude that the district court neither made an error of law nor abused its discretion in impliedly finding that "the variance would not create a substantial detriment to the adjacent property, that the character of the district would not be changed, and that the variance would not produce a substantial detriment to the public good or substantially impair the intent and purpose of the zoning regulation."

Bearing in mind that whether Semin has the right to maintain his lights and cameras is not before us, what demonstrates that an 80-inch-high fence does not interfere with the enjoyment of

his property by, for example, restricting his view, as was the case in *Frank v. Russell*, 160 Neb. 354, 70 N.W.2d 306 (1955), or restricting the amount of air circulation and sunlight, as was the case in *Bowman v. City of York*, 240 Neb. 201, 482 N.W.2d 537 (1992)? Nothing. Bearing in mind that Barrett's fence will project 26 feet closer to the front lot line of her property than other fences in the zoning district are permitted to project, what demonstrates that the variance does not change the character of the district by, for example, changing its harmonious appearance, as was the case in *Frank v. Russell, supra*? Nothing. Bearing in mind that extra 26-foot projection, what demonstrates that the variance does not produce a substantial detriment to the public good or substantially impair the intent and purpose of the zoning regulation by, for example, limiting visibility for those using the street abutting the Barrett property? Nothing.

Section 19-910 confers upon boards of adjustment the very limited authority to exempt from the operation of a zoning regulation property which, because of a statutorily specified extraordinary or exceptional situation or condition existing at the time of the adoption of the regulation, causes the owner thereof exceptional and undue hardship of the statutorily described types; provided, however, that the exemption does not work a substantial detriment to adjacent property, does not change the character of the district, and does not substantially impair the intent and purpose of the regulation. Thus, harsh as the result may appear to be, the contention of the board of adjustment that Barrett's remedy, if any, lies elsewhere in the law is legally correct, and I would therefore reverse the judgment of the district court.

By permitting its compassion to override its reason, the majority has ignored the narrow scope of § 19-910 and this court's prior application of that statutory language. See, e.g., *Bowman v. City of York, supra*. In so doing, the majority has converted boards of adjustment into courts of equity with the power to abate what may be only private nuisances, thus proving, once again, the wisdom of the rubric that hard cases make bad law. *Northern Securities Co. v. United States*, 193 U.S. 197, 24 S. Ct. 436, 48 L. Ed. 679 (1904) (Holmes, J.,

dissenting).

FAHRNBRUCH, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. DONALD L. ELLINGTON, APPELLANT.

495 N.W.2d 915

Filed February 26, 1993. No. S-90-888.

1. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress will be upheld on appeal unless the trial court's findings of fact are clearly erroneous. In reviewing a trial court's findings on a suppression motion, an appellate court 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.
2. **Police Officers and Sheriffs: Search and Seizure.** A police officer may question a person without bringing about a seizure when the interrogation is carried on without interrupting or restraining the questioned person's movement.
3. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** Whether a police officer has a reasonable suspicion of criminal activity to justify an investigative stop based on sufficient articulable facts requires taking into account the totality of the circumstances.
4. **Police Officers and Sheriffs: Investigative Stops.** When an officer does not recognize or know an individual; is not acting on particularized information from a third party; does not observe an exchange of items or money between the individual and another person; does not observe any movement, gestures, or attempts by the individual to conceal or hide objects; does not observe the individual repeatedly approach vehicles in a similar pattern of activity; and does not suspect the individual of any other crime, the officer's mere observation of a pedestrian leaning into a window of a stopped vehicle in a high-crime area and then walking away upon seeing the officer does not amount to a reasonable suspicion of drug-related activity warranting an investigatory stop.
5. **Police Officers and Sheriffs.** Police officers may not actively create "street encounters" unless the officers have knowledge of suspicious facts and circumstances sufficient to allow them to infringe upon an individual's right to be free from governmental interference.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and WRIGHT, Judges, on appeal thereto from the District Court for Douglas County, JERRY M. GITNICK, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

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

Don Stenberg, Attorney General, and Barry Waid for appellee.

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

WHITE, J.

This appeal from a criminal conviction comes before this court by means of a request for further review from a decision of the Nebraska Court of Appeals. After a stipulated bench trial, the district court for Douglas County convicted appellant, Donald L. Ellington, of possession of cocaine, and the Nebraska Court of Appeals affirmed. See *State v. Ellington*, 1 NCA 668 (1992). Ellington's appeal is based on a single assignment of error: the trial court's decision to overrule Ellington's pretrial motion to suppress the fruits of a *Terry* stop and appellant's subsequent arrest.

The events leading up to appellant's arrest and conviction are for the most part undisputed. On the evening of January 14, 1990, Officer Mark Lang of the Omaha Police Division's uniform field bureau patrol was on routine cruiser patrol in a two-officer marked car with his partner, James Morgan. Lang had been an officer for approximately 4 years and had received academy teaching and hands-on training in narcotics investigations.

At approximately 9 p.m., while patrolling an area with known drug trafficking, the defendant caught Lang's attention because the defendant was standing on a sidewalk and, in Lang's words:

> He was bent over, leaning into a vehicle which was parked on the west side of 24th Street just north of Taylor Street, with his arms extended into the vehicle, and appeared to be conversing with the occupants of the vehicle.
>
> . . . .
>
> [When the defendant observed the police cruiser he] quickly stepped away from the vehicle, and then began to

walk away.

Lang and his partner, who were in uniform, exited the police cruiser, approached Ellington, and explained that it appeared Ellington might be involved in a drug transaction. Lang asked Ellington whether he had any drugs or weapons on his person, to which Ellington replied in the negative. After allegedly receiving Ellington's permission, Lang performed an exterior pat-down search. During this search, Lang felt a hard object in the right inside pocket of Ellington's jacket that Lang testified felt like a possible weapon. Lang removed the object, which proved to be a glass crack pipe.

Lang placed Ellington under arrest after the discovery of the pipe. A further search uncovered a rocklike substance later identified as crack cocaine, a woman's compact containing a razor blade with a whitish powder residue, and two pieces of bronze wire meshing with residue.

Ellington filed a pretrial motion to suppress all physical evidence discovered from the search of his person. The defendant alleged that the search was without a warrant, without authority, prior to and not incident to a lawful arrest, without probable cause, and without proper consent of the defendant, in violation of his state and federal constitutional rights.

Lang was the sole witness to testify at the suppression hearing. Lang testified that the defendant's actions caught his attention because "[b]ased on parties that we have arrested in the past, and knowledge that drug transactions usually occur primarily with parties on foot in that area, they sometimes will flag down a car, or approach a car that will stop, at which time the transaction will take place."

However, Lang testified that he did not see Ellington flag down the car or approach the car before it was stopped, did not see anything in Ellington's hands, nor did he see anything pass between Ellington and the occupants of the automobile, such as plastic bags, containers, or money. Furthermore, Lang could not hear any conversation between the automobile occupants and Ellington.

Finding that an investigative stop permitted under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968),

justified the detention of Ellington for questioning, the district court overruled the motion to suppress physical evidence. The court declined to make a voluntariness finding, acknowledging that the voluntariness of any statements made by the defendant was not fully explored within the context of the hearing.

Ellington waived his right to a jury trial, in part because of a desire to preserve the suppression issue for appeal. All evidence produced at the suppression hearing, as well as the police and chemist reports, were admitted by stipulation of the parties and were prefaced by Ellington's counsel with the following: "Again, the whole intent of this type of proceeding today is so that we do not waive our right to appeal the issues on the suppression hearing."

The matter was submitted to the court with neither the State nor the defendant presenting any other evidence. The court found the defendant guilty of possession of a controlled substance, crack cocaine, and sentenced the defendant to 15 months in jail, with credit for time served.

On appeal to the Nebraska Court of Appeals, Ellington maintained that the record was devoid of facts which would reasonably raise an inference that he was engaging in criminal conduct. The Nebraska Court of Appeals held that the lower court was not clearly in error in finding a justified investigative stop based on the totality of the circumstances and consequently found that the crack pipe was lawfully found in the course of a pat-down search allowed under *Terry v. Ohio*. *State v. Ellington, supra*. The Nebraska Court of Appeals further found that the additional evidence discovered in the full search was admissible either because the discovery of the pipe provided the officer with probable cause to believe the defendant was in possession of contraband, or because the full search was incident to a lawful arrest. *Id.*

Because the Nebraska Court of Appeals found that the initial search was lawful as an investigative stop under *Terry v. Ohio*, the court did not reach the issue of whether the defendant consented to the complete search. The Nebraska Court of Appeals also declined to address the State's contention that the defendant had not properly preserved the objection to the admission of the evidence at the bench trial. *State v. Ellington,*

supra.

A trial court's ruling on a motion to suppress will be upheld on appeal unless the trial court's findings of fact are clearly erroneous. *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992). In reviewing a trial court's findings on a suppression motion, an appellate court 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. *Id.*

The defendant argues that the record is devoid of any fact, observed or discovered by Lang, which would create a reasonable suspicion of criminal activity to justify an investigatory detention under *Terry v. Ohio*. In *Terry v. Ohio*, the U.S. Supreme Court held that the public's interest in effective law enforcement makes it reasonable to detain and question individuals under certain circumstances in which probable cause to arrest is lacking. However, in order to protect an individual's right to personal security free from arbitrary interference by law officers, limited investigatory stops are permissible only upon a reasonable suspicion supported by specific and articulable facts that the person is, was, or is about to be engaged in criminal activity. In determining whether the officer acted reasonably, it is not the officer's inchoate or unparticularized suspicion or hunch that will be given due weight, but the specific reasonable inferences which the officer is entitled to draw from the facts in light of the officer's experience. *Terry v. Ohio, supra.*

We apply this same standard when determining the propriety of an investigatory stop under Neb. Const. art. I, § 7, which forbids the unreasonable seizure of persons by state authorities. *State v. Hicks, supra.*

While a police officer may question a person without bringing about a seizure when the interrogation is carried on without interrupting or restraining the questioned person's movement, see *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991), neither the State nor the trial court questioned the defendant's assertion that he was seized or detained at the time the two officers stopped him as he walked away. Therefore, it is undisputed on appeal that the initial encounter between the defendant and the officers was a seizure within the meaning of

the Fourth Amendment to the U.S. Constitution and art. I, § 7, of the Nebraska Constitution.

Having determined that a *Terry* stop occurred, we must next resolve whether the police officers had a reasonable suspicion of criminal activity to justify the investigatory stop. Whether a police officer has a reasonable suspicion based on sufficient articulable facts requires taking into account the totality of the circumstances. *State v. Pillard*, 235 Neb. 642, 456 N.W.2d 755 (1990). We recently held that an individual's flight upon the approach of a police vehicle patrolling a high-crime area, in the absence of specific knowledge connecting the individual to involvement in criminal conduct, is insufficient in itself to justify an investigatory stop. *State v. Hicks, supra*. Therefore, the focus is whether the officer's observation of Ellington leaning into a vehicle with his arms extended into the passenger window while conversing with the occupants amounted to specific knowledge connecting Ellington to criminal activity.

Similar factual circumstances proffered to justify a reasonable articulable suspicion of drug-related activity have been addressed and rejected by other jurisdictions. See, *Gaskin v. State*, 565 So. 2d 675 (Ala. Crim. App. 1990); *People v. McGriff*, 217 Cal. App. 3d 1140, 266 Cal. Rptr. 429 (1990) (citing *People v. Aldridge*, 35 Cal. 3d 473, 674 P.2d 240, 198 Cal. Rptr. 538 (1984)); *Dames v. State*, 566 So. 2d 51 (Fla. App. 1990); *State v. White*, 197 Ga. App. 426, 398 S.E.2d 778 (1990); *State v. Cuevas*, 526 So. 2d 1346 (La. App. 1988); *McKinney v. State*, 761 S.W.2d 549 (Tex. App. 1988). These jurisdictions have collectively concluded that when an officer does not recognize or know an individual; is not acting on particularized information from a third party; does not observe an exchange of items or money between the individual and another person; does not observe any movement, gestures, or attempts by the individual to conceal or hide objects; does not observe the individual repeatedly approach vehicles in a similar pattern of activity; and does not suspect the individual of any other crime, the officer's mere observation of a pedestrian leaning into a window of a stopped vehicle in a high-crime area and then walking away upon seeing the officer does not amount to a reasonable suspicion of drug-related activity warranting an

investigatory stop.

This court has consistently held that the record must demonstrate facts that are sufficiently particularized and objective to justify a state official's reasonable suspicion of criminal activity. See, generally, *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992) (finding that the police had formed a reasonable suspicion based on informant's tip corroborated by surveillance of area in question); *State v. Patterson*, 237 Neb. 198, 465 N.W.2d 743 (1991) (concluding that a police officer who verified information from a confidential informant had a reasonable suspicion); *State v. Mahlin*, 236 Neb. 818, 464 N.W.2d 312 (1991) (holding that police observations of a passenger rolling a small white object, lighting it, smoking it, and passing it to the driver provided a reasonable suspicion of drug activity); *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991) (recognizing that a reasonable suspicion may be based on appearances and activities that fit the so-called drug courier profile); *State v. Bridge*, 234 Neb. 781, 452 N.W.2d 542 (1990) (finding that a police officer had a reasonable suspicion based on information received from another officer who had smelled alcohol on defendant's breath and then saw defendant drive a car); *State v. Hill*, 233 Neb. 305, 444 N.W.2d 905 (1989) (finding that a police officer, who knew defendant, had a reasonable suspicion based on a 6-week surveillance of the area, the officer's personal knowledge, and an observed exchange of cash and an unknown object); *State v. Booth*, 202 Neb. 692, 276 N.W.2d 673 (1979), *cert. denied* 444 U.S. 982, 100 S. Ct. 485, 62 L. Ed. 2d 409 (finding that a police officer who was responding to information from an identified witness about a defendant known to be a drug user was acting upon a reasonable suspicion of criminal activity).

In examining the record for the activity which the police officer observed, we find that the officer failed to articulate specific facts to justify a *Terry* stop. Lang merely observed a male standing on a sidewalk in an area with known drug trafficking. The male was leaning toward a legally parked vehicle with his arms extended into the passenger window, appearing to converse with the occupants of the vehicle. This individual then looked toward the officer's marked cruiser,

quickly stepped away, and proceeded to walk away from the vehicle.

There is no evidence in the record that Lang knew either Ellington or the occupants of the vehicle to whom the defendant was talking. There is no indication that Lang was acting upon a recent tip or had observed other similar encounters between Ellington and other passing motorists. Lang specifically denied seeing anything in Ellington's hands, observing an exchange of money or other objects between Ellington and the occupants of the vehicle, or seeing Ellington put anything in his pocket when he straightened up and proceeded to walk away. The vehicle was parked in an outside lane primarily used for parking, and there is nothing in the record to indicate that the encounter was causing a traffic hazard or other similar violation.

Mere suspicious activity is not a sufficient basis for police interference with an individual's freedom, nor may police officers actively create " 'street encounters' " unless the officers have knowledge of suspicious facts and circumstances sufficient to allow them to infringe upon an individual's right to be free from governmental interference. *State v. Cuevas*, 526 So. 2d 1346, 1350 (La. App. 1988) (citing *State v. Hathaway*, 411 So. 2d 1074 (La. 1982)).

The State urges that even if the stop was illegal, the subsequent search was lawful because the defendant gave his consent. The trial court specifically declined to make a finding that the defendant voluntarily consented to a search due to the limited basis of the suppression hearing and the court's ultimate holding founded on a permissible *Terry* stop. We therefore decline to make such a factual finding, which is properly left to the province of the trial court.

The State further argues that the defendant did not timely and properly object to the admission of evidence at the bench trial. A review of the trial records establishes that at all material times, the State was aware that the defense counsel stipulated to the admission of all evidence at the bench trial on condition that the defendant's objections at the motion to suppress be preserved. We find that the defendant, by conditionally stipulating to the admission of evidence, preserved for this

court's review all alleged errors in the motion to suppress.

In sum, based on the totality of the circumstances, we find that the police officers failed to articulate specific and objective facts that would justify an investigatory stop under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Because the glass crack pipe, crack cocaine, and other drug paraphernalia were obtained as a direct result of the illegal stop, it was error for the district court to deny the defendant's motion to suppress. Accordingly, the judgment is reversed and the cause remanded to the Nebraska Court of Appeals with directions to reverse the judgment of the district court and to grant a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. STEAVE BALTIMORE, APPELLANT.

495 N.W.2d 921

Filed February 26, 1993. No. S-91-124.

1. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure: Evidence.** Evidence seized in a defendant's home as the result of a nonconsensual entry by police without a warrant is a product of an unreasonable search and seizure and may be suppressed as constitutionally inadmissible evidence.
2. **Standing: Warrantless Searches.** Before one may challenge a search without a warrant, one must have standing in a legal controversy.
3. **Standing: Words and Phrases.** "Standing" means that a person has a sufficient legally protectable interest which may be affected in a justiciable controversy, entitling that person to judicial resolution of the controversy.
4. **Courts: Jurisdiction.** While not a constitutional prerequisite for jurisdiction of courts of the State of Nebraska, existence of an actual case or controversy, nevertheless, is necessary for the exercise of judicial power in Nebraska.
5. **Courts: Justiciable Issues.** A court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting.
6. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes which are appropriately resolved though the judicial process.

7. _____: _____. Standing relates to jurisdiction and prudential considerations regarding exercise of jurisdiction.
8. **Standing: Jurisdiction: Justiciable Issues.** As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf.
9. **Claims: Parties.** Generally, a litigant must assert the litigant's own legal rights and interests, and cannot rest a claim on the legal rights or interests of third parties.
10. **Standing: Courts: Jurisdiction: Parties.** Because the requirement of standing is fundamental to a court's exercising jurisdiction, a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding.
11. **Constitutional Law: Search and Seizure.** A person's expectation of privacy may be based on the right to be let alone by other people, the right to withhold property from public scrutiny, or the person's belief that he or she is secure from intrusion by others.
12. _____: _____. The capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place.
13. **Search and Seizure.** A person may have a sufficient interest in a place other than his home to enable the person to be free in that place from unreasonable searches and seizures.
14. **Constitutional Law: Standing: Police Officers and Sheriffs: Search and Seizure.** Since constitutional protection against an unreasonable search and seizure is a personal right, a defendant's expectation of privacy in another's residence, not the fact that the building is someone else's residence, gives the defendant a legitimate expectation of privacy and standing to challenge a police search of the residence.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

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

Don Stenberg, Attorney General, and James A. Elworth for appellee.

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

SHANAHAN, J.

As a result of a jury trial in the district court for Douglas County, Steave Baltimore was convicted on separate counts of

possessing a controlled substance, Ritalin (methylphenidate hydrochloride) and Talwin (pentazocine), with the intent to distribute, deliver, or dispense the substances, contrary to Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1989) of the Nebraska Criminal Code. As the sole assignment of error in his appeal, Baltimore claims that the Ritalin and Talwin, seized by police and introduced as physical evidence over Baltimore's objection at trial, were unconstitutionally obtained by an unreasonable search and seizure.

SURVEILLANCE AND ARREST OF BALTIMORE

The Surveillance.

The narcotics unit of the Omaha Police Division received information that an illegal narcotics operation was being conducted in Omaha at a vacant house described as 2509 Grant Street. Sometime on June 13, 1990, near the vacant house, a police informant had purchased some Ritalin and Talwin from Baltimore and supplied the narcotics unit with a detailed description of Baltimore, including his physical characteristics and the clothing worn by him. Arthur Cowans resided in a house at 2218 North 25th Avenue, catercorner and southeast of the vacant house. Consequently, Baltimore and Cowans were prime suspects in the narcotics traffic area. East of and adjacent to Cowans' residence was a dwelling at 2220 North 25th Avenue, where James Holly lived. Baltimore lived several blocks from the Holly house and Cowans' residence. Between Cowans' residence and the Holly house was a small vegetable garden where Baltimore and his cogardner-friend, Holly, raised corn, sweet potatoes, and cabbage. Since there was no water supply for the garden, Baltimore prevailed on Cowans for use of a garden hose kept inside Cowans' house and water from the Cowans residence. Cowans "sometimes" gave Baltimore a key to Cowans' house so that Baltimore "borrowed the hose from Cowans" and "hooked it up and watered" the Baltimore-Holly garden.

About 10:30 p.m. on June 13, 1990, officers of the narcotics unit took up surveillance of the vacant house. Officers involved in the surveillance were, among others, Bruce M. Ferrell, Mark T. Langan, and Mark Sundermeier. When the officers

commenced their surveillance, an individual, later identified as Cowans, was seated in a lawn chair beneath the carport attached to the vacant house. Police observed that another man, fitting the previous description of Baltimore according to the informant, walked toward the rear of the vacant house, bent down, and picked up something from the ground. That man then proceeded to enter the Cowans residence through a rear door on the west side of the house. At that time, the officers decided to approach Cowans and Baltimore, who was still in Cowans' house.

Police Entry into Cowans' Residence.

Wearing a jacket with "Omaha Police" printed in fluorescent letters and with his badge displayed from a chain around his neck, Officer Ferrell went to the rear door of Cowans' house and knocked. Baltimore partially opened the door and, when he saw Ferrell, who identified himself as a police officer, tried to slam the door with his left hand, while simultaneously using his right hand to throw an object behind him. Ferrell put his foot in the open doorway and heard something hit the floor inside the house. Believing that Baltimore was about to conceal or destroy evidence, Ferrell threw open the door and entered the house's kitchen area. Ferrell then arrested Baltimore and placed handcuffs on him near the refrigerator. Another officer entered and took charge of Baltimore, while Ferrell went to talk with Officer Sundermeier, who had taken Cowans into custody. Ferrell walked to the carport at the vacant house, where, in the meantime, officers had found a pharmaceutical container labeled "Talwin" and $590 in cash on Cowans. Ferrell asked Cowans' permission to search the Cowans residence for drugs and weapons. Officer Langan, also present when Ferrell was talking with Cowans, told Cowans that the police wanted to search his house for Ritalin and Talwin. Cowans verified that Baltimore did not live in Cowans' residence and granted permission to the police for a search of the Cowans house.

Ferrell and Langan went back into the kitchen of Cowans' house, where Baltimore was still handcuffed and in the custody of an officer. In a trash box beneath a table near the

refrigerator, Ferrell discovered a brown "pill bottle" containing tablets, later analyzed and identified as 67 Talwin tablets and 26 Ritalin tablets. Several other pill bottles were retrieved from the trash box. On searching Baltimore's person, officers found a set of keys that fit the lock and dead bolt in the rear door of the Cowans house. Police transported Baltimore to their headquarters, and he was later charged regarding the Ritalin and Talwin taken from Cowans' residence.

BALTIMORE'S SUPPRESSION MOTION AND TRIAL

Before trial, Baltimore filed his motion to suppress the State's use of the Ritalin and Talwin discovered at Cowans' house as evidence against Baltimore, and alleged that the police unconstitutionally obtained the substances by an unreasonable search and seizure, in violation of U.S. Const. amend. IV and Neb. Const. art. I, § 7. After the court denied Baltimore's suppression motion, Baltimore went to trial, during which he renewed his constitutional objection to the State's introduction of the Ritalin and Talwin as evidence.

Ferrell testified concerning the circumstances and events surrounding his participation in the surveillance previously described and his entry into Cowans' house. Langan, as a specially trained narcotics investigator, testified about Ritalin, a mild central nervous system stimulant, and Talwin, a potent analgesic with sedative properties and effects similar to codeine. According to Langan, individuals illegally purchase a "set" of Talwin and Ritalin, that is, one Talwin tablet and two Ritalin tablets per set, which sell for $21. The tablets are then pulverized and, being readily soluble, are dissolved in water to achieve a liquid for an intravenous injection that produces a "heroin-type high."

Baltimore testified on his own behalf. On the evening of the police surveillance, Baltimore went to Holly's house to deliver some seeds for the garden. Since Holly was not home, Baltimore visited briefly with Cowans at the carport at the vacant house. Baltimore testified: "I needed to use the bathroom, I couldn't wait until I got home." Therefore, he asked for the key to Cowans' house and use of its bathroom. Baltimore testified that, although Cowans had previously given

him a key which enabled Baltimore to get the hose and water the garden frequently, even as recently as the morning preceding the evening surveillance by the police, Baltimore did not intend to water his garden that evening. Using the key received from Cowans at the carport that night, Baltimore unlocked the back door of the Cowans residence and entered to use the bathroom. After using the toilet, and while he was opening the rear door of Cowans' house, Baltimore encountered Ferrell wearing his police garb and badge. Ferrell said, "Get back in there," and Baltimore retreated to the refrigerator in the kitchen. Ferrell handcuffed Baltimore and later searched the kitchen, where Ferrell found the pill bottle containing the Ritalin and Talwin tablets, which, over Baltimore's renewed constitutional objection, were received as evidence in Baltimore's trial.

The jury found Baltimore guilty as charged, and he now appeals and claims that the evidence of the Ritalin and Talwin were constitutionally inadmissible and, therefore, should have been excluded from evidence against him. Baltimore argues that the police lacked probable cause for the search that produced the physical evidence, i.e., the Ritalin and Talwin. In response, the State contends that Baltimore lacks standing to raise the issue concerning constitutional validity of the search and seizure. To support his position that he has standing, Baltimore relies on the fact that Cowans gave him a key and permission to enter the Cowans residence and get the hose to water the garden.

STANDING

In *Payton v. New York*, 445 U.S. 573, 576, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), the U.S. Supreme Court held that "the Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment . . . prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." Evidence seized in a defendant's home as the result of a nonconsensual entry by police without a warrant is a product of an unreasonable search and seizure and may be suppressed as constitutionally inadmissible evidence. However, before one may challenge a search without a warrant, one must

have standing in a legal controversy. *State v. $15,518*, 239 Neb. 100, 474 N.W.2d 659 (1991).

"Standing" means that a person has a sufficient legally protectable interest which may be affected in a justiciable controversy, entitling that person to judicial resolution of the controversy. See, *State v. $15,518, supra*; *Rexroad, Inc. v. S.I.D. No. 66*, 222 Neb. 618, 386 N.W.2d 433 (1986); *Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth.*, 220 Neb. 504, 371 N.W.2d 258 (1985); *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 327 N.W.2d 595 (1982). See, also, *Sierra Club v. Morton*, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972); *State ex rel. Cartwright v. Oklahoma Tax Comm'n*, 653 P.2d 1230 (Okla. 1982).

"While not a constitutional prerequisite for jurisdiction of courts of the State of Nebraska . . . existence of an actual case or controversy, nevertheless, is necessary for the exercise of judicial power in Nebraska." *Mullendore v. Nuernberger*, 230 Neb. 921, 925, 434 N.W.2d 511, 515 (1989). Accord *In re Estate of West*, 226 Neb. 813, 415 N.W.2d 769 (1987). Thus, a court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting. See, *Mullendore v. Nuernberger, supra*; *In re Estate of West, supra*.

Therefore, standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes which are appropriately resolved though the judicial process. See *Whitmore v. Arkansas*, 495 U.S. 149, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990). As pointed out in 13 Charles A. Wright et al., Federal Practice and Procedure: Standing § 3531 at 338-39 (2d ed. 1984), under the doctrine of standing, a court may refuse to determine merits of a legal claim because "the litigant advancing it is not properly situated to be entitled to its judicial determination. The focus is on the party, not the claim itself."

Standing relates to jurisdiction and prudential considerations regarding exercise of jurisdiction. See *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). As an aspect of jurisdiction and justiciability, standing requires

that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf. See *id.* Thus, generally, a litigant must assert the litigant's own legal rights and interests, and cannot rest a claim on the legal rights or interests of third parties. See *id.* See, also, *Mullendore v. Nuernberger, supra.*

In *Whitmore v. Arkansas, supra*, the U.S. Supreme Court identified several basic requirements which must exist before a litigant has standing:

> [A] litigant first must clearly demonstrate that he has suffered an "injury in fact." That injury, we have emphasized repeatedly, must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is "distinct and palpable," [citation omitted], as opposed to merely "[a]bstract," [citation omitted], and the alleged harm must be actual or imminent, not "conjectural" or "hypothetical." [Citation omitted.] Further, the litigant must satisfy the "causation" and "redressability" prongs of the Art. III minima by showing that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." [Citations omitted.] The litigant must clearly and specifically set forth facts sufficient to satisfy these Art. III standing requirements. A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing.

495 U.S. at 155-56.

Because the requirement of standing is fundamental to a court's exercising jurisdiction, a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding. See *State v. $15,518, supra.* "When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the trial court." *State v. Miller*, 240 Neb. 297, 300, 481 N.W.2d 580, 582 (1992). Accord, *Andrews v. City of Lincoln*, 224 Neb. 748, 401 N.W.2d 467 (1987); *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986). "Litigants

cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent." *Coffelt v. City of Omaha*, 223 Neb. 108, 110, 388 N.W.2d 467, 469 (1986). Accord, *Marshall v. Marshall*, 240 Neb. 322, 482 N.W.2d 1 (1992); *State v. Miller, supra*; *Andrews v. City of Lincoln, supra*. Therefore, although the State did not raise the jurisdictional issue of standing until this appeal, we must determine whether Baltimore has standing to challenge the police search of Cowans' home without a warrant.

EXPECTATION OF PRIVACY

The U.S. Supreme Court, in *Katz v. United States*, 389 U.S. 347, 351-52, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), wrote that

> the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations omitted.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

In his concurrence in *Katz*, Justice Harlan established the two-part test used to determine whether a litigant has an "expectation of privacy" protected by the Fourth Amendment, that is, a litigant must show (1) an actual, although subjective, expectation of privacy and (2) a privacy expectation "that society is prepared to recognize as 'reasonable'." 389 U.S. at 361. In practice, however, courts frequently do not distinguish between the two parts of Justice Harlan's *Katz* test. See 1 Wayne R. LaFave, Search and Seizure § 2.1(c) (2d ed. 1987).

A person's expectation of privacy may be based on the "right to be let alone by other people," 389 U.S. at 350, the right to withhold property from public scrutiny, see *Fed. Trade Comm. v. Amer. Tobacco Co.*, 264 U.S. 298, 44 S. Ct. 336, 68 L. Ed. 696 (1924), or the person's belief that he or she is secure from intrusion by others.

The U.S. Supreme Court stated in *Rakas v. Illinois*, 439 U.S. 128, 140-43, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978):

> [T]he question is whether the challenged search and seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence

> obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect. . . .
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> . . . .
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> . . . [A] person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place. [Citation omitted.] [A]rcane distinctions developed in property and tort law between guests, licensees, invitees, and the like, ought not to control.

In *Rakas*, the Court concluded: "[T]he Court in *Katz* held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." 439 U.S. at 143.

"[A] person may have a sufficient interest in a place other than his home to enable [the person] to be free in that place from unreasonable searches and seizures." *Minnesota v. Olson*, 495 U.S. 91, 98, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990). Thus, when a guest is permitted into another's home, the guest assumes that neither the guest nor his or her possessions on the premises will be disturbed by anyone except the host or those allowed by the host to be inside the dwelling. *Id.* See, also, *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960). A person who has a key to an apartment, is free to come and go, stores belongings there, and pays a part of the rent also has "a sufficient connection to the invaded place to assert the protection of the fourth amendment." *U.S. v. Davis*, 932 F.2d 752, 757 (9th Cir. 1991).

In *State v. Gonzalez*, 211 Neb. 697, 320 N.W.2d 107 (1982), *cert. denied* 459 U.S. 1039, 103 S. Ct. 454, 74 L. Ed. 2d 607, we held that Gonzalez lacked standing to challenge the search of a duplex from which he had recently departed, because "[t]here was no showing whether the defendant was, in fact, ever residing at the [duplex], rented or owned the property, exercised any type of control over the property, or kept any clothing or

personal belongings at the property." 211 Neb. at 703, 320 N.W.2d at 111. We also stated that "the capacity to claim protection of the fourth amendment as to unreasonable searches and seizures depends not upon the property right in the invaded place but upon whether the person who claims the protection of the fourth amendment has a legitimate expectation of privacy in the invaded place." *Id.* Accord *State v. Cortis*, 237 Neb. 97, 465 N.W.2d 132 (1991). Consequently, since constitutional protection against an unreasonable search and seizure is a personal right, a defendant's expectation of privacy in another's residence, not the fact that the building is someone else's residence, gives the defendant a legitimate expectation of privacy and standing to challenge a police search of the residence.

In the present case, Baltimore testified that although he did not reside in Cowans' home, he did maintain a garden at or near that residence. Baltimore also testified that Cowans gave him permission to use the garden hose kept in Cowans' house and to obtain water from that residence. Baltimore "sometimes" had a key for Cowans' house so that he could get the garden hose when Cowans was away. Therefore, although Baltimore did have a key to Cowans' house, he had the key for the very limited purpose of getting Cowans' garden hose from the house. Consequently, Baltimore lacked Cowans' general permission to enter the house for any purpose other than getting the garden hose. Also, Baltimore never exercised general control over Cowans' house or its contents and did not keep his personal belongings in the house. On the night he was arrested, Baltimore had asked for, and received, Cowans' house key and permission to use the toilet in the house. Baltimore's conduct that night negates existence of an unlimited right to enter Cowans' house. Moreover, Baltimore's presence in Cowans' house on the night of the arrest was totally unrelated to getting the garden hose, the only purpose for which Baltimore was given a key to the Cowans house before the night of the arrest. Thus, Baltimore's connection with Cowans' house consisted of intermittent entry for a limited purpose and sporadic presence without an unrestricted right of occupancy on the premises. In the final analysis of Baltimore's association with the Cowans

house, nothing indicates that Baltimore, even with a key to the house, had a legitimate expectancy of freedom from others' entering Cowans' house; hence, he was not constitutionally secure under U.S. Const. amend. IV or Neb. Const. art. I, § 7, from the police coming in or intruding into Cowans' house where the Ritalin and Talwin were discovered by the police. Although Baltimore places much stock in his having a key for access to Cowans' house, more than possession of a house key is necessary for access to the Constitution for an objection against the police search of Cowans' house without a warrant.

Consequently, we conclude that Baltimore's limited access to the Cowans house is insufficient to demonstrate that Baltimore had a legitimate expectation of privacy in Cowans' house. Without that expectation of privacy, Baltimore lacked standing to challenge the police search that disclosed the Ritalin and Talwin in Cowans' residence.

Because Baltimore lacked a legitimate expectation of privacy in Cowans' house and, hence, lacked standing to challenge the warrantless search of that house, we affirm the district court's judgment that the evidence in question was constitutionally admissible in Baltimore's trial.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GERARDO GARZA, APPELLANT.

496 N.W.2d 448

Filed February 26, 1993. No. S-91-736.

1. **Constitutional Law: Appeal and Error.** To be properly raised at the appellate court level, a specific constitutional challenge must have been presented to the trial court for disposition.
2. **Constitutional Law: Taxation: Self-Incrimination.** A statutory tax which, if complied with, confronts the taxpayer with a "real and appreciable" hazard of self-incrimination is unconstitutional and unenforceable unless the statute provides protection as broad in scope and effect as the right against self-incrimination.

3. **Constitutional Law: Statutes: Presumptions.** State statutes are presumed to be constitutional, and when a statute is constitutionally suspect the Nebraska Supreme Court will endeavor to construe the statute in a manner consistent with the Constitution.
4. **Taxation: Controlled Substances.** Any written information received by the Nebraska Tax Commissioner from a taxpayer complying with Nebraska's Marijuana and Controlled Substances Tax Act shall be considered part of the "report" referred to in Neb. Rev. Stat. § 77-4315 (Reissue 1990). Such information is confidential.
5. **Criminal Law: Taxation: Controlled Substances: Trial: Evidence.** Under Nebraska's Marijuana and Controlled Substances Tax Act, information may be "directly" confidential under Neb. Rev. Stat. § 77-4315 (Reissue 1990) or "derivatively" confidential, if gained through the use of otherwise confidential information. All such confidential information is inadmissible against the taxpayer in a criminal proceeding, except when independently obtained or when being used in a prosecution to enforce the act.
6. **Constitutional Law: Taxation: Controlled Substances: Self-Incrimination.** Because information disclosed by complying with Nebraska's Marijuana and Controlled Substances Tax Act is confidential, a taxpayer cannot refuse to comply with the act based on the constitutional right against compulsory self-incrimination.
7. **Taxation: Controlled Substances: Liens: Actions.** If a taxpayer, by unjustified nonpayment of a tax due under Nebraska's Marijuana and Controlled Substances Tax Act, forces the Nebraska Tax Commissioner to file a tax lien or bring an action for unpaid taxes, disclosures resulting from the filing will not be confidential.
8. **Taxation.** A tax imposed on the doing of an act, including a business or license tax, is an excise tax and not a property tax.
9. **Constitutional Law: Taxation.** The requirements of Neb. Const. art. VIII, § 1, are not applicable to an excise tax.
10. **Taxation: Controlled Substances.** The tax imposed by Nebraska's Marijuana and Controlled Substances Tax Act is an excise tax and need not be levied by valuation.
11. **Appeal and Error.** An appellate court will address only issues that are both assigned as error and discussed in the brief of the party alleging prejudicial error.
12. **Criminal Law: Controlled Substances: Statutes: Taxation.** Neb. Rev. Stat. § 77-4301(2) (Reissue 1990), in conjunction with Neb. Rev. Stat. § 77-4309 (Reissue 1990), does not conflict with Neb. Rev. Stat. § 28-416(6) (Reissue 1989).
13. **Search and Seizure: Search Warrants: Presumptions.** A search pursuant to a warrant is presumed valid.
14. **Search Warrants: Probable Cause.** In evaluating probable cause for the issuance of a search warrant, a 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.

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

Jeffrey L. Hrouda for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

WHITE, J.

Gerardo Garza appeals his district court convictions for possession of marijuana with intent to deliver (count I) and failure to affix the requisite tax stamps to marijuana or controlled substances in his possession (count II). On count I, a violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1989), Garza was sentenced to not less than 18 months' nor more than 3 years' incarceration, with 63 days credited for time served. On count II, a violation of Neb. Rev. Stat. § 77-4309 (Reissue 1990), Garza was sentenced to 1 year's imprisonment, the sentence to run concurrently with the count I sentence, and was required to pay the costs of prosecution. We affirm.

Pursuant to a search warrant based on an informant's tip, Garza's residence was searched on March 3, 1991. Police discovered 55 bags of marijuana in 1/4-ounce lots, with a combined weight of over 10 ounces. No tax stamps were affixed to the bags as is required by Nebraska law.

Garza was charged with one count of possession of marijuana with intent to deliver and one count of failure to affix tax stamps to the marijuana. Prior to trial, Garza filed a motion to suppress the fruits of the search warrant and a motion to quash or dismiss, which challenged the constitutionality of Nebraska's Marijuana and Controlled Substances Tax Act, Neb. Rev. Stat. §§ 77-4301 to 77-4316 (Reissue 1990) (Tax Stamp Act or act). The district court overruled each motion.

At a bench trial, Garza renewed his objections regarding the constitutionality of the Tax Stamp Act and to the evidence

based on the search warrant. Garza's attacks on the act included arguments based on his constitutional right against self-incrimination and on Nebraska's constitutional provisions on tax valuation. Garza also objected regarding the validity of the search warrant, noting that the presenting officer had added language to the affidavit after being questioned by the judge who issued the warrant. Garza argued that the affidavit did not provide probable cause to issue the warrant. The court overruled each objection and found Garza guilty on both counts. Garza then appealed to this court.

The majority of Garza's assignments of error fall into two categories: those dealing with the district court's ruling on the motion to quash and those dealing with the court's ruling on the motion to suppress. With regard to the motion to quash, Garza asserts that the district court erred by overruling the motion because the Tax Stamp Act unconstitutionally (1) violates Garza's right against self-incrimination; (2) levies a personal property tax based on weight, rather than valuation; (3) creates an arbitrary classification of persons who must pay the tax, in violation of equal protection; (4) violates the Due Process Clause as it relates to the assessment of the tax and Garza's right to appeal; and (5) defines "dealer" in a way that is vague, overbroad, and conflicts with § 28-416.

Garza also argues that the district court erred by overruling his motion to suppress the fruits of the search warrant. Garza asserts that the investigating officer's affidavit failed to establish the reliability of the confidential informant and therefore did not provide probable cause to issue the warrant. Finally, Garza argues that the district court abused its discretion by sentencing Garza to imprisonment rather than to probation.

In his motion to quash, Garza did not include the constitutional challenges constituting assignments of error Nos. 3 and 4. At trial Garza objected to the admission of evidence relating to the Tax Stamp Act, renewing the constitutional challenges made in the motion to quash. He did not, however, make any additional arguments as to why the act was unconstitutional.

We have frequently stated, "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) (citing *State v. Fletcher*, 221 Neb. 562, 378 N.W.2d 859 (1985)). Generally, a constitutional question will not be considered on appeal if not properly raised in the trial court. *Oldfield, supra*. We are not convinced by Garza's argument that a trial-level challenge to the constitutionality of a statute on one basis allows the challenger to assert different constitutional attacks on appeal.

While it is true that constitutionality is itself an issue, a mere blanket challenge is not specific enough to allow the trial court to make an informed ruling on the constitutional validity of a statute. Neither does a challenge based on one constitutional clause enable the court to adequately consider whether a statute violates some other constitutional provision. Objections and challenges that lack specificity rob the trial court of its role as a decisionmaker. It is not an appellate court's duty to assume that role in the first instance. To be properly raised at the appellate court level, the specific constitutional challenge must have been presented to the trial court for disposition.

Nor are we persuaded by Garza's argument that his third and fourth assignments of error were clearly evident from the record and constituted plain error. The interplay between the Tax Stamp Act and the Nebraska and U.S. Constitutions allows countless "arguments" about constitutional violations. None of those arguments, however, including those in assignments Nos. 3 and 4, are plainly evident. Garza failed to raise these challenges at the trial level; we will not address them here.

Garza argues that his motion to quash count II should have been granted because the Tax Stamp Act is unconstitutional. He first argues that the act violates his right to be free from compulsory self-incrimination, as guaranteed by the Fifth Amendment to the U.S. Constitution and Neb. Const. art. I, § 12 (hereinafter jointly referred to as Fifth Amendment protection). Garza argues that compliance with the act—i.e., receiving the stamps by self-presentation or by having them mailed to him—would force him to disclose, and thereby incriminate, himself as a possessor of illegal substances. This

challenge, although complex, has been previously raised in other jurisdictions that have enacted similar "drug tax" legislation.

The burden of showing a statute to be unconstitutional rests on the party challenging the statute. *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991). In addition, legislation is presumed to be constitutional, and all reasonable doubts will be resolved in favor of a statute's constitutionality. *Id.*

When analyzing whether a tax statute violates the Fifth Amendment, the principal issue is whether compliance with the statute confronts the taxpayer with a "real and appreciable" hazard of self-incrimination. *Marchetti v. United States*, 390 U.S. 39, 48, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968). In *Marchetti*, the U.S. Supreme Court created a three-part test for answering this issue. A statutory tax meeting each of the three elements of the test violates the constitutional right to be free from self-incrimination and cannot be enforced. See *id.*

Under the *Marchetti* test, a court must first determine whether the conduct being regulated is part of " 'an area permeated with criminal statutes' " and whether the individuals who engage in that conduct are part of a group " 'inherently suspect of criminal activities.' " 390 U.S. at 47 (quoting *Albertson v. SACB*, 382 U.S. 70, 86 S. Ct. 194, 15 L. Ed. 2d 165 (1965)). Secondly, the reviewing court must determine whether the statutory tax requires the taxpayer, under penalty of criminal prosecution, to disclose information "he might reasonably suppose would be available to prosecuting authorities." 390 U.S. at 48. Finally, the court must determine whether the required information would prove a "significant 'link in a chain' of evidence tending to establish his guilt." *Id.*

Applying the *Marchetti* test to the Nebraska Tax Stamp Act, we can easily dispose of the first part of the test. The possession, manufacture, and delivery of controlled substances is an area replete with criminal statutes, and those individuals who engage in such activities are inherently suspect of criminality. The State concedes this point.

The second and third parts of the test, however, are more

problematic. The Nebraska act explicitly states that the taxpayer need not disclose his name, address, or any other identifying information—thus calling into question whether any "significant" incriminating information is required (part 3 of the *Marchetti* test). See § 77-4304(1). Moreover, the act specifically addresses the use of taxpayer information for criminal prosecution. The act provides in part that

> [n]either the Tax Commissioner nor a public employee may reveal facts contained in a report required by [the Tax Stamp Act]. Information contained in any report required by the Tax Commissioner shall not be used against the dealer in any criminal proceeding, unless independently obtained, except in connection with a proceeding involving taxes due from the taxpayer making the report.

§ 77-4315. The act thus seems to avoid part 2 of the *Marchetti* test—that the taxpayer might "reasonably suppose" that information he provided would be available to prosecutors. Garza asserts, however, that § 77-4315, the act's confidentiality provision, is not broad enough to adequately protect taxpayers from criminal prosecution based on information they provide when complying with the act.

The effectiveness of the confidentiality provision is the essential element in our self-incrimination analysis. To our knowledge, eight cases have addressed Fifth Amendment challenges to controlled-substance taxing schemes. *Leary v. United States*, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969); *Briney v. State Dept. of Revenue*, 594 So. 2d 120 (Ala. Civ. App. 1991); *Harris v. State, Dept. of Revenue*, 563 So. 2d 97 (Fla. App. 1990); *State v. Smith*, 120 Idaho 77, 813 P.2d 888 (1991); *State v. Durrant*, 244 Kan. 522, 769 P.2d 1174 (1989), *cert. denied, Dressel et al. v. Kansas*, 492 U.S. 923, 109 S. Ct. 3254, 106 L. Ed. 2d 600; *Sisson v. Triplett*, 428 N.W.2d 565 (Minn. 1988); *State v. Roberts*, 384 N.W.2d 688 (S.D. 1986); *State v. Davis*, 787 P.2d 517 (Utah App. 1990). In these cases, only those statutory schemes that did not limit the dissemination of information to prosecuting authorities were held unconstitutional. See, *Leary, supra* (holding federal Marihuana Tax Act unconstitutional as violative of *Marchetti* because it required the taxpayer to identify himself and the

information was available to authorities on request); *Smith, supra* (holding unconstitutional a version of stamp tax act that did not provide confidentiality for taxpayer, but also noting that amended version, which did afford confidentiality, was constitutional); *Roberts, supra* (holding unconstitutional controlled substances tax act that allowed release of taxpayer information to authorities on request). See, also, *Grosso v. United States*, 390 U.S. 62, 88 S. Ct. 709, 19 L. Ed. 2d 906 (1968) (holding that federal wagering tax act was unconstitutional because the act did not impose explicit restrictions on use of information obtained through payment of the tax).

Garza attacks the effectiveness of the Tax Stamp Act's confidentiality provision on three grounds. Garza first argues that the confidentiality provision does not provide adequate protection because it only forbids use of information in "reports," and not other information that might be disclosed by challenging the amount of tax or by receiving the stamps. He next argues that the act provides no sanctions for public officials who violate the confidentiality requirement. Finally, he argues that incriminating information could be disclosed if, pursuant to the Tax Stamp Act, the Tax Commissioner files a tax lien or brings an action against a taxpayer who has not paid the required stamp tax. We address these arguments in the order presented.

Garza argues that when receiving the stamps, either in person or by mail, a taxpayer will be forced to incriminate himself by disclosing his appearance or mailing address—items perhaps not included in "reports." We agree that it is unclear from the act and its legislative history what information must be placed in a report. We do note, however, that the act neither requires the taxpayer himself to pick up the stamps nor requires that the stamps be mailed to the taxpayer's place of residence. The act requires only that the tax be paid. See §§ 77-4302 and 77-4304. In addition, as our later discussion will indicate, a taxpayer's mailing address is confidential if disclosed by a taxpayer complying with the act.

Garza's second argument relates to the lack of a penalty for violating the confidentiality provision. The act clearly prohibits

the use of "leaked" confidential information in a criminal prosecution against the taxpayer. See § 77-4315. Although the act provides no sanction for such a violation, this alone will not render the confidentiality provision inadequate. When confronted with similar tax-related Fifth Amendment challenges, the U.S. Supreme Court has indicated that the principal concern is whether the legislature intended the taxing scheme to disclose criminal transgressions. See, *Leary, supra*; *Marchetti, supra*. The confidentiality provisions in the Nebraska act make clear a legislative intent that the taxpayer's Fifth Amendment rights be protected. See §§ 77-4304 and 77-4315. If the protection granted by the statute is as broad in scope and effect as the Fifth Amendment, the taxpayer's right against self-incrimination will not be unconstitutionally compromised. See *Marchetti, supra*.

State statutes are presumed to be constitutional, and when a law is constitutionally suspect this court will endeavor to interpret the statute in a manner consistent with the Constitution. *In re Application U-2*, 226 Neb. 594, 413 N.W.2d 290 (1987). The Tax Stamp Act's confidentiality provision can be construed to grant protection coextensive with the right against self-incrimination. In *Marchetti*, *Leary*, and *Grosso*, the U.S. Supreme Court refused to save the offending statutes by placing judicial use restrictions on information required by the statutes. The Court reasoned that such restrictions would preclude effectuation of one of the integral purposes behind each of the statutes—providing information to prosecuting authorities. Unlike these federal statutes, however, the Nebraska act restricts the use of confidential information. See § 77-4315. The Legislature clearly did not enact the Tax Stamp Act to provide prosecutors with information about dealers. Therefore, placing use restrictions on information gained from compliance with the Nebraska act will not controvert legislative purposes.

Faced with a similar situation, the Supreme Court of Kansas stated:

> For a statutory grant of immunity to be coextensive with the privilege against self-incrimination, it must grant not only use immunity, or protection from the direct use of

> compelled incriminatory information, but also derivative-use immunity, which prohibits use of any such information for investigatory purposes leading to other evidence of criminal activity. . . . We think it is obvious, and we so hold, that the legislature, by its enactment of [the Kansas act's confidentiality provision] intended to extend not only use immunity but also derivative-use immunity to any person complying with the act.

State v. Durrant, 244 Kan. 522, 534-35, 769 P.2d 1174, 1183 (1989), *cert denied, Dressel et al. v. Kansas*, 492 U.S. 923, 109 S. Ct. 3254, 106 L. Ed. 2d 600.

Like the Kansas lawmakers, the Nebraska Legislature included a confidentiality provision in the Tax Stamp Act—obviously intending to protect the Fifth Amendment right of taxpayers who complied with the act. The Legislature further indicated this intention by providing that when paying the tax, taxpayers need not disclose their name, address, Social Security number, or other identifying information. See § 77-4304(1). We therefore hold that any written information received by the Tax Commissioner from a taxpayer complying with the Tax Stamp Act shall be considered part of a report and is therefore "directly" confidential under § 77-4315. We further hold that any evidence obtained through the use of information made confidential by § 77-4315 is "derivatively" confidential, including information gained when the taxpayer appeals the amount of the tax or penalty. See § 77-4314. All such information, whether directly or derivatively confidential, is inadmissible in any criminal prosecution against the taxpayer, except when independently obtained or when being used in a prosecution to enforce the Tax Stamp Act itself. See § 77-4315.

We finally address Garza's last confidentiality-based argument, that incriminating information might be disclosed in an action for delinquent taxes or pursuant to the filing of a tax lien, which is provided for in § 77-4310. We first note that a tax lien may be filed only when the taxpayer "*neglects or refuses* to pay such . . . fee *after demand*." (Emphasis supplied.) Neb. Rev. Stat. § 77-3904(1) (Reissue 1990). In addition, we note that the Fifth Amendment privilege may not be asserted if the taxpayer is afforded other protection as broad in scope and

effect as the privilege itself. *Marchetti, supra*. In light of our holding that information disclosed *by complying* with the Tax Stamp Act is confidential, a taxpayer cannot refuse to comply with the act based on the right against compulsory self-incrimination. See *id*. Noncompliance with a taxing scheme based on a reasonable fear of self-incrimination is permissible; noncompliance based on a dislike of paying taxes is not. We therefore hold that if a taxpayer, by unjustified nonpayment of the tax due under the Tax Stamp Act, forces the Tax Commissioner to file a tax lien or bring an action for unpaid taxes, disclosures resulting from the filing will not be confidential. See, also, § 77-4315 (providing that information in a report may be used "in connection with a proceeding involving taxes due from the taxpayer making the report").

The Nebraska Tax Stamp Act, construed to grant derivative-use immunity, provides protection to taxpayers coextensive with the Fifth Amendment protection against self-incrimination. Garza cannot legitimately claim that compliance with the act would force him to disclose significantly incriminating information he might reasonably suppose would be available to prosecuting authorities. His failure to comply with the act on this ground was not constitutionally permissible.

Garza next argues that the district court improperly overruled his motion to quash because the Tax Stamp Act levies a personal property tax based on weight rather than value, in contravention of Neb. Const. art. VIII, § 1. We disagree.

Our initial task is to determine what type of tax is levied by the Tax Stamp Act. Several sections of the act refer to a tax "on" or "upon" marijuana and controlled substances. See §§ 77-4302, 77-4303, and 77-4305. However, this does not, of itself, make the tax a property tax. Other sections of the act indicate that what is being taxed is the dealer's use of the substances. Section 77-4301(2) provides that "[d]ealer shall mean a person who, in violation of Nebraska law, *manufactures, produces, ships, transports, or imports* into Nebraska, or in any manner *acquires or possesses* six or more ounces of marijuana" (emphasis supplied), and § 77-4302 provides that "[n]o dealer may possess marijuana or controlled

substances upon which a tax is imposed . . . unless the tax has been paid . . . ."

Regarding statutory interpretation, we have stated, " '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.' " *Indian Hills Comm. Ch. v. County Bd. of Equal.*, 226 Neb. 510, 518, 412 N.W.2d 459, 465 (1987) (quoting *Wounded Shield v. Gunter*, 225 Neb. 327, 405 N.W.2d 9 (1987)).

We begin our analysis by contrasting the definitions of "property" and "excise" taxes. Black's Law Dictionary (6th ed. 1990) provides the following definitions: "**Excise tax.** A tax imposed on the performance of an act [or] the engaging in an occupation . . . . A tax on the manufacture, sale, or use of goods or on the carrying on of an occupation or activity . . . ." *Id.* at 563. "**Property tax.** An *ad valorem* tax . . . on the value of real or personal property that the taxpayer owns on a specified date. The tax is generally expressed as a uniform rate per thousand of valuation." *Id.* at 1218.

We have previously held that a tax imposed on the doing of an act, including a business or license tax, is an excise tax and not a property tax. *State v. Galyen*, 221 Neb. 497, 378 N.W.2d 182 (1985). In *Burke v. Bass*, 123 Neb. 297, 242 N.W. 606 (1932), we addressed a statute which required "dealers" —persons who imported or produced fuel for use or distribution in Nebraska—to pay a tax of 4 cents per gallon on the fuel. See *Galyen, supra*. We held that the tax was an excise tax on the sale and use of the fuel. *Burke, supra*. See, also, *Galyen, supra* (holding that a tax of 25 cents per head of cattle sold was an excise tax); *Licking v. Hays Lumber Co.*, 146 Neb. 240, 19 N.W.2d 148 (1945) (holding tax imposed as an annual charge on the right to maintain corporate existence, although computed based on the amount of capital stock, was an excise tax).

The tax imposed by the Tax Stamp Act does not meet the express definition of a property tax. Property taxes, by their

very nature, target the *value* of an item. See Black's Law Dictionary, *supra*. The tax levied by the Tax Stamp Act, however, targets individuals who put the substances to certain uses, basing its rate on the quantity involved, not the value. See §§ 77-4301 to 77-4303. Garza's argument, viewed in light of the aforementioned definitions, is non sequitur: he asserts that because the Tax Stamp Act levies a tax based on weight, not value, it is an invalid property tax. The obvious answer to this argument is that if the tax is not based on value, it is not a property tax at all.

We find that the Tax Stamp Act levies an excise tax. The Tax Stamp Act clearly targets the use or sale of the substances; the substances themselves are relevant only as a basis for computation of the tax. First, the tax levied by the act applies only to dealers, who are defined according to their actions. See §§ 77-4301(2) and 77-4302. Second, the tax applies only to possession of substances in excess of a certain amount, e.g., 6 or more ounces of marijuana. § 77-4301(2). The tax obviously aims at the activities of a certain group—individuals holding relatively large amounts of the substances—who will engage in either the distribution or large-scale consumption of the substances. If the tax was on the substances themselves, rather than on their use, the tax would apply to any individual who possessed any amount of the substances.

Our finding is consistent with the findings of courts reviewing similar taxing schemes. For example, in *Burke, supra*, we held the gasoline tax to be an excise tax despite the tax's being levied on each gallon of fuel. We determined that the dispositive factor was that the tax aimed at dealers' sale and use of the fuel. The Tax Stamp Act similarly applies to dealers who produce, import, or acquire the substances. See §§ 77-4301 and 77-4302.

Even more persuasive is *Patton v. Brady, Executrix*, 184 U.S. 608, 22 S. Ct. 493, 46 L. Ed. 713 (1902), which held that the federal tax on tobacco products (precursor of 26 U.S.C. § 5701 et seq. (1988)) was an excise tax. The applicable statute levied a per-pound tax on " 'tobacco and snuff, however prepared, manufactured and sold, for consumption or sale. . . .' " 184 U.S. at 616.

In holding that the statute imposed an excise tax, the U.S. Supreme Court stated:

> Ever since the early part of the civil war there has been a body of legislation . . . by which, upon goods intended for consumption, *excises have been imposed in different forms at some time intermediate the beginning of manufacture or production and the act of consumption.* Among the articles thus subjected to those excises have been liquors and tobacco, appropriately selected therefor on the ground that they are not a part of the essential food supply of the nation, but are among its comforts and luxuries.

184 U.S. at 617. See, also, *Schenley Distillers v. United States*, 153 F. Supp. 898 (W.D. Pa. 1957), *aff'd* 255 F.2d 334, *cert. denied* 358 U.S. 835, 79 S. Ct. 57, 3 L. Ed. 2d 72 (1958) (holding the federal tax on distilled spirits to be an excise tax).

Having determined that the act imposes an excise tax, we now turn to the relevant constitutional provisions. Neb. Const. art. VIII, § 1, provided, in pertinent part, that "[t]axes shall be levied *by valuation* uniformly and proportionately upon all tangible property and franchises." (Emphasis supplied.) In *Galyen*, 221 Neb. at 502, 378 N.W.2d at 186, we stated, "[T]he requirements of article VIII, § 1, are not applicable to an excise tax." We therefore held in that case that the "uniformly and proportionately" language was inapplicable to excise taxes. Under the same reasoning, the "valuation" provisions of art. VIII, § 1, do not apply to excise taxes. The tax imposed by the Tax Stamp Act is an excise tax and therefore need not be levied by valuation. Garza's second assignment of error is without merit.

Garza's final assignment of error relating to the motion to quash asserts that the Tax Stamp Act unconstitutionally defines "dealer" in a way that is vague, is overbroad, and conflicts with § 28-416(6). With regard to this assignment of error, Garza's brief discusses only the alleged conflict between §§ 77-4301(2) and 28-416(6). This court will address only issues that are both assigned as error and discussed in the brief of the party alleging prejudicial error. *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992). We thus proceed to the alleged

conflict between the statutes.

Under § 77-4301(2), a "dealer" is defined as one "who, in violation of Nebraska law, manufactures, produces, ships, transports, or imports into Nebraska, or in any manner acquires or possesses six or more ounces of marijuana . . . ." Such an individual is subject to a felony conviction for failing to affix the required tax stamps to the marijuana. § 77-4309.

Garza argues that § 77-4301(2) conflicts with § 28-416(6), which makes it a misdemeanor to knowingly or intentionally possess marijuana weighing over 1 ounce but not over 1 pound. Garza asserts that the two sections provide different penal consequences for the same conduct and that therefore § 77-4301(2) is arbitrary, capricious, vague, and overbroad.

Garza's argument is untenable. We agree that the sections do classify the offenses differently; however, the sections address different types of misconduct. Section 28-416 makes it a misdemeanor to *possess* marijuana of a certain amount. Section 77-4301(2), in conjunction with § 77-4309, makes it a felony to possess marijuana "*without affixing the official stamp, label, or other indicium.*" (Emphasis supplied.) One statute penalizes possession of a drug, the other penalizes the failure to pay taxes. The two sections are not, as Garza asserts, inconsistent.

Garza next asserts that the trial court erred by denying his motion to suppress the evidence obtained when his residence was searched. He argues that the presenting officer's affidavit did not contain sufficient indication of the confidential informant's reliability or credibility and therefore failed to establish probable cause to issue the search warrant. Garza notes that the affidavit contains handwritten language that was added prior to the signing of the warrant. At trial the district court inquired about this language:

> BY THE COURT:
>
> Q. Deputy, the affidavit upon which the search warrant was issued has the language written in, "I have received information from this informant before which was proven reliable information." Is that true?
>
> A. Yes, it is.
>
> Q. And you say [the issuing judge] suggested that you

> might have some language to that effect?
>
> A. Yes, he did. He asked if I had received information from this informant before. I routinely place that in the affidavit, and for some reason it was overlooked in this affidavit.
>
> Q. It is, in fact, a requirement, isn't it?
>
> A. Yes.
>
> . . . .
>
> Q. So although [the issuing judge] may have suggested that this language be inserted, it was, in fact, language that you inadvertently omitted?
>
> A. Yes.

The district court denied the motion to suppress, ruling that the affidavit established probable cause under *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). In reaching this ruling, the court held that the affidavit sufficiently established the reliability of the informant and that the issuing judge's inquiry about previous dealings with the informant did not taint the affidavit.

When reviewing a trial court's ruling on a motion to suppress, this court will uphold a trial court's findings of fact in the ruling unless those facts are clearly erroneous. *State v. Pope*, 239 Neb. 1009, 480 N.W.2d 169 (1992). In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion. *Id.*; *State v. Melton*, 239 Neb. 790, 478 N.W.2d 341 (1992).

The district court correctly employed the *Gates* "totality of the circumstances" test to determine whether an affidavit sufficiently supports a search warrant. We have formulated this test as such:

> In evaluating probable cause for the issuance of a search warrant, the 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 the reviewing court is to ensure that the issuing magistrate had a substantial basis for determining that probable cause existed.

(Citations omitted.) *State v. Groves*, 239 Neb. 660, 665, 477 N.W.2d 789, 794-95 (1991). In addition, a search pursuant to a warrant is presumed valid. *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987), *cert. denied* 484 U.S. 863, 108 S. Ct. 180, 98 L. Ed. 2d 133.

We agree with the district court that the issuing judge's inquiry about past dealings with the informant did not taint the affidavit. Past dealings with an informant are a relevant factor under the "totality of the circumstances" test. See, *Groves, supra*; *State v. Patterson*, 237 Neb. 198, 465 N.W.2d 743 (1991). The issuing judge correctly recognized the inadvertent omission of the "reliability" language and properly inquired further on the matter. The questioning did not diminish the level of proof required in the affidavit and thus did not taint the affidavit.

Even without the handwritten language, however, the affidavit provided the magistrate with adequate evidence of the informant's "veracity and basis of knowledge." The affidavit indicated that in addition to the information about Garza's possession of marijuana, the informant had conveyed other information which the deputy corroborated prior to seeking the warrant. First, the informant reported that while in a named individual's apartment, he had witnessed marijuana being smoked and sold, information the officer corroborated by smelling marijuana on the informant after he left the apartment and by verifying the name of the apartment's resident. Second, the informant had accurately provided Garza's address. Finally, the informant had stated that Garza would go to Texas around March 1 to acquire the marijuana, information corroborated when a Texas deputy called the Norfolk police on February 28, requesting vehicle information on Garza's automobile.

The affidavit set forth sufficient facts about the informant's veracity and basis of knowledge, when combined with the other circumstances, to provide the issuing judge with a substantial basis for finding probable cause. The district court did not err

by overruling Garza's motion to suppress.

Lastly, Garza argues that the district court erred by sentencing him to not less than 18 months' nor more than 3 years' incarceration. Again, we disagree.

Under § 28-416, any person who knowingly or intentionally possesses marijuana with intent to deliver is guilty of a Class III felony. See, also, Neb. Rev. Stat. 28-405 (Reissue 1989). Such a person may be sentenced to a term of 1 to 20 years' imprisonment. Neb. Rev. Stat. § 28-105(1) (Reissue 1989).

We have frequently stated that "[a] sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion." *State v. Smith*, 240 Neb. 97, 102, 480 N.W.2d 705, 708 (1992). After considering the evidence, the district court judge ruled that a lesser sentence would depreciate the seriousness of the crime or promote disrespect for the law. We find no abuse in the court's determination of Garza's sentence.

The Nebraska Tax Stamp Act does not violate Garza's right to be free from self-incrimination; neither does the act violate Neb. Const. art. VIII, § 1, or conflict with § 28-416(6). The district court correctly overruled Garza's motion to quash. The court was also correct in overruling Garza's motion to suppress evidence from the search of his residence. Finally, the court did not abuse its discretion in sentencing Garza. We therefore affirm Garza's convictions and sentences.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JIM L. BROWN, RESPONDENT.

495 N.W.2d 929

Filed February 26, 1993. No. S-93-107.

Original action. Judgment of disbarment.

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

PER CURIAM.

A disciplinary complaint was filed against Jim L. Brown with the Counsel for Discipline of the Nebraska State Bar Association. The complaint asserted that in December 1990, respondent was retained to pursue a medical malpractice action on a contingency basis. Despite respondent's repeated assurances that appropriate actions were being undertaken, the clients learned in October 1992 that respondent had neither initiated a medical malpractice claim against the defending physician, contacted the physician's insurance company, nor initiated appropriate litigation to preserve the clients' claim under appropriate statutes of limitations.

Pursuant to Neb. Ct. R. of Discipline 15 (rev. 1992), respondent filed a voluntary surrender of license with this court. The respondent voluntarily waived all proceedings against him in connection with the pending disciplinary complaint. Respondent admits that he has violated Canon 1, DR 1-102(A)(1) and (4) of the Code of Professional Responsibility as adopted by this court. He consents to an order of disbarment and waives any right to notice, appearance, or hearing prior to entry of the order.

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

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

NORTHERN BANK, A NEBRASKA BANKING CORPORATION, APPELLEE, V. FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER, APPELLANT.

496 N.W.2d 459

Filed March 5, 1993. No. S-90-407.

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 correct conclusion irrespective of the determination made by the trial court.

2. **Contracts: Appeal and Error.** The construction of a contract is a matter of law in connection with which an appellate court has an obligation to reach an independent correct conclusion irrespective of the determination made by the trial court.
3. **Actions: Equity: Appeal and Error.** In an action in equity, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, the appellate court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Banks and Banking: Receivers.** Where the Federal Deposit Insurance Corporation acts as a receiver, state law controls as to the rights or obligations of depositors, creditors, and stockholders.
5. **Loans: Sales: Banks and Banking: Agents: Title.** A participated loan results in the sale of the designated percentage of the loan to the participating bank with the lead bank acting as the participant's agent to collect and forward the appropriate repayments and to service the loan; however, the participant does not acquire full legal title to the loan and attendant documents; such title rests in the lead bank for the benefit of the participant.
6. **Trusts: Property: Title.** A constructive trust is imposed when one has acquired legal title to property under such circumstances that one may not in good conscience retain the beneficial interest in the property; in such a situation, equity converts the legal titleholder into a trustee holding the title for the benefit of those entitled to the ownership thereof.

Appeal from the District Court for Clay County: STEPHEN ILLINGWORTH, Judge. Affirmed.

Chip Lowe, of Adams, Howe & Zoss, P.C., and Ann S. DuRoss, Joan E. Smiley, and E. Whitney Drake for appellant.

Steven J. Woolley, of Polack, Woolley & Forrest, P.C., for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

The plaintiff-appellee, Northern Bank, a Nebraska banking corporation, participated in loans which were arranged by another Nebraska banking corporation, Fairfield State Bank, for the latter's customer, the borrower Fairfield Nonstock Co-op Fertilizer Association. The defendant-appellant, Federal Deposit Insurance Corporation (FDIC), an instrumentality of

the government of the United States, subsequently became the receiver of the assets and liabilities of Fairfield Bank. The FDIC in effect treated the Co-op's loan repayments to Fairfield Bank as belonging to that bank. Northern Bank claims that as it was the participating bank, the repayments belonged to it. The district court so found and entered judgment in favor of Northern Bank, together with prejudgment interest. The FDIC assigns four claims of error, which merge to assert that the district court (1) mistakenly found the repayments to be assets of the participant Northern Bank, rather than assets of the lead Fairfield Bank, and (2) incorrectly awarded Northern Bank prejudgment interest on its claims. We affirm.

II. BACKGROUND

The record reveals that a "participated loan" arises under an agreement in which one bank, known as the lead bank, transfers a loan it has arranged, or a part thereof, to a second bank, known as the participating bank. The participated loan device is intended to create in the borrower the illusion that it is the lead bank which is making the loan. For that reason it is used whenever the lead bank cannot or does not wish to lend its own funds, but nonetheless wishes to keep the borrower as a potential customer for other banking services. When a participated loan is transferred without recourse against the lead bank, which is the situation in this case, the participating bank assumes the credit risk, that is, the risk of the borrower's repayment or default.

The lead bank is responsible for gathering and passing credit information on to the participating bank, for securing the proper loan documentation, and for collecting the repayments made by the borrower. The lead bank typically receives compensation as the result of the "spread," that is, the difference between the rate of interest charged the borrower by the lead bank and the lesser rate of interest the participating bank is to receive.

Fairfield Bank had been suffering from problem loans, inadequate capital, and illiquidity for some time. By 1985, it had outstanding loans of its own funds totaling more than $5.5 million against total deposits of less than $7 million. Because

the demands for credit by its customers exceeded the amount of its deposits, it had, in addition, over $7.3 million of participated loans in which it was the lead bank.

In the wintertime the Co-op typically built up a checking account balance, that is, a demand deposit balance, of several hundred thousand dollars. In the spring, it borrowed money from Fairfield Bank on 3- to 6-month notes, and using the money it was paid for the goods and services it provided its members, it usually repaid its loans ahead of schedule.

After an FDIC examination in May 1985, a demand was made upon the shareholders of Fairfield Bank to inject more capital to insure the financial integrity of the bank. The shareholders were either unable or unwilling to do so, and, as a result, Fairfield Bank was closed by the Nebraska Department of Banking at 2 p.m. on May 31, 1985. The FDIC was then appointed as receiver of the bank's assets and liabilities.

III. SCOPE OF REVIEW

As becomes apparent from the remainder of this opinion, a number of scopes of review come into play.

The matter of what law controls, treated hereinafter in part V, is in large part resolved by statute. Statutory interpretation is a matter of law in connection with which we, as an appellate court, have an obligation to reach an independent correct conclusion irrespective of the determination made by the trial court. *Curry v. State ex rel. Stenberg, post* p. 695, 496 N.W.2d 512 (1993).

The analysis of the FDIC's summarized assignments of error, treated in part VI, involves both contracts and constructive trusts. As is the case with the interpretation of statutes, the construction of a contract is also a matter of law subject to the same standard of review. *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992); *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992). However, the constructive trust aspects of the case sound in equity. *Vejraska v. Pumphrey*, 241 Neb. 321, 488 N.W.2d 514 (1992). In an action in equity, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a

material issue of fact, the appellate court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Speidell Monuments v. Wyuka Cemetery, ante* p. 134, 493 N.W.2d 336 (1992).

IV. TRANSACTIONAL FACTS

1. THE LOANS

The case at hand involves two participated loans arising under agreements, each denominated a "Certificate of Participation," in which Fairfield Bank as the lead bank and Northern Bank as the participating bank covenanted, in relevant part, that:

> [Northern Bank] is entitled to participation in said loan to the extent of the principal amount of such contribution, plus interest thereon at the rate of . . . per cent per annum from [date]. . . .
>
> The said obligation and any security or enforcement rights in connection therewith, of any nature whatsoever, are held and will be enforced and disposed of by [Fairfield Bank] for its benefit and the benefit of the holders of this and like certificates, representing in the aggregate the principal of said loan, and the holders of this and other like certificates are entitled respectively to a pro rata share of the proceeds of any and all payments made on account of the principal or interest of said loan, after deducting therefrom all expenses incurred in connection with the collection of said loan, foreclosure of any liens or security interests given to secure the same, and the sale or other disposition of said collateral.
>
> [Fairfield Bank], by issuing this certificate, makes no representation or warranty as to the collectibility of the loan, and while [Fairfield Bank] agrees to use the same degree of care in servicing said loan as would if said loan had been made for its own sole account, the holder hereof, by accepting this certificate, releases [Fairfield Bank] from any and all liabilities in connection with the above loan except the proportionate distribution of the funds received by [Fairfield Bank] for such distribution as above

provided.

(a) First Loan

The first loan arose from a transaction which began on April 22, 1985, when Northern Bank advanced $200,000 on a loan Fairfield Bank had arranged for the Co-op, which was evidenced by a promissory note payable to Fairfield Bank in the amount of $200,000, bearing interest at the rate of 13.75 percent per annum. On the same day, the two banks executed the first of the described participation agreements, which gave Northern Bank the right to all of the principal amount of the loan at an interest rate of 12.5 percent.

On May 30, 1985, the Co-op issued a check in repayment of the loan, which was drawn on and was payable to Fairfield Bank in the amount of $202,863.01, the total amount of principal and interest which had accrued under the aforedescribed note. In exchange, Fairfield Bank stamped the note paid and returned it to the Co-op. As the repayment had been made by a check drawn on the Co-op's checking account with Fairfield Bank, the bank, on that same day, charged the amount of the repayment against the Co-op's checking account, thereby reducing Fairfield Bank's demand deposit liability to the Co-op by $202,863.01.

Because Fairfield Bank needed liquidity to assure that its checks would clear, it had borrowed $500,000 from the then First National Bank, Lincoln, Nebraska, where Fairfield Bank maintained an account. On the same day that the Co-op repaid its loan, Fairfield Bank requested that the Lincoln bank "wire" transfer, in effect immediately, $202,671.24 to Northern Bank and charge that amount against Fairfield's account, but the Lincoln Bank chose not to honor the request. (The difference between the amount of the requested transfer and the amount of the repayment constituted the servicing fee Fairfield Bank was entitled to receive for the services it had performed as the lead bank.)

(b) Second Loan

The second loan arose from a transaction commenced on April 26, 1985, when Northern Bank advanced $100,000 on another $200,000 loan Fairfield Bank had arranged for the

Co-op. The loan was evidenced by a promissory note payable to Fairfield Bank in the amount of $200,000, bearing an interest rate of 13.75 percent per annum. On the same day, Northern Bank and Fairfield Bank executed the second of the participation agreements referred to in part IV(1)(a), which entitled Northern Bank to a $100,000 participation in the loan, at an interest rate of 12.5 percent. (Another bank participated on the remaining half of the loan.)

On May 31, 1985, the Co-op issued a check drawn on and payable to Fairfield Bank in the amount of $100,000. In exchange, Fairfield Bank placed a written notation on the face of the note acknowledging receipt of the $100,000. On the same day, Fairfield Bank charged the $100,000 check against the Co-op's checking account, thereby reducing Fairfield Bank's demand deposit liability to the Co-op by a like amount.

Prior to being closed on May 31, Fairfield Bank as remitter issued a cashier's check for $100,000 payable to the order of Northern Bank, which Northern Bank received after Fairfield Bank had been closed. When Northern Bank presented the check for payment, the FDIC refused to honor it. However, on December 15, 1985, the FDIC paid Northern Bank the $100,000. The bank accepted the payment in partial satisfaction of its claim under an agreement whereby the FDIC acknowledged that Northern Bank preserved whatever other rights it might have.

V. CONTROLLING LAW

Before proceeding further, we must determine what law controls the resolution of this case. Neb. Rev. Stat. § 8-703 (Reissue 1991) provides, in relevant part:

> The [FDIC when acting as a receiver or liquidator] . . . shall have and possess all the powers and privileges provided by the laws of this state with respect to a receiver or liquidator respectively of a banking institution, its depositors and other creditors, and be subject to all the duties of such receiver or liquidator except insofar as such powers, privileges or duties are in conflict with the provisions of subsection (1) of section 12B of the Federal Reserve Act, as amended . . . .

Likewise, Neb. Rev. Stat. § 8-704 (Reissue 1991) reads that where the FDIC pays insured deposits, irrespective of whether it acts as receiver or liquidator, it becomes subrogated to the rights of the paid depositors, as set forth in the Federal Reserve Act, "[*p*]*rovided*, that the rights of depositors and other creditors of such closed institution shall be determined in accordance with the applicable provisions of the laws of this state."

In like fashion, 12 U.S.C. § 1819 (1988) specifies that the laws of the United States shall control all suits in which the FDIC sues or is sued,

> except that any such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States.

12 U.S.C. § 1821(e) (1988) is consistent, declaring that with respect to an insured state bank, when the FDIC acts as a receiver, it "shall possess all the rights, powers and privileges granted by State law to a receiver of a State bank."

Federal courts have held that under §§ 1819 and 1821(e), federal jurisdiction was lacking in actions involving the FDIC as receiver dealing with the rights or obligations of depositors, creditors, and stockholders. *Federal Deposit Ins. Corp. v. Sumner Fin. Corp.*, 602 F.2d 670 (5th Cir. 1979); *Federal Deposit Ins. Corp. v. National Surety Corp.*, 345 F. Supp. 885 (S.D. Iowa 1972).

However, where the FDIC acts in its corporate capacity rather than as receiver, federal law controls, as such suits are not subject to the state law exception of §§ 1819 and 1821(e). *Federal Deposit Ins. Corp. v. Bank of America*, 701 F.2d 831 (9th Cir. 1983), *cert. denied* 464 U.S. 935, 104 S. Ct. 343, 78 L. Ed. 2d 310 (applying state common law although FDIC acted in its corporate capacity, since no federal law was directly applicable); *First Western Federal Sav. Bank v. FDIC*, 678 F. Supp. 224 (D.S.D. 1988).

Inasmuch as in this case the FDIC acted as the receiver of Fairfield Bank, a state bank, the issues presented are controlled by the law of this state.

VI. ANALYSIS

Having settled upon the scopes of our review and the law applicable, and having detailed the transactions in question and the background against which they arose, we proceed to a consideration of the FDIC's summarized assignments of error.

1. Ownership of Repayments

As noted in part I, in the first summarized assignment of error the FDIC asserts that the district court mistakenly found the repayments to be the assets of Northern Bank rather than the assets of Fairfield Bank.

Relying on the diverse contractual language found in the various participation agreements, the widespread majority of cases holds that the participated loan device results in the sale of the designated percentage of the loan to the participating bank with the lead bank acting as the participant's agent to collect and forward the appropriate repayments and to service the loan. However, the participant does not acquire full legal title to the loan and attendant documents; such title rests in the lead bank. See, generally, *McVay v. Western Plains Corp.*, 823 F.2d 1395 (10th Cir. 1987); *Interfirst Bank Abilene v. Federal Deposit Ins.*, 777 F.2d 1092 (5th Cir. 1985); *Hibernia Nat. Bank v. Federal Deposit Ins. Corp.*, 733 F.2d 1403 (10th Cir. 1984); *Franklin v. C.I.R.*, 683 F.2d 125 (5th Cir. 1982); *Federal Deposit Ins. Corp. v. Mademoiselle of California*, 379 F.2d 660 (9th Cir. 1967); *Chase Manhattan Bank, N.A. v. F.D.I.C.*, 554 F. Supp. 251 (W.D. Okla. 1983); *Holcomb State Bank v. FDIC*, 180 Ill. App. 3d 840, 536 N.E.2d 453 (1989); *First Bank of WaKeeney v. Peoples State Bank*, 12 Kan. App. 2d 788, 758 P.2d 236 (1988).

As written in *Hibernia Nat. Bank v. FDIC, supra*, "The lead is the only secured party. The 'participants' can look solely to the lead for satisfaction of their claims because they are not themselves creditors of the borrowers and cannot assert creditor claims against the borrowers." *Id.* at 1407.

In the final analysis, the terms of the participation agreement govern the relationship between the lead and participating banks. *Franklin v. C.I.R., supra*. The agreements in this case make clear that Northern Bank advanced the funds in question;

that as to Northern Bank each participation was without recourse against Fairfield Bank; that while the notes and attendant documents named Fairfield Bank as the payor, they were executed to secure Northern Bank's interests and Fairfield Bank thus, to the extent of those interests, held the documents for the benefit of Northern Bank; and that Northern Bank was to receive the proceeds in the proportions that the funds it had advanced bore to the total amounts of the loans.

That Fairfield Bank held the repayments in constructive trust for Northern Bank is illustrated by *State, ex rel. Sorensen v. Farmers State Bank*, 121 Neb. 532, 237 N.W. 857 (1931). Therein, the borrower was obligated to the bank on a $4,500 promissory note he executed to discharge and renew an earlier note which, unknown to him, the bank had sold. The bank sold the second note as well, but rather than using the funds so produced to pay off the borrower's earlier note, it used the funds for its own purposes and dissipated them before it was closed and a receiver appointed.

The *Farmers State* court held that under the circumstances, the borrower entrusted the second promissory note to the bank for the sole purpose of discharging the earlier note. Although there was no express written trust, the court held the bank was essentially a constructive trustee, stating:

> The bank thus became a trustee to pay the original note with the renewal note and to return the former note to the [borrower]. . . . The bank never acquired [the borrower's] title nor a right to use his credit or proceeds or money in the banking business. In equity his converted property was never a bank asset to which depositors had a right to resort for payment of their general deposits.

Id. at 534-35, 237 N.W. at 858.

As this court has since noted:

> A constructive trust is imposed when one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the property. In such a situation, equity converts the legal titleholder into a trustee holding the title for the benefit of those entitled to the ownership thereof.
>
> . . . .

> "A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment."

Gottsch v. Bank of Stapleton, 235 Neb. 816, 825-26, 458 N.W.2d 443, 450 (1990).

This so-called "swollen assets" or "augmentation of assets" doctrine was also applied in the following cases: *State, ex rel. Sorensen v. State Bank of Touhy*, 122 Neb. 582, 240 N.W. 925 (1932) (granting an obligor on a refinanced note a preferred claim for funds not forwarded to pay off the first note, as in *Farmers State*); *State, ex rel. Sorensen v. Beemer State Bank*, 123 Neb. 231, 242 N.W. 445 (1932) (denying relief where customer had knowledge that the bank used the bonds in question as general assets of the bank); *State, ex rel. Sorensen v. Citizens State Bank*, 124 Neb. 562, 247 N.W. 345 (1933) (granting a preferred claim for loan repayments received by the failed bank to the assignee of the note). See, also, *State, ex rel. Sorensen v. South Omaha State Bank*, 129 Neb. 43, 260 N.W. 815 (1935); *State, ex rel. Sorensen v. Nebraska State Savings Bank*, 128 Neb. 479, 259 N.W. 46 (1935); *State, ex rel. Sorensen v. Fidelity State Bank*, 127 Neb. 529, 255 N.W. 781 (1934); *First Trust Co. v. Exchange Bank*, 126 Neb. 856, 254 N.W. 569 (1934); *Davis v. Polak*, 126 Neb. 640, 254 N.W. 246 (1934); *State, ex rel. Sorensen v. Commercial State Bank*, 126 Neb. 490, 253 N.W. 647 (1934); *State, ex rel. Sorensen v. Dwight State Bank*, 126 Neb. 388, 253 N.W. 410 (1934); *State, ex rel. Sorensen v. Bank of Otoe*, 125 Neb. 383, 250 N.W. 254 (1933); *State, ex rel. Sorensen v. Citizens Bank*, 124 Neb. 717, 248 N.W. 82 (1933).

The FDIC nonetheless argues that *State, ex rel. Sorensen v. Nebraska State Savings Bank*, 127 Neb. 832, 257 N.W. 64 (1934), controls. We therein held that book entries shifting assets between two related banks, both of which failed, did not serve to augment the funds of the related bank with which the borrower had dealt. However, the situation presented in *Nebraska State* is quite different from that presented in the case at hand. In *Nebraska State*, the claimant was unable to show

that any of the assets were actually transferred from one bank to the other; rather, the entries were made merely "for the purpose of bolstering up the reserve" of one of the related banks. *Id.* at 835, 257 N.W. at 65. Here, Fairfield Bank actually received funds which reduced its deposit liabilities and loan receivables and left an unrealized obligation to Northern Bank.

We thus hold that the participation agreement in question effectuated a sale by Fairfield Bank to Northern Bank of all of the first loan and half of the second loan. However, legal title to the promissory notes and related documents remained in Fairfield Bank, who as lead bank acted as an agent for Northern Bank in servicing the loan; as such, Fairfield Bank served merely as a conduit between the Co-op and Northern Bank. As a consequence, the repayments never became assets of Fairfield Bank; it merely held the repayments in constructive trust for the benefit of Northern Bank.

Accordingly, the district court correctly determined that the repayments were assets of Northern Bank.

2. Prejudgment Interest

We thus reach the second and last assignment of error, which, as first noted in part I, claims that in any event, the district court erred in awarding Northern Bank prejudgment interest on the amount of its claims.

The district court awarded Northern Bank prejudgment interest at the contract rate on its claim under the first loan from the date it advanced its money to the date of judgment. It also awarded prejudgment interest at the contract rate on the money it advanced for the second loan to December 15, 1985, when the FDIC reimbursed Northern Bank as described in part IV(1)(b). That interest amounted to $6,780.83, on which amount the district court also ordered prejudgment interest at the contract rate.

The FDIC argues that under *Department of Banking v. Elm Creek State Bank*, 205 Neb. 323, 287 N.W.2d 440 (1980), no claim for interest may arise until there is a surplus above all claims, which is not the situation in this case. However, in *Elm Creek*, the claimant was a stockholder of the closed bank, not a preferred claimant, as is Northern Bank. As the court in *Elm*

Creek noted: "Whether interest on preferred claims could have been paid prior to payment of general claims is not here argued or decided." *Id.* at 324, 287 N.W.2d at 442.

The FDIC further argues that under federal law claimants are not entitled to prejudgment interest against the FDIC. In support of that proposition it cites *Marchese v. U.S.*, 781 F. Supp. 241 (S.D.N.Y. 1991) (holding that the FDIC in its corporate capacity is not required to pay interest to insured deposit holders), and *Far West Federal Bank v. Director, OTS*, 787 F. Supp. 952 (D. Or. 1992), *aff'd*, *Far West Federal v. Office of Thrift Supervision*, 930 F.2d 883 (Fed. Cir. 1991) (denying prejudgment interest of investors of a failed thrift against the office of thrift supervision).

The FDIC's immunity from prejudgment interest was also discussed in *Philadelphia Gear Corp. v. Federal Deposit Ins.*, 751 F.2d 1131 (10th Cir. 1984), *reversed on other grounds* 476 U.S. 426, 106 S. Ct. 1931, 90 L. Ed. 2d 428 (1986), in these terms:

> Absent an express waiver, sovereign immunity bars suit against the United States government or its agencies. By statute, 12 U.S.C. § 1819, the FDIC has the capacity to sue and to be sued. But that does not waive the sovereign immunity doctrine on claims for prejudgment interest. . . . The FDIC insurance statute . . . permits delays in paying insurance when the FDIC is in doubt about the validity of a claim to insurance proceeds: [quotation from the statute]. Thus, Congress expressly recognized that delays would occur in paying some insurance claims, yet it did not expressly waive its immunity to prejudgment interest. Under those circumstances we must hold that prejudgment interest should not have been awarded on the claims for insurance proceeds.

Id. at 1138-39.

However, in the foregoing cases the FDIC and the office of thrift supervision were acting in their corporate capacities rather than as receivers, a significant distinction established in part V of this opinion.

Here, the claim is against the FDIC for the return of assets not rightfully a part of the receivership. In that circumstance,

Northern Bank has a right to recover prejudgment interest at the contract rate on its liquidated claims. *Graff v. Burnett*, 226 Neb. 710, 414 N.W.2d 271 (1987); *Lease Northwest v. Davis*, 224 Neb. 617, 400 N.W.2d 220 (1987); *Edquist v. Commercial Sav. & Loan Assn.*, 191 Neb. 618, 217 N.W.2d 82 (1974).

VII. JUDGMENT

The record failing to sustain either of the summarized assignments of error, the judgment of the district court is affirmed.

AFFIRMED.

ERNEST B. NENNEMANN ET AL., APPELLEES, V. MARY L. REBUCK ET AL., APPELLEES, AND JACK R. WICKER AND CHARLES D. HAHN, APPELLANTS.

496 N.W.2d 467

Filed March 5, 1993. No. S-90-458.

1. **Quiet Title: Equity: Appeal and Error.** A suit to quiet title is equitable in nature, and an appellate court reviews the record in such a case de novo and reaches an independent conclusion without reference to findings of the trial court. However, when credible evidence is in conflict, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Adverse Possession: Proof.** The burden is on one who claims title by adverse possession to prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for the statutory period of 10 years.
3. **Adverse Possession: Intent.** The claim of adverse possession is founded upon the intent of the occupant, such intent being determined by his acts.
4. **Adverse Possession.** Sufficiency of possession in adverse possession depends upon the character of the land and the use that can reasonably be made of it.
5. _____. In determining the rights of an adverse owner, the entry and possession of his tenant, expressly authorized to act, is the entry and possession of such owner.
6. **Adverse Possession: Taxation.** Payment of real estate taxes is a circumstance which may be considered with all other circumstances in determining the question of adverse possession.

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

Charles D. Hahn for appellant.

Richard H. Hoch, of Hoch & Steinheider, for appellees Nennemann et al.

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

BOSLAUGH, J.

This is a suit to quiet title to a tract of river bottom farmland situated on the east side of the Missouri River. The plaintiffs are the heirs of Ernest W. Nennemann, who purchased the property under a Missouri description from Henry Hrdlicka and Joe and Ruth Beranek in April 1955. At that time, the plaintiff Ernest B. Nennemann began farming the property for his father. Either Nennemann or his tenants have farmed the land on behalf of the tenants in common since the time of the elder Nennemann's death in April 1964. At this time, Dennis Hendrickson is the tenant farming the land for the plaintiffs and has been since 1984. Crops have been grown on the land in question since the time the land was purchased by Ernest W. Nennemann, with the exception of 1984, when the land was flooded and was incapable of being farmed. The plaintiffs also claim title by adverse possession.

The principal defendants are Jack R. Wicker and Charles D. Hahn, who filed an answer and cross-petition in which they claimed title under certificates of tax sale issued by Otoe County, Nebraska, and alleged that they have been in adverse possession of the property.

The trial court found generally in favor of the plaintiffs, finding that the plaintiffs had been in adverse possession of the property for more than 10 years prior to the filing of the petition and that the defendants had not been in adverse possession of the property. The trial court quieted title to the property in the plaintiffs and dismissed the cross-petition of the defendants. From that judgment, the defendants Wicker and Hahn have appealed.

The defendants' first assignment of error is that the trial

court erred in failing to sustain the defendants' motion to dismiss the plaintiffs' petition for lack of jurisdiction. The defendants argue that a Nebraska court could not obtain jurisdiction of the action because the plaintiffs testified that they believed the land was located in Missouri.

The petition described the land as "[t]he East Half (E 1/2) of the West Half (W 1/2) of Section Thirty-Three (33), Township Seven (7) North, Range Fifteen (15), East of the 6th P.M., Otoe County, Nebraska, and all accretions thereto."

Ron Hazard, the Otoe County, Nebraska, surveyor, who testified on behalf of the plaintiffs, testified that the plaintiffs' possession of the land conformed to the Missouri description of the property. Hazard also testified that he established the Nennemanns' possession of the land as occupying all of the Nebraska description of the property except for approximately 6.3 acres of land. At the close of the plaintiffs' case, the trial court allowed the plaintiffs to amend their petition to exclude the 6.3 acres in order to conform the petition to the proof. The 6.3 acres not possessed by the plaintiffs is described by metes and bounds in the judgment and is excepted from the tract to which title was quieted in the plaintiffs.

The judgment in this case does not determine whether the land is in Nebraska or Missouri and is not binding on either Nebraska or Missouri. The fact that it has not been determined whether the land is actually in Nebraska or Missouri did not deprive the Nebraska court of jurisdiction to determine the rights of the parties to the land. The pleadings alleged that the land was in Nebraska and that the district court had jurisdiction of the persons of the parties. This was sufficient to allow the district court to determine the rights of the parties to the land.

In *Durfee v. Duke*, 375 U.S. 106, 84 S. Ct. 242, 11 L. Ed. 2d 186 (1963), the U.S. Supreme Court held that the judgment of a Nebraska court quieting title to land alleged to be in Nebraska was binding on parties claiming that the land was in Missouri where the questions had been fully and fairly litigated in the Nebraska court. The Court said:

> It is to be emphasized that all that was ultimately determined in the Nebraska litigation was title to the land in question as between the parties to the litigation there.

> Nothing there decided, and nothing that could be decided in litigation between the same parties or their privies in Missouri, could bind either Missouri or Nebraska with respect to any controversy they might have, now or in the future, as to the location of the boundary between them, or as to their respective sovereignty over the land in question. *Fowler v. Lindsey*, 3 Dall. 411 [1 L. Ed. 658 (1799)]; *New York v. Connecticut*, 4 Dall. 1 [1 L. Ed. 715 (1799)]; *Land v. Dollar*, 330 U. S. 731 [67 S. Ct. 1009, 91 L. Ed. 1209 (1947)]. Either State may at any time protect its interest by initiating independent judicial proceedings here. Cf. *Missouri* v. *Nebraska*, 196 U. S. 23 [25 S. Ct. 155, 49 L. Ed. 372 (1904)].
>
> For the reasons stated, we hold in this case that the federal court in Missouri had the power and, upon proper averments, the duty to inquire into the jurisdiction of the Nebraska courts to render the decree quieting title to the land in the petitioners. We further hold that when that inquiry disclosed, as it did, that the jurisdictional issues had been fully and fairly litigated by the parties and finally determined in the Nebraska courts, the federal court in Missouri was correct in ruling that further inquiry was precluded.

375 U.S. at 115-16. See, also, *Mississippi v. Louisiana*, 61 U.S.L.W. 4025 (U.S. Dec. 15, 1992) (No. 91-1158).

The defendant's second assignment of error is that the trial court erred in finding that the plaintiffs had been in adverse possession of the property for the statutory period.

A suit to quiet title is equitable in nature, and an appellate court reviews the record in such a case de novo and reaches an independent conclusion without reference to findings of the trial court. *State Nat. Bank & Trust Co. v. Jacobsen*, 218 Neb. 682, 358 N.W.2d 743 (1984). However, when credible evidence is in conflict, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Johnson v. City of Hastings*, 241 Neb. 291, 488 N.W.2d 20 (1992).

The burden is on one who claims title by adverse possession to prove by a preponderance of the evidence that he has been in

actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for the statutory period of 10 years. *Schaneman v. Wright*, 238 Neb. 309, 470 N.W.2d 566 (1991).

The claim of adverse possession is founded upon the intent of the occupant, such intent being determined by his acts. In *Nebraska State Bank v. Gaddis*, 208 Neb. 136, 302 N.W.2d 686 (1981), this court stated: " ' "[T]he possession is the important element, and it is held that such possession is not the less adverse because the person takes possession of the land in question innocently and through mistake. . . ." ' " *Id.* at 140, 302 N.W.2d at 689, quoting *Purdum v. Sherman*, 163 Neb. 889, 81 N.W.2d 331 (1957).

This court has also previously stated:

> "It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. When, therefore, a claimant occupies the land of another by actual, open, exclusive, and continuous possession, the owner is placed on notice that his ownership is endangered and unless he takes proper action within 10 years to protect himself, he is barred from action thereafter and the title of the claimant is complete."

Hadley v. Ideus, 220 Neb. 878, 881-882, 374 N.W.2d 231, 234 (1985), quoting *Purdum v. Sherman, supra*. Title may not be quieted on the theory of adverse possession in the absence of proof of exclusive possession for a purpose to which the land is adapted for the statutory period. *Young v. Lacy*, 221 Neb. 511, 378 N.W.2d 192 (1985).

Sufficiency of possession in adverse possession depends upon the character of the land and the use that can reasonably be made of it. *Id.*; *Wiedeman v. James E. Simon Co., Inc.*, 209 Neb. 189, 307 N.W.2d 105 (1981); *Weiss v. Meyer*, 208 Neb. 429, 303 N.W.2d 765 (1981). In *Weiss v. Meyer*, this court also stated:

> The law does not require that possession shall be evidenced by a complete enclosure, nor by persons remaining continuously upon the land and constantly from day to day performing acts of ownership thereon. It is sufficient if the land is used continuously for the

purposes to which it may be in its nature adapted.

Id. at 433, 303 N.W.2d at 768.

It is clear from the evidence in this case that the plaintiffs have farmed the disputed property under a claim of right for a period well beyond the statutory 10-year period. The plaintiffs' acts of farming the land and ejecting trespassers from the land are consistent with those acts performed by owners and was evidence of a claim of title adverse to the defendants.

The evidence established that the land in question was farmed to the extent possible either by the plaintiffs or by their tenants. " 'In determining the rights of an adverse owner, the entry and possession of his tenant, expressly authorized to act, is the entry and possession of such owner.' " *Id.* at 432, 303 N.W.2d at 768, quoting *Cassens v. Wisner*, 122 Neb. 408, 240 N.W. 526 (1932).

There was evidence that the plaintiffs had paid Nebraska real estate taxes on the property for several years and redeemed tax sale certificates on the land in question. This is a factor to be considered when determining whether the elements of adverse possession have been satisfied. Payment of real estate taxes is a circumstance which may be considered with all other circumstances in determining the question of adverse possession. *State Nat. Bank & Trust Co. v. Jacobsen*, 218 Neb. 682, 358 N.W.2d 743 (1984).

There is no evidence that the defendants were ever in possession of the property. The fact that trespassers may occasionally have hunted or fished upon the property without permission was not sufficient to interrupt the possession of the plaintiffs. The record fully supports a finding that the plaintiffs had been in adverse possession of the property for more than the statutory period.

The defendants' third assignment of error is that the evidence did not adequately show the dimensions of the tract possessed by the plaintiffs. The testimony of Hazard, the county surveyor of Otoe County, Nebraska, established that the plaintiffs had farmed all of the land that was suitable for farming except the 6.3 acres excluded from the legal description. The levee, which occupies a part of the land and the wooded area adjacent to the river, is not suitable for farming. The record is sufficient to

establish that the plaintiffs possessed the land described in the judgment.

The judgment of the trial court is affirmed.

AFFIRMED.

EDWARD F. SAUNDERS, JR., AND GERTRUDE A. SAUNDERS BREDTHAUER, APPELLEES AND CROSS-APPELLANTS, V. MARY L. REBUCK, A SINGLE PERSON, ET AL., APPELLEES AND CROSS-APPELLEES, AND JACK R. WICKER AND CHARLES D. HAHN, APPELLANTS AND CROSS-APPELLEES.

496 N.W.2d 472

Filed March 5, 1993. No. S-90-527.

1. **Quiet Title: Equity: Appeal and Error.** A suit to quiet title is equitable in nature, and an appellate court reviews the record in such a case de novo and reaches an independent conclusion without reference to findings of the trial court. However, when credible evidence is in conflict, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Adverse Possession: Proof.** The burden is on one who claims title by adverse possession to prove by a preponderance of the evidence that he or she has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for the statutory period of 10 years.
3. **Adverse Possession: Intent.** The claim of adverse possession is founded upon the intent of the occupant, such intent being determined by his acts.
4. **Adverse Possession.** Sufficiency of possession in adverse possession depends upon the character of the land and the use that can reasonably be made of it.
5. _____. In determining the rights of an adverse owner, the entry and possession of his tenant, expressly authorized to act, is the entry and possession of such owner.
6. **Adverse Possession: Taxes.** Payment of real estate taxes is a circumstance which may be considered with all other circumstances in determining the question of adverse possession.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed as modified.

Charles D. Hahn for appellants.

William G. Blake, of Pierson, Fitchett, Hunzeker, Blake & Loftis, for appellees Saunders and Bredthauer.

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

BOSLAUGH, J.

This is a suit to quiet title to a tract of river bottom farmland situated on the east side of the Missouri River. The land involved in this case is adjacent to and west of the property involved in case No. S-90-458. See *Nennemann v. Rebuck, ante* p. 604, 496 N.W.2d 467 (1993). It is described in the petition as "[t]he W1/2 of the NW1/4 and the W1/2 of the SW1/4 of Section 33, Township 7 North, Range 15 East of the 6th P.M., Otoe County, Nebraska, and all accretions thereto."

The plaintiffs in this case are Edward F. Saunders, Jr., and Gertrude A. Saunders Bredthauer.

The plaintiff Edward F. Saunders, Jr., testified that his mother and father, Edward and Ann Saunders, purchased the property under a Missouri description from Robert and Bessie Case in 1945. The Saunderses themselves farmed the land for several years. Thereafter, tenants farmed the land on their behalf. Ann Saunders managed the property after her husband's death. In 1974, Edward, Jr., inherited a life estate in the property in question from his mother, with the remainder to his daughter, Gertrude Saunders Bredthauer. Since that time, Edward, Jr., has managed the property. Edward, Jr., first learned in 1988 that Nebraska claimed and taxed the property in question when he attempted to sell the property to Michael Binder. In 1989, Binder farmed the property as the Saunderses' tenant. Crops have been grown on the land in question since the time the land was purchased by the plaintiffs' parents, with the exception of 1984, when the land was flooded and was incapable of being farmed.

The plaintiffs also claim title by adverse possession.

The principal defendants are Jack R. Wicker and Charles D. Hahn, who filed an answer and cross-petition in which they claimed title under certificates of tax sale issued by Otoe County, Nebraska, and alleged that they have been in adverse possession of the property.

The trial court found generally in favor of the plaintiffs, finding that the plaintiffs had been in adverse possession of the property for more than 10 years prior to the filing of the petition and that the defendants had not been in adverse possession of the property. The trial court quieted title to the property in the plaintiffs and dismissed the cross-petition of the defendants. From that judgment, the defendants Wicker and Hahn have appealed.

The assignments of error in this case are identical to the assignments of error in case No. S-90-458 and present the same issues as those raised in *Nennemann v. Rebuck, supra*, decided today. Our decision in that case is controlling so far as the issues in this case are concerned.

It is clear from the evidence in this case that the plaintiffs have farmed the disputed property under a claim of right for a period well beyond the statutory 10-year period. The plaintiffs' acts of farming the land and ejecting trespassers from the land are consistent with those acts performed by owners and was evidence of a claim of title adverse to the defendants.

The evidence established that the land in question was farmed to the extent possible either by the plaintiffs or by their tenants.

There was evidence that the plaintiffs had paid Nebraska real estate taxes on the property for several years and redeemed tax sale certificates on the land in question. This is a factor to be considered when determining whether the elements of adverse possession have been satisfied.

There is no evidence that the defendants were ever in possession of the property. The fact that trespassers may occasionally have hunted or fished upon the property without permission was not sufficient to interrupt the possession of the plaintiffs. The record fully supports a finding that the plaintiffs had been in adverse possession of the property for more than the statutory period.

At the close of the plaintiffs' evidence, the plaintiffs were granted leave to amend their petition to conform to the proof by excluding a small strip of land along the west edge of the land described in the petition and by including a small strip of land along the east edge of the land described in the petition. By

cross-appeal, the plaintiffs have noted that the judgment of the district court failed to include these amendments in the description of the land to which title was quieted in the plaintiffs. For that reason, the judgment should be modified to describe the land to which title is quieted in the plaintiffs as follows:

> [T]he West Half of the West Half of Section 33, [except that portion described as follows:] Beginning at the northwest corner of the West Half of the West Half ($W^1/_2W^1/_2$) of Section 33, Township 7 North, Range 15 East of the 6th P. M. in Otoe County, Nebraska, and running thence East for 80.4 feet along the north line of the said $W^1/_2W^1/_2$; thence Southerly for 4676 feet to the left bank of the Missouri River; thence Westerly for 40 feet along the said left bank to the west line of the said $W^1/_2W^1/_2$ and thence North 4675 feet along the said west line to the point of beginning [and also including that portion of the East Half of the West Half of Section 33 described as:] Beginning at the northwest corner of the East Half of the West Half ($E^1/_2W^1/_2$) of Section 33, Township 7 North, Range 15 East of the 6th P. M. in Otoe County, Nebraska, and running thence East for approximately 108 feet along the north line of the said $E^1/_2W^1/_2$; thence Southerly for approximately 4717 feet to the left bank of the Missouri River; thence Westerly for approximately 8.5 feet along the said left bank to the west line of the said $E^1/_2W^1/_2$ and thence North for approximately 4716 feet along the said west line to the point of beginning. . . .

The judgment of the trial court as modified is affirmed.

AFFIRMED AS MODIFIED.

FIRSTIER BANK, N.A., A BANKING CORPORATION, APPELLEE, V. RICHARD L. TRIPLETT AND CORALEA J. TRIPLETT, APPELLANTS.

497 N.W.2d 339

Filed March 5, 1993. No. S-90-581.

1. **Uniform Commercial Code: Negotiable Instruments: Promissory Notes.** Discharge of a negotiable instrument such as a promissory note is governed by the Uniform Commercial Code.
2. **Actions: Uniform Commercial Code.** An action under the Uniform Commercial Code is one at law.
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. **Judgments: Appeal and Error.** 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, who is entitled to every reasonable inference deducible from the evidence.
5. **Intent.** Intent is a question of fact.
6. **Promissory Notes.** The unintentional cancellation and surrender of a promissory note through clerical error do not discharge the maker of the note.

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

Gregory P. Drew for appellants.

Wyman E. Nelson for appellee.

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

FAHRNBRUCH, J.

After finding that Richard L. and Coralea J. Triplett had not fully paid a promissory note they had given for money they borrowed from FirsTier Bank, N.A., the district court for Washington County entered a $7,231.55 judgment in favor of FirsTier and against the Tripletts.

At trial and in this appeal, the Tripletts, who are husband and wife, contend that their debt was satisfied when their note was marked "paid" and mailed to them by FirsTier. The trial court found that the note was unintentionally marked "paid" and mailed to the Tripletts as a result of clerical error and without

the bank's authority.

ASSIGNMENT OF ERROR

Restated, the sole issue on appeal is whether the district court erred in granting a money judgment on a promissory note that had been marked "paid" and returned to the maker.

SCOPE OF REVIEW

Discharge of a negotiable instrument such as a promissory note is governed by the Uniform Commercial Code. See Neb. U.C.C. § 3-605 (Reissue 1980). An action under the Uniform Commercial Code is one at law. See, Neb. U.C.C. § 1-101 et seq. (Reissue 1992); *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983). 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. *Young v. Dodge Cty. Bd. of Supervisors, ante* p. 1, 493 N.W.2d 160 (1992); *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992).

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, who is entitled to every reasonable inference deducible from the evidence. *Young v. Dodge Cty. Bd. of Supervisors, supra*; *Ballard v. Giltner Pub. Sch.*, 241 Neb. 970, 492 N.W.2d 855 (1992); *K & K Farming v. Federal Intermediate Credit Bank*, 237 Neb. 846, 468 N.W.2d 99 (1991).

FACTS

At trial, two original promissory notes the Tripletts gave to FirsTier were referred to as exhibits 7 and 8. Exhibit 7, dated April 17, 1986, was for $14,000. It was secured by a 1985 Toyota pickup and a 1979 Lincoln automobile and was originally due April 20, 1990. By subsequent agreement, the due date was extended to June 20, 1990. Exhibit 8, dated June 16, 1987, was for $3,500. The note was secured by a 1979 Ford van.

The Tripletts sold the Toyota, and on July 6, 1987, Richard Triplett tendered a check for $7,200 as payment on the notes to

FirsTier's branch at Blair, Nebraska. At the time the check was tendered, the balances were $10,498.79 on exhibit 7 and $2,418.73 on exhibit 8.

In late July 1987, the Tripletts received a letter from FirsTier containing an original "Note and Security Agreement," exhibit 7, which was stamped "PAID . . . FirsTier Bank, N.A. Omaha, Nebraska." The stamp was signed by a clerk and hand dated "7-7-87." In November 1987, exhibit 8 was returned to the Tripletts. It also was stamped "PAID . . . FirsTier Bank, N.A. Omaha, Nebraska," and hand dated "7-7-87," but was signed by another clerk.

At trial, a bank officer testified that when a note has been paid in full, it is FirsTier's practice to send a computer-generated form letter over the original loan officer's name, thanking the customer for his or her business. He testified that the loan officer never sees or signs these letters, which he believed were signed by a clerk.

Richard Triplett testified that more than a year after receiving the last note, he received notice from FirsTier that the Tripletts still owed money on one of the notes. When FirsTier demanded payment of the note, Richard Triplett indicated to FirsTier that "the loan was paid up."

In May 1989, FirsTier sued the Tripletts for payment of the balance remaining on exhibit 7, for reformation and reinstatement of the erroneously canceled note, and for reinstatement of FirsTier's security interest.

At trial, Leonard Olson, FirsTier's vice president and manager of loan operations, testified that exhibit 7 had never been paid in full, although regular payments had been made until one large payment of $4,781.27 was made on July 6, 1987. At the time of trial, exhibit 7 had an outstanding balance of $7,231.55, representing $5,717.52 in principal plus accrued interest, which continued to accrue at a rate of 10 percent, or $1.57 per day. Olson also testified that with the payment of $2,418.73 on July 6, 1987, exhibit 8 was paid in full.

Olson testified that through clerical error, the file for exhibit 7 was pulled instead of the file for exhibit 8 and that a clerk erroneously marked exhibit 7 "paid." Olson testified that the employee who marked exhibit 7 "paid" was a loan service clerk,

one step above an entry-level position. According to Olson, the loan service clerk did not have authority to release a note which had not been paid in full, and FirsTier never intended to discharge exhibit 7 without payment in full. Both Olson and Lloyd Sheve, vice president and manager of FirsTier's Blair branch, testified that only the bank's collection department could authorize the release of an unpaid note, and they testified that neither of them had ever received authorization to settle and release exhibit 7.

In spite of Richard Triplett's initial representation to FirsTier that "the loan was paid up," the Tripletts do not dispute the fact that exhibit 7 has never been paid in full. Both of the Tripletts testified that they knew the $7,200 check was insufficient to pay off the balances of both notes. Richard Triplett testified that he had made no representations to FirsTier that he was paying off both notes. He testified that he did not know whether FirsTier had made an error in releasing exhibit 7.

Instead, the Tripletts alleged that exhibit 7 was discharged pursuant to § 3-605 (Reissue 1980) by (1) intentional cancellation of the note which was not a result of a mutual mistake or a unilateral mistake caused by the Tripletts' fraud or inequitable conduct and (2) surrender of the note.

The district court made specific factual findings that

> at the time of the $7,200.00 payment by the Defendants [Tripletts] to the Plaintiff [FirsTier], the Defendants specifically acknowledged and knew that said $7,200.00 was insufficient to make payment in full on both promissory notes . . . . [T]here was no intent on the part of FirsTier Bank to release promissory note [exhibit 7] for less than payment in full thereof, there was no agreement nor consideration to support same that promissory note [exhibit 7] would be released without payment in full, the stamping of [exhibit 7] as paid in full and the return thereof to the Defendants was as a result of a clerical error, allowing said release of promissory note [exhibit 7] would result in unjust enrichment to the [Tripletts], and the individual in the clerical position stamping promissory notes for return to bank customers did not have the authority or power to authorize the release of promissory

notes without payment in full thereof.

The court entered a $7,231.44 judgment, plus interest and costs, in favor of FirsTier on its first cause of action and granted no relief on the second and third causes of action. The Tripletts appealed. FirsTier did not cross-appeal.

ANALYSIS

The Tripletts claim that their debt on exhibit 7 was discharged as a matter of law under § 3-605(1) (Reissue 1980) because FirsTier marked exhibit 7 "paid" and returned it to them. FirsTier counters that a promissory note is not discharged when it is canceled as the result of clerical error by a party who has no authority to release a loan. The bank's position is that such an action does not constitute intent to cancel the maker's indebtedness and that therefore there was no discharge of the note.

Section 3-605 governed the discharge of negotiable instruments through cancellation or renunciation at all times material to this case. That statute provided in part:

> (1) The holder of an instrument may even without consideration discharge any party
>
> (a) in any manner apparent on the face of the instrument or the indorsement, as *by intentionally cancelling the instrument* or the party's signature by destruction or mutilation, or by striking out the party's signature; or
>
> (b) by renouncing his rights by a writing signed and delivered or *by surrender of the instrument to the party to be discharged.*

(Emphasis supplied.)

Whether a promissory note is discharged pursuant to the Uniform Commercial Code when it is marked "paid" and surrendered to the maker is a question of first impression in Nebraska. Other jurisdictions have considered the question, and their opinions are persuasive in deciding this case.

Because FirsTier both stamped exhibit 7 "paid" and surrendered it to the Tripletts by mailing it back to them, we must consider whether either of these actions by FirsTier had the effect of discharging the Tripletts' indebtedness under the note.

Subsection (a) of § 3-605(1) clearly stated that cancellation must be done "intentionally." Courts that have considered discharge of a promissory note under their states' counterparts to subsection (a) have held that cancellation must be accompanied by an *intent to discharge the maker*. See, *Columbia Sav. v. Zelinger*, 794 P.2d 231 (Colo. 1990); *Los Alamos Credit Union v. Bowling*, 108 N.M. 113, 767 P.2d 352 (1989); *Gover v. Home and City Sav. Bank*, 574 So. 2d 306 (Fla. App. 1991); *Richardson v. First Nat. Bank of Louisville*, 660 S.W.2d 678 (Ky. App. 1983); *Gibraltar Sav. Ass'n v. Watson*, 624 S.W.2d 650 (Tex. Civ. App. 1981); *Rubbelke v. Strecker*, 53 Wash. App. 20, 765 P.2d 314 (1988). Such intent is *not* the equivalent of a clerk's stamping the note "paid" when, in fact, it has not been paid. See, *Columbia Sav. v. Zelinger, supra*; *Richardson v. First Nat. Bank of Louisville, supra*. The Tripletts' assertion that the physical act of intentionally stamping exhibit 7 "paid" discharges the note as a matter of law is plainly incorrect in the absence of FirsTier's intent to discharge the Tripletts' indebtedness.

Although subsection (b) of § 3-605(1) did not specifically state that *surrender* of an instrument must be intentional in order to effect a discharge, "[t]he courts have glossed this section by requiring that surrender of the instrument be accompanied by an intent to discharge the party." 1 James J. White & Robert S. Summers, Uniform Commercial Code § 13-22 at 683 (3d ed. 1988). See, also, *Hubbard Realty Co. v. First Nat. Bank of Pikeville*, 704 F.2d 733 (4th Cir. 1983); *Columbia Sav. v. Zelinger, supra*; *Los Alamos Credit Union v. Bowling, supra*; *Peoples Bank of S. C., Inc. v. Robinson*, 272 S.C. 155, 249 S.E.2d 784 (1978); *Gover v. Home and City Sav. Bank, supra*; *Gibraltar Sav. Ass'n v. Watson, supra*. This is consistent with the Legislature's latest revision of Nebraska's Uniform Commercial Code. Discharge by cancellation or renunciation is now governed by Neb. U.C.C. § 3-604 (Reissue 1992), which replaced § 3-605 (Reissue 1980). Section 3-604(a) provides that "[a] person entitled to enforce an instrument . . . may discharge the obligation of a party to pay the instrument (i) by an *intentional* voluntary act, such as *surrender* of the instrument to the party . . . or *cancellation* of the instrument

. . . ." (Emphasis supplied.) This language requires that discharge be intentional, whether by cancellation *or* surrender.

All jurisdictions that have considered the issue have concluded that clerical error does not have the legal effect of canceling an existing debt or discharging an instrument. See, e.g., *Columbia Sav. v. Zelinger, supra*; *Los Alamos Credit Union v. Bowling, supra*; *Peoples Bank of S. C., Inc. v. Robinson, supra*; *Gover v. Home and City Sav. Bank, supra*; *First Galesburg Nat'l Bk. & Tr. v. Martin*, 58 Ill. App. 3d 113, 373 N.E.2d 1075 (1978); *Richardson v. First Nat. Bank of Louisville, supra*; *United Postal Sav. v. Norbob Enterprises*, 792 S.W.2d 898 (Mo. App. 1990). This is simply an application of the general rule that cancellation or surrender of an instrument has no effect when done by a person without authority from the holder of the instrument. See, *Los Alamos Credit Union v. Bowling, supra*; *Ohio Cas. Ins. Co. v. Yaklich*, 768 P.2d 1274 (Colo. App. 1989); *Mervis v. McGee*, 144 So. 2d 417 (La. App. 1962); *United Postal Sav. v. Norbob Enterprises, supra*; *Pentagon Federal Credit U. v. Edwards*, 571 S.W.2d 679 (Mo. App. 1978); *Reid v. Cramer*, 24 Wash. App. 742, 603 P.2d 851 (1979). A bank may recover even when its agents or officers have acted negligently, to prevent the maker of a note from retaining a gratuitous benefit to which he or she is not entitled. See, *Los Alamos Credit Union v. Bowling, supra*; *Bank of Naperville v. Catalano*, 86 Ill. App. 3d 1005, 408 N.E.2d 441 (1980).

Although the Tripletts, citing *J. J. Schaefer Livestock Hauling v. Gretna St. Bank*, 229 Neb. 580, 428 N.W.2d 185 (1988), and *Peterson v. Crown Financial Corp.*, 661 F.2d 287 (3d Cir. 1981), argue that subjective intent of the holder is irrelevant, both of these cases are distinguishable from the case at bar on their facts.

In *J. J. Schaefer Livestock Hauling*, the president and vice president of a bank satisfied promissory notes which the bank was holding by exercising the bank's right of setoff against the maker's account, to the detriment of third parties who were entitled to the funds in the account. The notes were canceled and returned to the maker. Only after the bank was compelled by legal process to reimburse the third parties did the bank

attempt reformation of the notes in what was essentially a claim for indemnity against the maker. This court held that surrender of the notes discharged the obligations as a matter of law. The court adopted the rationale of *Peterson* that " 'parties . . . which deal regularly in negotiable instruments, "ought to be held, as a matter of law, to an understanding of the implications which normal business practice assigns to 'intentionally cancelling [an] instrument' . . . ." [Citation omitted.] [S]ubjective intent not to discharge was irrelevant; mere intent to cancel was sufficient.' " *J. J. Schaefer Livestock Hauling v. Gretna St. Bank*, 229 Neb. at 588, 428 N.W.2d at 190, quoting *Peterson v. Crown Financial Corp., supra.*

In *Peterson*, a lender incorrectly advised a maker, Peterson, that $499,658.85 in interest was due on his note, instead of the $860,837.57 which was actually due. Peterson paid $500,000 in interest, and a vice president of the lending institution sent him a letter thanking him for his payment and advising him that this payment represented the interest due at that time. Peterson executed a new note to replace the previous note. The lender stamped the first note "canceled" and returned it to Peterson. When the second note became due 3 years later, the lender attempted to collect the deficiency in interest from the previous note.

Construing Pennsylvania law, the U.S. Court of Appeals for the Third Circuit held that the first note was discharged as a matter of law. However, the court made it clear that this was a very narrow holding:

> In such a situation . . . the lending institution is deemed as a matter of law not to have intended that the old indebtedness survive. Subjective intent *under these circumstances* is irrelevant; *in the absence of clerical error or other mistake—neither of which is claimed here*—the lender cannot, consistent with the dictates of § 3-605, remain free to insist upon the terms of a cancelled note simply because it did not subjectively intend to alter its terms.

(Emphasis omitted.) (Emphasis supplied.) *Peterson v. Crown Financial Corp.*, 661 F.2d at 292. The court explicitly stated that an underlying obligation would not be discharged by

unintentional or mistaken cancellation.

Thus, both *J. J. Schaefer Livestock Hauling* and *Peterson* are distinguishable from the present case. In *J. J. Schaefer Livestock Hauling*, the notes were intentionally canceled and surrendered by bank officers who had the authority of the holder to discharge the indebtedness. They also had actual knowledge of the transactions and their legal ramifications. No clerical error was involved in *J. J. Schaefer Livestock Hauling*. In *Peterson*, there also was no claim of clerical error. In the case at bar, FirsTier had no intention to cancel the Tripletts' indebtedness. The claimed discharge was through clerical error by an individual who had no authority to do so.

Therefore, the issue before the court is whether FirsTier possessed the requisite intent to discharge the Tripletts' indebtedness, as evidenced by exhibit 7, by either cancellation or surrender of the note. Intent is a question of fact. *Columbia Sav. v. Zelinger*, 794 P.2d 231 (Colo. 1990); *Rubbelke v. Strecker*, 53 Wash. App. 20, 765 P.2d 314 (1988); *Reid v. Cramer*, 24 Wash. App. 742, 603 P.2d 851 (1979). As previously noted, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. *Young v. Dodge Cty. Bd. of Supervisors, ante* p. 1, 493 N.W.2d 160 (1992); *Ballard v. Giltner Pub. Sch.*, 241 Neb. 970, 492 N.W.2d 855 (1992); *K & K Farming v. Federal Intermediate Credit Bank*, 237 Neb. 846, 468 N.W.2d 99 (1991).

That exhibit 7 has never been fully paid is undisputed. Two of FirsTier's vice presidents testified that FirsTier had no intention to discharge exhibit 7 without payment in full, that no one with authority to discharge exhibit 7 had done so, and that the cancellation and surrender of the note was done through clerical error. The Tripletts offered no evidence to refute this testimony.

CONCLUSION

The district court's factual finding that the note, exhibit 7, was unintentionally released through clerical error is not clearly erroneous. We hold that the unintentional cancellation and surrender of a promissory note through clerical error do not discharge the maker of the note. The district court's judgment is

affirmed.

AFFIRMED.

GRANT, J., dissenting.

I respectfully dissent. When the promissory notes in question were made, and when payment of the notes was sought by litigation, Neb. U.C.C. § 3-605 (Reissue 1980) provided, in part: "(1) The holder of an instrument may even without consideration discharge any party . . . (b) by renouncing his rights by a writing signed and delivered or by surrender of the instrument to the party to be discharged."

The evidence shows that plaintiff renounced its rights against defendants "by a writing signed and delivered" in a letter to defendants, which letter enclosed defendants' note stamped "paid." The instrument in question was surrendered to defendants.

The majority recognizes that subsection (b) of § 3-605 did not specifically state that surrender of an instrument must be intentional in order to effect a discharge. The majority, however, adopts the view of commentators and other courts that " 'courts have glossed this section by requiring that surrender of the instrument be accompanied by an intent to discharge the party.' " When language in a statute is clear, I do not believe that courts should "gloss" legislative language to reach a goal which courts guess that the Legislature desired.

By adopting Neb. U.C.C. § 3-604 (Reissue 1992) to replace § 3-605 (Reissue 1980), the Legislature recognized that the earlier act did not give lending institutions the protection that the court has afforded such institutions in this case. Section 3-605, prior to adoption of § 3-604 (Reissue 1992), provided (without glossing) that the holder of a note could discharge the maker of the note in various ways that did not require intent. Plaintiff, the holder of the note in question, so acted, without any fraud or inducement by defendants.

To permit a bank to prevail in this litigation removes much certainty in banking transactions. The resulting uncertainty is bad for lenders and borrowers. All parties to promissory notes must now wonder if a bank means that a note is paid just because the bank says that it is paid.

I would reverse the judgment, but if the judgment must be

affirmed, I also question the amount of the judgment. At the time of trial, apparently, plaintiff contended that the principal sum of $5,717.52 was due. Most of any delay in repayment was caused specifically by plaintiff's actions in telling defendants that the note was paid. Under those circumstances, when the trial court did not reform or reinstate the note in question as plaintiff requested, I do not see how plaintiff is entitled to any interest as set out in the note. If judgment must be entered, it should be in the amount of $5,717.52. Granting interest on that judgment, of course, is different from, in effect, granting plaintiff prejudgment interest.

CAPORALE, J., dissenting.

I join in that portion of Judge Grant's dissent which declares that we ought not read into Neb. U.C.C. § 3-605 (Reissue 1980) an intent requirement which is absent from the statutory language. Indeed, we have piously pronounced that courts may not add language to the plain terms of a statute so as to either restrict or extend its meaning. See *Wittler v. Baumgartner*, 180 Neb. 446, 144 N.W.2d 62 (1966). The fact that courts of other jurisdictions saw fit to engage in acts of judicial legislation does not license us to do the same.

ROBERT HOWARD, APPELLANT, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLEE.

496 N.W.2d 862

Filed March 5, 1993. No. S-90-607.

1. **Theft: Motor Vehicles: Title.** A thief acquires no title in an automobile he or she steals and can transfer no title in and to such a vehicle.
2. **Theft: Motor Vehicles: Insurance.** A subsequent innocent purchaser of a stolen vehicle acquires an insurable interest in such vehicle.
3. **Jurors.** A party unsuccessfully challenging the seating of a venireperson as a juror who subsequently passes the venire panel for cause thereby merely indicates that subject to the previously made cause objection, he or she is ready to exercise his or her peremptory challenges.
4. _____. A party failing to challenge the seating of a venireperson as a juror, who subsequently passes the venire panel for cause, thereby waives any objection that might otherwise have existed to the seating of the unchallenged venireperson as a juror.

5. _____. A party who challenges a venireperson for cause but fails to exercise all of his or her peremptory challenges waives any objection to the seating of the challenged venireperson as a juror.
6. **Jurors: Insurance.** A venireperson who holds a policy of insurance issued by a mutual insurance company is not, by virtue of that fact alone, disqualified to sit as a juror if he or she can decide the case fairly solely upon the evidence presented at trial, irrespective of whether the owned policy is assessable or nonassessable.
7. **Actions: Insurance.** An insurer which gives one reason for its conduct and decision as to a matter of controversy cannot, after litigation has begun, defend upon another and different ground.
8. **Pleadings: Appeal and Error.** A request to amend pleadings is addressed to the discretion of the trial court; absent an abuse of discretion, the trial court's decision will be affirmed.
9. **Appeal and Error.** To be considered by an appellate court, error must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred.
10. **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.
11. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
12. **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 remains uncontroverted, the movant is entitled to judgment as a matter of law.
13. **Property: Insurance.** Whether a party has an insurable interest in property is ordinarily a question of fact to be resolved by the fact finder.

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

Lawrence E. Barrett and Clark J. Vanskiver, of Sodoro, Daly & Sodoro, for appellant.

Michael F. Coyle, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

Under a policy of insurance issued to him by the defendant-

appellee, State Farm Mutual Automobile Insurance Company, the plaintiff-appellant, Robert Howard, seeks to recover the damages he claims to have sustained as the result of an automobile fire. Pursuant to verdict, the district court entered judgment in favor of State Farm. Howard asserts the district court erred in (1) failing to strike certain venirepersons for cause, (2) permitting him to be improperly impeached, (3) failing to grant his motion to strike State Farm's amended answer, (4) failing to grant his motion to strike a portion of the aforesaid answer, and (5) overruling his pretrial motions for summary judgment. We affirm.

II. FACTS

Howard, a licensed automobile dealer, owned and operated a used car and repossession business in Omaha, Nebraska. By the time of trial, he had purchased and sold some 150 automobiles.

In the fall of 1988, Howard saw in the parking lot of an Omaha restaurant a 1964 red Corvette with out-of-state license plates. After a close look at the automobile, Howard entered the restaurant and asked two persons whom he believed to be the owners whether the vehicle was for sale. The two replied that it was not, but Howard nonetheless handed them a business card and asked them to call him should they ever wish to part with the vehicle.

Approximately 3 to 4 weeks later, Howard received a telephone call from a man who identified himself as "the fellow who had the Corvette in the restaurant in Omaha . . . ." The caller informed Howard that he had decided to sell the Corvette and asked Howard to pay for his expenses in bringing the vehicle to Nebraska. Howard told the man to save his receipts and Howard would reimburse him the costs for gas, food, and the like. Negotiations set the sale price at $9,500, which Howard intended to pay by check. The caller told Howard that he would be contacted upon the caller's arrival in Omaha. Howard did not know whether this was the same man with whom he had spoken at the restaurant.

At around 9:30 or 10 p.m. on October 1 or 2, 1988, Howard again received a call placed from a pay telephone near Howard's home. Howard told the male caller that Howard would drive up

to the corner and make a U-turn so that the caller could follow Howard back to his (Howard's) home.

The caller, who identified himself as "Jay," was accompanied by a woman who drove a separate automobile. The two followed Howard to his home, where they put the Corvette in Howard's garage, and Howard paid the couple $50 to $60 for food and gasoline expenses.

The woman identified herself as the owner of the vehicle, and that evening Howard gave the couple $6,500 in cash "for tax purposes" and, since they would not accept a check, told them that they would have to call him the next morning so that he could take them to his bank to give them the remainder of the purchase price in cash. The woman gave Howard a bill of sale, upon which she signed her name as "Kathern Carter." Her signature was witnessed and notarized by Howard's wife, who did not require that the woman establish her identity. The bill of sale recited that "Kathern Carter" had "sold one 1964 Corvette . . . to Bob Howard for the sum of $6500 on the 1st day of October, 1988."

The Corvette remained in Howard's garage for the evening. At approximately 10:30 the next morning, the couple contacted Howard and then drove to his home. Once there, the man rode with Howard to the latter's bank, where Howard said he cashed a check drawn by his wife for $3,000, which he gave to the man.

However, Howard at no time received the actual certificate of title to the automobile. Rather, he obtained only a duplicate photocopy of the title certificate, stamped "photocopy," which listed Kathern Carter as the owner of record. But on two Georgia registration receipts and a State Farm insurance identification card which were given to Howard when he purchased the vehicle, the name of the owner of record was spelled as "Kathrine Carter" on all three documents, but signed "Katherine Carter" on the back of one of the registration receipts. The insurance card, allegedly issued by State Farm, was later discovered by State Farm to be a forgery.

Howard acknowledged that the woman's first name was spelled on various documents in three different ways and that the signature on one of the Georgia registration receipts did not appear to be the same as that on the bill of sale he was given.

Howard nonetheless claimed he did not "study a signature or didn't even think about studying the signature. [He] just looked at the [vehicle identification] numbers and the Corvette and basically that was about it." Howard stated that it "[l]ooked like a proof of ownership to" him.

Howard testified that he did not get the original title because the couple "said they had money borrowed against the title, there was a lien filed against the original title. They had to go back and pay off the lien with the money that I paid them for the automobile." However, the document that Howard received did not have a lien noted on it. Howard expected "Jay" to mail the title to him, but never heard from him again. Indeed, after the purchase of the automobile, Howard had no contact with either the seller or her male companion.

Howard testified at trial that although he did not attempt to write the alleged owners of the Corvette, he did try to call them once, but to no avail. However, during his pretrial deposition, Howard represented that he had never attempted to call the man or woman after the sale. He could not remember what he did with the couple's telephone number, nor could he recall the area code or state in which they resided.

Howard described the automobile as "all original," except that the wheels had belonged to a later model Corvette. He wanted to buy the vehicle "[b]ecause it was a fantastic buy," considering he estimated its retail value to be "[a]nywhere between eighteen and $24,000" or "around $25,000, probably between 20 and $25,000." As Howard put it, "I was greedy because it's not every day I run across a deal like that. If I had a chance to do it again, I know I would do it again even if I had to suffer through all this."

Howard testified that when purchasing an automobile, he "usually select[ed] the [vehicle identification] number, g[o]t all the paperwork for the car, and . . . usually [paid] for it. Lots of times it takes them fifteen days to send [him] a title." When purchasing an automobile from an out-of-state seller, Howard's usual practice was to take the title to be inspected. However, it was not unusual in his business to buy a vehicle and wait for the title.

In his deposition, Howard stated:

> He said I'll send you—you know, it was a bullshit deal. I had never done business like that before from out of state, because usually I don't buy anything out of state unless I've got everything sitting right in front of me.
>
> But I didn't want it to slip through my fingers. That's the basic truth of it. I figured it was too good to be true.

On October 6, 1988, Howard made an application for insurance on the Corvette through his wife's State Farm agent, a person with whom Howard had not previously personally dealt.

Howard told the agent that he purchased the Corvette as "a pleasure car," planned to drive it less than 6,000 miles annually, and appraised its value at $21,000.

Howard claimed to have had no plans to sell the Corvette, wishing to keep it as an investment for his children's college education. He did not register the Corvette, even though he drove it on a number of occasions.

Howard had represented during his deposition that he kept the Corvette in his garage at all times unless he was driving it; at trial, he testified that the first night he left the vehicle parked outside his garage was the night of the fire. He claimed that he had purchased a new vehicle and had parked the Corvette in back of his office in a fenced-in lot with the intention of purchasing a tarpaulin to cover it.

Howard said that on or about the morning of January 2, 1989, his landlord told him that the Corvette had caught on fire the prior evening. Howard contacted the arson bureau because he felt that the fire was suspicious, as "there was no reason the car should ever have burned up." Howard told the investigating officer that the fire would have occurred somewhere between 3 p.m. on January 2 and 9 a.m. on January 3. The officer discovered two melted plastic containers behind the front seat of the charred Corvette. The containers had a "very strong smell of gasoline."

The investigating Nebraska State Patrol officer discovered that the vehicle identification numbers on the glove compartment, engine, and valve tappet cover had been altered. The alterations attempted to change the last three digits from "868" to "888." The identification number on the transmission had

not been altered, presumably because it was more difficult to reach than the others, and thus still read "868." The investigator was unable to locate the confidential identification number on the automobile's frame. The investigation revealed that the automobile had been stolen in October 1986 in Seminole County, Florida.

Howard filed an affidavit of vehicle loss or damage with State Farm, on which he listed the Corvette's purchase price as $9,600. Howard told a State Farm field claims representative and a claims specialist that he suspected a disgruntled former girl friend, a "fatal attraction" thing, may have been involved in the arson. Moreover, Howard told the claims representative that he paid $18,000 for the automobile. After inspecting the automobile and discovering the altered numbers, the claims representative recommended that State Farm contact the police, for this was a "hot" vehicle.

According to Howard, the photostatic copy of the title was in the Corvette when it burned, as was the receipt Howard claimed he obtained for the $3,000 cash he paid to the couple.

At trial, a body shop manager and Corvette aficionado testified that in his opinion the vehicle was valued at between $15,000 and $20,000 prior to the fire. He further opined that the repair costs on it after the fire would be $10,000 to $12,000, such that he would not repair it. Howard testified that in his experience as an automobile dealer, the Corvette was a "total loss."

State Farm notified Howard by two separate letters that his claim was denied because he did not have a legally enforceable insurable interest in the Corvette and refunded in full the premium Howard had paid.

III. ANALYSIS

Although it is axiomatic that a thief acquires no title in an automobile he or she steals and can transfer no title in and to such a vehicle, see *First Nat. Bank & Trust Co. v. Ohio Cas. Ins. Co.*, 196 Neb. 595, 244 N.W.2d 209 (1976), it appears that we have not heretofore determined whether a subsequent innocent purchaser for value of a stolen vehicle may nonetheless have an insurable interest in the vehicle.

Neb. Rev. Stat. § 44-103(12) (Reissue 1988) defines an insurable interest as meaning "every interest in property or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured." A number of courts, reasoning that an innocent subsequent purchaser of a stolen vehicle has a pecuniary interest in its continued existence and would suffer an economic loss from its theft or destruction, have concluded under similar statutes that such purchasers do indeed have an insurable interest. E.g., *Snethen v. Okl. U. of Farmers Ed. & Co-op. U.*, 664 P.2d 377 (Okla. 1983); *Webb v. Mutual Insurance*, 44 Colo. App. 210, 620 P.2d 38 (1980); *Butler v. Farmers Ins. Co. of Arizona*, 126 Ariz. 371, 616 P.2d 46 (1980).

We adopt that reasoning and thus hold that a subsequent innocent purchaser of a stolen vehicle acquires an insurable interest in such vehicle. Consequently, Howard had no insurable interest in the Corvette if he either stole it or purchased it under other than innocent circumstances.

1. Cause to Strike Venirepersons

In connection with the first assignment of error, Howard claims the district court mistakenly refused to strike for cause venirepersons who were holders of State Farm insurance policies of one kind or another.

Howard's voir dire inquiries revealed the presence of three current State Farm policyholders on the venire: Dudley (homeowners policy), Brannen (automobile policy), and Pirrone (automobile and homeowners policies). Howard unsuccessfully moved that each of these persons be stricken for cause. His contention was that such venirepersons were biased because State Farm policyholders pay a membership fee, are entitled to insure additional vehicles, have some, albeit limited, voting privileges at membership meetings, and share in the earnings and savings of State Farm. At the completion of his portion of the voir dire, Howard passed the venire panel for cause. He then exercised all three of his peremptory challenges so as to strike Pirrone and two other venirepersons; however, Dudley and Brannen were seated as jurors.

(a) Passing Venire Panel for Cause

Although we, in *Sayer Acres, Inc. v. Middle Republican Nat.*

Resources Dist., 205 Neb. 360, 363, 287 N.W.2d 692, 694 (1980), held that "[b]y passing the jurors for cause the appellants waived any objection to their selection as jurors," we have in other cases declared that a party who fails to challenge prospective jurors for disqualification *and* passes them for cause waives any objection to their selection as jurors. *Bittner v. Miller*, 226 Neb. 206, 410 N.W.2d 478 (1987); *Schroll v. Fulton*, 213 Neb. 310, 328 N.W.2d 780 (1983); *Regier v. Nebraska P. P. Dist.*, 189 Neb. 56, 199 N.W.2d 742 (1972). See, also, *State v. Green*, 236 Neb. 33, 458 N.W.2d 472 (1990), *overruled on other grounds, State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991); *State v. Harris*, 184 Neb. 301, 167 N.W.2d 386 (1969); *State v. Eggers*, 175 Neb. 79, 120 N.W.2d 541 (1963). *Regier* expressly notes that "[n]o challenge for cause by the defendant was overruled . . . ." 189 Neb. at 59, 199 N.W.2d at 744. Such also may have been the case in *State v. Eggers, supra*.

To obviate any confusion the *Sayer* language may create, we now specifically hold that a party unsuccessfully challenging the seating of a venireperson as a juror who subsequently passes the venire panel for cause thereby merely indicates that subject to the previously made cause objection, he or she is ready to exercise his or her peremptory challenges. But a party failing to challenge the seating of a venireperson as a juror, who subsequently passes the venire panel for cause, thereby waives any objection that might otherwise have existed to the seating of the unchallenged venireperson as a juror. It must also be remembered that a party who challenges a venireperson for cause but fails to exercise all of his or her peremptory challenges likewise waives any objection to the seating of the challenged venireperson as a juror. See, *State v. Ballard*, 237 Neb. 729, 467 N.W.2d 662 (1991); *State v. Green, supra*; *State v. McCoy*, 228 Neb. 178, 421 N.W.2d 780 (1988); *Curran v. Percival*, 21 Neb. 434, 32 N.W. 213 (1887).

(b) Mutual Policyholders

That holding requires that we here consider how mutual insurance policyholders are to be treated for purposes of jury service in actions in which the issuing mutual company is a party.

Challenges for cause are statutorily prescribed. Neb. Rev. Stat. § 25-1601 (Reissue 1989) exempts from jury service, among others, "persons . . . who are parties to suits pending in the district court of the county of his, her, or their then residence for trial at that jury panel." It is sufficient cause for challenge if a juror is deemed incompetent under § 25-1601. Neb. Rev. Stat. § 25-1609 (Reissue 1989).

The general rule is that a person is incompetent to serve as a juror in a case where he or she has a direct pecuniary interest in the result of the action.

Georgia appears to be the only jurisdiction which requires all mutual company policyholders to be struck for cause in actions in which the mutual company is a party. In *Weatherbee v. Hutcheson*, 114 Ga. App. 761, 152 S.E.2d 715 (1966), the Georgia Court of Appeals held:

> If the company is a mutual one in which the policyholder has an interest in the assets of the company, usually realized by way of dividends reducing the policy premium, it is proper to qualify the jurors as to whether any of them are policyholders or related within the prohibited degree to policyholders. . . . But if it should appear that the company is a stock company the inquiry would be irrelevant, for in that event the policyholder has nothing more than a contract with the company, giving him no interest in its assets, and he is no more disqualified than would be a depositor in a bank that is a party to litigation.

Weatherbee at 765, 152 S.E.2d at 718-19.

The first question is whether State Farm is a true mutual company. Howard asserts that State Farm's use of the term "Mutual" in its name is sufficient to prove that it is organized as a mutual company. State Farm made an admission, of sorts, when it stated during voir dire examination that "State Farm is a mutual company so it's not really a corporation . . . ." An examination of Howard's State Farm insurance policy reveals that State Farm did hold itself out to be a mutual company. This, of course, is not the insurance policy of the questioned venirepersons. During his voir dire, Howard did not delve into the terms of the venirepersons' policies with State Farm. Thus,

it is unclear whether the policies of the venirepersons in question were mutual policies. The failure of the record to establish the facts in that regard is fatal to Howard's claim.

Nonetheless, we analyze the remaining issues in this regard in order to give guidance in future cases.

At this juncture we note that in some jurisdictions a distinction is made between assessable and nonassessable mutual policies. An assessable insurance policy is defined as one under which an insured is liable for additional premium if the losses are unusually large. Black's Law Dictionary 116 (6th ed. 1990). In these jurisdictions, policyholders of a mutual insurance company subject to being assessed for losses incurred by the company are deemed to be incompetent to serve as jurors in an action to which the mutual insurance company issuing the policy is a party. However, where the challenged venireperson is a policyholder in a nonassessable mutual insurance company, incompetency to serve is not presumed.

Illustrative is the reasoning present in *Kendall v. Prudential Insurance Co. of America*, 327 S.W.2d 174 (Mo. 1959). Therein, the Supreme Court of Missouri was called upon to determine whether the trial court's failure to sustain plaintiff's challenges for cause of four venirepersons who were policyholders with defendant insurance company constituted reversible error. In affirming the trial court's ruling, the *Kendall* court reasoned:

> While we agree that an employee or agent of a defendant . . . is subject to challenge for cause, we also agree . . . that a challenge for cause is not required to be sustained as to every kind of policyholder under all circumstances. In view of modern widespread use of all kinds of insurance, such a rule would be unreasonable at least as to those with nonassessable policies or those who do not participate in policy dividends.

Kendall, supra at 177-78. Accord, *George v. Howard Const. Co.*, 604 S.W.2d 685 (Mo. App. 1980); *State Farm Fire & Casualty Co. v. Hornback*, 217 Kan. 17, 535 P.2d 441 (1975); *Kanzenbach v. S.C. Johnson & Son, Inc.*, 273 Wis. 621, 79 N.W.2d 249 (1956); *Fedorinchik v. Stewart*, 289 Mich. 436, 286 N.W. 673 (1939).

It seems to us, however, the better rule is one which depends upon a particular venireperson's ability to decide the case fairly solely upon the evidence presented at trial, irrespective of the kind of policy he or she owns. See, e.g., *Good v. Farmers Mut. Ins. Co.*, 265 Wis. 596, 62 N.W.2d 425 (1954).

Any dividends a typical mutual policyholder would receive are presumably negligible, and such policyholder's interest would in most instances simply be too remote and minute to overbalance a sense of justice to the litigants. To say that because a mutual policyholder shares in the earnings and savings of a mutual company the policyholder is deemed incompetent is spurious. In one sense, all holders of insurance policies share in the earnings and savings of the insurers, be the insurers organized as stock or mutual companies, for a lower loss experience results in lower premiums, regardless of the name we append to the structure through which the business of apportioning and distributing losses is accomplished.

We hold that even the holder of an assessable policy issued by a mutual insurance company named as a party in an action may serve as a juror if the policyholder can decide the case fairly solely upon the evidence presented at trial. Thus, the district court did not abuse its discretion in refusing to strike for cause the three challenged venirepersons.

2. Impeachment

In his second assignment of error, Howard alleges that the trial court incorrectly permitted State Farm to impeach him at trial without laying proper foundation.

In the circumstances presented, it is irrelevant whether a proper foundation was laid for Howard's impeachment, for the inconsistent statements of a party are properly admissible as rebuttal evidence. *Fortin v. Hike*, 205 Neb. 344, 287 N.W.2d 681 (1980).

The use of inconsistent statements is controlled by statute. Neb. Rev. Stat. § 27-613 (Reissue 1989) provides:

> (1) In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown or its contents disclosed to him at that time, but on request the same shall be shown or disclosed to

opposing counsel.

(2) Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in subdivision (4)(b) of section 27-801.

Neb. Rev. Stat. § 27-801(4)(b) (Reissue 1989) defines, among other things, a party's own statement as not being hearsay. Thus, the foundational requirement of § 27-613, that a witness to be impeached be given an opportunity to explain or deny an apparently inconsistent statement, does not apply to admissions or statements offered against a party to the action, if the admissions or statements were made by that party. *Hyde v. Cleveland*, 203 Neb. 420, 279 N.W.2d 105 (1979). See *Fortin v. Hike, supra*. This has long been the rule with regard to admissions and statements of a party, predating this state's adoption of its present evidence code. See, e.g., *Bartlett v. Cheesebrough*, 32 Neb. 339, 49 N.W. 360 (1891).

McCormick on Evidence § 37 at 124-25 (4th ed. 1992) helps raze Howard's argument.

> If a party takes the stand as a witness, and the adversary desires to use a prior inconsistent statement of the witness, the statement is receivable in two aspects, first as the admission of the opposing party, and second, as an inconsistent statement to impeach the witness. In the first aspect, it is relevant evidence upon the fact issues; in the second aspect, it is not. In jurisdictions requiring traditional foundation questions for impeachment, the requirement is almost universally held inapplicable. There is less danger of surprising a party than a witness, and the party will have ample opportunity for denial or explanation after the inconsistent statement is proved. In these jurisdictions the courts on occasion may inadvertently assume that the requirement applies to the party-witness. Sometimes courts have imposed the requirement if the proponent offers the statement only for

impeachment, and one court held the judge has discretion to impose the requirement of a foundation question as prerequisite to proof of a party-witness admission. These niggling qualifications seem hardly worth their salt and in jurisdictions which otherwise require the foundation question the sensible practice is the simple one of dispensing with the "foundation" entirely in respect to parties' admissions.

Accordingly, the district court did not err in permitting the use of Howard's inconsistent pretrial statements.

3. Failure to Strike Amended Answer

In his third assignment of error, Howard urges us to find that the district court erred in failing to grant his motion to strike State Farm's amended answer.

Shortly before trial, State Farm, pursuant to leave, amended its answer by alleging that Howard should have known that the Corvette was stolen and that based upon the facts and circumstances surrounding the sale, Howard had a duty to make further inquiry regarding the seller's status as rightful owner. Howard contends the amendments should not have been permitted, as State Farm was estopped from changing its position.

As Howard correctly states in his brief, it has long been the rule in this state that an insurer which gives one reason for its conduct and decision as to a matter of controversy cannot, after litigation has begun, defend upon another and different ground. *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 406 N.W.2d 640 (1987); *Mutual Benefit Life Ins. Co. v. Chisholm*, 213 Neb. 301, 329 N.W.2d 103 (1983); *Hamblin v. Equitable Life Assurance Society*, 124 Neb. 841, 248 N.W. 397 (1933); *Continental Ins. Co. v. Waugh*, 60 Neb. 348, 83 N.W. 81 (1900). However, unlike the situation presented here, the cases applying this rule dealt with circumstances whereunder an insurer altered its position in an attempt to defend upon an entirely separate and different ground.

In *Chisholm, supra*, for example, the insurer filed its original petition seeking to rescind the insured's policy on the ground of misrepresentation. The insured allegedly misrepresented that

he had received medical treatment beyond the answer of routine examinations given on his application for group life insurance. The insurer subsequently amended the petition to include a new ground of misrepresentation by the insured in his failure to disclose his alleged alcoholism. On appeal, we upheld the trial court's granting of the insured's motion to strike the amendment because "on no occasion prior to the second amended petition did [the insurer] ever state that the insured's misrepresentation of alcoholism was a basis for its denial of the claim." *Chisholm, supra* at 305, 329 N.W.2d at 105.

Here, State Farm's amendments did no more than explicate the defense asserted in its letters of denial to Howard and in its original answer. Indeed, the amendments went to the heart of the matter, i.e., whether Howard had an insurable interest in the Corvette; more specifically, whether he himself stole the vehicle, and if not, whether he was an innocent subsequent purchaser for value.

A request to amend pleadings is addressed to the discretion of the trial court. Absent an abuse of discretion, the trial court's decision will be affirmed. *Bittner v. Miller*, 226 Neb. 206, 410 N.W.2d 478 (1987); *First Nat. Bank v. Schroeder*, 218 Neb. 397, 355 N.W.2d 780 (1984). We cannot under the circumstances say the district court abused its discretion in denying Howard's motion to strike. Howard's third assignment of error is without merit.

4. Failure to Strike Characterization

Howard contends in the fourth assignment of error that the district court erred in failing to grant his motion to strike a characterization in the amended answer.

The challenged characterization related to an automobile buyer's duty to investigate. Aside from Howard's discussion with regard to the trial court's refusal to grant Howard's motion to strike State Farm's amended answer, this particular assignment of error is not discussed in his brief. To be considered by an appellate court, error must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred. *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992). Therefore, this assignment of error will

not be considered.

5. SUMMARY JUDGMENT

In his fifth and final assignment of error, Howard asserts the district court erred in overruling his pretrial motions for summary judgment.

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. *Sarpy County v. City of Springfield*, 241 Neb. 978, 492 N.W.2d 566 (1992). Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Overmier v. Parks, ante* p. 458, 495 N.W.2d 620 (1993); *Holden v. Schwer, ante* p. 389, 495 N.W.2d 269 (1993). 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 remains uncontroverted, the movant is entitled to judgment as a matter of law. *Alder v. First Nat. Bank & Trust Co.*, 241 Neb. 873, 491 N.W.2d 686 (1992).

Howard filed two motions for summary judgment before trial commenced; however, so far as we can determine from the record, a hearing was held only on the first one filed. Be that as it may, resolution of this case centered on but one issue: whether Howard acquired an insurable interest in the Corvette. Whether a party has an insurable interest in property is ordinarily a question of fact to be resolved by the fact finder. *Crowell v. Delafield Farmers Mut.*, 453 N.W.2d 724 (Minn. App. 1990), *aff'd* 463 N.W.2d 737.

At no time did Howard present any physical evidence of a title in his name; his testimony and that of his wife concerning the manner in which the vehicle came into Howard's possession must be viewed in light of the suspicious nature of the transaction they described and of the fire itself. Thus, for the reasons mentioned in the introductory portion of part III of

this opinion, the inferences to be drawn from those occurrences present genuine issues of material fact as to whether Howard acquired an insurable interest in the Corvette. The district court therefore correctly denied Howard a summary judgment.

IV. JUDGMENT

The record failing to sustain any of Howard's assigned and discussed errors, the judgment of the district court is, as noted in part I above, affirmed.

AFFIRMED.

FIRST UNITED BANK OF BELLEVUE, A NEBRASKA BANKING CORPORATION, APPELLANT, V. FIRST AMERICAN TITLE INSURANCE COMPANY, APPELLEE.

496 N.W.2d 474

Filed March 5, 1993. No. S-90-671.

1. **Summary Judgment: Appeal and Error.** In appellate review of summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Contracts: Insurance: Title: Liability.** A title insurance policy is a contract of indemnity and not of guaranty, and unless and until an actual loss occurs a title insurer incurs no liability.
4. **Mortgages.** A subsequent mortgagee's security is limited to the mortgagor's equity in the property, that is, the value of the mortgaged property in excess of the amount of the prior mortgages.
5. **Estoppel.** An equitable estoppel rests largely on the facts and circumstances of the particular case, and consequently any attempted definition usually amounts to no more than a declaration of an estoppel under those facts and circumstances. The following, however, may be ventured as the sum of all cases: That a person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has, in good faith, relied thereon. Such an estoppel is founded on morality and justice, and especially concerns conscience and equity.

6. **Estoppel: Insurance.** As a general rule, the doctrine of estoppel may not be used to bring within the coverage of a policy risks expressly excluded therefrom.
7. _____: _____. A widely recognized exception to the general estoppel rule is that when an insurance company assumes the defense of an action against its insured, without reservation of rights, and with knowledge, actual or presumed, of facts which would have permitted it to deny coverage, it may be estopped from subsequently raising the defense of non-coverage.
8. **Estoppel: Insurance: Proof.** The exception to the general estoppel rule applies when an insured is able to show (1) that the insurer had sufficient knowledge of facts or circumstances indicating non-coverage, (2) that the insurer assumed or continued defense of the insured without obtaining an effective reservation of rights agreement, and (3) that the insured suffered some type of harm or prejudice.
9. **Insurance: Liability: Estoppel: Waiver.** Reservation of rights is a means by which prior to a determination of the liability of the insured, the insurer seeks to suspend the operation of waiver and estoppel. When coverage is in doubt, the insurer may offer to defend the insured, reserving all of its policy defenses in case the insured is found liable. Upon such notification the insured may either accept the reservation of rights and allow the company to defend or it may reject the reservation of rights and take over the defense itself.
10. **Insurance: Conflict of Interest.** The policy reasons underlying reservation of rights are two-fold: (1) to allow an insured to more ably protect its own interests by retaining control over its own defense, and (2) to avoid conflicts of interest between the insurer and its insured.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and WRIGHT, Judges, on appeal thereto from the District Court for Sarpy County, GEORGE A. THOMPSON, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Daniel D. Walsh, of Walsh, Fullenkamp & Doyle, for appellant.

Brian D. Nolan and Catherine Shugrue-Schaffner, of Hansen, Engles & Locher, P.C., for appellee.

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

FAHRNBRUCH, J.

The issue in this appeal is whether First American Title Insurance Company (American Title), is estopped from denying liability under its title policy because it defended, without a reservation of rights, the policyholder's interest in the

covered real estate.

The district court for Sarpy County entered summary judgment in favor of American Title and against its policyholder, First United Bank of Bellevue (First United). The Nebraska Court of Appeals affirmed the trial court. It found that First United had no real interest in the property insured by American Title, and therefore sustained no damage and no loss. See *First United Bank v. First Am. Title Ins. Co.*, 1 NCA 1158 (1992). Further review was granted by this court.

We reverse the Court of Appeals' decision and direct that court to reverse the district court and to remand the cause to the district court with instruction to conduct further proceedings not inconsistent with this opinion.

First United assigns as error in this court that the Court of Appeals erred (1) in holding that First United suffered "no actual loss" under the policy, (2) in failing to hold that American Title was estopped to assert the defense of no actual loss because American Title accepted First United's tender of defense without reservation of rights, (3) in failing to recognize that First United's insured deed of trust would have had full value by virtue of an offer from a third party, and (4) in failing to reverse the district court's order of summary judgment because there existed genuine issues of material fact.

STANDARD OF REVIEW

In appellate review of summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Properties Inv. Group v. JBA, Inc., ante* p. 439, 495 N.W.2d 624 (1993).

Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Properties Inv. Group v. JBA, Inc., supra.*

FACTS

The record shows that on December 11, 1986, American

Title issued a title insurance policy to First United in the principal amount of $33,000. The policy insured a deed of trust given by Kenneth L. Hindman and Janette A. Hindman, as Trustors, in favor of John Daum, Trustee, and First United as Beneficiary, in the amount of $49,423.98. This deed of trust, dated November 24, 1986, was recorded December 11, 1986, in the Office of the Recorder, Dallas County, Iowa. The property covered was a 10 acre tract, referred to in the proceedings as Parcel A.

Under the policy, American Title insured First United against loss or damage by reason of:

> 2. any defect in or lien or encumbrance on such title;
>
> . . . .
>
> 6. the priority of any lien or encumbrance over the lien of the insured mortgage. . . .

The policy, however, excluded the following from its coverage:

> 3. defects, liens, encumbrances, adverse claims, or other matters . . . . (c) resulting in no loss or damage to the insured claimant . . . .

The title insurance policy stated that the property was subject to the following superior liens: (1) a mortgage held by the Bank of Bellevue for $60,865.82, which was recorded January 6, 1986, and (2) an earlier mortgage to First United for $58,885.10, recorded April 28, 1986.

On February 16, 1988, Southwest Bank and Trust of Omaha (Southwest), a creditor not listed in the policy, filed a foreclosure action in the district court for Dallas County, claiming that it had a lien on the property superior to all other liens on the property.

On February 26, 1988, First United demanded that American Title perform its duty under the policy and defend First United in the foreclosure action. First United also demanded that American Title pay the full amount of the policy in the event that Southwest prevailed in its foreclosure action.

On March 2, 1988, Joseph McNamara, American Title's regional vice president and legal counsel in Omaha, accepted First United's tender of defense. McNamara hired Iowa counsel Gregory Hulse to defend First United in the foreclosure action. American Title did not enter into any reservation of rights with

First United, nor did it send notice of such reservation.

On April 6, 1988, Bank of Bellevue, which also held liens on Parcel A and other property owned by the Hindmans, offered to sell its interest in Parcel A, the adjacent property (Parcel B), and a fourplex in Des Moines, Iowa, to First United for $70,708.71. On April 25, 1988, Robert Doyle, secretary of First United, wrote to Hulse and forwarded the offer which had been received from Bank of Bellevue. Doyle conceded that Parcel A was "not worth $60,000.00, much less the $72,000.00 lien of the Southwest Bank and Trust Company." However, Doyle informed Hulse that

> [i]n our opinion, the value of the three properties sufficiently exceeds the $70,708.71 in an amount sufficient to provide the First United Bank with an equity of approximately $35,000.00 for the Note and Deed of Trust for which the Title Insurance was written. In our opinion, the security is not there if the property being foreclosed by the Southwest Bank and Trust Company is removed from the package.

On August 2, 1988, the district court for Dallas County entered a decree of foreclosure which foreclosed all of First United's rights in the property. The district court made a finding that on September 13, 1985, Southwest had filed in the Office of the Recorder in Dallas County an acknowledgement and an assignment of rents on Parcel A. It held that these filings put First United on notice of Southwest's deed of trust filed on July 31, 1987. The decree further found that Southwest's lien was prior and superior to First United's and that Southwest had a lien in judgment for the amount of $68,207.27, plus interest and costs.

On October 5, 1988, pursuant to the decree of foreclosure, the sheriff of Dallas County sold Parcel A to Southwest Bank for the sum of $55,000.

On March 14, 1989, American Title sent a letter to First United denying its claim under the title insurance policy. The letter stated two reasons for denial of the claim: (1) First United did not suffer a loss, and (2) First United had knowledge of a certain title search prepared by American Title's agent, Record Data of Nebraska, Inc., which title search was attached to the

March 14, 1989, letter. This title search had been prepared on April 8, 1986, and showed the interests held by Southwest at that time.

On June 20, 1989, First United sued American Title, requesting judgment for $33,000, plus prejudgment interest and attorney fees. American Title answered alleging that First United had suffered no loss or damage. First United replied, alleging that American Title was equitably estopped from denying coverage under the policy and from asserting any of its nine affirmative defenses because American Title had unconditionally accepted First United's tender of defense in the foreclosure action, and because American Title had failed to provide First United with timely notice of its intention to disclaim liability. The trial court entered summary judgment in favor of America Title and against First United.

On appeal, the Nebraska Court of Appeals rejected First United's estoppel argument and affirmed the order of the district court. This court granted First United's petition for further review, limited to the issue of whether American Title is estopped from asserting its defense of no actual loss under the policy of title insurance.

ANALYSIS

American Title correctly contends that a title insurance policy is a contract of indemnity and not of guaranty, and that unless and until an actual loss occurs a title insurer incurs no liability. See, *Blackhawk Prod. v. Chicago Ins.*, 144 Wis. 2d 68, 423 N.W.2d 521 (1988); *Grunberger v. Iseson*, 429 N.Y.S.2d 209, 75 A.D.2d 329 (1980). We first consider whether First United could show a loss resulting from Southwest's unexpected lien. This First United could not do, because even without the Southwest lien, Parcel A would have produced almost $70,000 less than needed to satisfy the mortgages ahead of First United's mortgage.

It is uncontroverted that Parcel A had not only the "surprise" superior lien of Southwest Bank attached to it, but two additional liens which were prior in time to the interest at bar held by First United. Parcel A sold for $55,000 at the sheriff's sale to satisfy Southwest's $68,207.27 lien. An affidavit

of a real estate appraiser indicated that the fair market value of the property never exceeded $50,000.

The four liens on the property totalled some $237,382.17. First United's lien at issue was the last of the four, with $187,958.19 of liens ahead of it, all of which could not be satisfied from a parcel of land worth only $50,000.

The total value of the liens superior to First United's obviously far exceeded the value of the property in question. Even excluding Southwest's surprise lien there were two liens, totalling $119,750.92, which held positions superior to First United's lien at issue. A subsequent mortgagee's security is limited to the mortgagor's equity in the property, that is, the value of the mortgaged property in excess of the amount of the prior mortgages. See, *Blackhawk Prod. v. Chicago Ins., supra*; *Ferrell v. Inter-County Title Guaranty & Mtg. Co.*, 213 So. 2d 518 (Fla. App. 1968). Hence, First United had no real interest in the property insured by American Title, and therefore suffered no damage as a result of the omission of the interest of Southwest Bank in the title policy.

However, that does not totally resolve this case. First United contends that American Title is estopped from denying coverage because it undertook First United's defense in the foreclosure action without a reservation of rights, to First United's prejudice. The doctrine of equitable estoppel was discussed in *National Union Fire Ins. Co. v. Bruecks*, 179 Neb. 642, 653-54, 139 N.W.2d 821, 828-29 (1966), in which this court stated:

> " '[A]n equitable estoppel rests largely on the facts and circumstances of the particular case, and consequently any attempted definition usually amounts to no more than a declaration of an estoppel under those facts and circumstances. * * * The following, however, may be ventured as the sum of all cases: That a person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has, in good faith, relied thereon. Such an estoppel is founded on morality and justice, and especially concerns conscience and equity.' . . . "

As a general rule, the doctrine of estoppel may not be used to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom. See, e.g., *Nieves v. Intercontinental Life Ins. Co. of P.R.*, 964 F.2d 60 (1st Cir. 1992); *Pennsylvania Nat. v. Kitty Hawk Airways*, 964 F.2d 478 (5th Cir. 1992); *City of Carter Lake v. Aetna Cas. and Sur.*, 604 F.2d 1052 (8th Cir. 1979); *Braun v. Annesley*, 936 F.2d 1105 (10th Cir. 1991); *Midwest Office Tech. v. Am. Alliance Ins.*, 437 N.W.2d 555 (Iowa 1989); *Texas Farmers Ins. Co. v. McGuire*, 744 S.W.2d 601 (Tex. 1988); *Hoeft v. United States Fire Ins. Co.*, 153 Wis. 2d 135, 450 N.W.2d 459 (1989); *Tradewinds Constr. v. Newsbaum*, 606 So. 2d 708 (Fla. App. 1992); *Lumber Transport v. International Indem.*, 203 Ga. App. 588, 417 S.E.2d 365 (1992); *Egnatz v. Medical Protective Co.*, 581 N.E.2d 438 (Ind. App. 1991); *Topeka Tent & Awning Co. v. Glen Falls Ins. Co.*, 13 Kan. App. 2d 553, 774 P.2d 984 (1989); *Holland Corp., Inc. v. Maryland Cas. Co.*, 775 S.W.2d 531 (Mo. App. 1989). Therefore it would seem that the estoppel argument would be of no avail to First United, since the policy expressly excludes coverage unless a loss can be demonstrated.

A widely recognized exception to the general estoppel rule is that when an insurance company assumes the defense of an action against its insured, without reservation of rights, and with knowledge, actual or presumed, of facts which would have permitted it to deny coverage, it may be estopped from subsequently raising the defense of non-coverage. See, e.g., *Pennsylvania Nat. v. Kitty Hawk Airways, supra*; *City of Carter Lake v. Aetna Cas. and Sur., supra*; *Sauer v. Home Indem. Co.*, 841 P.2d 176 (Alaska 1992); *American General v. Progressive Cas.*, 110 N.M. 741, 799 P.2d 1113 (1990); *American Home Assur. v. Ozburn-Hessey*, 817 S.W.2d 672 (Tenn. 1991); *Stonewall Ins. v. Palos Verdes Estates*, 7 Cal. App. 4th 309, 9 Cal. Rptr. 2d 663 (1992); *Doe v. Illinois St. Med. Inter-Insurance*, 234 Ill. App. 3d 129, 599 N.E.2d 983 (1992); *Admiral Ins. v. Columbia Ins.*, 194 Mich. App. 300, 486 N.W.2d 351 (1992); *Farmers Texas County Ins. Co. v. Wilkinson*, 601 S.W.2d 520 (Tex. Civ. App. 1980).

The exception to the general estoppel rule applies when an insured is able to show (1) that the insurer had sufficient

knowledge of facts or circumstances indicating non-coverage, (2) that the insurer assumed or continued defense of the insured without obtaining an effective reservation of rights agreement, and (3) that the insured suffered some type of harm or prejudice. See *Pennsylvania Nat. v. Kitty Hawk Airways, supra.*

Applying this test to the facts of this case, First United must first show that American Title had sufficient knowledge of facts or circumstances which would have indicated that First United's claim was not covered under the policy of title insurance issued by American Title. We first note that American Title seeks to impute knowledge of the existence of Southwest's lien to First United based upon a report by Record Data of Nebraska, Inc., an agent of American Title. It would seem reasonable, therefore, to impute the same knowledge to American Title.

Moreover, the record shows that on March 11, 1988, one of American Title's attorneys of record sent a letter to Hulse indicating that an investigation of the case had already been done at that time, that American Title was aware of Record Data's 1986 report showing Southwest's interests, and that Record Data was American Title's agent. American Title was therefore aware of facts constituting a ground for non-coverage by March 11, 1988, at the latest. Accordingly, American Title apparently had both constructive and actual knowledge of facts which would have permitted it to deny coverage at the time it assumed the defense of First United, or very shortly thereafter. This satisfies the first prong of the test.

Under the second prong of the test, First United must show that American Title assumed or continued the defense of the foreclosure action against First United without an effective reservation of rights agreement.

It is uncontroverted that American Title failed to obtain a reservation of rights agreement from First United. In addressing First United's estoppel argument, the Court of Appeals stated:

> [W]e find that whether the Title Company was estopped to deny coverage *is irrelevant* because it assumed [First United's] defense without sending [First United] a

> reservation of rights. Estoppel may not be used to bring the claim within the terms of the policy, where it is clear that no loss existed.

(Emphasis supplied.) *First United Bank v. First Am. Title Ins. Co.*, 1 N.C.A. at 1166.

Although the Court of Appeals correctly stated the general rule of estoppel, we disagree that it was "irrelevant" that American Title assumed First United's defense without notifying First United of a reservation of rights. On the contrary, this case exemplifies the precise situation in which a reservation of rights is essential to protect the interests of both the insured and the insurer.

> Reservation of rights is a means by which prior to a determination of the liability of the insured, the insurer seeks to suspend the operation of waiver and estoppel. When coverage is in doubt, the insurer may offer to defend the insured, reserving all of its policy defenses in case the insured is found liable. Upon such notification the insured may either accept the reservation of rights and allow the company to defend or it may reject the reservation of rights and take over the defense itself.

City of Carter Lake v. Aetna Cas. and Sur. Co., 604 F.2d at 1060, n.7. The policy reasons underlying reservation of rights are two-fold: (1) to allow an insured to more ably protect its own interests by retaining control over its own defense, and (2) to avoid conflicts of interest between the insurer and its insured. *Id.*

The record shows, and American Title does not dispute, that First United had an opportunity to protect its own interests by accepting an offer from the Bank of Bellevue. Even though First United notified American Title of the offer, American Title did not endeavor to negotiate on behalf of its insured, nor was American Title prompted to send any reservation of rights at that point. It is obvious that, by relying on American Title's unconditional defense, First United was denied the opportunity to control its own defense and protect its own interests.

Moreover, the record indicates that, while American Title was controlling First United's defense, American Title was collecting data which would only be relevant in litigation

against its insured. For example, American Title requested First United to explain how it had suffered a loss under the policy. This was not an issue in Southwest's foreclosure action against First United, but is a central issue in American Title's denial of coverage to its insured and First United's resulting breach of contract suit. Such conduct on the part of American Title at least raises the inference of divided loyalties.

American Title's failure to obtain a reservation of rights agreement from First United, far from being irrelevant, was in clear violation of the policy considerations underlying such agreements. Thus, the second prong of the test is satisfied.

Finally, First United must show that it was harmed or prejudiced in some way by American Title's actions. If First United has not been prejudiced, there is no ground for the assertion of estoppel.

The Nebraska Supreme Court addressed the issue of prejudice to the insured in *National Union Fire Ins. Co. v. Bruecks, supra*, a case somewhat similar to the present one. In *Bruecks*, a young man was injured when a hunting companion's gun went off in the car they were occupying. National Union had issued a personal liability policy covering the companion for $50,000. After agreeing to defend the policy holder, and doing so for some 17 months, National Union denied coverage claiming that accidents of the nature of the shooting were excluded by the policy. The trial court held that National Union was estopped to deny coverage.

This court rejected National Union's contention that estoppel was inappropriate because there was no evidence that the insured acted or failed to act to his detriment in reliance upon National Union's acts. Instead, the court stated that "the *assumption of complete control* of the matter for a period of 17 months, *with the consequent need of cooperation* with National under the terms of the policy, *in itself constituted a sufficient showing of prejudice*." (Emphasis supplied.) *Id.* at 654, 139 N.W.2d at 829. The court concluded that National Union's conduct "[was] a most persuasive argument for the operation of the doctrine of equitable estoppel. . . . [and] that by its conduct National construed the policy to provide coverage. . . ." *Id.* at 653, 139 N.W.2d at 828.

Similarly, we now hold that American Title's assumption of complete control of a matter involving a possible claim for over 12 months, with the consequent need of cooperation under the terms of the policy, and without a reservation of rights agreement, constitutes a sufficient showing of prejudice as a basis for urging estoppel. Furthermore, American Title's conduct deprived First United of the opportunity to otherwise protect its interests by entering into negotiations with Bank of Bellevue.

First United has satisfied all three requirements for application of the doctrine of estoppel to American Title's defense of non-coverage under the policy. Moreover, the facts of this case, like those in *Bruecks*, present a highly persuasive argument for the operation of the doctrine of estoppel. We therefore adopt the exception to the general rule of estoppel and hold that when an insurance company assumes the defense of an action against its insured, without reservation of rights, and with knowledge, actual or presumed, of facts which would have permitted it to deny coverage, it may be estopped from subsequently raising the defense of non-coverage. Based on the recited uncontroverted facts, American Title is estopped from raising the defense of non-coverage to First United's suit on the policy.

CONCLUSION

Because of our holding that First United was necessarily prejudiced by American Title's conduct, it was error for the district court to enter summary judgment in favor of American Title. By its conduct, American Title has construed its policy to provide coverage to First United. The only genuine issue of material fact, then, is the extent of First United's damages, if any, as a result of its lost opportunity to cover or mitigate its loss through negotiations with the Bank of Bellevue. We therefore reverse the Court of Appeals, with directions to reverse the district court, and to remand the cause for trial on the issue of First United's damages. Pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1988), the appellee is ordered to pay $3800 toward appellant's attorney fees.

REVERSED AND REMANDED WITH DIRECTIONS.

SHARON BLAIR, APPELLANT, V. PHYSICIANS MUTUAL INSURANCE COMPANY, APPELLEE.

496 N.W.2d 483

Filed March 5, 1993. No. S-90-733.

1. **Employment Contracts: Termination of Employment.** When employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause it chooses without incurring liability.
2. _____: _____. There are certain exceptions to the rule concerning an employment contract that is terminable at will; for example, when discharge from employment infringes on an employee's constitutionally protected interest or when a statute or contract prohibits an employer from discharging an employee for a particular reason or without cause.
3. **Termination of Employment.** Unless constitutionally, statutorily, or contractually prohibited, an employer may terminate an at-will employee at any time with or without reason and not be liable for its actions.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Lowell R. Johnson and Dennis E. Martin, of Martin & Martin, P.C., for appellant.

Terrence D. O'Hare and J. Scott Paul, of McGrath, North, Mullin & Kratz, P.C., for appellee.

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

SHANAHAN, J.

Sharon Blair brought a contract action against Physicians Mutual Insurance Company (PMI), claiming that PMI had breached its employment contract with Blair. After a verdict for PMI, Blair appealed to this court.

STANDARD OF REVIEW

"A verdict in a civil case will be upheld on appeal unless a jury's finding, necessary for the verdict, is clearly erroneous." *Williams v. Monarch Transp.*, 238 Neb. 354, 357, 470 N.W.2d 751, 754 (1991).

In reviewing sufficiency of evidence to sustain a verdict, an appellate court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh

evidence concerning factual questions submitted for disposition by a jury. A verdict in a civil case must be sustained if the evidence, viewed and construed most favorably to the prevailing party, is sufficient to support that verdict. In an appellate review of a verdict, the prevailing party is entitled to every reasonable inference deducible from the evidence. See, *Williams v. Monarch Transp., supra*; *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987).

BACKGROUND

Blair began working for PMI under an oral contract in 1973. At that time, she received an employee manual which supplied general information about company policies, but which did not contain any company procedure for resolution of employee grievances or set out a procedure for disciplining employees or terminating their employment.

In 1985, Blair received a new employee manual which, on its first page, stated:

> NOTICE
>
> 1. This manual is neither a contract of employment, nor does it express or imply terms of employment. Rather it is a compilation of rules, regulations, policies, procedures and guidelines assembled to orient and assist new employees at PMIC/PLIC with items that affect their daily working relationship, and to reacquaint current employees with the same information.
>
> . . . .
>
> 3. The information contained herein is not to be construed in any manner to be either an expressed or implied term of employment, or a practice, procedure, or benefit of any kind or nature that you are guaranteed as an employee of PMIC/PLIC.
>
> 4. The employer/employee relationship at PMIC/PLIC is an employment at will relationship. Employees may leave at any time and/or may be terminated without cause.

On page 10, where specific disciplinary guidelines were set out, the manual provided that "[e]mployees may be terminated without cause and/or if previous disciplinary action fails to

correct violations, or if a violation is so serious as to warrant immediate termination."

After Blair received the new manual, PMI launched an investigation in 1985 concerning possible drug abuse among PMI employees. During an interview conducted by a PMI investigator and attended by a stenographer who made shorthand notes of the interview, Blair said that she had given pills, which she called "white crosses," to other PMI employees. Although Blair stated that the pills contained only caffeine, the investigator led her to believe that the pills were a controlled substance. Near the conclusion of the interview, the investigator told Blair that she might be subject to criminal charges as a result of her transactions involving the white crosses and offered Blair the opportunity to resign from her employment. Blair then signed a written resignation form and left employment with PMI.

BLAIR'S SUIT

Blair sued PMI and claimed that PMI failed to follow company procedure specified in PMI's employee handbook for disciplinary action and termination of employment. Blair further claimed that PMI fired her without good cause, and, therefore, wrongfully terminated her employment. Blair also alleged that PMI's conduct in discharging her constituted a malicious termination of employment. The district court sustained PMI's demurrer to the allegation regarding malicious termination of Blair's employment. In response to Blair's allegations, PMI asserted that, because Blair was an employee at will, there was no restriction, such as a good cause prerequisite, on its right to fire Blair.

When PMI objected to Blair's interrogatories concerning identity of other PMI employees who were investigated for possible drug abuse or who left PMI's employment after the investigation, Blair moved for an order requiring PMI to answer the interrogatories. Blair also requested documents from PMI regarding its drug investigation. After PMI refused to supply the documents, Blair sought an order for production of the investigative documents. The court denied Blair's motion for compulsory discovery, and refused to compel PMI to

answer the interrogatories or produce the requested documents.

At trial, over Blair's hearsay objection, the transcription of the stenographer's shorthand notes made during Blair's interview by the PMI investigator was received in evidence. Additionally, a PMI manager testified that, contrary to Blair's assertion, employees were told that the first page of the employee manual expressed company policy and further testified that PMI employees were never told to disregard paragraph 4 on page 1 of the employee manual, the statement concerning the "at will relationship" and discharge from employment "without cause."

The court instructed the jury on various aspects of an employment contract, including the elements of a contract and an employer's right to fire an employee without good cause for such termination of employment if the contract involves an employment at will. The court also instructed that an employee handbook may be a part of the contract of employment and that provisions of the employment contract, including an employee handbook, may be orally modified by the employer. Consequently, the alternative but dichotomous factual questions submitted to the jury concerning termination of Blair's employment were whether the initial and oral contract for employment at will existed and whether PMI had modified the at-will contract so that cause was necessary for termination of Blair's employment. In response to those questions, the jury returned a general verdict in favor of PMI. Therefore, in view of the questions submitted to the jury, the general verdict implicitly contains the finding that Blair was an employee at will and not an employee whose modified contract of employment could be terminated only for cause.

ASSIGNMENTS OF ERROR

In her appeal, Blair contends that her hearsay objection should have been sustained for exclusion of the transcribed stenographic notes made during the interview by PMI's investigator. She also claims that the trial court should have compelled discovery as requested concerning PMI's answers to interrogatories and production of documents pertaining to PMI's drug investigation relative to Blair's dismissal from

employment with PMI. Also, Blair claims that the court erred by refusing to give Blair's tendered instruction regarding PMI's knowledge of possible drug abuse at the time of Blair's dismissal from employment. Blair further contends that the district court erred in sustaining PMI's demurrer to Blair's allegation that the company had maliciously terminated her employment.

CONSEQUENCES OF EMPLOYMENT AT WILL

The evidence authorizes the verdict that Blair had an unmodified oral contract for employment at PMI's will rather than a contract of employment which might be terminated only for cause. The employee manual states that the manual is not a contract for employment and does not provide terms of employment with PMI, and expressly informs employees that their employment with PMI is an "at will relationship [which] may be terminated without cause."

"It is well established in Nebraska that when employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause it chooses without incurring liability." *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 736, 408 N.W.2d 261, 265 (1987). See, also, *Jeffers v. Bishop Clarkson Memorial Hosp.*, 222 Neb. 829, 387 N.W.2d 692 (1986); *Mueller v. Union Pacific Railroad*, 220 Neb. 742, 371 N.W.2d 732 (1985).

In Blair's case, the jury, having considered the evidence under proper instruction, concluded that Blair was employed pursuant to an unmodified oral contract at PMI's will. Consequently, consistent with existing Nebraska law, Blair's employment was terminable at PMI's will without any prerequisite legally valid cause for termination of employment. Since Blair was PMI's at-will employee, PMI could terminate Blair's employment at any time without cause. See, *Johnston v. Panhandle Co-op Assn., supra*; *Jeffers v. Bishop Clarkson Memorial Hosp., supra*; *Mueller v. Union Pacific Railroad, supra*.

> Certain exceptions to the "terminable-at-will" rule have, however, been recognized by this court. Those instances include where the discharge infringes upon a

> constitutionally protected interest of the employee and where a statute or contract prohibits an employer from discharging an employee for a particular reason or without good cause.

White v. Ardan, Inc., 230 Neb. 11, 15, 430 N.W.2d 27, 30 (1988).

None of the exceptions indicated in *White v. Ardan, Inc.* are present in Blair's case. As an at-will employee whose employment was terminated, Blair is not entitled to recover from PMI under the facts determined by the jury or the law enunciated by this court. Consequently, the verdict against Blair is sustained.

We need not delve into admissibility of the transcribed stenographic notes during the interview by the PMI investigator. Admissibility of the transcription is immaterial in Blair's appeal because PMI could have discharged Blair from at-will employment even without the information contained in the transcribed notes and even if the interview itself had never taken place. For the same reason, we do not examine the propriety of the district court's ruling on Blair's request for compulsory discovery concerning PMI's answers to interrogatories and production of the investigative documents. In her appellate brief, Blair argues that "[d]isclosure of the information and documents requested in the remaining Interrogatories and Request for Documents is necessary to allow the Plaintiff to rebut the allegation that Blair was terminated for cause . . . ." Brief for appellant at 38. In light of the basic questions for submission to the jury in Blair's case, cause for termination of employment was irrelevant to disprove a contract for employment at will and irrelevant to prove a modified at-will contract requiring cause for employment termination. Under the circumstances, we find no abuse of discretion regarding the district court's ruling on discovery matters. See *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986) (discovery rulings are upheld on appeal in the absence of a trial court's abuse of discretion). See, also, *Younkin v. Younkin*, 221 Neb. 134, 375 N.W.2d 894 (1985).

Blair's complaint about the district court's sustaining PMI's demurrer and eliminating malicious termination of employ-

ment is without merit. In *White v. Ardan, Inc.*, 230 Neb. at 15, 430 N.W.2d at 30, this court stated:

> [O]ur attention has not been directed to, nor have we found, any Nebraska case that recognizes a cause of action sounding in tort for malicious termination of employment. As previously stated, unless constitutionally, statutorily, or contractually prohibited, an employer may terminate an at-will employee at any time with or without reason and not be liable for his actions.

Consequently, the district court properly removed malicious termination of employment as an aspect of the proceedings against PMI.

Next, Blair contends that her discharge from employment violates public policy of the State of Nebraska. However, in *Johnston v. Panhandle Co-op Assn.*, 225 Neb. at 742-43, 408 N.W.2d at 268-69, this court reaffirmed rejection of the public policy exception as a basis for recovery on an employment at-will contract:

> We discussed the public policy exception to the employment-at-will rule in *Mueller v. Union Pacific Railroad*, 220 Neb. 742, 371 N.W.2d 732 (1985): " 'We recognize, however, that the "employment at will" rule is not, in some jurisdictions, an absolute bar to a claim of wrongful discharge. In a number of jurisdictions, an exception to the "terminable at will" rule has been articulated in recent years. Under this exceptions, an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy. [Citations omitted.]
>
> 'So far as we are able to ascertain, Nebraska has not adopted this exception to the present time. Assuming *arguendo*, however, that such an exception were to be recognized in this jurisdiction, it is clear in this case that the plaintiff has failed in his burden to prove that his discharge was violative of a public policy of this state. We have held that "[c]ourts should be cautious in holding contracts void on ground of public policy and before they do so prejudice to the public interest should clearly appear." *Beaver Lake Assn. v. Beaver Lake Corp.*, 200

Neb. 685, 691, 264 N.W.2d 871, 875 (1978).' " 220 Neb. at 749-50, 371 N.W.2d at 737-38, quoting *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980).

We again decline to adopt the public policy exception at this time.

Finally, Blair claims that the trial court should have given her tendered instruction: If the jury found that Blair's employment contract was modified and required cause for termination of employment, then PMI "cannot use as cause conduct, knowledge of which [PMI] did not have at the time of the termination." The preceding instruction was conditioned on existence of a modified at-will contract of employment. The jury determined that PMI did not modify its employment contract with Blair. Therefore, the court's refusal to give the tendered and conditional instruction was not prejudicial under the circumstances.

Because Blair's employment with PMI was pursuant to a contract which was terminable at PMI's will, and since Blair has shown no exception to the general rule that employment of an at-will employee may be terminated without cause, we affirm the district court's judgment entered on the verdict for PMI.

AFFIRMED.

STATE OF NEBRASKA EX REL. SCOULAR PROPERTIES, INC., AND THE SCOULAR COMPANY, APPELLANT, V. FRANK BEMIS, DOUGLAS COUNTY ASSESSOR, APPELLEE.

496 N.W.2d 488

Filed March 5, 1993. No. S-90-755.

1. **Mandamus: Words and Phrases.** Mandamus is defined as an extraordinary remedy, not a writ of right, issued to compel performance of a purely ministerial act or duty, imposed by law on an inferior tribunal, corporation, board, or person, where (1) 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 the law.
2. **Mandamus: Appeal and Error.** Mandamus is a law action and conflicts in the evidence or findings of fact based thereon will not be disturbed on appeal unless clearly wrong.

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

Frederick S. Cassman and Aaron D. Weiner, of Abrahams, Kaslow & Cassman, for appellant.

James S. Jansen, Douglas County Attorney, Edwin T. Lowndes, and Ronald E. Bucher for appellee.

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

HASTINGS, C.J.

Relator appeals the district court's denial of its petition for an alternative writ of mandamus. We affirm.

Neb. Const. art. VIII, § 12, provides in part:

> For the purpose of rehabilitating, acquiring, or redeveloping substandard and blighted property in a redevelopment project . . . any city or village of the state may . . . incur indebtedness, whether by bond, loans, notes, advance of money, or otherwise. . . such cities or villages may also pledge for and apply to the payment of the principal, interest, and any premium on such indebtedness all taxes levied by all taxing bodies, . . . on the assessed valuation of the property in the project area portion of a designated blighted and substandard area that is in excess of the assessed valuation of such property for the year prior to such rehabilitation, acquisition, or redevelopment.

To implement that section of the Constitution, the Legislature enacted the Community Development Law, Neb. Rev. Stat. §§ 18-2101 et seq. (Reissue 1991). That Act provides in substance that upon approval of a redevelopment plan, the developer's cost of reconstruction and redevelopment of the specific property may be financed by the issuance of bonds by the particular city involved. *Upon request*, the county assessor is to transmit a redevelopment valuation of the property equal to the assessed valuation for the year immediately preceding the effective date of the redevelopment plan. Following the redevelopment, the developer agrees to pay taxes on the basis of the assessed valuation of the property resulting from the

redevelopment, and the difference between the taxes which would have been paid on the pre-redevelopment valuation and the taxes paid on the post-redevelopment valuation, is paid into a special fund to be used to repay the principal and interest on the bonds so issued.

In December 1987, Scoular Properties, Inc. (Scoular), was interested in purchasing an unoccupied office building located at 2027 Dodge Street, Omaha. Scoular approached the planning department of the City of Omaha and inquired whether the city would be willing to provide tax increment financing in an amount that would make the purchase and redevelopment of the property feasible.

A representative of the city planning department, Gregory Peterson, printed out the information on the property which he accessed from the Douglas County computer terminal. The record does not disclose that at that time any specific request for this information was made of the county assessor. The assessed valuation of the property for the 1987 tax year in this computer printout appears to have been $0.00 for both the land and improvements. A copy of that computer printout, which appears in the record as Exhibit 4, is captioned "INQUIRY ONLY" followed by "EXEMPT 0." There then follows "CURRENT VALUE, Year, 1987, 01-18-1988, LAND 0, IMPR 0, TOTAL 0."

Based upon the city planning department's representation as to the feasibility of the redevelopment plan, Scoular proceeded with the purchase of the property sometime between December 1987 and February 1988. On June 28, 1988, the city council of the City of Omaha approved a redevelopment plan for renovation and rehabilitation of the property, the cost of which, according to relator's petition, was "to be augmented by Tax Increment Financing through the anticipated increased tax valuation of approximately $3,980,000 which would yield estimated annual property taxes of $101,438.00".

On August 1, 1988, Scoular entered into a redevelopment agreement with the City of Omaha with respect to the tax increment financing under the provisions of the Nebraska Community Development Law. The same day, Douglas County, along with the City of Omaha and Scoular, entered into

an inducement agreement with FirsTier Bank regarding the bank's purchase of $700,000 in City of Omaha Term Revenue Notes wherein the parties agreed to cause assessed valuation of the redeveloped property following completion of the project to be not less than $784,000 on January 1, 1988, and not less than $3,980,000 on and after January 1, 1989. This increase in assessed valuation over what Scoular thought was a pre-development valuation of $0.00 would generate excess ad valorem taxes of $101,438 each year which could be applied against the payment of the revenue notes.

As the final step in obtaining the tax increment financing, the City of Omaha on January 31, 1989, for the first time, then requested that respondent, the Douglas County Assessor, transmit to the City and Douglas County Treasurer the "redevelopment project valuation". In response to this request, Chief Deputy County Assessor Robert L. Rice, by letter dated February 14, 1989, transmitted a redevelopment valuation of $1,360,000 (the 1988 assessed valuation) instead of the 1987 assessed valuation of $0.00 apparently shown on the assessor's records accessed by computer by the City of Omaha. This mandamus action was instituted to force respondent to transmit the assessed valuation for the property in the amount of $0.00, as required, relators contend, by Neb. Rev. Stat. § 18-2148 (Reissue 1991). That section provides in part that "the county assessor . . . shall transmit to an authority and the county treasurer, upon request of the authority, the redevlopment project valuation . . . ."

According to Frank Bemis, the Douglas County Assessor, the respondent herein, the Scoular property would reflect a $0.00 value because the property was assessed by the State of Nebraska by means of central assessment through the State Tax Commissioner pursuant to Neb. Rev. Stat. §S 77-801 et seq. (Reissue 1990) for the reason that the property had been owned by ENRON, a public service entity.

When ENRON sold the Dodge Street property to Scoular, a private corporation, Douglas County resumed responsibility for the property's assessment. Since the State does not carry assessments on individual parcels, but merely a lump sum on all the property a company owns in a particular county, Douglas

County had no way of knowing with any accuracy the assessable value of Scoular's 2027 Dodge Street property before 1989. When requested to transmit a "redevelopment project valuation", the county had an appraiser inspect the property whose recommendation was to place a valuation of $1,360,000 on the property. The county then adopted this January 1988 figure as the January 1987 figure for the base redevelopment valuation.

Mandamus is defined as an extraordinary remedy, not a writ of right, issued to compel performance of a purely ministerial act or duty, imposed by law on an inferior tribunal, corporation, board, or person, where (1) 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 the law. Neb. Rev. Stat. § 25-2156 (Reissue 1989); *State ex rel. Pederson v. Howell*, 239 Neb. 51, 474 N.W.2d 22 (1991); *State ex rel. PROUD v. Conley*, 236 Neb. 122, 459 N.W.2d 222 (1990). Mandamus is a law action and conflicts in the evidence or findings of fact based thereon will not be disturbed on appeal unless clearly wrong. *State ex rel. Fraiser v. Whaley*, 194 Neb. 703, 234 N.W.2d 909 (1975).

The "clear duty" existing on the part of the respondent in this instance was to "transmit to an authority and the county treasurer, (City of Omaha and Douglas County Treasurer) upon request of the authority, (City of Omaha) the redevelopment project valuation . . . ." Neb. Rev. Stat. § 18-2148 (Reissue 1991). Once the request was made by "the authority" the respondent county assessor did just that. Although the relator was dissatisfied with the valuation furnished, it should have been quite apparent that the printout, Exhibit 4, upon which the relator originally relied, was not an official document of the county assessor's office. Further, that the "0" valuation resulted from the fact that the property was classified as "exempt" was also apparent and should have alerted the relator that it was not entitled to rely on that figure as the valuation of this property. The respondent did comply with his lawful duty "to do the act requested" by furnishing the "redevelopment

project valuation."

The relator having received from the respondent compliance with the legal duty for which the respondent was obligated, the district court was correct in refusing to grant relator's requested writ and its judgment is affirmed.

AFFIRMED.

SANDRA CALVERT, APPELLANT, V. ROBERTS DAIRY COMPANY, A CORPORATION, APPELLEE.

496 N.W.2d 491

Filed March 5, 1993. No. S-90-901.

1. **Pleadings: Demurrer: Limitations of Actions.** A petition is demurrable which shows on its face that the action is barred by a statute of limitations and no allegations tolling the statute are made.
2. **Pleadings: Demurrer.** A demurrer goes only to those defects which appear on the face of the petition and where the alleged defect does not appear on the face of the petition, it becomes an affirmative defense which must be raised by the party seeking the benefit of the defect.
3. **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.
4. **Judicial Notice: Statutes: States.** Every court of this state shall take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States. Neb. Rev. Stat. § 25-12,101 (Reissue 1989).
5. **Judicial Notice: Statutes.** The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information. Neb. Rev. Stat. § 25-12,102 (Reissue 1989).
6. **Judicial Notice: Pleadings: States.** To require a trial court to take judicial notice of the law of another state, it must be pleaded.
7. **Parties: Actions: States.** Although substantive rights of parties to an action are governed by the state where the cause of action arose, procedural matters are dictated by the law of the forum.
8. **Constitutional Law: Limitations of Actions: States.** The Constitution of the United States does not bar application of the forum state's statute of limitations to claims that in their substance are and must be governed by the law of a different state.

9. **Statutes.** We are required to give effect, if possible, to all the several parts of a statute, and no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.
10. **Statutes: Claims: Limitations of Actions: States.** Nebraska's borrowing statute, Neb. Rev. Stat. § 25-215 (Reissue 1989), permits the barring of a claim by the statute of limitations of a foreign state only in the event the claim would have been barred by the applicable Nebraska statute of limitations if the defendant had been a resident of this state for the period therein prescribed by the applicable Nebraska statute of limitations.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed and remanded for further proceedings.

Jacob J. Peters, of Peters Law Firm, P.C., and Jack A. Dike, of Headley & Dike Law Office, for appellant.

Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellee.

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

HASTINGS, C.J.

The plaintiff, Sandra Calvert, appeals the order of the district court sustaining the defendant's demurrer and dismissing the plaintiff's petition with prejudice. We reverse and remand for further proceedings.

The petition, filed on May 15, 1990, alleges that plaintiff was at all times a resident of the State of Iowa and the defendant was a Nebraska corporation. The petition further alleges damages arising out of an accident as a result of the negligence of the defendant occurring in Council Bluffs, Iowa. Defendant demurred "pursuant to Neb. Rev. Stat. §25-806 for the reason that on the face of Plaintiff's Petition, the cause of action is barred by the applicable Statute of Limitations and that there are no special circumstances which have tolled the Statute."

Neb. Rev. Stat. § 25-806 (Reissue 1989) provides in pertinent part:

> The defendant may demur to the petition only when it appears on its face (1) that the court has no jurisdiction of the person of the defendant or the subject of the action; . . . or (6) that the petition does not state facts sufficient to

constitute a cause of action.

A petition is demurrable which shows on its face that the action is barred by a statute of limitations and no allegations tolling the statute are made. *Bend v. Marsh*, 145 Neb. 780, 18 N.W.2d 106 (1945); *Pohle v. Nelson*, 108 Neb. 220, 187 N.W. 772 (1922). A demurrer goes only to those defects which appear on the face of the petition and where the alleged defect does not appear on the face of the petition, it becomes an affirmative defense which must be raised by the party seeking the benefit of the defect. *Smick v. Langvardt*, 216 Neb. 778, 345 N.W.2d 830 (1984).

Neb. Rev. Stat. § 25-207 (Reissue 1989), provides that an action for an injury to the rights of the plaintiff not arising out of contract may only be brought within 4 years. The petition in this case was filed within 4 years of the accident and therefore on the face of the petition the action is not barred by the applicable statute of limitations. For that reason alone the action of the district court should be reversed and the cause remanded for further proceedings.

However, even though not pled, there is a finding in the order of the trial court and statements in the briefs of the parties that Iowa has a 2-year statute of limitations which the district court found applicable and which caused this action to be time barred. In *Minneapolis Harvester Works v. Smith*, 36 Neb. 616, 54 N.W. 973 (1893), however, this court noted:

> [W]hen a party relies upon a statute of another state to make out his cause of action or defense, he must plead the statute upon which he depends in the same manner he would any other fact. . . . While it is the better, and safer, practice in pleading the statute of another state to set out a copy thereof in the pleading, yet, we think, it is sufficient to allege the substance of the statute desired.

Id., 36 Neb. at 619-20, 54 N.W. at 974.

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. *First Nat. Bank v. Heiden*, 241 Neb. 893, 491 N.W.2d 699 (1992); *May Broadcasting Co. v. Boehm*, 241 Neb. 660, 490 N.W.2d 203 (1992).

It is provided by Neb. Rev. Stat. § 25-12,101 (Reissue 1989) that "[E]very court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States." Section 25-12,102 states that "[T]he court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information." However, this court has said that in order for a litigant to invoke the Uniform Judicial Notice of Foreign Law Act, § 25-12,101 et seq., he or she must give reasonable notice in pleadings or otherwise of the intention so to do, *Smith v. Brooks*, 154 Neb. 93, 47 N.W.2d 389 (1951), and to require a trial court to take judicial notice of the law of another state, it must be pleaded, *Scott v. Scott*, 153 Neb. 906, 46 N.W.2d 627 (1951).

Nevertheless, in the trial court's order, and as admitted by plaintiff in her brief, Iowa apparently does have a 2-year statute of limitation as to actions involving torts. The court further found that Nebraska's "borrowing" statute, Neb. Rev. Stat. § 25-215 (Reissue 1989), would require the application of Iowa's statute of limitations. The case was tried on that theory in the trial court, and was briefed and argued in this Court on that theory. Furthermore, if we were to remand the case to the district court for the reason that the defect did not appear on the face of the petition, it is likely that the case would be retried and the issue of the Iowa statute of limitations would properly be raised, and we again would be confronted with the same issue to decide. Therefore, in the interest of judicial economy we proceed to decide the pivotal question raised here.

Preliminarily we should state that although substantive rights of parties to an action are governed by the state where the cause of action arose, procedural matters are dictated by the law of the forum. *Whitney v. Penrod*, 149 Neb. 636, 32 N.W.2d 131 (1948).

In *Sun Oil Co. v. Wortman*, 486 U.S. 717, 108 S. Ct. 2117, 100 L. Ed. 2d 743 (1988), the Court stated: "This Court has long and repeatedly held that the Constitution does not bar application of the forum State's statute of limitations to claims that in their substance are and must be governed by the law of a different State." *Id.* at 722.

The proposition that a forum always applies its own statute of limitations has been modified in many jurisdictions by the enactment of borrowing statutes. A borrowing statute directs a forum court to apply the statute of limitations of a foreign jurisdiction.

Nebraska's borrowing statute is found at Neb. Rev. Stat. § 25-215 (Reissue 1989). It provides as follows:

> All actions and causes of action which are barred by laws of any other state, territory or country shall be deemed barred in this state; *but no action shall be barred by laws of any other state, territory or country unless the same would have been barred by the provisions of this chapter had the defendant been a resident of this state for the period herein prescribed.*

(Emphasis supplied.)

On its face, the section limits the application of the statute of limitations of a foreign jurisdiction, as a minimum, to the comparable statute of limitations of this state.

However, to say that this section makes any particular sense would be a gross overstatement. In his article, *The Nebraska Borrowing Statute: A History and Translation*, found at 9 Creighton L. Rev. 677 (1976), Professor J. Patrick Green makes an heroic effort to bring order out of chaos through his historical review of the components and precursors of this section. Whatever conclusions one might draw from his analysis, no one could quibble with his stated conclusion:

> The primary purpose of this study has been the explanation of the borrowing statute. Hopefully, it has accomplished that purpose. However, the study has an additional goal. That a statute as potentially important as the borrowing statute is almost unintelligible without a close examination of its history should be an embarrassment to the bar. When the confused state of the borrowing statute typifies the conditions of many of the Nebraska statutes governing civil practice, then the time for a thorough going revision of those statutes has arrived. Statutes governing procedure should facilitate the expeditious resolution of litigation. Statutes like the borrowing statute convert the process of litigation into the

traversal of a mine field.

Id. at 692.

Section 25-215 finds its origin in Sections 18 and 21 of the Nebraska Code of Civil Procedure, which provided as follows:

> Section 18. All actions, or causes of action, which are or have been barred by the laws of this territory, or any state or territory of the United States, shall be deemed barred under the laws of this territory.
>
> . . . .
>
> Section 21. When a cause of action has been fully barred by the laws of any state or country where the defendant has previously resided, such bar shall be the same defense in this territory as though it had risen under the provisions of this title.

Neb. Rev. Stat. pt. II, tit. II, § 18 and § 21 (1866).

Section 21 was later amended, in 1905, to read:

> When a cause of action has been fully barred by the laws of any state or country where the defendant has previously resided, such bar shall be the same defense in this state as though it had arisen under the provisions of this title. *Provided that the provisions of this section shall be construed to apply only to causes of action arising without this state unless the action would have been barred had the debtor continued to reside in this state.*

(Emphasis supplied.)

Sections 18 and 21 remained unchanged until 1913, when § 18 was merged with language from § 21 to create a new, somewhat altered, borrowing statute, § 19. The 1913 revision is retained as the current § 25-215 (Reissue 1989), which as previously stated provides:

> All actions and causes of action which are barred by laws of any other state, territory or country shall be deemed barred in this state; *but no action shall be barred by laws of any other state, territory or country unless the same would have been barred by the provisions of this chapter had the defendant been a resident of this state for the period herein prescribed.*

(Emphasis supplied.)

Thus the statute has been changed from an unconditional

borrowing of a foreign statute to the logical limitation to those causes of action which arose outside the state, to an unconditional limitation of the use of foreign statutes of limitations to the minimum period provided by our own statutes. Bizarre as this result may appear, we are required to give effect, if possible, to all the several parts of a statute, and no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. *NC + Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985).

Accordingly, we hold that Nebraska's borrowing statute, Neb. Rev. Stat. § 25-215 (Reissue 1989), permits the barring of a claim by the statute of limitations of a foreign state only in the event the claim would have been barred by the applicable Nebraska statute of limitations if the defendant had "been a resident of this state for the period [t]herein prescribed" by the applicable Nebraska statute of limitations, i.e., in this case, 4 years of residency between the accrual of the claim and the filing of the action. Although defendant apparently had been a resident since its incorporation, the period of residency between accrual of and filing of the cause of action did not encompass 4 years.

Thus, the exception of § 25-215 comes into play, the Iowa statute of limitations is not effective, the Nebraska statute of limitations applies, this action is not barred by those provisions, and the judgment of the district court is reversed and remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE INTEREST OF M.J.B., A CHILD UNDER 18 YEARS OF AGE. DEPARTMENT OF SOCIAL SERVICES, APPELLEE, V. C.B., APPELLANT.

496 N.W.2d 495

Filed March 5, 1993. No. S-90-926.

1. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, we 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 being our duty to discover, if possible, the Legislature's intent from the language of the statute itself.
2. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.
3. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of an act are consistent, harmonious, and sensible.
4. **Juvenile Courts: Minors: Appeal and Error.** Under the provisions of Neb. Rev. Stat. § 43-287.03 (Cum. Supp. 1992), a dispositional order of a juvenile court which implements a plan different than that prepared by the Department of Social Services and which is believed by the department or any other person to be not in the best interests of the juvenile falls within the ambit of the expedited appeal process specified by Neb. Rev. Stat. §§ 43-287.01 through 43-287.06 (Cum. Supp. 1992).
5. **Juvenile Courts: Appeal and Error.** Neb. Rev. Stat. §§ 43-287.01 through 43-287.06 (Cum. Supp. 1992) provide the sole method of reviewing juvenile court dispositional orders falling within the ambit of the expedited appeal process therein specified.

Appeal from the District Court for Buffalo County, DONALD E. ROWLANDS II, Judge, on appeal thereto from the County Court for Buffalo County, JOHN P. ICENOGLE, Judge. Appeal dismissed, and cause remanded with direction.

Daniel L. Aschwege and Teresa K. Luther, of Knapp, Mues, Beavers, Luther & Fangmeyer, for appellant.

Don Stenberg, Attorney General, and Royce N. Harper for appellee.

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

CAPORALE, J.

After taking jurisdiction of the subject juvenile, the county court, sitting as a juvenile court, directed the juvenile's father, the appellant herein, to undergo therapy, and ordered the Nebraska Department of Social Services, the appellee herein, to pay for it. Taking issue with the payment order, the department sought review by the district court, which, among other things, reversed the county court in that regard. Inasmuch as the district court lacked subject matter jurisdiction, we likewise lack jurisdiction to consider the father's appeal to this court. Accordingly, we dismiss the appeal in this court and remand the cause to the district court with the direction to dismiss the appeal to it.

Neb. Rev. Stat. § 43-2,106 (Cum. Supp. 1992) provides, in relevant part: "When a juvenile court proceeding has been instituted before a county court sitting as a juvenile court . . . except as provided in sections 43-287.01 to 43-287.06, appeal may be had to the district court as in civil cases . . . ."

The critical issues thus are whether the order the department appealed to the district court falls within the ambit of the statutory scheme providing for the expedited review of certain juvenile dispositions by a "juvenile review panel" found in Neb. Rev. Stat. §§ 43-287.01 through 43-287.06 (Cum. Supp. 1992) and, if so, whether that expedited appeal is the sole avenue of review.

Section 43-287.01 reads:

> The purpose of sections 43-287.01 to 43-287.06 is to provide for an expedited review of juvenile dispositions by the courts. It is the intent to allow such review only when a court orders the implementation of a plan different than the plan prepared by the Department of Social Services for the care, placement, and services to be provided to such juvenile and the department or any other party believes such court-ordered plan not to be in the best interests of the juvenile.
>
> It is the intent of sections 43-287.01 to 43-287.06 to remove contested dispositional plans from the appellate process for the purpose of expediting review by a juvenile review panel. Nothing in such sections shall otherwise

> limit the right of any party to appeal other final orders of a juvenile court pursuant to [other sections].

Section 43-287.03 implements the intent expressed in § 43-287.01 by providing:

> A juvenile review panel shall review a disposition of a court when the court makes an order directing the implementation of a plan different from the plan prepared by the Department of Social Services concerning the care, placement, or services to be provided to the juvenile and the department or any other party believes that the court's order is not in the best interests of the juvenile.

In construing these statutes, we are bound by the rule that in discerning the meaning of a statute, we 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 being our duty to discover, if possible, the Legislature's intent from the language of the statute itself. See, *Curry v. State ex rel. Stenberg, post* p. 695, 496 N.W.2d 512 (1993); *In re Interest of Powers, ante* p. 19, 493 N.W.2d 166 (1992). In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *Hamilton v. Hamilton, post* p. 687, 496 N.W.2d 507 (1993); *Curry, supra*; *State v. Chambers, ante* p. 124, 493 N.W.2d 328 (1992). The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of an act are consistent, harmonious, and sensible. See *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992).

With those rules in mind, we conclude that since the order in question required the department to pay for services rendered to the juvenile's father, it constitutes a disposition of the type contemplated by §§ 43-287.01 and 43-287.03. See Neb. Rev. Stat. § 43-290 (Reissue 1988) (allocating of financial responsibility for treatment is in nature of disposition hearing).

We must next look to Neb. Rev. Stat. § 43-285(2) (Cum.

Supp. 1992), which declares, in pertinent part: "The department or any other party may request a review of the court's order concerning the plan by a juvenile review panel as provided in section 43-287.04." Section 43-287.04 sets forth the procedure to seek such review. While standing alone the quoted language of § 43-285(2) would entitle the department to obtain an expedited review in any case, its reach is limited by the requirements set forth in §§ 43-287.01 and 43-287.03. The second sentence of § 43-287.01 and the provisions of § 43-287.03 require the application of a disjunctive test: First, the order must implement a different plan than that proposed by the department. Second, there must exist a belief in the department that the court-ordered plan is not in the best interests of the juvenile.

The county court rejected that part of the department's plan which implicitly called for the father to pay for the therapy the department recommended he undergo and substituted therefor the requirement that the department pay for the father's therapy. The county court thereby implemented a plan different than that prepared by the department, and the first part of the test has thus been met. Since the department urges that the juvenile's best interests would be best served by the father assuming responsibility for the cost of his own involvement in the rehabilitation plan, the department demonstrates a belief that the plan implemented by the county court is not in the best interests of the juvenile. Therefore, the second part of the test has been met as well. Accordingly, the order appealed falls within the ambit of the expedited appeal statutes.

The question at this point is whether expedited appeal is the sole avenue of review available to the department. The question is answered in the affirmative by the portion of § 43-287.01 which reads that nothing in §§ 43-287.01 to 43-287.06 "shall otherwise limit the right of any party to appeal *other* final orders of a juvenile court pursuant to" other sections. (Emphasis supplied.) As the subject order constitutes a disposition of the type contemplated by §§ 43-287.01 and 43-287.03 and meets both aspects of the disjunctive test imposed by those sections, it is not an "other" final order.

Consequently, the district court lacked subject matter

jurisdiction, for where the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction. *Garber v. State*, 241 Neb. 523, 489 N.W.2d 550 (1992); *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991). However, although an extrajudicial act of a lower court cannot vest the appellate court with jurisdiction to review the merits of the appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power, that is, jurisdiction, to enter the judgment or other final order sought to be reviewed. See *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986).

Accordingly, as noted in the first part of this opinion, we dismiss the appeal to this court and remand the cause to the district court with the direction to dismiss the appeal to it.

APPEAL DISMISSED, AND CAUSE REMANDED WITH DIRECTION.

MAGGIE G. PENDLETON, APPELLANT, V. LLOYD J. PENDLETON, APPELLEE.

496 N.W.2d 499

Filed March 5, 1993. No. S-90-955.

1. **Divorce: Appeal and Error.** In an appeal involving an action for dissolution of marriage, an appellate court's review of the judgment of a trial court is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion.
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 trial court.
3. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
4. **Property Division.** The division of property is entrusted to the discretion of the trial judge.

5. **Divorce: Alimony: Property Division.** Although alimony and distribution of property have different purposes in marriage dissolution proceedings, they are closely related and circumstances may require that they be considered together.
6. **Divorce: Property Division.** In dividing marital property, the trial court should take into consideration the indebtedness of the parties in order to divide the net marital estate.
7. **Divorce: Modification of Decree: Alimony: Statutes.** The statutory prohibition against modifying a decree at a later time to provide for alimony when not allowed in the original decree, applies to a dissolution of the marriage, not to a decree of legal separation.
8. **Divorce: Alimony: Property Division.** The failure to award alimony or to assign specific property in an action for legal separation does not in and of itself preclude such awards upon a dissolution of marriage.
9. **Divorce: Appeal and Error.** Because appeals in domestic relations matters are heard de novo on the record, appellate courts are empowered to enter the order which should have been made as reflected by the record.
10. **Divorce: Property Division: Armed Forces: Pensions.** 10 U.S.C. § 1408 (b)(1) provides that a court may treat disposable retired or retainer pay of a military member either as property solely of the member or as property of the member and his or her spouse in accordance with the law of the jurisdiction.
11. **Divorce: Property Division: Pensions.** Neb. Rev. Stat. § 42-366(8) (Reissue 1988) requires the Supreme Court to "include as part of the marital estate, for the purposes of the division of property at the time of dissolution, any pension plans, retirement plans, annuities, and other deferred compensation owned by either party.
12. **Divorce: Property Division.** The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
13. _____: _____. Although the general rule is to award to a spouse one-third to one-half of the marital property, such a division of property is not always subject to a precise mathematical formula.

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

Carll J. Kretsinger for appellant.

Chris M. Arps, of Arps & Schirber Law Offices, for appellee.

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

HASTINGS, C.J.

Petitioner, Maggie Pendleton, was granted a decree signed by the court on September 11, 1990, dissolving her marriage to

respondent, Lloyd Pendleton. However, she appeals from that portion of the decree which denied her request for a division of marital property accruing since an earlier decree of legal separation and denied her request for alimony. In addition, petitioner asks for attorney's fees in this action.

The basic question presented by this appeal is whether the provision of Neb. Rev. Stat. § 42-365 (Reissue 1988), which prevents the later modification of a decree of dissolution to provide for alimony when none was awarded in the original decree, applies in like manner to proceedings granting a legal separation. There is a related question of whether the failure to award alimony or to divide respondent's military pension in the legal separation is res judicata so as to preclude such award in a later dissolution proceeding.

The parties had been married on November 19, 1960. Petitioner filed for a legal separation on March 7, 1975, and a decree of legal separation was entered on September 8, 1975. The petition requested child custody and support, alimony, and a division of the real and personal property. In the decree, the trial court granted custody of the couple's four then-minor children to the petitioner, ordered respondent to pay $125 per child per month in child support, equitably distributed the "then known personal property between the parties", awarded the home to the petitioner subject to a lien of $2,500 in favor of the respondent payable upon sale of the house, ordered respondent to pay the outstanding bills and $350 in attorney's fees to petitioner. The decree was silent as to petitioner's property interest in respondent's military pension or as to the existence of any such pension.

Respondent had enlisted in the United States Air Force on October 7, 1951, and retired in November, 1977, after which he commenced receiving his pension. On January 4, 1990, petitioner filed a petition seeking a dissolution of the marriage, asking that the court adopt and incorporate in its decree the property division previously ordered in the separation proceedings, but modifying that decree "only to the extent of the marital interests acquired; ordering the Respondent to pay alimony to the Petitioner . . . ." The trial court entered a decree dissolving the marriage, but recited "that all other relief

requested in this case and not expressly granted herein, is hereby denied."

It is apparent from statements made on the record that the trial court relied upon the doctrine of res judicata in denying petitioner's request for alimony and in rejecting her argument in requesting a share of respondent's military pension. The court further, in its oral findings, held that since the legal separation decree provided for no alimony, petitioner was barred from later seeking alimony in a dissolution action.

Petitioner's assignments of error distilled to the basics involve a claim that the trial court erred in interpreting the statutes by failing to make a distinction between legal separation support and dissolution ordered alimony and in concluding that the statutory prohibition against later awarded alimony in a dissolution case is applicable to a legal separation in which latter proceedings there was a failure to award alimony.

In an appeal involving an action for dissolution of marriage, an appellate court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. *McWha v. McWha*, 241 Neb. 355, 356, 488 N.W.2d 357 (1992); *Stover v. Stover*, 240 Neb. 391, 392, 482 N.W.2d 244, 245 (1992). However, 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. *Calvert v. Roberts Dairy Co., ante* p. 664, 496 N.W.2d 491 (1993).

A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Uhling v. Uhling*, 241 Neb. 368, 488 N.W.2d 366 (1992).

The division of property is entrusted to the discretion of the trial judge. *Policky v. Policky*, 239 Neb. 1032, 479 N.W.2d 795 (1992). Although alimony and distribution of property have

different purposes in marriage dissolution proceedings, they are closely related and circumstances may require that they be considered together. *Hildebrand v. Hildebrand*, 239 Neb. 605, 477 N.W.2d 1 (1991). In dividing marital property, the trial court should take into consideration the indebtedness of the parties in order to divide the net marital estate. *Hildebrand v. Hildebrand, supra.*

The oral findings of the trial court found in the record are quite lengthy. However, in substance they state that the district court for Sarpy County has always treated the term "support" as used in the legal separation statute and the term "alimony" as used in the dissolution statute as being applied interchangeably. "[The] decree of legal separation provided for no alimony, and the lack of provision for any alimony I think bars Mrs. Pendleton from ever seeking alimony."

The court went on to state that at the time of entering the decree of legal separation,

> "Judge Case (the trial judge in that proceeding) had to be aware that at that point of time that he had over 20 years in the Air Force, or military, that a military pension was certainly in existence. . . . And I would conclude that the award of the personal property in essence awarded the military pension to Mr. Pendleton."

Whether the original trial judge was in fact aware of the existence of a pension is not in the record and we do not know what he thought. In any event, in 1975 when the decree of legal separation was entered, respondent's pension rights did not constitute marital property subject to division between the parties. "As late as May 28, 1980, this court followed the rule that a pension of one party to a marriage, unless its terms provide otherwise, is not a joint fund for the benefit of the other party and is not ordinarily subject to division as part of a property settlement, but may be considered as a source for the payment of alimony." *Kullbom v. Kullbom*, 209 Neb. 145,151, 306 N.W.2d 844, 847 (1981). At the time of the legal separation there was no authority to award petitioner any portion of respondent's expected pension as property, and the court obviously chose not to award her any support other than in the form of child support. Because the parties continued to be

husband and wife after the decree of separation, the relator maintained her continuing marital interest in the respondent's property realizable upon the death of respondent, and because there is no provision in the statute relating to legal separations preventing the later award of support, it is reasonable to assume that the court felt for the time being, at least, the $500 per month child suppport was sufficient.

The trial court in the present proceedings utilized Neb. Rev Rev. Stat. § 42-365 (Reissue 1988) to conclude that because alimony was not awarded in the decree for legal separation it could not be awarded in a later decree for dissolution. Section 42-365 provides in part:

> When *dissolution* of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, . . . orders for alimony may be modified or revoked for good cause shown, *but when alimony is not allowed in the original decree dissolving a marriage*, such decree may not be modified to award alimony.

(Emphasis supplied.)

The statutory provisions relating to legal separation which were in effect at the time of the decree of separation contained no provisions similar to the italicized language above. Neb. Rev. Stat. § 42-347 (Reissue 1974), provided in part that "(3) Legal separation shall mean a decree of a court of competent jurisdiction providing that two persons who have been legally married shall thereafter live separate and apart and providing for any necessary adjustment of property, support, and custody rights between the parties, but not dissolving the marriage; . . . ."

In dealing with legal separations, Neb. Rev. Stat. § 42-366 (Reissue 1974) provided in part that "(6) Alimony may be ordered in addition to a property settlement award."

Finally:

> When a legal separation is decreed, the court may order payment of such support by one party to the other as may be reasonable, having regard for the circumstances of the parties and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Orders

> for support may be modified or revoked for good cause shown upon notice and hearing, except as to amounts accrued prior to date of service of motion to modify, to which date modification may be retroactive.

Neb. Rev. Stat. § 42-368 (Reissue 1974).

As is apparent from the above language in effect at the time of the decree of separation, and in the same statutory sections existing today, the prohibition against modifying a decree at a later time to provide for alimony when not allowed in the original decree, applies to a *dissolution* of the marriage, not to a decree of legal separation. Therefore the court in this dissolution proceeding is not statutorily prohibited from awarding alimony in its discretion.

In 1980 the Legislature amended § 42-366 which is now codified at Neb. Rev. Stat. § 42-366 (Reissue 1988) to add the following provision:

> (8) If the parties fail to agree upon a property settlement which the court finds to be conscionable, the court shall order an equitable division of the marital estate. The court shall include as part of the marital estate, for purposes of the division of property *at the time of dissolution*, any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested.

(Emphasis supplied.)

For the first time, Nebraska law directed that the court *shall* include pensions as part of the marital estate for purposes of division of property. Clearly, any claim by the petitioner back in 1975 against her husband's future pension would have been of no avail as she was not entitled to her husband's pension in the eyes of the law. The Nebraska courts had no jurisdiction over federal military pensions to consider them as property of the marriage for the purpose of division until, as stated by this court in *Taylor v. Taylor*, 217 Neb. 409, 412, 348 N.W.2d 887, 889 (1984),

> Congress then passed the Uniformed Services Former Spouses Protection Act, Pub. L. No. 97-252, § 1002(a), 96 Stat. 730 (1982) (codified at 10 U.S.C. §§ 1401 et seq (1982)) (USFSPA). The act provides, among other things:
>
> Subject to the limitations of this section, a court may

> treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

10 U.S.C. § 1408(c)(1).

As previously stated, the court is not statutorily precluded from awarding alimony in a dissolution proceeding simply because no alimony was awarded by a prior separation decree. However, appellee argues that because appellant was not awarded alimony in the legal separation proceedings the court is prevented from addressing that issue in the dissolution case because of the doctrine of res judicata. He cites *Kehr v. Kehr*, 173 Neb. 532, 114 N.W.2d 26 (1962) in support of that proposition because of the following language:

> A division of property and an allowance of alimony in a divorce from bed and board is as broad in scope as in an absolute divorce. The extent of the use of the power granted rests within the sound discretion of the trial court. It is clearly within the power of the district court to adjust all the property rights of a husband and wife in a proceeding for a divorce from bed and board *when the evidence and circumstances require it*.

(Emphasis supplied.) *Id.* at 534, 114 N.W.2d at 28.

The issue in *Kehr* was whether either a pending action for divorce or divorce from bed and board would justify the sustaining of a plea in abatement in a partition action involving joint tenancy property owned by the husband and wife. Accordingly, it is of little authority in this case. *Kehr* cited *Scholz v. Scholz*, 172 Neb. 184, 109 N.W.2d 156 (1961) which contains the following language:

> A divorce from bed and board is in the nature of a conditional decree, *leaving the legal status of the parties unchanged in many respects* but relieving both parties from all obligations and rights to cohabitation while *making necessary adjustments* of their property to assure support during the *continuance of the relationship. It was not intended that the parties in a limited divorce would have all of the benefits of an absolute divorce except the legal*

dissolution of the marriage.

(Emphasis supplied.) *Id.* at 188, 109 N.W.2d at 159.

We hold that the failure to award alimony or to assign specific property in an action for legal separation does not in and of itself preclude such awards upon a dissolution of marriage and therefore we turn to such problem.

It is apparent from the statement made by the trial judge in the record that he and the parties anticipated that if the trial court was found to have erred in denying as a matter of law the petitioner a share of respondent's pension, the case should be remanded to the trial court for factual findings in that regard. However, we have found such a "bifurcation" of a dissolution case to result in no final, appealable order, *Gerber v. Gerber*, 218 Neb. 228, 353 N.W.2d 4 (1984), which is exactly the situation with which we are here confronted.

However, because appeals in domestic relations matters are heard de novo on the record we are empowered to enter the order which should have been made as reflected by the record.

The record leaves something to be desired, both on behalf of the petitioner and the respondent, but the parties will have to live with it as it is.

We view the circumstances of the parties as they existed on the effective date of the decree of dissolution, July 31, 1990. Respondent was drawing a military pension in the gross amount of $1,418 per month, less Survivor's Benefit Plan cost of $73.13 and income tax withholding of $135.48, leaving a "take home pay" of $1,209.39. We do not consider the additional deduction of $179.95 for "allotments" because we have no idea what they are for. They could be for bonds, for payment of bills, for savings or whatever. It was the responsibility of the respondent to furnish this information in the record and he did not do so. Accordingly, we conclude that respondent's "disposable or retainer pay" under the provisions of 10 U.S.C. § 1408(a)(4) amounts to $1,209.39 per month. As previously set forth in full, 10 U.S.C. § 1408(b)(1) provides that a court may treat disposable retired or retainer pay of a member either as property solely of the member or as property of the member and his or her spouse in accordance with the law of the jurisdiction. Neb. Rev. Stat. § 42-366(8) (Reissue 1988) requires this court to "include as part of the

marital estate, for the purposes of the division of property at the time of dissolution, any pension plans, retirement plans, annuities, and other deferred compensation owned by either party."

Respondent testified that because of his 26 years of active service his pension amounted to 65 percent of his base pay; (50 percent of base pay for 20 years plus 2 1/2 percent additional for each year over 20 years to a maximum of 6 additional years). At the time of his retirement he and the petitioner had been married for 17 years. Therefore, 65 percent (17/26) of the total pension had been earned during the marriage. Sixty-five percent of $1,209.39 amounts to $786.10 per month. Under the provisions of 10 U.S.C. § 1408(e)(1) the total amount payable to a spouse for child support, alimony, or division of property is limited to 50 percent of the "disposable retired or retainer pay," but in any event, of course, is further limited by the disposition which might be made by the state courts.

This court has said on innumerable occasions that the ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Hildebrand v. Hildebrand*, 239 Neb. 605, 477 N.W.2d 1 (1991). We have recognized the general rule to be the awarding to a spouse of one-third to one-half of the marital property, but have also recognized that a division of property is not subject to a precise mathematical formula. *Sullivan v. Sullivan*, 223 Neb. 273, 388 N.W.2d 516 (1986). The "one-third to one-half rule" in dividing marital property is of significance when the marriage is of long duration and the parties are the parents of all the children. *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986).

We determined an award of 26 percent to the wife and 74 percent to the husband an abuse of discretion in *Sullivan v. Sullivan, supra*. The Court in *Taylor v. Taylor, supra*, concluded that an award of 25 percent to the wife was not unreasonable considering that the spouses had been separated for significant periods during their marriage.

In the present case the parties had been separated for 15 of their 30 years of marriage. There is no evidence of the age of either party other than can be inferred from the fact that their

eldest child is 30 years of age. No evidence appears in the record as to the education of either spouse or the prospects of future employment. Each party seems able to support herself and himself and is in need of no alimony. We do not consider the overpayment of child support by the respondent nor the absence of other provisions for the support of petitioner between 1975 and 1990.

After a consideration of all the other facts and circumstances of the case we are of the opinion that the decree of the district court should be modified to provide for a division of the disposable retired pay of the military pension earned during the marriage by awarding petitiioner the sum of $260 per month for her lifetime or until the pension benefits are no longer available, which is roughly one-third of that portion of the disposable retirement pay which is marital property. The decree as so modified, is affirmed.

Petitioner has filed a motion for attorney fees in this court. However, the affidavit in support of the award of fees simply states "Attorney's retainer for Appeal including all costs, $2,500.00" This is not sufficient under the provisions of Rule 9F Neb. Ct. R. of Prac. (rev. 1992) to support such an award and the motion is denied.

AFFIRMED AS MODIFIED.

GILBERT HUEFTLE, APPELLEE, V. NORTHEAST TECHNICAL COMMUNITY COLLEGE BOARD OF GOVERNORS, AND THE NORTHEAST TECHNICAL COMMUNITY COLLEGE AREA, A BODY CORPORATE AND A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANTS.

496 N.W.2d 506

Filed March 5, 1993. No. S-90-996.

1. **Motions for New Trial.** A motion for new trial may appropriately be filed only in a trial court.
2. **Motions for New Trial: Courts: Appeal and Error.** It is improper to move for a new trial in a court which reviewed the decision of a lower court or

administrative agency and thus functioned not as a trial court but as an intermediate court of appeals.

3. **Motions for New Trial: Courts: Time: Appeal and Error.** The filing of a motion for new trial in a court which functioned as an intermediate court of appeals does not stop the running of the time within which to perfect an appeal from the reviewing court.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Appeal dismissed.

John M. Gerrard, of Gerrard, Stratton & Mapes, P.C., for appellants.

Max G. Dreier, of Jewell, Gatz, Collins, Dreier & Fitzgerald, for appellee.

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

PER CURIAM.

This appeal from the district court for Madison County must be dismissed because it was not timely filed in this court.

Based upon the college's policy of mandatory retirement at age 70, the Northeast Technical Community College Board of Governors (Board) terminated the employment of Gilbert Hueftle, one of its teachers. Hueftle reached age 70 during the 1989-1990 school year.

Hueftle filed a petition in error in the district court on March 9, 1990. At a hearing on July 6, 1990, the court received the record of the Board's proceedings and heard arguments of counsel. On July 18, 1990, finding that there was insufficient evidence as a matter of law to support the Board's decision, the district court vacated the Board's decision and ordered Hueftle reinstated.

On July 20, 1990, the Board filed a motion for a new trial which the court heard on July 31. On September 13, 1990, the court overruled the motion for a new trial. The Board filed its appeal to this court on September 17, 1990.

Because the appeal to this court was not timely, we lack jurisdiction to consider the issues presented on appeal by the Board.

[A] motion for new trial may appropriately be filed only in

> a trial court. See *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990). It is improper to move for a new trial in a court which reviewed the decision of a lower court or administrative agency and thus functioned not as a trial court but as an intermediate court of appeals. See *Interstate Printing Co., supra.* It necessarily follows then that the filing of a motion for new trial in a court which functioned as an intermediate court of appeals does not stop the running of the time within which to perfect an appeal from the reviewing court. *Id.*

Booker v. Nebraska State Patrol, 239 Neb. 687, 688, 477 N.W.2d 805 (1991).

The district court in this case functioned as an intermediate court of appeals. As such, the court did not act as a trial court, it only reviewed the record of the hearing before the Board. Thus, the filing of a motion for new trial in that court did not stop the running of the time within which to perfect an appeal. The Board had 30 days from entry of the district court's July 18, 1990, order in which to file an appeal to this court. See Neb. Rev. Stat. § 25-1912 (Reissue 1989). Because the Board failed to meet this deadline, we lack jurisdiction of the appeal.

APPEAL DISMISSED.

ROBERT W. HAMILTON, JR., APPELLEE, V. HAMAKO HAMILTON, APPELLANT.

496 N.W.2d 507

Filed March 5, 1993. No. S-91-461.

1. **Statutes: Legislature: Intent.** Repeals by implication are not favored and will not be found unless such is made necessary by the evident intent of the Legislature.
2. **Statutes.** In order to bring the doctrine of repeal by implication into play, the later statute must be unavoidably repugnant to the earlier statute.
3. _____. In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.
4. **Estoppel: Limitations of Actions.** Under the equitable doctrine of estoppel, or

estoppel in pais, a party may not lull an adversary into a false sense of security, thereby cause the adversary to subject her or his claim to the bar of the statute of limitations, and then plead as a defense the very delay caused by the first party's conduct.

5. **Estoppel.** The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

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

Richard A. Knudsen, of Knudsen, Berkheimer, Richardson & Endacott, for appellant.

Larry F. Fugit for appellee.

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

CAPORALE, J.

The respondent-appellant former wife, Hamako Hamilton, seeks to modify the decree which dissolved her marriage to the petitioner-appellee former husband, Robert W. Hamilton, Jr., so as to require the husband to pay additional alimony and to share with her an interest in his retirement pay. The district court granted the husband's motion for summary judgment. In challenging that ruling, the wife asserts, in summary, that the district court erred in determining that she was foreclosed from modification as a matter of law. We affirm.

When the parties were married on March 7, 1957, the husband was a member of the U.S. Air Force. By the time the marriage of the parties was dissolved in Sarpy County on March 28, 1980, the husband had retired from the Air Force and became entitled to retirement pay under the provisions of 10 U.S.C. § 1401 et seq. (1988).

The dissolution decree, which incorporated the parties' property settlement agreement, provides, in relevant part:

> Husband will pay the [w]ife the sum of $600.00 per month for a period of two years from the date of the entry of the Decree herein; the [h]usband will then pay the [w]ife the sum of $550.00 per month for the next two years and for the remaining six years and three months which is until [w]ife reaches the age of 62, [h]usband will pay [w]ife the sum of $500.00 per month for permanent alimony.

Although the decree awards no part of the husband's retirement pay to the wife, it does provide that should the husband become ill and unable to work full time, the alimony payments shall not exceed "one-half of the amount of [h]usband's Air Force Retirement at the time of such illness . . . ."

Anticipating the termination of alimony upon her upcoming 62nd birthday, the wife sought social security benefits in May 1990 and at that time learned that she would not qualify under her husband's social security fund until he reached the age of 65 in February 1996. She thereafter, on May 31, 1990, filed the petition in this proceeding.

The Sarpy County Sheriff received the summons issued in connection therewith on June 1, 1990. According to his return, the sheriff first attempted to serve the husband on June 2. Having been unsuccessful in that effort and in efforts made on June 3 and 5, he remitted the summons unserved. The husband was ultimately served with process in Maine on July 27, 1990.

Notwithstanding the recitation in the sheriff's return that no attempt was made to serve the summons until June 2, one affiant swore that the husband was aware "service of process had been attempted on him at his home . . . on or before June 1, 1990." According to the same affiant, the husband wished to leave for a vacation and had been "advised to get out of town as soon as possible" so this action could be delayed until he returned from Maine in August. Although the record discloses that the husband had departed Nebraska for Maine by June 4, 1990, it does not disclose when he left Nebraska.

Neb. Rev. Stat. § 42-365 (Reissue 1988) provides, in relevant part: "Unless amounts have accrued prior to the date of service of process on a petition to modify, orders for alimony may be

modified or revoked for good cause shown . . . ." The obligor in *Welke v. Welke*, 205 Neb. 426, 288 N.W.2d 41 (1980), had been ordered to pay alimony in monthly installments such that his entire obligations had accrued by January 1, 1978. The obligee thereafter, in June 1978, filed an application for modification. Service of process upon the obligor was obtained on June 21 of the same year. We held that because the entire amount of alimony had accrued prior to the date of service upon the obligor, § 42-365 prevented the award of additional alimony. *Welke* thus teaches that a decree under which all rights and obligations have accrued is not subject to modification in any respect.

As a preliminary matter, it must be recalled that the decree in this case requires that the alimony payments commence "from the date of the entry of the [d]ecree." As the decree was entered on March 28, 1980, the last payment would have accrued 123 months later, or on May 28, 1990, 3 days before the wife filed her petition in this proceeding. At first blush, it thus would appear § 42-365 would foreclose any modification of the decree, because the wife's petition would not have been filed until after all of her rights and obligations and all of the husband's rights and obligations would have accrued; as a consequence, the husband could not, under any circumstance, have been served in time.

Although the wife suggests the apparent change in due dates was produced by Neb. Rev. Stat. § 42-369(1) (Cum. Supp. 1992), which provides that alimony judgments are to commence on the first day of each month, such is not the case. Not only did § 42-369(1) not come into effect until August 26, 1983, 1983 Neb. Laws, L.B. 371, § 11, more than 3 years after the decree in question was entered, the statutory provision is merely directory, not mandatory. See *Cotton v. Cotton*, 222 Neb. 306, 383 N.W.2d 739 (1986).

However, notwithstanding that the record contains no order modifying the due dates of the monthly alimony payments, the parties have handled this case as if the last payment became due on June 1, 1990, and the payment record of the clerk of the district court suggests that the district court itself so dealt with the case. Under those circumstances and because such treat-

ment makes no difference to the outcome, we too consider the decree as having been amended by some event not disclosed by the record such as to make the last alimony payment due June 1, 1990, 1 day after the wife filed this action.

The threshold question therefore is whether any modification is nonetheless foreclosed as a matter of law, as even under the amended decree, all rights and obligations had accrued before the husband was served with process. According to the wife, the answer is in the negative. She contends that the crucial date, notwithstanding the language of § 42-365, is the date of filing of the petition seeking modification, not the date service of process was achieved. In taking that position, she argues that the service language of § 42-365 has been repealed by implication as a result of amendments to Neb. Rev. Stat. § 25-217 (Reissue 1989).

She points out that although at one time § 25-217 provided that an action was deemed commenced as of the date the summons was served upon the defendant, § 25-217 (Reissue 1975), in 1979 it was amended to provide that an action be deemed to have been commenced "on the date the petition is filed with the court if proper service is obtained within six months of such filing." 1979 Neb. Laws, L.B. 510. Later, by 1986 Neb. Laws, L.B. 529, § 21, § 25-217 was again amended to read as it does today. "An action is commenced on the date the petition is filed with the court. The action shall stand dismissed without prejudice as to any defendant not served within six months from the date the petition was filed."

But repeals by implication are not favored, *Hammond v. City of Broken Bow*, 239 Neb. 437, 476 N.W.2d 822 (1991), and thus will not be found unless such is made necessary by the evident intent of the Legislature. *Nebraska Equal Opp. Comm. v. State Emp. Retirement Sys.*, 238 Neb. 470, 471 N.W.2d 398 (1991). Moreover, in order to bring the doctrine into play, the later statute must be unavoidably repugnant to the earlier statute. *Hammond v. City of Broken Bow, supra.*

There is nothing in § 42-365 which is repugnant to § 25-217, for § 42-365 deals not with when an action is commenced, but with what an order of modification may affect. Commencing a new action is different than affecting the rights and obligations

accruing under an existing decree. The language of § 42-365 reflects the Legislature's determination that in the latter circumstance, a party may rely on what the court has decreed at least until receipt of notice that an effort is being made to effect a change.

It is also to be noted that the service language of § 42-365 was adopted at the same time as was Neb. Rev. Stat. § 42-352 (Reissue 1988), which reads, in pertinent part: "A proceeding under sections 42-347 to 42-379 shall be commenced by filing a petition in the district court." 1972 Neb. Laws, L.B. 820, §§ 6 and 19. Even if one were to argue that specifying how a proceeding shall be commenced does not necessarily specify the event which constitutes commencement, a matter we do not decide, the fact remains that the language used in § 42-352 shows that the Legislature well knew at the time it adopted § 42-365 the appropriate words to use had it wished to tie the operative date of a modification to the filing of the petition rather than to the obtaining of service.

The wife's first contention being without merit, we move on to her second and final claim with regard to the district court's ruling. In reliance upon Neb. Rev. Stat. § 25-214 (Reissue 1989), the wife urges that as the husband fled to Maine, the period of his absence from Nebraska may not be counted in determining when he was served. Section 25-214 reads:

> If, when a cause of action accrues against a person, he is out of the state, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is absconded or concealed; and if, after the cause of action accrues, he departs from the state, or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought.

Leaving aside that the record does not disclose when the husband left his home and that, according to the sheriff's return, service was not even attempted until after all of the husband's obligations under the decree had accrued, this matter, as noted earlier, concerns not the commencement of an action, but upon what an order of modification operates.

Consequently, § 25-214 simply does not apply. As recently reaffirmed, in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *In re Interest of M.J.B., ante* p. 671, 496 N.W.2d 495 (1993); *Curry v. State ex rel. Stenberg, post* p. 695, 496 N.W.2d 512 (1993); *State v. Chambers, ante* p. 124, 493 N.W.2d 328 (1992).

Nonetheless, a party may not lull an adversary into a false sense of security, thereby cause the adversary to subject her or his claim to the bar of the statute of limitations, and then plead as a defense the very delay caused by the first party's conduct. See *Muller v. Thaut*, 230 Neb. 244, 430 N.W.2d 884 (1988).

The operation of this equitable doctrine of estoppel, or estoppel in pais, was recently illustrated in *Reifschneider v. Nebraska Methodist Hosp.*, 233 Neb. 695, 447 N.W.2d 622 (1989). We therein held that because the plaintiff knew of the period of limitations and had concluded approximately 6 months before its expiration that she would not get a satisfactory settlement unless she filed suit, the defendant was not estopped from asserting the limitations defense notwithstanding that it had for a time paid plaintiff's expenses. In so ruling, we reaffirmed that the elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice. See, also, *First United Bank v. First Am. Title Ins. Co., ante* p.

640, 496 N.W.2d 474 (1993).

Since the husband neither said nor did anything which the wife even claims induced her to delay the issuance of summons, the doctrine does not apply. It is the lack of improper inducement on the part of the husband and the reciprocal lack of reliance on the part of the wife which distinguish the case before us from those cases in which the doctrine came into play. See, *Muller v. Thaut, supra* (existence of a fact issue as to whether the defendant concealed the cause of death prevented the entry of summary judgment on the basis of limitations defense); *State Farm Mut. Auto. Ins. Co. v. Budd*, 185 Neb. 343, 175 N.W.2d 621 (1970) (reliance of plaintiff upon repeated assurances of defendant's insurer that it would honor plaintiff's property damage subrogation claim when the insurer settled related personal injury claim prevented insurer from asserting a limitations defense); *MacMillen v. A.H. Robins Co.*, 217 Neb. 338, 348 N.W.2d 869 (1984) (fraudulent concealment of known danger prevented assertion of limitations defense); *Atlas Corporation v. Magdanz*, 130 Neb. 519, 265 N.W. 743 (1936) (payee of note who made payments and wrote on note that it was extended estopped from asserting limitations defense.)

Inasmuch as the wife is as a matter of law foreclosed from having the decree modified, the district court correctly sustained the husband's motion for summary judgment. *First United Bank v. First Am. Title Ins. Co., supra*; *Jaramillo v. Mercury Ins. Co., ante* p. 223, 494 N.W.2d 335 (1993).

AFFIRMED.

DOUGLAS W. CURRY, M.D., APPELLANT, V. STATE OF NEBRASKA EX REL. DONALD STENBERG, ATTORNEY GENERAL, ET AL., APPELLEES.

496 N.W.2d 512

Filed March 5, 1993. No. S-92-051.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question 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.
2. **Statutes: Legislature: Intent.** In determining the meaning of 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 being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
3. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.
4. **Statutes: Legislature: Intent.** When considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.
5. **Statutes.** A statute which specifies the object of its operation excludes therefrom every object not expressly mentioned.
6. _____. The special provisions of a statute in regard to a subject will prevail over the general provisions in the same or other statutes.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded with directions.

Robert B. Creager, of Berry, Anderson, Creager & Wittstruck, P.C., for appellant.

Don Stenberg, Attorney General, and Melanie J. Whittamore-Mantzios for appellees.

Robert T. Grimit, of Baylor, Evnen, Curtiss, Grimit & Witt, for amicus curiae Ken Kester, R.P.

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

CAPORALE, J.

Pursuant to the provisions of Neb. Rev. Stat. § 71-150

(Reissue 1990), the defendant-appellee, State of Nebraska, through its Attorney General, brought a proceeding before the Director of its Department of Health to discipline the plaintiff-appellant, Douglas W. Curry, M.D. The director found that Curry had engaged in unprofessional conduct, in violation of Neb. Rev. Stat. § 71-147(10) (Reissue 1990), and as a consequence restricted his medical practice in a variety of respects for a period of 1 year, required him to take additional training, and placed him on probation for a period of 2 years following the period of restriction. Upon appeal by Curry, the district court affirmed the director's order. On appeal to this court Curry asserts, among other things, that the district court erred in failing to find that, as interpreted, the relevant statute is unconstitutionally vague. A preliminary aspect of that assertion of error having merit, we reverse and remand with the direction that the district court reverse the director's order and command dismissal of the cause.

After the health department received information that Curry, a licensed physician, may have been prescribing medication for other than legitimate medical purposes, an investigation was launched. Two health department investigators visited Curry under assumed identities and posed as patients.

On his initial visit to Curry, the first investigator represented that he was a runner training for a marathon and was experiencing a lack of "mental energy to stay with" his effort to increase his running from 65 to 85 miles per week. He expressed the hope that something might be done about it, and said he knew a few runners who told him they took "speed" and that a couple of them had given him a substance which he described. He denied having any other problems, but Curry noted that the investigator's blood pressure was elevated (Curry's nurse had measured it at 160/90) and inquired if the investigator knew what it was when it was last checked. The investigator claimed that he periodically checked his own blood pressure and that it usually read 120/80. Curry said he did not "suppose that a short term thing, if that's all you're using it for would create any significant problems, as long as that's all it is is a short term thing." Curry explained that by short term he meant a month,

and wrote a prescription for 30 5-milligram tablets of Dextroamphetamine, to be taken each evening. Dextroamphetamine is a type of amphetamine, a controlled substance under Neb. Rev. Stat. § 28-405 [Schedule II] (c) (Reissue 1989).

This same investigator returned to Curry 16 days later, at which time his blood pressure was measured by Curry's nurse as being 120/80, but which Curry's chart shows as reading 140/80. In any event, the investigator represented that he was running short of the prescription, as he had started working out twice a day two or three times per week. Curry said he "could try giving [the investigator] a few more and see how things go," but commented that he did not "think [it is] a good idea to get into a long term habit of trying to keep things going by using some speed. . . ." He then wrote a prescription for 30 more 5-milligram tablets of Dextroamphetamine, to be taken one tablet each evening before running.

On this investigator's third trip to Curry, his blood pressure measured 160/90. The investigator told Curry he had reduced his training schedule for the last 20 days or so but had recently resumed training. Upon Curry's agreement to prescribe more Dextroamphetamine, the investigator explained that because of the hot weather, he was running later in the evening and was having trouble "winding down," claiming that it was often 2 in the morning before he could relax enough to sleep. He asked for "something to take the edge off." Curry prescribed 30 more 5-milligram tablets of Dextroamphetamine, to be taken each evening before running, and 30 30-milligram doses of Dalmane, a trade name for flurazepam, a controlled substance under § 28-405 [Schedule IV] (a)(10).

On his fourth and final encounter with Curry, the investigator represented that although he liked the speed, he did not care for the Dalmane much, as it "worked too good sometimes because it made it difficult in the morning and it kind of seems to have a long lasting" effect. The investigator asked if Valium would be better, and Curry explained that Valium is a mild tranquilizer and might not be enough and that he would try switching to something different. The investigator then asked about getting a prescription for more than a 30-day supply, as the appointments took so much time from his work

schedule. Curry agreed and prescribed 60 5-milligram Dextroamphetamine tablets, to be taken each evening before running, and 30 .25-milligram doses of Halcion, a trade name for triazolam, a controlled substance under § 28-405 [Schedule IV] (a)(45). The investigator also inquired whether anyone he had referred had been in. When Curry responded negatively, the investigator said he had given some of his Dextroamphetamine to a "couple of guys" he ran with, telling them he had gotten the tablets from Curry, and that he thought they were going to call Curry for an appointment.

The second investigator then made an appointment and went to see Curry. After Curry's nurse recorded his height, weight, pulse, and blood pressure, which measured 140/98, the investigator told Curry that he was referred to him by the first investigator, describing him as a friend with whom he ran and who had given him a couple of "pills," which had helped him keep up. The investigator explained that although he was not training to run a marathon, he ran between 3 and 7 miles per run, usually three times per week. Curry noted that the investigator's blood pressure was a little high and asked if that was normal for him or if there was a history of high blood pressure in his family. The investigator replied that he did not know what his blood pressure usually measured and denied a family history of high blood pressure. Curry then advised the investigator to have his blood pressure checked periodically and that if it was consistently above 140/90, he might need treatment. Curry also explained that he was "not real gung ho" on Dextroamphetamine but supposed it was "no big deal" if one took it two or three times a week to "help with the work out for a little bit." He would not suggest its use on a regular basis, but "for a couple of months [it is] really not any big deal," remarking that its use tends to elevate blood pressure and that the investigator's already looked a little suspicious, but that a few could be tried for awhile. The investigator then asked if he could be given a few extra pills so that he could give part of the prescription to his wife for use as diet pills. Curry replied that he could give him a few, "but generally speaking if she'd want something to help her with diet she probably ought to be seen rather than just giving you, giving you a bunch of tablets."

Nonetheless, Curry issued a prescription for 30 5-milligram tablets of Dextroamphetamine, to be taken one tablet "3-4 days weekly before running."

A board-certified specialist in internal medicine testified that the accepted indications for use of amphetamines are for narcolepsy and attention deficit disorder. He was of the view that a prescription for any other reason would be contraindicated and that the presence of an elevated blood pressure constituted a specific contraindication. This witness further opined that it constitutes unprofessional conduct to prescribe Dextroamphetamine for the purpose of training for a marathon run. The repeated prescription of the drug before the first supply should have been consumed and later after the patient represented that he had shared the drug with another also constituted unprofessional conduct. For all a physician would know, the patient was taking more of the drug than prescribed. Whether the patient took more of the drug than prescribed or whether he shared it with another, the drug was being used inappropriately. Additionally, the prescription of Halcion and Dalmane to counteract the effects of the amphetamines added to the impropriety of Curry's prescriptions to the first investigator.

In this witness' opinion, a reasonably prudent physician in prescribing a drug would not rely solely on the indications and contraindications listed in the Physicians' Desk Reference, since the reference is "put out by the drug manufacturers." Although the reference listed weight control as an indicated use for amphetamines, the witness was of the view that its use for such purpose is not appropriate. However, without more, prescription of the product for such a program would not be unprofessional conduct. This witness also testified that a contraindication for the use of a particular drug does not per se preclude its prescription; in making a prescription decision, a physician must weigh the benefits of a drug against its detriments.

A physician board certified in family practice was of the opinion that the indications for use of Dextroamphetamine are as an appetite suppressant employed in conjunction with a diet program and counseling by the physician, narcolepsy, and

hyperkinetic syndrome, also known as hyperactive child syndrome. Contraindications include cardiovascular heart disease, hypertension, or a known sensitivity to the drug.

This physician was of the view that it is unprofessional conduct to prescribe Dextroamphetamine to a runner for the purpose of training for a marathon and to prescribe Dalmane and Halcion to a runner. He agreed that a contraindication to the use of a particular drug is not an absolute prohibition against its use; rather, a physician must, in making a prescription decision, weigh the advantages and disadvantages of using a particular drug. This witness was not aware of any publication or treatise declaring that Dextroamphetamine cannot be prescribed to enhance athletic performance. However, he was of the opinion that when a patient requests a specific drug which is a controlled substance, the physician should suspect drug abuse.

On the other hand, a surgeon whose practice includes vascular, noncardiac thoracic, and general surgery expressed the opinion that while "reasonable physicians, under similar circumstances might disagree over the decision of . . . Curry to prescribe Dextroamphetamines, even in low dosages, for enhancing a patient[']s ability to train for athletic endeavors . . . Curry's treatment under the circumstances" did not constitute unprofessional conduct.

With those facts in mind, we turn our attention to the language of § 71-147, the statute under which the proceedings against Curry were brought. It provides that a "license or certificate to practice a [health] profession may be . . . limited, revoked, or suspended, or have other disciplinary measures taken against it . . . when the . . . licensee . . . is guilty of any of the following acts or offenses." Among the 17 acts or offenses then enumerated is subdivision (10), which reads: "unprofessional conduct, which term includes all acts specified in section 71-148 and such other acts as may be defined in rules and regulations adopted and promulgated by the board of examiners in the profession of the . . . licensee . . . with the approval" of the health department.

Neb. Rev. Stat. § 71-148 (Reissue 1990) reads: "For the purpose of section 71-147, unprofessional conduct shall include

any of the following acts," trailed by 15 defining clauses, none of which deal with the prescribing of drugs. However, two of the 17 acts or offenses proscribed by § 71-147 do relate to the prescribing of drugs: Subdivision (13) punishes the "distribution of . . . controlled substances, or drugs for any other than lawful purposes"; subdivision (17) punishes "acts or offenses for which disciplinary measures may be taken against a registration for controlled substances under" other Nebraska statutes.

The State acknowledges that neither § 71-148 nor the rules and regulations concerning the practice of medicine

> specifically state that prescribing controlled substances for other than medical purposes; continuing to prescribe a controlled substance after the patient is taking more of the controlled substance than instructed and sharing the controlled substances with others; and prescribing controlled substances to counter the effects of the first controlled substance prescribed is unprofessional conduct.

Brief for appellee at 22. However, in reliance upon the presence of the word "includes" in the statute, the State claims that § 71-147(10) is a broad, inclusive law which embraces Curry's conduct as unprofessional conduct because it violated the practice standards of the medical profession.

Although Curry phrases his concerns in constitutional terms, the threshold question is whether § 71-147(10), as expanded by the provisions of § 71-148, encompasses Curry's conduct. As a question of statutory interpretation, the matter is one of law in connection with which we as an appellate court have an obligation to reach an independent conclusion, irrespective of the determination made by the court below. *Calvert v. Roberts Dairy Co., ante* p. 664, 496 N.W.2d 491 (1993); *FirsTier Bank v. Triplett, ante* p. 614, 497 N.W.2d 339 (1993); *Speidell Monuments v. Wyuka Cemetery, ante* p. 134, 493 N.W.2d 336 (1992); *In re Interest of Powers, ante* p. 19, 493 N.W.2d 166 (1992).

In determining the meaning of a statute, we 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 being our duty to

discover, if possible, the Legislature's intent from the language of the statute itself. *In re Interest of Powers, supra.* Moreover, in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *State v. Chambers, ante* p. 124, 493 N.W.2d 328 (1992). Additionally, when considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible. *In re Interest of Powers, supra.*

With those general rules in mind, we revisit the language of the pertinent statutes. As noted earlier, § 71-147 enumerates, in subdivisions (13) and (17), two specific drug-related activities which subject a licensed health care provider such as Curry to discipline. We are not unaware of the rule of construction which provides that a statute which specifies the object of its operation excludes therefrom every object not expressly mentioned (expressio unius est exclusio alterius). *State Bd. of Ag. v. State Racing Comm.*, 239 Neb. 762, 478 N.W.2d 270 (1992); *Nebraska City Education Assn. v. School Dist. of Nebraska City*, 201 Neb. 303, 267 N.W.2d 530 (1978); *School District of Omaha v. Adams*, 151 Neb. 741, 39 N.W.2d 550 (1949). However, the fact that those two specific drug-related activities are specifically covered by § 71-147 does not, in and of itself, necessarily mean that other and different drug-related activities cannot come within the purview of another and more general provision of the statute. Thus, we come to the language of § 71-147(10), permitting the imposition of discipline for unprofessional conduct which "includes all acts specified in section 71-148 and such other acts as may be defined in rules and regulations adopted and promulgated" as therein specified.

The State in effect argues that because § 71-147 contains the word "includes," one can look to the practice standards of the medical profession to determine what constitutes unprofessional conduct notwithstanding that § 71-147(10) specifies the

sources to which one is to look in order to determine that fact. The State's contention, however, overlooks that the special provisions of a statute in regard to a subject will prevail over the general provisions in the same or other statutes. *Glockel v. State Farm Mut. Auto. Ins. Co.*, 219 Neb. 222, 361 N.W.2d 559 (1985), *appeal after remand* 224 Neb. 598, 400 N.W.2d 250 (1987); *Kibbon v. School Dist. of Omaha*, 196 Neb. 293, 242 N.W.2d 634 (1976); *Mancuso v. State*, 123 Neb. 204, 242 N.W. 430 (1932). Thus, the word "includes" is restricted by the language which specifies the sources to which one is to refer in order to determine what constitutes unprofessional conduct, to wit, § 71-148 and rules and regulations which were never adopted. Obviously, unadopted rules and regulations cannot define anything, and § 71-148 does not deal with the prescription of drugs. Thus, a violation of the practice standards of the medical profession does not define unprofessional conduct for the purposes of § 71-147(10).

It is true that in *Scott v. State ex rel. Board of Nursing*, 196 Neb. 681, 244 N.W.2d 683 (1976), under a statute which empowered the Board of Nursing to deny a license to one "guilty of unprofessional conduct," we held that what constituted such conduct could be established by the testimony of qualified experts. However, the relevant statute in *Scott*, Neb. Rev. Stat. § 71-132.29 (Cum. Supp. 1976), did not restrict the meaning of unprofessional conduct to definitions contained in specifically named sources, as does § 71-147(10); thus, the State's reliance upon *Scott* is misplaced.

Because § 71-147(10) does not encompass Curry's conduct, we do not reach the constitutional concerns he has raised. Neither are we confronted with the need to determine whether the Legislature has properly set the standards and limits within which the rulemaking bodies are to act.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. RONALD E. REIMERS, APPELLANT.

496 N.W.2d 518

Filed March 5, 1993. No. S-92-206.

1. **Sentences: Prior Convictions: Appeal and Error.** A sentencing court's determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court's determination is clearly erroneous.
2. **Prior Convictions: Pleas: Right to Counsel: Sentences.** A prior conviction, based on a defendant's plea of guilty, but obtained in violation of the defendant's right to counsel, is unconstitutional and void and, therefore, cannot be used to enhance the sentence for the defendant's subsequent conviction.
3. **Sentences: Prior Convictions: Pleas: Records: Right to Counsel: Waiver: Proof.** In a proceeding for an enhanced penalty, when the record of a defendant's prior conviction, based on the defendant's plea of guilty, does not affirmatively show that the defendant was represented by counsel, or that the defendant, having been informed of the right to counsel, did voluntarily, intelligently, and knowingly waive that right, the State has the burden to prove the constitutional validity of the defendant's prior plea-based conviction in relation to the defendant's right to counsel before the State may use the prior plea-based conviction for an enhanced penalty.

Petition for further review from the Nebraska Court of Appeals, on appeal thereto from the District Court for Hall County, WILLIAM H. RILEY, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with direction.

Gerard A. Piccolo, Hall County Public Defender, for appellant.

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

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

SHANAHAN, J.

Pursuant to Neb. Rev. Stat. § 24-1107 (Cum. Supp. 1992), this court has granted Ronald E. Reimers' petition for further review of the Nebraska Court of Appeals' summary affirmance of Reimers' conviction and enhanced sentence for

drunk driving (DUI), that is, operating a motor vehicle while he was under the influence of alcoholic liquor, a violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1990). The primary appellate question is whether the evidence before the sentencing court established that Reimers' prior plea-based DUI conviction in 1982 was constitutionally valid for the purpose of enhancing the penalty for Reimers' DUI conviction in 1992.

STANDARD OF REVIEW

A sentencing court's determination whether a defendant's prior conviction, based on a plea of guilty, is constitutionally valid and, therefore, available to enhance a penalty for a subsequent conviction is analogous to a ruling on a motion to suppress evidence that is constitutionally inadmissible.

> In determining the correctness of a trial court's ruling on a motion to suppress evidence claimed to be constitutionally inadmissible, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous. In reviewing a trial court's findings on a suppression motion, an 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.

State v. Thomas, 240 Neb. 545, 547, 483 N.W.2d 527, 530 (1992). Accord, *State v. Childs, ante* p. 426, 495 N.W.2d 475 (1993); *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992).

Consequently, a sentencing court's determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court's determination is clearly erroneous.

BACKGROUND OF REIMERS' PRIOR CONVICTIONS

As a result of his having been in a traffic accident on July 19, 1991, Reimers was arrested for drunk driving. On October 30, the State filed an information against Reimers in the district court for Hall County, charging Reimers with (1) operating a motor vehicle during a period when his motor vehicle operator's license was revoked and (2) drunk driving. In its information against Reimers, the State alleged that Reimers had convictions

for DUI before the 1991 offense.

Reimers waived his right to a jury trial, and, on January 23, 1992, after a trial to the court, he was found guilty on both charges. At the sentence hearing and for the purpose of enhancing Reimers' sentence for the 1992 drunk driving conviction, the State offered exhibit 1, a certified copy of a complaint and journal entry in the county court for Hall County, Nebraska, reflecting that in 1985 Reimers was convicted of drunk driving and that Reimers had been convicted of drunk driving in 1979 and 1982. Exhibit 1 also reflected that Reimers was represented by counsel when Reimers entered his plea of guilty to the DUI charge on which he was convicted in 1985. However, exhibit 1 failed to disclose whether Reimers was represented by counsel, or waived his right to counsel, in either the 1979 or 1982 convictions.

Reimers objected to introduction of exhibit 1 in view of Neb. Rev. Stat. § 39-669.07(3) (Cum. Supp. 1990): "The defendant shall be given the opportunity to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions." Reimers' objection pointed out that exhibit 1, as a copy of the court record of Reimers' prior drunk driving convictions, failed to state or otherwise indicate that Reimers was represented by counsel, or that he waived his right to counsel, concerning the 1979 and 1982 convictions. The court overruled Reimers' objection to exhibit 1 which was received and used to enhance the penalty imposed as a result of Reimers' conviction under § 39-669.07(2)(c) (Cum. Supp. 1990), that is, the penalty for a DUI conviction when there is "a total of two or more times in the ten years prior to the date of the current conviction . . . ." The court sentenced Reimers to 90 days in the county jail, ordered Reimers to pay a $500 fine, and suspended the driver's license of Reimers for 15 years. The court also sentenced Reimers to 90 days in jail on the license revocation conviction.

In his appeal to the Nebraska Court of Appeals, Reimers requested reversal of his DUI conviction. At the State's request, the Nebraska Court of Appeals summarily affirmed Reimers' conviction and sentence. Reimers then requested further review

by this court on the issue whether his prior DUI convictions, reflected in exhibit 1, may be used to enhance the penalty for his 1992 conviction.

Concerning Reimers' prior DUI convictions, the 1979 conviction cannot be used for the enhancement of a penalty imposed for Reimers' 1992 conviction because the 1979 conviction is based on an offense that occurred more than 10 years before the 1991 incident and offense that led to Reimers' conviction for DUI in 1992. See § 39-669.07(2)(c) (Cum. Supp. 1990). See, also, *State v. Crane*, 240 Neb. 32, 480 N.W.2d 401 (1992) (the 10-year period of § 39-669.07(2)(c) is determined by and measured from the dates of the prior offenses, not the dates of the convictions for such prior offenses). Reimers was represented by counsel when Reimers, by his plea of guilty, was convicted of DUI in 1985. Thus, Reimers' 1985 DUI conviction was properly used as a prior conviction for the purpose of an enhanced penalty. Therefore, the crucial question is whether Reimers' 1982 conviction may be used to enhance the penalty imposed for Reimers' 1992 conviction.

UNCOUNSELED GUILTY PLEAS AS A BASIS FOR ENHANCEMENT

U.S. Const. amend. VI states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Similarly, Neb. Const. art. I, § 11, provides: "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel . . . ."

In *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), the U.S. Supreme Court reviewed a conviction in Texas wherein the prosecutor introduced Burgett's prior Tennessee conviction, but the transcript for the Tennessee conviction failed to show whether Burgett was represented by counsel, or had waived his right to counsel, concerning that conviction. In holding that Burgett's Tennessee conviction could not be used under Texas' recidivist statute, the Court stated:

> *Gideon v. Wainwright*[, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)] established the rule that the right to counsel guaranteed by the Sixth Amendment was

> applicable to the States by virtue of the Fourteenth, making it unconstitutional to try a person for a felony in a state court unless he had a lawyer or had validly waived one. And that ruling was not limited to prospective applications. See *Doughty v. Maxwell*, 376 U.S. 202, 84 S.Ct. 702, 11 L.Ed.2d 650; *Pickelsimer v. Wainwright*, 375 U.S. 2, 84 S.Ct. 80, 11 L.Ed.2d 41. In this case the certified records of the Tennessee conviction on their face raise a presumption that petitioner was denied his right to counsel in the Tennessee proceeding, and therefore that his conviction was void. Presuming waiver of counsel from a silent record is impermissible. *Carnley v. Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70. To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense (see *Greer v. Beto*, 384 U.S. 269, 86 S.Ct. 1477) is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.

389 U.S. at 114-15, 88 S. Ct. at 261-62.

Later, in *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct 1585, 64 L. Ed. 2d 169 (1980), a per curiam opinion, the U.S. Supreme Court held that an uncounseled misdemeanor conviction may not be used under an enhancement statute to convert a subsequent misdemeanor into a felony. Justice Marshall, in a concurring opinion joined by two other justices, said:

> [U]nless an accused has "the guiding hand of counsel at every step in the proceedings against him," *Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932), his conviction is not sufficiently reliable to support the severe sanction of imprisonment. *Argersinger v. Hamlin*, [407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972)]. An uncounseled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent offense. For this reason, a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains

> invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute.

446 U.S. at 227-28, 100 S. Ct. at 1588.

Therefore, a prior conviction, based on a defendant's plea of guilty, but obtained in violation of the defendant's right to counsel, is unconstitutional and void and, consequently, cannot be used to enhance the sentence for the defendant's subsequent conviction.

In *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983), this court examined a prosecution and conviction for drunk driving and an enhanced penalty based on two prior drunk driving convictions. In *Smith*, the State failed to show that Smith was represented by counsel, or waived his right to counsel, concerning the two convictions used for enhancement. This court followed *Burgett* and *Baldasar*, set aside Smith's enhanced sentence, and remanded the case for resentencing with the following statement:

> [U]nder the present circumstances, the burden remains with the State to prove the prior convictions. This cannot be done by proving a judgment which would have been invalid to support a sentence of imprisonment in the first instance. [Citation omitted.] Where the record is silent as to a defendant's opportunity for counsel, we may not presume that such rights were respected. . . .

213 Neb. at 449, 329 N.W.2d at 566.

More recently, in *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992), we considered, as a matter of due process for the validity of a plea-based conviction, the use of a prior conviction for enhancement purposes when the record failed to show affirmatively that a defendant had been informed of constitutional rights concerning a guilty plea. The particular conviction in Wiltshire's case was his 1982 conviction for drunk driving. We stated in *Wiltshire*:

> 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 *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.

241 Neb. at 823-24, 491 N.W.2d at 328. We continued in *Wiltshire* as follows:

> Like an uncounseled guilty plea, an un-*Boykinized* 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-*Boykinized* 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.

241 Neb. at 824-25, 491 N.W.2d at 329.

In *Wiltshire*, we concluded that

> [t]here 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.

241 Neb. at 826, 491 N.W.2d at 329-30.

Consequently, in a proceeding for an enhanced penalty, when

the record of a defendant's prior conviction, based on the defendant's plea of guilty, does not affirmatively show that the defendant was represented by counsel, or that the defendant, having been informed of the right to counsel, did voluntarily, intelligently, and knowingly waive that right, the State has the burden to prove the constitutional validity of the defendant's prior plea-based conviction in relation to the defendant's right to counsel before the State may use the prior plea-based conviction for an enhanced penalty. Cf. *Parke v. Raley*, ____ U.S. ____, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992) (consistent with due process, a state may fashion and prescribe a procedure to determine the constitutional validity of a prior plea-based conviction used for the purpose of enhancement).

In the case now before us, the sentencing court used Reimers' 1982 conviction as one of the convictions to enhance the penalty imposed on Reimers, that is, the court used the 1982 conviction as one of the multiple convictions within the 10-year period prior to the 1991 offense which led to Reimers' 1992 conviction. See § 39-669.07(2)(c) (Cum. Supp. 1990). Yet, the record offered by the State concerning the 1982 conviction contains nothing that establishes or indicates that Reimers had counsel or waived his right to counsel in that conviction. Also, the State supplied no additional evidence at the enhancement hearing in Reimers' case to show that Reimers' 1982 conviction was constitutionally valid in relation to the right of counsel. Since we cannot presume a waiver from a silent record, see *State v. Nowicki*, 239 Neb. 130, 474 N.W.2d 478 (1991); *State v. Sherrod*, 229 Neb. 128, 425 N.W.2d 616 (1988); *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984), we are compelled to conclude that Reimers was convicted without counsel in 1982 and that Reimers was not informed of his right to counsel and, therefore, did not waive his right to counsel concerning his 1982 conviction for drunk driving. For that reason, Reimers' 1982 conviction is constitutionally invalid and unavailable for the purpose of an enhanced penalty. That leaves only the 1985 conviction as a basis for an enhanced penalty for Reimers' drunk driving conviction. However, as noted, the sentencing court, in imposing the enhanced penalty, had to have used either the 1979 conviction which is outside the 10-year

period of permissible use for enhancement, or the 1982 conviction which was obtained in violation of Reimers' constitutional right to counsel. Therefore, the enhanced sentence imposed on Reimers must be set aside.

Therefore, we affirm the judgment of the Nebraska Court of Appeals which affirmed Reimers' conviction for drunk driving, but we reverse the judgment of the Nebraska Court of Appeals which affirmed the enhanced sentence imposed on Reimers. Consequently, we remand this cause to the Nebraska Court of Appeals with direction to reverse the sentence imposed on Reimers and remand this cause to the district court for Hall County, Nebraska, for sentencing according to law.

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

STATE OF NEBRASKA, APPELLEE, V. RODNEY L. STEWART, ALSO KNOWN AS SHAKUR ABDULLAH, APPELLANT.

496 N.W.2d 524

Filed March 5, 1993. No. S-92-356.

1. **Postconviction: Rules of the Supreme Court: Attorneys at Law: Appeal and Error.** The disposition of a direct appeal pursuant to Neb. Ct. R. of Prac. 3B is a disposition on the merits. Rule 3B includes actions seeking postconviction relief.
2. **Postconviction: Appeal and Error.** In an appeal from a denial of a motion for postconviction relief, the lower court's findings will be upheld unless clearly erroneous.
3. _____: _____. 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.
4. **Postconviction.** A court need not entertain a second motion or successive postconviction relief motions for similar relief on behalf of the same prisoner.
5. **Criminal Law: Right to Counsel.** A defendant in a criminal case where imprisonment is imposed has the right to assistance of counsel.
6. **Constitutional Law: Right to Counsel: Appeal and Error.** The assistance of counsel provision in the U.S. Constitution applies to direct appeals only.
7. **Constitutional Law: Right to Counsel: Convictions: Appeal and Error.** A defendant has no federal constitutional right to counsel when attacking a conviction that has long since become final upon exhaustion of the appellate process.

8. **Postconviction: Collateral Attack: Convictions: Appeal and Error.** Postconviction relief is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction.
9. **Postconviction: Due Process: Right to Counsel.** States have no obligation to provide a postconviction relief procedure, and when they do, the fundamental fairness mandated by the Due Process Clause of the U.S. Constitution does not require that the State supply a lawyer as well.
10. **Postconviction: Constitutional Law: Right to Counsel: Effectiveness of Counsel.** Because there is no constitutional right to an attorney in state postconviction proceedings, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Shakur Abdullah (Rodney L. Stewart), pro se.

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

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

FAHRNBRUCH, J.

Rodney L. Stewart, also known as Shakur Abdullah, who is serving a life sentence for first degree murder and 15 to 50 years for shooting with intent to kill, wound or maim, appeals the decision of the district court for Douglas County denying his second motion for postconviction relief. We affirm.

In January 1975, Stewart, then 16 years old, shot both Thomas Ehlers and Daniel Evans during an argument over drugs supplied to Stewart by Ehlers and Evans. Stewart then poured gasoline in the van in which they all had been riding and set it afire. Evans escaped from the vehicle and survived his injuries. Ehlers died from a gunshot wound to his head.

Following a jury trial, during which he was represented by a Douglas County public defender, Stewart was found guilty of first degree murder and of shooting with intent to kill, wound, or maim. He was sentenced to death on the murder charge and to 15 to 50 years imprisonment on the charge of shooting with intent to kill, wound, or maim. On his direct appeal to this

court, Stewart alleged that the trial court erred, inter alia, in failing to (1) suppress his confession, (2) accept his guilty plea, and (3) instruct the jury on manslaughter. Although Stewart's convictions were upheld on direct appeal, his death sentence was reduced to life imprisonment. *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977).

In 1983, Stewart filed a motion for postconviction relief in the district court for Douglas County under the provisions of Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989). He alleged that (1) he was denied effective assistance of counsel during his trial, (2) the trial court erred in refusing to instruct the jury regarding manslaughter, (3) the trial court improperly refused the guilty plea he tendered to the court, and (4) the element of malice was never established.

The district court appointed new counsel to represent Stewart in the postconviction proceeding filed in 1983. Following a hearing on the matter, in which Stewart's trial counsel testified, the district court overruled Stewart's motion for postconviction relief. After that ruling was appealed to this court, Stewart's counsel moved to withdraw pursuant to Neb. Ct. R. of Prac. 3B on the ground that the appeal was frivolous. The motion was granted and the judgment appealed from was affirmed. *State v. Stewart*, 218 Neb. xxxiii (case No. 84-681, January 11, 1985).

Rule 3B states, in relevant part, that "[a] motion of court appointed counsel to withdraw shall state the reason for the request, and shall be served on opposing counsel and the defendant." We have held that the disposition of a direct appeal pursuant to Neb. Ct. R. of Prac. 3B is a disposition on the merits. See, *State v. Nance*, 227 Neb. 581, 418 N.W.2d 600 (1988); *State v. Bean*, 224 Neb. 278, 398 N.W.2d 104 (1986). Rule 3B includes actions seeking postconviction relief. *State v. Harper*, 214 Neb. 911, 336 N.W.2d 597 (1983). In *Harper*, we cited *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), in setting standards for counsel filing motions to withdraw pursuant to Rule 3B. *Harper*, 214 Neb. at 916, 336 N.W.2d at 600. In *Anders*, the U.S. Supreme Court stated that in the course of a direct appeal, "if counsel finds his case to be wholly frivolous, after a conscientious examination

of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744. Later, the U.S. Supreme Court in *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987), rejected the argument that "*Anders* procedures should be applied to a state-created right to counsel on postconviction review just because they are applied to the right of counsel on first appeal. . . ." 481 U.S. at 556. We therefore overrule *Harper* to the extent that it implies that *Anders* procedures must be followed in postconviction proceedings in which counsel files a motion to withdraw on the grounds that an appeal is wholly frivolous. In any event, Stewart has not, in his second postconviction proceeding, claimed that it was error for this court to dispose of his first postconviction relief motion pursuant to Rule 3B.

Stewart has also filed a number of actions in federal court, of which we take judicial notice. On September 3, 1980, Stewart filed a petition in the U.S. District Court for the District of Nebraska for a writ of habeas corpus in which he alleged that he was denied due process, in part, because the trial court admitted into evidence his confession which had been given without prior advice that he could be prosecuted as an adult. See U.S. District Court file CV 80-L227. On December 16, 1981, the U.S. District Court rejected this claim and dismissed Stewart's petition. On appeal to the U.S. Court of Appeals for the Eighth Circuit, that court remanded the case to the district court to give Stewart an opportunity to amend his petition and delete claims that had not been exhausted in Nebraska state courts. *Stewart v. Parratt*, 682 F.2d 757 (8th Cir. 1982).

On January 16, 1986, Stewart filed a petition in federal district court for a writ of habeas corpus, in which he again alleged, in part, that the trial court erred in receiving into evidence his confession which had been given without prior advice that he could be prosecuted as an adult. See U.S. District Court file CV 86-L51. Stewart also alleged that he received ineffective assistance of counsel at his trial and that his confession was erroneously admitted into evidence because it had been given in response to interrogating officers' promises

to ask for lenient treatment for Stewart. On June 27, 1986, Stewart filed an amended petition for writ of habeas corpus in the federal district court. Stewart made additional allegations including that of ineffective assistance of counsel on his direct appeal to this court. The federal district court denied Stewart's petition on October 20, 1987. That court rejected Stewart's arguments that he had received ineffective assistance of counsel at trial and that his confessions were improperly admitted into evidence. The trial court's holdings were affirmed on appeal to the U.S. Court of Appeals for the Eighth Circuit. *Stewart v. Grammer*, 871 F.2d 1091 (8th Cir. 1988).

A second motion for postconviction relief was filed in the Douglas County District Court by Stewart on January 27, 1992. In it, he alleged violations of the Fifth, Sixth, and 14th Amendments of the U.S. Constitution, and violations of Neb. Const. Art. I, §§ 3, 11, and 12. Stewart also filed a Motion for Appointment of Counsel and Evidentiary Hearing. In a Supplemental Amended Petition filed April 15, 1992, Stewart alleged additional violations involving U.S. Const. art. IV, § 2, cl. 1, and the Tenth Amendment and of Neb. Const. art. I, §§ 13, 19, 23, and 26. Stewart could have raised these claims or litigated them in his first postconviction proceeding. He did not do so. Under Nebraska's procedural law, those claims may not be litigated in a second postconviction proceeding. See Neb. Rev. Stat. § 29-3001 (Reissue 1989) and *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991), *cert. denied*, ____ U.S. ____, 111 S. Ct. 2279, 115 L. Ed. 2d 965.

The district court overruled Stewart's 1992 motion for postconviction relief, and declined to hold an evidentiary hearing or to appoint counsel for Stewart. Stewart's 19 assignments of error to this court combine to claim that the trial court erred in (1) denying Stewart's fundamental right to perfect his own direct appeal to this court, (2) admitting his confession into evidence, and (3) denying Stewart's claim of ineffective assistance of counsel during the trial, direct appeal, and in the first proceeding for postconviction relief. Stewart has not assigned as error the district court's denial of his motions for appointment of counsel and for a evidentiary hearing.

In an appeal from a denial of a motion for postconviction relief, the lower court's findings will be upheld unless clearly erroneous. *State v. Victor, ante* p. 306, 494 N.W.2d 565 (1993). 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. Otey, supra.*

Stewart's claim that his confession was improperly admitted into evidence was addressed in his direct appeal and in his federal court actions. His claim of ineffective assistance of counsel with regard to his trial counsel was raised in his first postconviction proceeding and in federal court. Nebraska's procedural law expressly provides that all of these claims, having been litigated either in courts of this state or in federal courts, are precluded from consideration in this appeal. *Id.*

In his first postconviction proceeding when Stewart had new counsel, he could have raised his claim of ineffective assistance of counsel during his direct appeal and he could have raised his claim that he was denied his fundamental right to perfect his own direct appeal. Therefore, under Nebraska's procedure, Stewart is expressly foreclosed from raising those claims in a second postconviction proceeding. See § 29-3001 and *State v. Otey, supra.* Therefore, we will not now address those claims.

We next consider Stewart's claim that he had ineffective assistance of counsel at his first postconviction proceeding.

It was in *State v. Ohler*, 215 Neb. 401, 338 N.W.2d 776 (1983), that we first improvidently held that a defendant could, in a second postconviction relief motion, complain of ineffective assistance of counsel in the defendant's first postconviction proceeding. That holding was based upon *Sims v. State*, 295 N.W.2d 420 (Iowa 1980). In deciding *Sims*, the Iowa court relied on Iowa's postconviction statute that provided

> [a]ny ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in . . . any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent [postconviction] application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or

> was inadequately raised in the original . . . application.

Id. at 422 (quoting Iowa Code § 663A.8).

In *State v. Nance*, 227 Neb. 581, 418 N.W.2d 598 (1988), citing *State v. Ohler, supra*, we held that "[a] defendant is entitled to bring a second proceeding for postconviction relief only if the grounds relied upon did not exist at the time of the filing of the first motion." *Nance*, 227 Neb. at 584-585, 418 N.W.2d at 601. We explained: "Obviously, appellant's allegations of ineffective assistance of counsel at his postconviction hearing could not have been raised in his first postconviction motion." *Id.*

In *State v. Meis*, 233 Neb. 355, 445 N.W.2d 610 (1989), citing *State v. Ohler, supra*, and *State v. Nance, supra*, without citing other authority, we held that "[t]he defendant is entitled to bring this second proceeding for postconviction relief because the grounds relied upon, ineffective assistance of postconviction counsel, did not exist at the time of the filing of the first motion for postconviction relief." *Meis*, 233 Neb. at 359, 445 N.W.2d at 613. Following this line of reasoning would lead a person to believe that postconviction relief motions could be filed ad infinitum. Such is not the law in this state. Nebraska's postconviction relief proceedings are purely statutory. Neb. Rev. Stat. § 29-3001 (Reissue 1989), provides in part:

> A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion at any time in the court which imposed such sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence.

In regard to more than one motion for postconviction relief, § 29-3001 provides that "[the] court *need not entertain a second motion or successive [postconviction relief] motions for similar relief on behalf of the same prisoner*." (Emphasis supplied.) The only types of relief that can be sought under the act are provided in the act itself, that is, to vacate and set aside the judgment and discharge the prisoner or resentence him or grant a new trial as may appear appropriate. That is the relief that

Stewart has sought in each of his postconviction relief proceedings.

The federal constitution has been interpreted to provide that a defendant in a criminal case where imprisonment is imposed has the right to assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This court ruled the same in *State v. Green*, 238 Neb. 492, 471 N.W.2d 413 (1991). The United States Supreme Court and this court have held that the term "assistance of counsel" means "*effective*" assistance of counsel. *Strickland v. Washington, supra*; *State v. Kern*, 232 Neb. 799, 442 N.W.2d 381 (1989). The U.S. Supreme Court has also held that the assistance of counsel provision in the U.S. Constitution applies to direct appeals only. See *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987). The *Finley* court declared that "a defendant has no federal constitutional right to counsel when . . .attacking a conviction that has long since become final upon exhaustion of the appellate process." 481 U.S. at 555. (Citations omitted.) As the *Finley* court stated, postconviction relief is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. States have no obligation to provide a postconviction relief procedure, and when they do, the fundamental fairness mandated by the Due Process Clause of the U.S. Constitution does not require that the State supply a lawyer as well. See *Pennsylvania v. Finley, supra*.

In *Coleman v. Thompson*, ____ U.S. ____, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), the U.S. Supreme Court held that because there is no constitutional right to an attorney in state postconviction proceedings, "a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." 111 S. Ct. at 2566. The Nebraska Constitution's provision for assistance of counsel in a criminal case is no broader than its counterpart in the federal constitution. We, therefore, hold that a prisoner cannot claim constitutionally ineffective assistance of counsel as a result of an attorney's service in a postconviction proceeding. We overrule *State v. Ohler, supra*, *State v. Nance, supra*, and *State v. Meis, supra*,

insofar as they conflict with the holding in *Coleman v. Thompson* that a prisoner has no claim of ineffective assistance of counsel in a postconviction proceeding.

Since Stewart had separate and different counsel at his trial, on his direct appeal, and on first postconviction proceeding, his claim of ineffective assistance of counsel during his first postconviction proceeding is without merit.

We have reviewed all of Stewart's arguments in his second postconviction proceedings and find that none of them has merit and that the district court for Douglas County was correct in denying him postconviction relief.

The decision of the district court is affirmed.

AFFIRMED.

JOHN MONAGHAN, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLANT.

496 N.W.2d 895

Filed March 12, 1993. No. S-90-351.

1. **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.
2. **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.
3. _____. 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. **Federal Acts: Railroads: States: Negligence.** The Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. (1988), preempts state law and statutorily supplies uniform law controlling a railroad employee's claim for damages caused by negligence of the employer railroad while the employee is engaged in the railroad's interstate commerce activity.
5. **Federal Acts: Railroads: Claims: Courts.** In disposing of a claim controlled by the Federal Employees' Liability Act, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under the Federal Employers' Liability

Act are determined by the provisions of the act and interpretative decisions of the federal courts construing the Federal Employers' Liability Act.

6. **Federal Acts: Employer and Employee: Limitations of Actions.** Compliance with 45 U.S.C. § 56 is a condition precedent to an injured employee's recovery in an action under the Federal Employers' Liability Act. Failure to timely bring suit not only bars the claimant's remedy, but it also destroys the employer's liability.
7. **Federal Acts: Proof: Limitations of Actions.** In an action under the Federal Employers' Liability Act, a plaintiff must prove that the action was commenced within the 3-year period specified by § 56 of the act.
8. **Federal Acts: Words and Phrases.** For the purpose of the Federal Employers' Liability Act, an occupational disease is a condition which causes impairment, deviation, or interruption of the normal structure or function of a worker's body and which results from hazards or conditions peculiar to a particular occupation or employment.
9. **Federal Acts: Actions: Limitations of Actions.** Under the Federal Employers' Liability Act, a cause of action accrues for statute of limitations purposes when a reasonable person knows or in the exercise of reasonable diligence should have known of both the injury and its governing cause.

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

William J. Lamson, Jr., and Mark E. Novotny, of Kennedy, Holland, DeLacy & Svoboda, for appellant.

J. Thomas Rowen and John T. Carpenter, of Carpenter, Rowen & Fitzgerald, P.C., for appellee.

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

SHANAHAN, J.

In an action brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 et seq. (1988), Union Pacific Railroad Company (UP) appeals from the judgment on a verdict for John Monaghan on his claim for a loss of hearing as the result of employment at UP's shops. UP contends that the district court for Douglas County should have directed a verdict for UP because Monaghan's claim was barred by the act: "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." 45 U.S.C. § 56 (1988).

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 *Anderson v. Union Pacific RR. Co.*, 229 Neb. 321, 426 N.W.2d 518 (1988)). Accord, *Eccleston v. Chait*, 241 Neb. 961, 492 N.W.2d 860 (1992); *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).

MONAGHAN'S WORKPLACE

Monaghan began working as a machinist for UP in 1958 at the railroad's Omaha shops where diesel locomotives were repaired or rebuilt. Noise was so loud throughout the shop that "you didn't talk to a person, you kind of yelled at him." In an attempt to communicate with one another, shop employees had to "holler at each other."

Around 1978, Monaghan's work involved daily "load testing" a collection of four to eight diesel locomotives simultaneously parked on four adjacent tracks near the shop. Load testing, the noisiest operation at the shop, was designed to assure that rebuilt or repaired generators, compressors, and engines functioned properly before a locomotive returned to service. For load testing, which might last from 4 to 8 hours each day, a locomotive's throttle was increased a "notch" at a time until an engine's maximum revolutions were reached at the eighth notch on a throttle, resulting in noise much like a "jet engine." On occasion, the noise generated by load testing became so intense that it "blew windows out of the shop." In the testing area, employees communicated "strictly by hand signal

or head nodding." Even inside a locomotive being tested, employees next to each other had to "yell" in an attempt to communicate. Employees made an effort to protect themselves and block the noise by inserting toilet paper or rags into their ears since UP did not provide any protection from noise at the shop. In 1985, however, UP began supplying earplugs and, starting in 1987, required that shop employees wear earplugs in the shop.

MONAGHAN'S HEARING PROBLEMS

Sometime in 1980, Monaghan noticed a "ringing" in his ears. In 1984, during an examination by Dr. William Carter, an otolaryngologist, Monaghan's "ringing" condition was diagnosed as tinnitus which Dr. Carter described as an "abnormal noise" perception or "a false noise" because

> [t]here really is no noise there, but the patient feels that they hear this and it can take any form. It can be like crickets; it can be like bells ringing; it can be like winds howling; it can be like motors running; and it can vary in its intensity from very, very mild to very, very severe.

Tinnitus is the "head noises than an individual experiences sometimes without a hearing impairment."

Monaghan first realized that he had suffered a loss of hearing in 1987, when he was again examined by Dr. Carter.

MONAGHAN'S SUIT AND TRIAL

Monaghan filed his FELA action on June 14, 1988, and alleged that UP was negligent by failing to provide protective equipment to prevent Monaghan's loss of hearing and otherwise provide a safe workplace.

Monaghan testified that, before the examination by Dr. Carter in 1987, Monaghan "didn't know if [the noise at UP's shop] was harmful" to his hearing, did not know that the noise was "damaging" his hearing, and did not know that he was "losing" his hearing or had sustained a "hearing loss," although he did, as a result of "noise at work," experience tinnitus or "ringing" in his ears.

During Monaghan's trial, experts, including Dr. Carter, testified that Monaghan's noise-induced permanent loss of hearing was caused by exposure to excessively loud and

prolonged noise over a long period of time.

Dr. David Lipscomb, an audiologist, testified in detail concerning the structure and function of the human ear and described how intense noise causes physical damage to the ear, resulting in a loss of hearing. When the cochlea, a small tube in the inner ear, is exposed to prolonged or repeated loud noise, cochlear cells "die." There is no mechanism to replace destroyed cochlear cells necessary to activate nerves for transmitting data to the brain; hence, a noise-induced loss of hearing is permanent. An audiometric examination of Monaghan in 1988 showed that he had suffered a noise-induced loss of hearing. As Dr. Lipscomb testified: "Unless there is a sudden accidental exposure to sound, such as an explosion, the development of a noise induced hearing impairment occurs slowly, over time, seldom recognized by the individual. . . ."

Dr. Carter distinguished a noise-induced hearing loss from an "acoustic trauma." A noise-induced hearing loss is "caused by frequent or constant exposure to very loud noise over prolonged periods of time," whereas an acoustic trauma is a hearing loss that is caused by "one exposure to excessively loud noise." Also, Dr. Carter explained that "tinnitus is purely a subjective complaint and what I mean by that is that only the patient himself knows if he has tinnitus. I can't tell you if he does; you can't tell if he does; nobody can tell." Tinnitus is distinguished from a loss of hearing that can be objectively determined by testing with scientifically accepted equipment and methods, such as the audiogram which showed that Monaghan had actually suffered a loss of hearing. Dr. Carter concluded that Monaghan's loss of hearing was "a gradually-acquired loss over a 28-year span of time and due to frequent exposure to excessively loud noise," that is, Monaghan's "ear has been damaged by exposure to excessively loud noise during his 28 years of employment with the railroad."

At the conclusion of all the evidence, UP moved for a directed verdict because Monaghan's "cause of action is barred by the applicable statute of limitations in that [Monaghan] knew or should have known his cause of action accrued more than 3 years before June 14, 1988, the date on which

[Monaghan] filed his petition." The court overruled UP's motion and instructed the jury that the statute of limitations under the Federal Employers' Liability Act did not bar Monaghan's claim unless Monaghan, on or before June 13, 1985, knew that he had a loss of hearing or, in the exercise of reasonable care, should have known that he had a loss of hearing. The jury returned a verdict for Monaghan.

UP's assignments of error may be distilled into one: The 3-year statute of limitations under the Federal Employers' Liability Act barred Monaghan's action; therefore, the district court should have directed a verdict for UP.

FEDERAL EMPLOYERS' LIABILITY ACT

Preemption by Federal Law.

> The Federal Employers' Liability Act preempts state law and statutorily supplies uniform law controlling a railroad employee's claim for damages caused by negligence of the employer railroad while the employee is engaged in the railroad's interstate commerce activity. . . .
>
> . . . .
>
> Courts of the United States and courts of the several states have concurrent jurisdiction over claims controlled by the Federal Employers' Liability Act. 45 U.S.C. § 56. In disposing of a claim controlled by the Federal Employees' Liability Act, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, [citations omitted.], but substantive issues concerning a claim under the Federal Employers' Liability Act are determined by the provisions of the act and interpretative decisions of the federal courts construing the Federal Employers' Liability Act . . . .

Chapman v. Union Pacific Railroad, 237 Neb. 617, 621-23, 467 N.W.2d 388, 392-93 (1991).

Burden of Proof Re: Statute of Limitations.

> Compliance with 45 U.S.C. § 56 is a condition precedent to an injured employee's recovery in a FELA action. . . . Failure to timely bring suit not only bars the claimant's remedy, but it also destroys the employer's

> liability. . . . "For if a statute of limitations is thus made a limitation upon the continued existence of the right, rather than a mere bar to suit upon it, it goes to the substance of the plaintiff's claim so that he must show himself to be within the statute in order to recover . . . ." The burden is therefore on the claimant to allege and to prove that his cause of action was commenced within the three-year period.

Emmons v. Southern Pacific Transp. Co., 701 F.2d 1112, 1117-18 (5th Cir. 1983) (quoting *Goodwin v. Townsend*, 197 F.2d 970 (3rd Cir. 1952)). Consequently, in an action under the Federal Employers' Liability Act, a plaintiff must prove that the action was commenced within the 3-year period specified by § 56 of the act. Hence, Monaghan had the burden to prove that he timely filed his FELA action against UP.

The FELA Statute of Limitations.

Although the Federal Employers' Liability Act does not contain a definition or characterization of "occupational disease," from a medical standpoint, an occupational disease is "any deviation from or interruption of the normal structure or function" of the human body and which is "due to factors involved in one's employment." Dorland's Illustrated Medical Dictionary at 481, 490 (27th ed. 1988). According to Professor Arthur Larson, an occupational disease is "any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally." 1B A. Larson, The Law of Workmen's Compensation § 41.00 (1992). The preceding characterization by Larson has been adopted by federal courts to define "occupational disease" in the absence of a definition expressed in federal statutes. See, *Liberty Mut. Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750 (1st Cir. 1992) (Longshore and Harbor Workers' Compensation Act); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173 (2nd Cir. 1989). Therefore, for the purpose of the Federal Employers' Liability Act, an occupational disease is a condition which causes impairment, deviation, or interruption of the normal structure or function of a worker's body and which results from

hazards or conditions peculiar to a particular occupation or employment.

In *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949), the U.S. Supreme Court first applied the FELA statute of limitation to a case involving an occupational disease. *Urie* involved a railroad employee who had contracted silicosis from continuous inhalation of silica dust blown into locomotives on which the employee had been working for 28 years. Rejecting the contention that the statute of limitations began to run when Urie first contracted silicosis, the court stated:

> If Urie were held barred from prosecuting this action because he must be said, as a matter of law, to have contracted silicosis prior to November 25, 1938, it would be clear that the federal legislation afforded Urie only a delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.
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> . . . .
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> We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. . . . "[C]onsequently the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves . . . ."

337 U.S. at 169-70, 69 S. Ct. at 1024-25 (quoting *Associated Indemnity Corp. v. Industrial Accident Commission*, 124 Cal. App. 378, 12 P.2d 1075 (1932)).

Later in *United States v. Kubrick*, 444 U.S. 111, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979), a medical malpractice case brought under the Federal Tort Claims Act, the U.S. Supreme Court elaborated on the rule announced in *Urie*. In 1968, Kubrick, a veteran, was treated with neomycin at a veteran's hospital for an infection. In 1969, Kubrick's private physician

informed him that it was highly possible that the hearing loss was the result of the neomycin treatment. Another of Kubrick's private physicians, in June 1971, told him that neomycin had caused his injury and should not have been administered. In 1972, Kubrick filed suit under the Federal Tort Claims Act, alleging that he had been injured by negligent treatment at the VA hospital. A provision of the Federal Tort Claims Act, § 28 U.S.C. § 2401(b), bars any tort claim against the United States unless the claim is presented in writing to the appropriate federal agency "within two years after such claim accrues." The Court in *Kubrick* stated: "The issue in this case is whether the claim 'accrues' within the meaning of the Act when the plaintiff knows both the existence and the cause of his injury or at a later time when he also knows that the acts inflicting the injury may constitute medical malpractice," 444 U.S. at 113, 100 S. Ct. at 355, and then stated:

> We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask. If he does ask and if the defendant has failed to live up to minimum standards of medical proficiency, the odds are that a competent doctor will so inform the plaintiff.

444 U.S. at 122, 100 S. Ct. at 359. The Court concluded:

> We thus cannot hold that Congress intended that "accrual" of a claim must await awareness by the plaintiff that his injury was negligently inflicted. A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing

> so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government.

444 U.S. at 123, 100 S. Ct. at 360.

Urie and *Kubrick*, when read together, supply a basis for a discovery rule regarding an action under the Federal Employers' Liability Act: Although a claimant may be unaware that a legal wrong has occurred, a negligence cause of action accrues when the claimant has knowledge, or, in the exercise of reasonable diligence, should have known of the critical facts of both an injury and the cause of the injury. Thus, the discovery rule relative to an FELA action was expressed in *Fries v. Chicago & Northwestern Transp. Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990):

> [A] cause of action accrues for statute of limitations purposes when a reasonable person knows or in the exercise of reasonable diligence should have known of both the injury and its governing cause. . . . Both components require an objective inquiry into when the plaintiff knew or should have known, in the exercise of reasonable diligence, the essential facts of injury and cause.

See, also, *Bealer v. Missouri Pacific R. Co.*, 951 F.2d 38 (5th Cir. 1991) (a cause of action accrues when a plaintiff knows or should have known that the injury is work-related, i.e., when a plaintiff is aware of the critical facts concerning the injury and its causation); *Albert v. Maine Cent. R. Co.*, 905 F.2d 541 (1st Cir. 1990) (the statute of limitations begins to run when an employee becomes aware of the disease and its cause); *Townley v. Norfolk & Western Ry. Co.*, 887 F.2d 498 (4th Cir. 1989) (a cause of action for an occupational disease does not accrue when the injury is initially sustained, but, rather, when the plaintiff becomes, or should have become, aware of the injury; generally, this will be when the condition is diagnosed, unless it is shown that the plaintiff should have known at an earlier date that the plaintiff was injured); *Kichline v. Consolidated Rail Corp.*, 800 F.2d 356 (3rd Cir. 1986) (the statute of limitations begins to run when a plaintiff possesses sufficient critical facts

to put the plaintiff on notice that a wrong has been committed and that an investigation is necessary to determine whether redress is available); *Dubose v. Kansas City Southern Ry. Co.*, 729 F.2d 1026 (5th Cir. 1984) (the statute of limitations begins to run when a plaintiff should reasonably have been aware of the critical facts of injury and causation). See, also, *Fletcher v. Union Pac. R. Co.*, 621 F.2d 902, 906 (8th Cir. 1980), *cert. denied* 494 U.S. 1110, 101 S. Ct. 918, 66 L. Ed. 2d 839 (1981):

> In cases involving traumatic injury, when the symptoms are immediately manifested so that the employee is aware of the event causing the injury, the cause of action accrues upon the occurrence of the injury, regardless of whether the full extent of the disability is known at that time. . . . By the same token, with industrial diseases, where the symptoms are not immediately manifested, the cause of action does not accrue until the employee is aware or should be aware of his condition.

Although it is undisputed that Monaghan's tinnitus was medically confirmed in 1984, the testimony establishes that tinnitus or "ringing in the ears" may occur without a loss of hearing. Tinnitus, as a subjective condition, may occur independently of a noise-induced loss of hearing which is an objectively verifiable physical injury to cochlear cells in the inner ear. Although the separate conditions of tinnitus and noise-induced loss of hearing may exist simultaneously, there is no cause-and-effect relationship between the conditions. Moreover, tinnitus is not a noise-induced loss of hearing, the injury which, according to Dr. Carter, Monaghan suffered as the result of exposure to frequently recurrent loud noise over a protracted period. Therefore, Monaghan's knowledge that he was experiencing tinnitus cannot necessarily be equated with knowledge that he was gradually losing his hearing. In fact, Monaghan testified that he was unaware that he was gradually losing his hearing and that he acquired knowledge of his hearing loss only at the time of his examination by Dr. Carter in 1987. Thus, the evidence in Monaghan's case presented a two-fold question for the jury: When did Monaghan know that he had a hearing loss, or, more important under the circumstances, when, in the exercise of reasonable diligence,

should Monaghan have known that he had a hearing loss and attempted to identify the cause of that injury? Considering all the evidence, reasonable persons could answer the preceding questions differently on the basis of the evidence. One such permissible answer and conclusion was the jury's determination that Monaghan, sometime after June 13, 1985, and, therefore, within the 3-year period for filing an FELA action, acquired the information necessary for accrual of his cause of action against UP; hence, Monaghan timely filed his negligence action under the Federal Employers' Liability Act.

CONCLUSION

Considering the facts in a light most favorable to Monaghan, we cannot conclude, as a matter of law, that, sometime before June 13, 1985, Monaghan knew, or should have known, that he had sustained a hearing loss and should have attempted to identify the cause of his injury. The district court appropriately overruled UP's motion for a directed verdict based on the statute of limitations in the Federal Employers' Liability Act and properly submitted Monaghan's case to the jury. Therefore, we affirm the district court's judgment entered on the verdict awarded to Monaghan.

AFFIRMED.

JULIE PARRISH, A MINOR, BY AND THROUGH HER MOTHER AND NEXT FRIEND, KAREN PARRISH, APPELLANT, V. OMAHA PUBLIC POWER DISTRICT ET AL., APPELLEES.

496 N.W.2d 914

Filed March 12, 1993. No. S-90-389.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Jean V. Faulconbridge and Joseph B. Muller, of The Law Offices of Ronald J. Palagi, P.C., for appellant.

Rex A. Rezac, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee Omaha Public Power District.

Theodore J. Stouffer, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee Hawkins Construction Company.

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

SHANAHAN, J.

Karen Parrish, as next friend of Julie Parrish, sued Omaha Public Power District (OPPD) and Hawkins Construction Company (Hawkins) for negligence that allegedly caused severe emotional distress to Julie Parrish after the death of Julie's father, Eldon Parrish. Without elaboration, the district court granted summary judgment to OPPD and Hawkins and dismissed the action.

STANDARD OF REVIEW

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

Union Pacific RR. Co. v. Kaiser Ag. Chem. Co., 229 Neb. 160, 162-63, 425 N.W.2d 872, 875 (1988). Accord, *Dowis v. Continental Elev. Co.*, 241 Neb. 207, 486 N.W.2d 916 (1992); *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992); *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992). See Neb. Rev. Stat. § 25-1330 et seq. (Reissue 1989) (summary judgments).

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* [*v. St. Elizabeth Comm. Health Ctr.*, 241 Neb. 467, 488 N.W.2d 567 (1992)] citing *Bass v. Nooney Co.*, [646 S.W.2d 765 (Mo. 1983)].

Schleich v. Archbishop Bergan Mercy Hosp., 241 Neb. 765, 770-71, 491 N.W.2d 307, 310-11 (1992).

FACTS

Although the parties argue Julie Parrish's status as a "bystander" or a "direct victim" in relation to a cause of action for negligent infliction of emotional distress, there is another aspect of the summary judgment which disposes of the Parrish appeal.

The facts surrounding Eldon Parrish's death in a construction accident on June 9, 1987, are discussed in *Parrish v. Omaha Pub. Power Dist.*, *post* p. 783, 496 N.W.2d 902 (1993). After Eldon Parrish's death, Karen Parrish told the Parrishes' 10-year-old daughter, Julie, that her father had been killed in the accident. Julie described her reaction to her mother's telling her that Eldon Parrish had died: "I was very sad and I was hollering and yelling and I didn't want to believe her [mother] and I wanted . . . to tell her that she was lying and that he didn't — that he wouldn't die and leave me." According to Karen Parrish, Julie cried so much following her father's death that "she constantly had headaches and constantly was to the point of not breathing." Julie's physician diagnosed her breathing problems as hay fever and allergies and prescribed a regimen of weekly shots.

After her father's death, Julie continued in school without any particular problem except that her grades were generally lower than her grades before her father's death. Nearly 3 years after her father's death, and prompted by the suicide of one of her school acquaintances, Julie visited a school counselor because she was sad and could not concentrate on her school

work. However, at the time of her deposition in March 1990, Julie had not required any medical or psychological treatment on account of her father's death. Nothing indicates that Eldon Parrish's death had an extraordinary effect, either psychological or physical, on Julie Parrish.

Although we do not disregard or minimize the understandable anguish and enduring sadness that Julie Parrish experienced on learning of her father's death, an action for emotional distress is a particular type of legal action which requires "emotional distress . . . so severe that no reasonable person could have been expected to endure it" and which is of "sufficient severity that it is medically significant." See *Schleich v. Archbishop Bergan Mercy Hosp., supra.* To avoid a summary judgment in an action for emotional distress, the record must present some evidence establishing a factual question, i.e., a genuine issue of material fact, whether Julie Parrish's reaction to her father's death is "emotional distress" sufficiently severe and medically significant to be actionable under Nebraska law. The record does not contain evidence in that regard; hence, the district court properly entered summary judgment in favor of OPPD and Hawkins.

Therefore, we affirm the district court's judgment.

AFFIRMED.

GRANT, J., not participating.

FIRST NATIONAL BANK IN MITCHELL, APPELLEE, V. TED DAGGETT ET AL., APPELLANTS.

497 N.W.2d 358

Filed March 12, 1993. No. S-90-418.

1. **Debtors and Creditors: Property: Fraud.** There are two classes of creditors' bills, one to reach the equitable assets or property of the debtor on which an execution at law cannot be levied; the other in aid of an execution at law, as to set aside an incumbrance or a transfer of property made to defraud creditors.
2. **Debtors and Creditors: Judgments: Proof: Property.** There are three requirements for an equitable-assets creditor's bill: (1) the creditor must have a judgment against the debtor; (2) the creditor must "allege and show that he has

exhausted his remedy at law," i.e., the creditor must show that execution has not satisfied the judgment; and (3) the debtor must have some interest in property that the creditor is unable to reach through execution.

3. **Trusts: Real Estate.** Nebraska law determines the validity of a trust of an interest in Nebraska real estate.
4. **Trusts.** A trust that does not adequately identify its beneficiaries must fail.
5. **Evidence: Proof.** The burden of evidence at any particular time rests on the party who would be defeated if no further evidence would be introduced.
6. **Debtors and Creditors: Actions: Judgments: Liens: Property.** The beginning of a creditor's action to subject an equitable estate to the payment of a judgment gives a specific lien upon the property which it is sought to reach and this lien continues while the cause is pending.
7. **Trusts: Property.** A resulting trust is created when an inter vivos express trust fails and the settlor has not indicated how the property should be distributed upon such failure.
8. _____: _____. The beneficiary of a resulting trust remains the equitable owner of the property held in resulting trust.
9. **Debtors and Creditors: Limitations of Actions.** An equitable-assets creditors' bill, not being based on fraud, is governed by the five-year, judgment-dormancy limitations period.
10. **Motions for New Trial: Appeal and Error.** A motion for new trial should be granted only where there is error prejudicial to the rights of the unsuccessful party.

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

Robert M. Harris and Randall L. Lippstreu, of Harris & Lippstreu, for appellants.

Benjamin P. King, of Reed-King Law Office, for appellee.

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

WHITE, J.

Defendants-appellants, Daggetts and Klor (defendants), appeal a judgment from the district court for Scotts Bluff County in favor of plaintiff-appellee, First National Bank of Mitchell (FNB). FNB brought suit against the defendants seeking to satisfy a judgment against Ted Daggett's interest in real property that he and his wife, Mona, had conveyed to a trust. The district court (1) held that Ted Daggett's transfers to the trust and his later transfers of his beneficiary interest therein were fraudulent to FNB; (2) declared the trust void; (3) set aside

the transfers to the trust and determined that Ted and Mona each held an undivided one-half interest in the title to the real estate; and (4) held that Ted's interest in the property was subject to execution by FNB. We affirm.

The controversy in this case centers around the transfer of real estate, via two deeds, from Ted Daggett (Daggett) and his wife to the "T-M Enterprises Trust" (trust) on October 12, 1982. The relevant facts surrounding these transfers and the subsequent lawsuit are as follows.

At the time of the transfers to the trust, Daggett owed FNB over $271,000. Following the transfers, Daggett failed to repay his debt to FNB. On September 4, 1984, FNB recovered a judgment against Daggett for $378,178.66. Despite its judgment, FNB's attempts at execution in 1985 and 1988 recovered only $21,487.94. To aid its recovery FNB filed an action in April of 1985 seeking to set aside the transfers to the trust. FNB later dismissed that action without prejudice.

On October 5, 1988, FNB filed the present action, again seeking to satisfy its judgment against the realty Daggett had transferred to the trust. In its amended petition FNB listed three causes of action. FNB first asserted that due to various infirmities of the T-M Trust instrument, the trust was void. FNB's final two causes of action asserted that the transfers were fraudulent to FNB.

FNB asked the district court to declare the trust void, to declare Daggett's transfers to the trust and his sons fraudulent, and to set aside those transfers. FNB further requested that the court determine and partition Daggett's interest in the property so that FNB could satisfy its judgment against that interest. The defendants' answers alleged that FNB's action was barred by the statute of limitations and did not state a cause of action.

The district court found, among other things, that the trust was void and that Daggett's transfers to the trust and to his sons were fraudulent. The court ordered that the transfers be set aside, determined that Daggett and his wife each held title to an undivided one-half interest in the real estate, and declared that Daggett's one-half interest was subject to execution to satisfy FNB's judgment. The court subsequently denied the defendants' motion for a new trial.

The defendants argue that the district court erred by (1) overruling their objection that FNB's petition failed to state a cause of action; (2) failing to find the action barred by the statute of limitations; and (3) overruling the defendants' motion for a new trial.

FNB's action against Daggett is a creditor's bill by which FNB seeks to subject property, allegedly owned by Daggett, to payment of a judgment. We have noted that there are two types of creditor's bills, both of which sound in equity. See *Thies v. Thies*, 111 Neb. 805, 198 N.W. 151 (1924). We therefore apply the following standard of review:

> In an appeal of an equity action, this court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

State v. Nebraska Assn. of Pub. Employees, 239 Neb. 653, 657, 477 N.W.2d 577, 581 (1991) (quoting *State ex rel. Spire v. Strawberries, Inc.*, 239 Neb. 1, 4, 473 N.W.2d 428, 432 (1991)).

Furthermore, when reviewing questions of law we are obliged to reach conclusions independent of the trial court's rulings. *Dowd v. First Omaha Securities Corp., ante* p. 347, 495 N.W.2d 36 (1993).

Regarding creditors' suits, we stated in *Thies, supra*:

> There are two classes of creditors' bills, one to reach the equitable assets or property of the debtor on which an execution at law cannot be levied; the other in aid of an execution at law, as to set aside an incumbrance or a transfer of property made to defraud creditors.

Id. at 809, 198 N.W. at 152 (quoting *State Bank of Ceresco v. Belk*, 68 Neb. 517, 94 N.W. 617 (1903)).

FNB's amended petition included both types of creditor actions. FNB's first action alleged that the trust was void, that Daggett had retained an interest in the deeded real estate, and sought to satisfy its judgment against that interest. FNB's second and third actions sought to set aside the deeds based on fraud. Because we find that FNB's first cause of action is

dispositive, we address only the type of creditors' bill attacking the trust's validity, which we will refer to as an "equitable assets" creditor's bill.

There are three requirements for an equitable-assets creditor's bill. First, the creditor must have a judgment against the debtor; second, the creditor must "allege and show that he has exhausted his remedy at law," i.e., the creditor must show that execution has not satisfied the judgment; and finally, the debtor must have some interest in property that the creditor is unable to reach through execution. See *Thies, supra*, at 809, 198 N.W. at 152.

The first two requirements of *Thies* are disposed of easily. FNB gained a judgment against Daggett in 1984. In addition, FNB's attempts at satisfying the judgment through legal action proved unsuccessful; executions in both 1985 and 1988 recovered only $21,487.94 of the $378,178.66 judgment. Our inquiry thus focuses on whether Daggett possesses an interest in property which execution cannot reach.

FNB argues, and the district court agreed, that the T-M Enterprises Trust was void for several reasons, including failure to adequately identify its beneficiaries. FNB concludes that because the trust was void, Daggett retained equitable ownership of the deeded real estate and his interest therein is subject to FNB's 1984 judgment.

We first must determine which law governs the validity of the trust. A section of the trust provides that the law of various named jurisdictions shall be applied "[w]here the . . . validity . . . of the trust must be viewed by a court of law . . . ." Thirty-four trust provisions are then listed, along with the designated jurisdictions—23 different states and England. Included in the list is the language, "Identity of beneficiaries — Georgia law."

In *Morris v. Linton*, 74 Neb. 411, 104 N.W. 927 (1905), we stated that "the law of the *situs* shall exclusively govern in regard to all rights, interests and titles in and to immovable property." *Id.* at 417, 104 N.W. 929. The same rule, although more particularized, is stated in the Restatement (First) of Conflict of Laws § 241 (1934): "The validity of a trust of an interest in land is determined by the law of the state where the land is." *Id.*

Unless contrary to public policy, choice-of-law provisions are usually enforced. *Lauritzen v. Larsen*, 345 U.S. 571, 588-89, 73 S. Ct. 921, 97 L. Ed. 1254 (1953). We hold that in this situation, however, Nebraska law governs. The trust was created and executed in Nebraska and, most importantly, the *real estate* held in trust is located in Nebraska. The record indicates that Georgia has absolutely no contacts with the trust, the parties, or the real estate. In fact, Daggett stated that he only included the choice-of-law list because he had been instructed to do so in a trusts class. Daggett also admitted that he had not read any of the state laws included in the list.

At issue is the validity of a Nebraska trust—the receptacle of Nebraska real estate. Were we to resort to the laws of unconnected, outside jurisdictions to determine the ownership of Nebraska land, the certainty of title, marketability, and transferability of land in this State would be adversely impacted. Policy requires the law of the situs to govern. Nebraska law will determine the validity of the T-M Enterprises Trust. See *Morris, supra*. See, also, *Cook v. Frazier*, 765 S.W.2d 546 (Tex. Ct. App. 1989).

The relevant portions of the original trust document provide:

> BENEFICIARIES
>
> The beneficiaries of this trust are those persons holding certificates representing units of beneficial interest, whose names are recorded and ascertainable in the trust records.
>
> . . . .
>
> RECORDING THE NAMES OF BENEFICIARIES
>
> The names of each beneficiary of this trust must be recorded by the trust recordkeeper in the trust records . . . . An up-to-date list of these beneficiaries may be certified by the trustees . . . . [T]hat list is intended to represent a clear and definite means for the ascertainment of the beneficiaries of this trust.

In *First Nat. Bank v. Schroeder*, 222 Neb. 330, 383 N.W.2d 755 (1986), we held invalid a trust that failed to adequately identify its beneficiaries. The trust at issue in *Schroeder* provided that the lawful possessor of the trust's "units of beneficial interest" would be the lawful owner of the interests. *Id.* at 332, 383 N.W.2d at 757. We declared the trust invalid,

stating:

> The trust document *contains no provision indicating who is to receive the certificates of beneficial interest, nor does it empower the trustees to make that determination.*
>
> [The Settlor] argues that [under the trust provisions] . . . the beneficiaries were at all times ascertainable.
>
> [The Settlor] misses the point that "[i]t is essential to the creation and existence of a trust that a . . . beneficiary . . . *be designated* with sufficient clarity and certainty to be capable of identification, although not necessarily by name. . . ." (Emphasis supplied.) [Citation omitted.] The trust simply designates the owner as the beneficiary *without providing how possession and ownership shall occur.* Resultingly, the trust, on its face, does not adequately identify its beneficiaries and therefore must fail.

Id. (Emphasis supplied.)

The T-M Enterprises Trust similarly fails, on its face, to adequately designate its beneficiaries. The trust, like the trust in *Schroeder, supra*, merely provides a method of ascertaining who owns the certificates of beneficial interest. However, nothing *in the trust instrument itself* indicates how possession and ownership shall occur. The trust provisions do not indicate who is to receive the certificates, nor do they give the trustees the power to make that determination. As was the case in *Schroeder*, the trust must fail.

FNB also attacked the validity of the trust on other grounds, including failure to adequately identify its corpus and creating a spendthrift trust for the benefit of the settlor. Because failure to adequately identify beneficiaries is sufficient ground to invalidate the trust, we do not address FNB's other allegations.

Having determined that no trust existed to which Ted and Mona Daggett could transfer their realty, we next must consider the effect of the two deeds. In *Schroeder, supra*, we were faced with a factual scenario strikingly similar to the one now before us. After the debtor in *Schroeder* had transferred most of his assets to a trust, the bank obtained a judgment against him. Its attempts at execution having failed, the bank successfully attacked the validity of the trust in district court. *Schroeder*,

222 Neb. at 331, 383 N.W.2d at 756-57. On appeal, we agreed that the trust was invalid and affirmed the district court decree which declared that "[the trust's] assets are held by the Trustees in Constructive Trust for [the debtor]." *Id.* at 332-33, 383 N.W.2d at 757-58.

Although our analysis in *Schroeder* was correct, we note that a resulting trust, rather than a constructive trust, is created when an inter vivos express trust fails and the settlor has not indicated how the property should be distributed upon such failure. See, *In re Estate of Mooney*, 131 Neb. 52, 267 N.W. 196 (1936) (citing Restatement of Trusts § 411); *Holbein v. Holbein*, 149 Neb. 281, 30 N.W.2d 899 (1948); V William F. Fratcher, Scott on Trusts §§ 404.2, 411 (4th ed. 1989). The difference in name, however, does not change the result. As was the case in *Schroeder, supra*, the trustees of the T-M Enterprises Trust held the deeded real estate in trust for the settlors, Ted and Mona Daggett.

Despite conveying his legal title to the real estate to the trustees, as a beneficiary of the resulting trust Daggett remains the equitable owner of the property. See, *Holbein, supra*; Scott on Trusts, *supra*, at §§ 404.2, 462.1. As such, Daggett possessed an interest in the real estate that could be used to satisfy FNB's judgment. The requirements of *Thies* are therefore satisfied and FNB may satisfy its judgment through equitable proceedings. See *Thies, supra*. Neb. Rev. Stat. § 25-1564 (Reissue 1989) provides, in pertinent part:

> Where a judgment debtor has not personal or real property subject to levy on execution, sufficient to satisfy the judgment, . . . any interest he may have *in any . . . claims or choses in action*, due or to become due to him . . . shall be subject to the payment of such judgment *by proceedings in equity . . . .*

Id. (Emphasis supplied.)

The record indicates that at some point after June 20, 1988, the T-M Enterprises Trust was amended to cure the invalid beneficiary provisions. However, there is no indication of when the amendment occurred. FNB established a prima facie case for its equitable-assets creditor's action by proving that (1) it had obtained a judgment against Daggett; (2) it had exhausted

its remedies at law; and (3) due to an infirmity in the trust, Daggett had retained an equitable interest in the realty until at least June 20, 1988. See *Thies, supra*. Having established these requirements, the burden was on the defendants to show that the trust had been successfully cured prior to the filing of this action. *State ex rel. Beck v. Associates Discount Corp.*, 168 Neb. 298, 308, 96 N.W.2d 55, 65, *modified* 168 Neb. 803, 97 N.W.2d 583 (1959), *overruled on other grounds Dailey v. A.C. Nelsen Co.*, 178 Neb. 881, 136 N.W.2d 186 (1965) (stating: "The burden of evidence at any particular time rests on the party who would be defeated if no further evidence would be introduced.").

The defendants have not shown that the trust was amended prior to the initiation of this suit. Because the defendants have failed to rebut FNB's prima facie case, we treat the trust as invalid at the time this suit was filed. At that time the trust held only bare legal title to the property. As a result, regardless of the curative effect of the subsequent amendment, the trust and Daggett's sons took Daggett's equitable interest in the real estate subject to FNB's judgment. See *Nowka v. Nowka*, 157 Neb. 57, 66, 58 N.W.2d 600, 605, (1953) (holding: "[T]he beginning of a creditor's action to subject an equitable estate to the payment of a judgment gives a specific lien upon the property which it is sought to reach and this lien continues while the cause is pending."). FNB may reach Daggett's interest in the real estate to satisfy its judgment. See Neb. Rev. Stat. §§ 25-1503, 25-1564 (Reissue 1989).

We next address the defendants' argument concerning the statute of limitations. The defendants argue that FNB's causes of action are barred by the statute of limitations and that, as a result, FNB's petition failed to state a cause of action. They further allege that the applicable statute of limitations in an action to set aside a conveyance as fraudulent is four years, pursuant to Neb. Rev. Stat. § 25-207 (Reissue 1989). We agree with the defendants' interpretation of the law; if FNB had brought suit based solely on allegations of fraudulent conveyances, § 25-207 would apply.

However, as we have already discussed, FNB asserted another ground for making the real estate subject to its

judgment—the invalidity of the trust itself. This non-fraud ground falls outside the ambit of § 25-207. However, a judgment is a prerequisite for bringing a creditors' action, *Thies, supra*, and the equitable-assets action, not specifically governed by any other limitations period, is therefore governed by Neb. Rev. Stat. § 25-1515 (Reissue 1989). Section 25-1515 provides, in pertinent part:

> If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered in any court of record in this state, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment . . . shall become dormant . . . .

Id.

FNB clearly complied with § 25-1515. FNB received its original judgment in 1984 from the district court for Scotts Bluff County. In 1985 and 1988, FNB issued execution, collecting roughly $21,500. The present action was filed on October 5, 1988. FNB has allowed no five-year lapses between executions and has not allowed the judgment to become dormant. FNB's action is not barred.

Because we have determined that the invalidity of the trust is dispositive on the issue of FNB's ability to reach the real estate, we do not address FNB's contentions that Daggett's transfers to the trust were fraudulent. We thus turn to the defendants' final assignment of error, that the district court erred in denying their motion for a new trial.

"A motion for new trial should be granted only where there is error prejudicial to the rights of the unsuccessful party." *Kumar v. Douglas County*, 234 Neb. 511, 516, 452 N.W.2d 21, 24 (1990). "The District Court has the power and is required to consider and determine motions for a new trial by the exercise of its sound judicial discretion." *Carnes v. Weesner*, 229 Neb. 641, 650, 428 N.W.2d 493, 499 (1988) (quoting *Alliance Tractor & Implement Co. v. Lukens Tool & Die Co.*, 199 Neb. 489, 491, 260 N.W.2d 193, 195 (1977)). The district court's denial of a motion for new trial will be affirmed when the court's decision is neither prejudicial nor an abuse of discretion. *Schuster v.*

Baumfalk, 229 Neb. 785, 429 N.W.2d 339 (1988).

Although we have not addressed each cause of action addressed by the district court, we agree with the court on the dispositive issue—FNB's ability, as a result of the invalid trust, to reach Daggett's interest in the land. The district court correctly held that the trust was void and Daggett's interest in the realty could be reached to satisfy FNB's judgment. The court's ruling was not, as the defendants argue, contrary to the evidence or the law. The record indicates no abuse of discretion in the court's denial of the motion for new trial. We therefore affirm the district court's ruling on the motion.

The district court correctly ruled that the trust was invalid. As such, Daggett retained an equitable interest in the deeded realty which FNB may reach to satisfy its judgment. We therefore affirm the district court on those grounds necessary to dispose of this case.

AFFIRMED.

DANIEL R. LEWIS, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, APPELLEE.

497 N.W.2d 33

Filed March 12, 1993. No. S-90-439.

1. **Demurrer: Pleadings: Appeal and Error.** When testing whether a petition which was challenged by a demurrer stated a cause of action, an appellate court is required to accept as true all the facts which were well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom; it does not, however, accept as true the conclusions of the pleader.
2. **Federal Acts: Railroads: Torts.** The Federal Employers' Liability Act includes intentional torts which are committed by railroad officers, agents, or employees.
3. **Federal Acts: Railroads: States.** The Federal Employers' Liability Act supersedes a state's common and statutory law, even though an employee seeks relief in a state court.

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

Thomas F. Hoarty, Jr., of McGowan & Hoarty, for appellant.

Gayla L. Fletcher for appellee.

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

HOWARD, D.J., Retired.

The demurrer to plaintiff's second amended petition was sustained, plaintiff elected to stand on that petition, the petition was dismissed, and this appeal followed.

When testing whether a petition which was challenged by a demurrer stated a cause of action, an appellate court is required to accept as true all the facts which were well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom; it does not, however, accept as true the conclusions of the pleader. *LaPan v. Myers*, 241 Neb. 790, 491 N.W.2d 46 (1992).

Plaintiff, Daniel R. Lewis, basing his action on the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 et seq. (1988), alleged in his first cause of action as follows: He was a long-time employee of the defendant, Union Pacific Railroad Company, in the contracts and real estate department. In about October 1987, he was diagnosed as suffering from duodenitis, colitis, and gastritis, and this was reported to defendant's medical department. From that time until November 1988, he was off work on medical leaves of absence for considerable periods of time in an effort to bring his medical problems under control. His treatment included medication, stress management sessions, and medically approved leaves of absence "from his stress-producing job with the Defendant." Returning to work from a 5-month absence, he was presented "with an enormous stack of paperwork" which had accumulated in his absence. He began performing this work, and within a few weeks he began experiencing stomach problems again. In January and February 1989, his new supervisor, Barbara Zandbergen, repeatedly criticized him for not completing more work, and she urged him to work more hours, including overtime and evenings. In May 1989, his supervisor, being aware of his

history of stomach disorders and "the fact that job stress caused these stomach disorders," said that she was placing him on 60 days' probation for not devoting enough time to his job and that he would be fired if he did not produce more work. As a result, plaintiff attempted to work more than 40 hours a week, including many 12-hour days, "which resulted in his suffering severe lower abdominal pains and rectal bleeding on the job." He was directed by his physicians to stay off work for about 2 months in the summer of 1989. When he returned to work in August 1989, he was notified that he would be fired September 15, 1989. As a direct result of the acts of defendant, he suffered a peptic ulcer and colitis, and his general health and strength have been permanently impaired. Defendant negligently failed to provide him with a safe place to work and "caused, permitted and allowed" him to perform stressful work for a prolonged period of time when defendant knew or should have known that plaintiff would be injured thereby. Plaintiff's second cause of action, also brought under FELA, alleged that plaintiff's supervisor, being fully informed of plaintiff's medical condition and the "stress related injuries from which Plaintiff suffered," required him to work overtime, knowing this would cause "a relapse of his previous injuries," and also alleged that the supervisor's conduct was outside the "bounds of reasonable supervisory practice" and "constituted the intentional infliction of emotional distress."

FELA provides in § 51 that railroads are liable to employees for "injury" while employed "resulting in whole or in part from the negligence of any of the officers, agents, or employees."

It is now generally held that the act includes intentional torts. See, *Lancaster v. Norfolk and Western Ry. Co.*, 773 F.2d 807 (7th Cir. 1985), *cert. denied* 480 U.S. 945, 107 S. Ct. 1602, 94 L. Ed. 2d 788 (1987); *Slaughter v. Atlantic Coast Line Railroad Company*, 302 F.2d 912 (D.C. Cir. 1962); *Masiello v. Metro-North Commuter RR.*, 748 F. Supp. 199 (S.D.N.Y. 1990). The U.S. Court of Appeals for the Sixth Circuit appears to be alone in its refusal to recognize a claim based on injuries suffered as a result of intentional acts of the employer. See *Adkins v. Seaboard System R.R.*, 821 F.2d 340 (6th Cir. 1987), *cert. denied* 484 U.S. 963, 108 S. Ct. 452, 98 L. Ed. 2d 392. In

Naidoo v. Union Pacific Railroad, 224 Neb. 853, 402 N.W.2d 653 (1987), the Nebraska Supreme Court acknowledged that FELA has been interpreted to reach at least some intentional torts. The act supersedes a state's common and statutory law, even though an employee seeks relief in a state court. *Chapman v. Union Pacific Railroad*, 237 Neb. 617, 467 N.W.2d 388 (1991). In *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949), the U.S. Supreme Court examined FELA in reference to negligence determined by Missouri law and stated:

> [FELA] does not define negligence, leaving that question to be determined, as the Missouri Supreme Court said [on the first appeal of this case], "by the common law principles as established and applied in the federal courts." 352 Mo. at 218. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, has no application. What constitutes negligence for the statute's purposes is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes. Federal decisional law formulating and applying the concept governs. Hence the Missouri Supreme Court's decision on the first appeal, that the complaint did not state a cause of action for negligence, is subject to our independent review and is not to be taken as governed conclusively by the state court decisions which alone were cited in support of the determination.

337 U.S. at 174. By extension, the *Urie* rule applies to intentional acts.

In *Naidoo v. Union Pacific Railroad*, 224 Neb. at 858, 402 N.W.2d at 657, this court, denying FELA relief, stated that "[t]he clear weight of authority is that only damages for physical injury may be recovered under the FELA." (Emphasis omitted.) Plaintiff seeks to distinguish his case by pointing to a resultant peptic ulcer and colitis with rectal bleeding on the job. There is federal authority for such a distinction. In *Masiello v. Metro-North Commuter RR., supra*, the plaintiff alleged that her emotional injuries resulted in ulcers, which the court ruled met a physical injury requirement. The court's decision in *Teague v. National R.R. Passenger Corp.*, 708 F. Supp. 1344 (D. Mass. 1989), would allow a plaintiff to recover for mental

distress that was accompanied by physical manifestations. There, a pattern of harassment resulted in the plaintiff's psychological and physical injuries which included ulcers, duodenitis, and chest pain. But we focus here on the question whether plaintiff alleges acts of the defendant which fasten liability, assuming damages for which relief is available.

Federal decisions which we believe are most apposite in respect to the employer's conduct and the injury alleged take into account the needful, traditional, and accepted practices in the employer-employee arena, including the employer's right to lay out the work to be done, to demand its performance, and to criticize. In *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421 (3d Cir. 1990), *cert. denied* 498 U.S. 1090, 111 S. Ct. 970, 112 L. Ed. 2d 1057 (1991), the plaintiff claimed that he was inadequately trained as a conductor and that he suffered stress with resultant physical manifestations and involuntary rectal discharge. The court stated:

> We also acknowledge that Holliday's condition was not solely emotional, as he suffered from physical consequences attributable to his emotional state, but that circumstance does not alter our analysis. . . . The physical manifestations, though obviously germane to the assessment of Holliday's condition, have no bearing on the character of Conrail's allegedly tortious activity.

914 F.2d at 425. Denying relief, the court concluded:

> Conrail's allegedly tortious activity in putting him in that position was simply an ordinary management decision and was not of such a character that his emotional reaction and related physical consequences constituted an "injury" compensable under the FELA. . . .
>
> . . . .
>
> . . . We are encouraged to reach our result by the realization that if we hold that a railroad employee demonstrating some possible negligence with psychological consequences will always present a jury question in a FELA action, the most attenuated claims could be advanced. Indeed, a routine management decision not resulting in an accident could give rise to a claim by an employee for psychological injuries.

914 F.2d at 425-27.

The court in *Lancaster v. Norfolk and Western Ry. Co.*, 773 F.2d 807 (7th Cir. 1985), *cert. denied* 480 U.S. 945, 107 S. Ct. 1602, 94 L. Ed. 2d 788 (1987), commenting on a case in which employees claimed to have suffered physical and mental strain because the railroad had not given them enough help to be able to do their jobs adequately, said: "But the complaint was not that working conditions were unsafe; it was that clerical employees had been given too much—not too dangerous —work to do. That is not our idea of an FELA claim . . . ." 773 F.2d at 813.

In *Kraus v. Consolidated Rail Corp.*, 723 F. Supp. 1073 (E.D. Pa. 1989), a dispatcher claimed physical and mental distress disorders, having been admitted to the hospital with chest pains after his territory was doubled. Another dispatcher suffered a heart attack, blaming increased workload, a chaotic condition, and disputes with his supervisor; a third acquired ulcers while working hard after cuts in manpower; and a fourth blamed a reduction in force and disciplinary actions for his necessary absenteeism from the stressful workplace. The court denied these claims as "not the type of problem intended to be dealt with by the FELA." 723 F. Supp. at 1090.

Plaintiff's first cause of action did not escape the rationale of these decisions. The allegations disclosed an extraordinary consideration of plaintiff's problems by defendant. Plaintiff, having returned to work after lengthy leaves of absence, was presumably fit to undertake it. The allegation that his supervisor knew or should have known that requiring him to work, or to work hard, would bring about injuries to him attributes impossible medical prescience to her. The petition was not well pled in this respect, and the first cause of action did not state a claim for relief under FELA.

The second cause of action was for "the intentional infliction of emotional distress." In *Atchison T. & S. F. R. Co. v. Buell*, 480 U.S. 557, 107 S. Ct. 1410, 94 L. Ed. 2d 563 (1987), the U.S. Supreme Court stated:

> The question whether "emotional injury" is cognizable under the FELA is not necessarily an abstract point of law or a pure question of statutory construction that might be

> answerable without exacting scrutiny of the facts of the case. Assuming, as we have, that FELA jurisprudence gleans guidance from common-law development, see *Urie* v. *Thomspon*, 337 U. S., at 174, whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity. For example, while most States now recognize a tort of intentional infliction of emotional distress, they vary in the degree of intent required to establish liability, and the level of physical manifestation of the emotional injury required to support recovery. Moreover, some States consider the context and the relationship between the parties significant, placing special emphasis on the workplace. In addition, although many States have now recognized a tort of negligent infliction of emotional distress, they too vary in the degree of objective symptomatology the victim must demonstrate. These issues are only exemplary of the doctrinal divergences in this area. In short, the question whether one can recover for emotional injury may not be susceptible to an all-inclusive "yes" or "no" answer. As in other areas of law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand.

480 U.S. at 568-70.

In recent cases, federal courts have found emotional injuries cognizable under FELA. The court in *Taylor v. Burlington Northern R. Co.*, 787 F.2d 1309 (9th Cir. 1986), held that an injured worker can recover for purely emotional injuries. In *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (5th Cir. 1991), the plaintiff, a tugboat captain, suffered a significant emotional injury after an explosion on a barge being towed by his tugboat. The plaintiff had not been physically injured, but he did suffer from posttraumatic stress disorder and depression, and the court recognized such an action under FELA for purely emotional reasons.

In *Masiello v. Metro-North Commuter RR.*, 748 F. Supp. 199 (S.D.N.Y. 1990), the plaintiff allegedly suffered anxiety, depression, and an ulcer because of sexual harassment at her

place of employment. The court permitted the plaintiff to proceed under FELA. In *Amendola v. Kansas City Southern Ry. Co.*, 699 F. Supp. 1401 (W.D. Mo. 1988), the court pointed to a clear majority view upholding emotional distress claims under FELA, at least if physical harm is present.

Research discloses no distinct federal common law on what constitutes a claim for intentional infliction of emotional distress, but two federal courts have gleaned guidance from the states in which they sit. See, *Outten v. National R.R. Passenger Corp.*, 928 F.2d 74 (3d Cir. 1991) (court applied Pennsylvania's lenient bystander law to FELA claim of negligent infliction of emotional injuries, citing FELA's broad, remedial purpose announced in *Atchison T. & S. F. R. Co. v. Buell, supra*); *Gillman v. Burlington Northern R. Co.*, 878 F.2d 1020 (7th Cir. 1989) (affirming lower court's dismissal of FELA claim for failure to state a claim of negligent infliction of emotional distress under Illinois law).

In considering the first cause of action, we hold that it was not well pled in respect to the allegation that defendant's supervisor knew or should have known that her instructions would cause harm to plaintiff, and this holding applies to the second cause of action, which, stripped of its conclusions, amounted to no more than a claim that excessive work was given to plaintiff. It did not allege an intent to do harm to plaintiff, a necessary ingredient of the claimed "intentional infliction of emotional distress," and thus it failed to state a separate cause of action. The decision of the district court was correct and must be affirmed.

AFFIRMED.

HY-VEE FOOD STORES, INC., APPELLEE AND CROSS-APPELLEE, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE AND CROSS-APPELLANT, AND CITY OF LINCOLN, APPELLANT.

497 N.W.2d 647

Filed March 12, 1993. Nos. S-90-513, S-90-514, S-90-515, S-90-516.

1. **Liquor Licenses: Appeal and Error.** When reviewing, de novo on the record, the evidence considered by the Nebraska Liquor Control Commission, this court will consider only the evidence presented to the commission.
2. **Liquor Licenses.** Different classes of liquor licenses serve different needs of purchasers and cannot be considered interchangeably when determining the number of "similar" licenses that serve an area.
3. **Alcoholic Liquors: Sales: Ordinances: Equal Protection.** A municipal ordinance that treats certain "dual business operators" differently with regard to liquor sales, but does so without justification, violates equal protection and is invalid.
4. **Alcoholic Liquors: Sales.** A distinction between purveyors of liquor that is based solely on whether the liquor sold is consumed on or off the premises does not bear a rational relation to furthering temperance.
5. **Liquor Licenses.** A city council's arbitrary recommendation to deny a liquor license, based on a belief of sufficient licenses, does not, by itself, justify denial of an otherwise valid license.
6. _____. The fact that beer or liquor 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; some justification for classification must exist.

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

William F. Austin, Lincoln City Attorney, and Joel D. Pedersen for appellant.

John D. Hartigan, Jr., and Diane C. Sonderegger, of Kennedy, Holland, DeLacy & Svoboda, and James D. Meyer, of Meyer Law Firm, for appellee Hy-Vee Food Stores.

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

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

WHITE, J.

Based on the recommendation of appellant City of Lincoln (Lincoln), appellee Hy-Vee Food Stores, Inc. (Hy-Vee) was

denied four liquor licenses by appellee-cross-appellant Nebraska Liquor Control Commission (commission). (Lincoln filed the first notice of appeal in the district court; the commission is therefore an appellee and cross-appellant. See Neb. Ct. R. of Prac. 1C and 1E (rev. 1992)). The district court reversed the commission, ordering it to issue the four licenses. Lincoln and the commission then appealed to this court. We affirm.

On January 24, 1989, Hy-Vee applied to the commission for four class "D" liquor licenses. A class D license permits the retailer to sell liquor and beer, in the original package, for off-premises consumption. Neb. Rev. Stat. § 53-124(5)(d) (Reissue 1984). On February 21 the Lincoln City Council held a hearing to consider the propriety of issuing the licenses.

At the Lincoln hearing a number of local citizens appeared objecting to issuance of the licenses. Moreover, the Lincoln police chief, in a letter to the city council, voiced concern about granting the licenses. Hy-Vee also presented evidence to the city council, including petitions signed by 657 citizens, which had been gathered over a two-day period and supported issuing the licenses.

The Lincoln City Council, acting in an advisory capacity to the Nebraska Liquor Control Commission, recommended denial of the licenses. In its recommendation, Lincoln listed seven reasons for denying the licenses.

In accordance with Lincoln's recommendation, the commission denied the licenses to Hy-Vee. The commission's order stated that although Hy-Vee complied with the first three parts of Neb. Rev. Stat. § 53-132(2) (Reissue 1984), which governs issuance of liquor licenses, Hy-Vee did not meet the requirements of subsection (2)(d) of that statute. Section 53-132(2)(d) addresses "the present or future public convenience and necessity" as requiring issuance of a license. *Id.* The commission's order concluded, "the general finding of the Commission that the issuance of this license is not required by the present or future public convenience and necessity [is] based upon the following specific findings of fact . . . (a) The local governing body's recommendation of denial."

On appeal, the Lancaster County District Court reversed the

commission. The court, after reviewing the proceedings before the city council and commission, held that Lincoln's recommendation had been arbitrary and unreasonable. The court further held that the commission's adoption of that recommendation was also unreasonable and an abuse of discretion. The court thus ordered the commission to issue the four licenses to Hy-Vee. This appeal followed.

Although both Lincoln and the commission filed briefs challenging the district court's ruling, only Lincoln's brief included assignments of error. Restated, Lincoln argues that the district court erred by (1) exceeding its lawful scope of review; (2) making findings contrary to the evidence and the law; (3) finding that Lincoln's denial was based on a policy against issuing licenses to certain outlets; and (4) reversing the commission's order and ordering that the licenses be issued. As our discussion will indicate, our standard of review obviates a review of the errors complained of in Lincoln's first three assignments. We therefore focus on the propriety of reversing the commission and ordering that the licenses be issued.

We recently addressed similar issues in *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 898, 492 N.W.2d 7 (1992). Our analysis is governed by that opinion.

As was the case in *Gas 'N Shop*, Hy-Vee filed its appeal to the district court during a "window" period in which license application and appeals were governed by liquor control law as it stood prior to the 1986 legislation held unconstitutional in *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988). For the reasons set forth in *Gas 'N Shop*, our standard of review is de novo on the record. See *id.* at 899-901, 492 N.W.2d at 9-10.

With this standard in mind, we first consider an evidentiary issue raised by the parties. In district court, Hy-Vee offered a transcription of a statement made by one of the commission members that explained his reason for voting against issuance of the licenses. The substance of the statement was not reflected in the commission's subsequent order, which denied the licenses. The district court sustained Lincoln's objections to the statement, holding that the statement was outside the record. Hy-Vee made an offer of proof and now asks us to consider the

statement as part of the record. Based on our standard of review, we do not.

Because our review is de novo on the record, we consider only the evidence considered by the commission. The statements made by the commissioner, reflecting the reasons behind his vote, were not part of the record considered by the commission. Neither do they constitute part of the record before us. See *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 229 Neb. 530, 427 N.W.2d 784 (1988) (hereinafter *Gas 'N Shop I*).

We now turn to the record that was before the commission—which included the testimony and exhibits from the city council hearing. Applying pre-*Bosselman* law to the case at bar, we focus our inquiry on Neb. Rev. Stat. § 53-132 (Reissue 1984). The relevant portions of § 53-132, which list the qualifications for a license applicant, provide:

> (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.

Id. See, also, Neb. Rev. Stat. § 53-133 (Reissue 1984) (requiring a commission hearing on the application if, among other things, the city recommended denial of the license).

The record is abundantly clear that Hy-Vee has met the conditions in § 53-132(2)(a), (b) and (c). The parties have not argued otherwise. The evidence indicates that Hy-Vee has operated its Nebraska stores in a lawful manner and that none of the stores has been cited for a liquor-code or commission violation. We thus proceed to subsection (2)(d) of the statute and apply the evidence bearing on the factors listed in § 53-132(3). We consider the factors in the order listed in subsection (3), except that we will conclude with subsection (3)(a), that being the most involved application.

Beginning with subsection (3)(b), we note that only one written citizen protest was filed with the commission—by an attorney representing the Lincoln Package Beverage Association. The attorney also testified at the commission hearing. The Beverage Association clearly had an interest in denying the licenses; additional licenses would dilute existing retailers' market share. The Beverage Association attorney and six other individuals protested the issuance of licenses at the city council meeting. However, the majority of these protests indicated a general aversion to alcohol sales or to the sale of alcohol in grocery stores. Finally, the protests were more than counterbalanced by Hy-Vee's presentation of a petition signed

by 657 individuals who favored granting the licenses.

There is also undisputed evidence that Lincoln's population as of January 1, 1987, was 185,500, up from 171,932 in 1980. The evidence further indicates that Lincoln's population is growing at a rate of approximately 1 percent per year. Although the record does not clearly establish the nature of the neighborhoods or communities surrounding the stores, it does establish that the stores are in areas zoned for local business, planned neighborhood business, or commercial districts.

The attorney for the Package Beverage Association also presented evidence to the commission regarding the number of off-sale licenses located within one mile of each of the proposed locations. However, that information varied somewhat from similar information provided by Lincoln in its recommendations of denial. The evidence included in the city's recommendations also focused on the number of liquor licenses within one mile of each of the locations. Although Lincoln provided evidence of each type of license in the surrounding areas, subsection (3)(e) requires consideration of "retail licenses . . . with *similar privileges* within the neighborhood or community." Arguably, this would require a listing of only class D licenses. However, class C licenses—alcoholic liquors, on and off premises, in original packages—provide somewhat similar privileges. See Neb. Rev. Stat. § 53-124(5)(c) (Reissue 1984).

The evidence indicates that at the time Lincoln compiled its figures, the one-mile-radius circle around the store at 6919 "O" Street was served by three class D and ten class C licenses. The area around 2343 North 48th Street was served by four class D and three class C licenses. The area around the 1401 Superior Street store was served by one class D and one class C license. Finally, the area around the store at 3800 Old Cheney Road was served by three class C licenses.

Even though we list the number of class C licenses in the area near each store, we agree with Hy-Vee that many individuals might feel less comfortable buying off-sale liquor at a local tavern than at a grocery store. Furthermore, there is no close approximation between the purchase of off-sale liquor at a grocery store and the purchase and consumption of liquor in an "on premises" establishment.

The record contains no evidence regarding motor vehicle and pedestrian traffic, or sanitation and sanitary conditions around each store, subsections (3)(f) and (i) respectively. However, the record does indicate that zoning restrictions do not pose a problem. The evidence establishes that the stores are all located in areas zoned for business or commercial use.

Lincoln's police chief testified to the commission regarding the adequacy of existing law enforcement. The chief stated, "[i]f we saw *all the convenience stores and grocery stores* getting licenses, clearly, we would have to increase the people that work in our liquor and vice area. We would probably have to increase by a couple of officers." (Emphasis supplied). However, we are not involved in a review of licenses by all convenience and grocery stores. We only consider whether issuance of the four licenses to Hy-Vee would render existing law enforcement inadequate. The police chief's testimony does not shed light on that circumstance.

Further evidence regarding law enforcement was presented at the city council hearing. A letter from the police chief to the city council voiced concern that increased licenses would result in greater illegality and would be an "unnecessary burden for law enforcement." However, the police chief offered no corroborating evidence for this assertion and, as we stated in *Gas 'N Shop, supra*, "there is no evidence which establishes that illegal activity increases merely because a new license is issued." *Id.* at 903-04, 492 N.W.2d at 11.

The record indicates that the police department's only true "objection" was based on a Lincoln ordinance which required "separate and distinct liquor operations." As our discussion will indicate, however, this was an inappropriate basis for denial of the licenses. Despite these concerns, the police chief's letter continued, "[w]e are not concerned with the management, financial abilities, or moral fiber of the applicants. There is no question these are reputable people and businesses."

Nothing in the foregoing evidence indicates that the granting of the licenses would not be in the public interest. Thus, we finally address § 53-132(3)(a), the recommendation of the local governing body, as affecting the showing of public convenience

and necessity. In its recommendation of denial to the commission, Lincoln stated seven reasons for denying the licenses. Restated, the reasons given by Lincoln were: (1) the area around each location was adequately served by existing licenses; (2) the Lincoln Police Department's objections; (3) the applicant did not demonstrate a need for the licenses or a true increase in service to the public; (4) the applicant did not demonstrate an improvement to the neighborhood or a betterment to the community; (5) Lincoln's existing population and projected growth did not warrant the issuance of the licenses; (6) the present and future public convenience and necessity did not indicate a need for the licenses; and (7) the grocery stores did not comply with Lincoln's "separate and distinct business activity" ordinance. We address these factors in order.

With regard to adequate service by existing licenses, Lincoln's recommendation makes no distinction between types of licenses or between the locations of the stores. As we stated previously, an on-premises license is not the equivalent of a class D license, and serves different needs of purchasers of alcoholic beverages. Lincoln's recommendation lumps all types of licenses together. Likewise, the city makes no distinction between the different locations. The 69th and "O" location was served by ten class C and three class D licenses, while the area around the 1401 Superior Street store was served by one class D and one class C license. Yet Lincoln denied both licenses based on the same factors, without citing differences in population or neighborhood makeup. Without fact-based distinctions, the blanket claim of "adequate service" around each location appears arbitrary.

We have already addressed the police objections to the licenses. The police objections were either based on inappropriate grounds or factually unsupported.

With regard to demonstration of public service or community betterment, Lincoln's finding runs contrary to the record. The only evidence on the record relating to these amorphous "factors" balances in favor of Hy-Vee. Seven individuals protested the issuance of the licenses, while over 650 people indicated support for Hy-Vee. Likewise, the record

indicates that Hy-Vee (1) does community-service work in Lincoln; (2) provides efficient, economical, and courteous service to its customers; and (3) employs over 650 people in Lincoln, with an annual payroll of over $5 million.

Lincoln's past and projected population growth are also relied on in the city council's recommendation of denial. The record indicates an annual growth rate of 1 percent. The record further indicates, however, that although Lincoln had 51 more liquor licenses in 1989 than it had in 1980 (an average increase of 2.5 percent per year), only three class D licenses were added during that period. In fact, there were six less class D licenses in 1989 than there had been in 1970.

Lincoln's sixth reason for denial, that public convenience and necessity did not require the licenses, simply begs the question. A legal conclusion does not aid us in our determination of whether § 53-132(2)(d) was met.

The aforementioned six reasons given by Lincoln do not provide an adequate basis for denial of the licenses. The city's reasons either are neutral or actually support issuance of the licenses. The record indicates that the final reason given by Lincoln, the "separate and distinct" ordinance, provided the predominant reason for denial of the licenses. However, the city's reliance on the ordinance as a ground for denial of the licenses was inappropriate.

In *Gas 'N Shop I, supra*, we addressed the constitutionality of an earlier version of Lincoln's "separate and distinct" ordinance. That version made unlawful the retail sale of liquor "except within duly licensed premises which are separate and distinct from any other business activity; provided, this subsection shall not apply to the retail sale of alcoholic liquor as part of a bowling alley, hotel, motel, club, or restaurant business . . . ." *Id.* at 536, 427 N.W.2d at 788 (quoting Lincoln Mun. Code § 6.08.100 (1981)).

We declared the ordinance invalid, noting that the exemption of bowling alleys, hotels, etc., treated certain "dual business operators" differently, but without justification, and therefore violated the policy of Neb. Rev. Stat. § 53-101.01(2) (Reissue 1984). We thus held that the ordinance violated equal protection. *Gas 'N Shop I, supra*, at 541-42, 427 N.W.2d at 791.

The version of the "separate and distinct" ordinance considered by the city when denying the Hy-Vee applications was an amended version of the ordinance declared invalid in *Gas 'N Shop I*. The amended version stated, in pertinent part: "It shall be unlawful for any person . . . keeping or selling alcoholic liquor for consumption *off the premises* to keep, or sell the same except within duly licensed premises which are separate and distinct from any other business activity." Lincoln Mun. Code § 6.08.100 (1986) (emphasis supplied). Although the amendment eliminated the exempted class of businesses addressed in *Gas 'N Shop I*, the ordinance still violated equal protection because it continued, without justification, to treat dual business operators differently.

The new ordinance applies the "separate and distinct" rule only to dual business operators who sell liquor for off-premises consumption. We have held, however, that this distinction does not bear a rational relation to furthering temperance, as required by Neb. Rev. Stat. § 53-101.01(4) (Reissue 1984). *Casey's Gen. Stores v. Nebraska Liq. Cont. Comm.*, 220 Neb. 242, 369 N.W.2d 85 (1985). In *Casey's*, we addressed legislation which treated convenience stores differently from, among other things, restaurants. In declaring the legislation unconstitutional we stated:

> At either [a convenience store or a restaurant] a person may purchase food as well as alcohol . . . . The only distinction is that the alcoholic beverages purchased at the convenience store will be drunk off the premises. *This difference, however, presents no distinctive corollary to furthering temperance, as an individual may drink as much in a private restaurant as he may at home or elsewhere.*

Id. at 245-46, 369 N.W.2d at 88. See, also, *Gas 'N Shop I, supra.*

The Lincoln "separate and distinct" ordinance, even in its amended form, distinguished between dual business operators without valid justification. The city's reliance thereon to deny Hy-Vee's applications was inappropriate.

We finally turn to the question before us: according to the evidence, is the issuance of the requested licenses required by

the present or future public convenience and necessity? We determine that it is. As we stated in *Gas 'N Shop, supra*, combining the concept of public convenience and necessity with the sale of alcohol appears oxymoronic. However, the record indicates that many consumers support the issuance of licenses to Hy-Vee. No evidence before the commission, including the recommendation of Lincoln, indicated that the surrounding areas were adequately served by licensees possessing similar privileges. See Neb. Rev. Stat. § 53-132(3)(e). Furthermore, a city council's arbitrary recommendation of denial, based on a belief of sufficient licenses, does not, by itself, justify denial of an otherwise valid license. *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).

We reiterate our statement in *Gas 'N Shop* as applied to the sale of beer or liquor:

> The fact that beer [or liquor] 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.

Id. at 905, 492 N.W.2d at 12.

The record supports granting Hy-Vee the requested licenses. We therefore affirm the district court's holding and its order that the licenses be issued.

AFFIRMED.

B & R STORES, INC., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLEE, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE AND CROSS-APPELLANT, AND CITY OF LINCOLN, APPELLANT.

497 N.W.2d 654

Filed March 12, 1993. Nos. S-90-517, S-90-518, S-90-519, S-90-520.

1. **Appeal and Error.** An appellate court will not consider an alleged error that has not been both assigned and discussed in the brief of the party claiming that prejudicial error has occurred.
2. **Liquor Licenses.** A lawful justification for refusing to grant a liquor license must exist; purely arbitrary treatment or classification cannot be sustained.

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

William F. Austin, Lincoln City Attorney, and Joel D. Pedersen for appellant.

M.J. Bruckner and Paul J. Peter, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellee B & R Stores.

Robert M. Spire, Attorney General, and Marie C. Pawol, and, on brief, Donald E. Hyde for appellee Liquor Control Commission.

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

WHITE, J.

Based on the recommendation of appellant City of Lincoln (Lincoln), appellee B & R Stores, Inc. (B & R) was denied four liquor licenses by appellee-cross-appellant Nebraska Liquor Control Commission (commission). Because Lincoln filed the first notice of appeal in the district court, the commission is an appellee and cross-appellant. See Neb. Ct. R. of Prac. 1C and 1E (rev. 1992). The district court reversed the commission, ordering it to issue the four licenses. We affirm.

B & R's application process occurred during the same "window" period discussed in *Hy-Vee Food Stores v. Nebraska Liquor Control Comm., ante* p. 752, 497 N.W.2d 647 (1993) (case nos. 90-513, 90-514, 90-515 and 90-516), decided today. For the reasons articulated in that decision, our review is

de novo on the record. The facts, evidence, and the decisions of Lincoln and the commission are much the same in B & R's appeals as they were in *Hy-Vee, supra*. We will thus follow the analysis set forth in *Hy-Vee*, noting any factual discrepancies between the records in the cases.

On January 11, 1989, B & R applied to the commission for one class "B" and three class "D" liquor licenses. A class D license permits the retailer to sell liquor and beer, in the original package, for off-premises consumption. A class B license permits sale of beer only, in the original package, for consumption off the premises. Neb. Rev. Stat. § 53-124(5)(b), (d) (Reissue 1984). The Lincoln City Council, following a hearing, recommended to the commission that the licenses be denied.

The commission followed Lincoln's recommendation and denied the licenses. In its April 19, 1989, order, as it had in *Hy-Vee*, the commission determined that B & R had satisfied the requirements set forth in Neb. Rev. Stat. § 53-132(2)(a), (b) and (c) (Reissue 1984). However, the commission found that B & R did not satisfy the requirements of subsection (2)(d) of the statute. The commission based its finding on Lincoln's recommendation of denial.

On appeal, the Lancaster County District Court reversed the commission, ordering issuance of the licenses. Lincoln and the commission then appealed to this court.

Restated, Lincoln argues that the district court erred by: (1) exceeding its lawful scope of review; (2) making findings contrary to the evidence and the law; (3) finding that Lincoln's denial was based on a policy against issuing licenses to certain outlets; (4) reversing the commission's order and ordering that the licenses be issued; and (5) overruling Lincoln's objection to "exhibit 6" and thereby accepting new evidence into the record. For the reasons set forth in *Hy-Vee, supra*, we need not address Lincoln's first three assignments of error. Before reviewing the propriety of reversing the commission, however, we address two other matters.

Lincoln's fifth assignment of error is completely without merit. The district court admitted no "exhibit 6" and Lincoln has not described what the allegedly improper evidence was.

Furthermore, our standard of review requires us to consider only the record before the commission, and thus we will not consider any evidence that might have been erroneously added by the district court. See *Hy-Vee, supra*.

A second matter involves an allegation of error by the commission. The commission alleges that the bill of exceptions was offered at the district court level without the separate envelope containing exhibits. We first note that the record before us contains the exhibits that were before the commission, including the evidence and testimony from the city council hearing. In addition, we will not consider an alleged error that has not been both assigned and discussed in the brief of the party claiming that prejudicial error has occurred. *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992). Neither Lincoln nor the commission has assigned this point as error and therefore we do not consider it.

The record clearly establishes that B & R has met the first three requirements of § 53-132. We thus turn to the factors set forth in § 53-132(3) as they bear on whether the "public convenience and necessity" requires issuance of the licenses. As in *Hy-Vee, supra*, we consider the factors in the order listed, except that we conclude with subsection (3)(a), the recommendation of the local governing body.

At the commission hearing, the Lincoln Package Beverage Association protested issuance of the licenses. In addition, at the city council hearing seven individuals spoke against issuing the licenses, including representatives from the Package Beverage Association, Mothers Against Drunk Driving, and the Nebraska Council on Alcohol and Drug Education. However, one person at the council hearing spoke in favor of issuing the licenses. Furthermore, B & R presented over 4,000 signatures in favor of liquor and beer being sold at their stores.

Statistics as to Lincoln's population growth were also presented to the commission—the same figures presented in *Hy-Vee*. Evidence was also offered regarding the existence of other retail licenses within one mile of each location. At the time of the city council hearing, the one-mile-radius circle around the store at 130 North 66th Street was served by three class D and ten class C licenses. The area around the store at 5500 South

56th Street was served by one class D and four class C licenses. The area around 233 North 48th Street was served by three class D and twelve class C licenses. Finally, the area around the store at 4200 South 27th Street (the store seeking the class B license) was served by one class C and two class D licenses. Further evidence was presented to the commission and the city council indicating that in 1989 Lincoln had one class B or D license per 3,557 people—the lowest such ratio among the 17 largest cities in Nebraska.

The evidence showed that substantial motor vehicle traffic passed by each proposed licensed premises. The record indicated that the number of cars passing each location daily was 15,000 by the store at 4200 South 27th Street; 12,700 by 5500 South 56th Street; 20,000 by 233 North 48th Street; and a combined 47,000 by the store at 130 North 66th Street. The evidence also indicated that the neighborhoods around the stores were zoned as either "planned regional business" or "local business" districts and were bordered by predominantly commercial areas.

No evidence was presented as to the adequacy of existing law enforcement or the sanitary conditions on or about each location. With regard to subsection (3)(e), whether the proposed business would be consistent with the public interest, the evidence was in equipoise. Two University of Nebraska professors testified before the commission and voiced concern that increased availability of alcohol in convenient shopping locations could increase consumption. However, testimony from the president of B & R indicated that the stores would carefully train the employees who would sell the alcohol. Furthermore, the testimony indicated that B & R would provide adequate, economical, and efficient service to purchasers of alcoholic beverages.

We thus turn to § 53-132(3)(a), the recommendation of the local governing body. In its recommendation of denial to the commission, Lincoln stated the same seven reasons that it had stated in the *Hy-Vee* cases, namely (1) the area around each location was adequately served by existing licenses; (2) the Lincoln Police Department's objections; (3) the applicant did not demonstrate a need for the licenses or a true increase in

service to the public; (4) the applicant did not demonstrate an improvement to the neighborhood or a betterment to the community; (5) Lincoln's existing population and projected growth did not warrant the issuance of the licenses; (6) the present and future public convenience and necessity did not indicate a need for the licenses; and (7) the grocery stores did not comply with Lincoln's "separate and distinct business activity" ordinance. We again address these factors in order.

As we pointed out in *Hy-Vee*, Lincoln's claim of "adequate service" in the surrounding areas appears purely arbitrary. Lincoln provided no evidence of population in each area, nor did it distinguish between the different locations or the types of licenses serving each area.

Lincoln also cites the "objections raised by the Lincoln Police Department" as reason for denying the licenses. However, the record is devoid of any objections by the Lincoln Police Department relating to the four stores seeking the licenses.

With regard to demonstration of public service or community betterment, the record again supports issuance of the licenses. B & R has provided efficient and economical service to Lincoln, with a recent study indicating that B & R provides 38% of the city's total grocery supply. B & R also employs over 750 people in Lincoln, with an annual payroll of over $8 million.

The figures relating to population growth remain the same as those relied on by the city in *Hy-Vee*. The number of liquor licenses in Lincoln increased from 172 licenses in 1980, to 211 active licenses in September of 1988—an increase of 2.5 percent per year. However, the number of class D licenses increased by only two during that period, and the number of class B licenses fell from one to zero. Furthermore, Lincoln's conclusory statement that "public convenience and necessity would not indicate that this license should be issued" is as little help to our inquiry as it was in *Hy-Vee*.

We again come to the conclusion that the major reason for the city's recommendation of denial was the "separate and distinct" ordinance codified at Lincoln Mun. Code § 6.08.100 (1986). As we noted in *Hy-Vee*, the ordinance was an improper

ground for denial of the licenses.

Furthermore, statements made by Lincoln's city council members indicated that the recommendation of denial was based in large part on an aversion to granting licenses to stores that would make the purchase of alcohol convenient. However, a lawful justification for refusing to grant a liquor license must exist; purely arbitrary treatment or classification cannot be sustained. *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 905, 492 N.W.2d 7 (1992).

The evidence before the commission supports granting B & R the licenses. That fact, combined with over 4,000 signatures favoring the sale of liquor by B & R, convinces us that B & R has met the requirements of § 53-132(2)(d). Lincoln's arbitrary recommendation of denial does not justify denial of B & R's otherwise valid licenses. See *Hy-Vee, supra*. We therefore affirm the district court's reversal of the commission and its order that the licenses be issued to B & R.

AFFIRMED.

SPORTS COURTS OF OMAHA, LTD., A NEBRASKA LIMITED PARTNERSHIP, APPELLANT AND CROSS-APPELLEE, V. HARRY W. MEGINNIS, JR., APPELLEE AND CROSS-APPELLANT.

497 N.W.2d 38

Filed March 12, 1993. No. S-90-546.

1. **Courts: Jurisdiction: Appeal and Error.** A district court is divested of subject matter jurisdiction over a particular case when an appeal of that case is perfected to an appellate court.
2. **Statutes.** Interpreting a statute presents a question of law for judicial determination.
3. **Secured Transactions: Deeds: Trusts.** The Nebraska Trust Deeds Act, Neb. Rev. Stat. § 76-1001 et seq. (Reissue 1990), provides a specific statutory plan to obtain performance of an obligation, prescribes a distinct procedure to dispose of security for performance of an obligation, and, generally, authorizes a form of financing quite apart from other methods recognized under Nebraska law.

4. **Statutes.** 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.
5. **Limitations of Actions: Legislature: Intent.** A special statute of limitations controls and takes precedence over a general statute of limitations because the special statute is a specific expression of legislative will concerning a particular subject.
6. **Secured Transactions: Deeds: Trusts: Limitations of Actions.** The obligation secured by a deed of trust, not the title to the security, determines applicability or availability of the 3-month statute of limitations under Neb. Rev. Stat. § 76-1013 (Reissue 1990).
7. **Attorney Fees: Actions: Words and Phrases.** A legal position is frivolous for purposes of Neb. Rev. Stat. § 25-824(2) (Reissue 1989) if the position is wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit.
8. **Actions.** An action is frivolous or in bad faith if a party attempts to relitigate the same issue previously resolved in an action involving the same party.
9. _____. Any doubt whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.
10. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision allowing or disallowing an attorney fee under Neb. Rev. Stat. § 25-824 (Reissue 1989) will be upheld in the absence of the trial court's abuse of discretion.

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

Daniel E. Klaus and Donald L. Dunn, of Rembolt Ludtke Parker & Berger, for appellant.

W. Michael Morrow, of Hecht, Sweet, Morrow, Poppe & Otte, P.C., for appellee.

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

SHANAHAN, J.

Sports Courts of Omaha, Ltd., sued Harry W. Meginnis, Jr., as a comaker of a promissory note to Sports Courts. The district court for Lancaster County granted summary judgment to Meginnis on three bases, one of which is the 3-month statute of limitations contained in Neb. Rev. Stat. § 76-1013 (Reissue 1990) of the Nebraska Trust Deeds Act.

Sports Courts appeals and, referring to the statute of limitations issue, contends that the general 5-year statute of

limitations, expressed in Neb. Rev. Stat. § 25-205 (Reissue 1989), governs the time limit for commencement of the action against Meginnis. In his cross-appeal, Meginnis claims that the district court erred by refusing to award an attorney fee to Meginnis for Sports Courts' action which, according to Meginnis, was frivolous.

STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Neb. Rev. Stat. § 25-1332 (Reissue 1989). See, also, *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992); *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988).

Interpreting a statute presents a question of law for judicial determination. See, *Sarpy County v. City of Springfield*, 241 Neb. 978, 492 N.W.2d 566 (1992); *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). "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, *Young v. Dodge Cty. Bd. of Supervisors, ante* p. 1, 493 N.W.2d 160 (1992); *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992).

BACKGROUND

According to the stipulated facts, Meginnis and Tom Schuessler were the shareholders of Tom-Har, Inc. Sports Courts sold an Omaha sports facility, including real estate and personal property, to Tom-Har for $600,000 reflected by a promissory note signed by Tom-Har, Schuessler, and Meginnis as comakers in 1984. The note was secured by a trust deed on the real estate involved in the Tom-Har sale.

On August 26, 1985, after Tom-Har failed to pay the note and had received Sports Courts' notice of default, the trustee, pursuant to the power of sale expressed in the trust deed, sold real estate described in the deed, but the proceeds from the sale

were insufficient to pay the indebtedness of the sale price and corresponding promissory note.

Sports Courts' Douglas County Actions.

Before liquidating property under the deed of trust, Sports Courts had sued Meginnis and Schuessler in Douglas County on April 15, 1985, seeking $630,495 as principal and interest on the promissory note for the sale price. On April 23, 1986, the district court dismissed Sports Courts' action for want of prosecution, but, on October 15, 1987, pursuant to Sports Courts' motion, the court reinstated the suit. However, on April 18, 1988, the court again dismissed the Sports Courts action for failure to prosecute and, on June 30, 1989, refused to reinstate the action. On July 28, Sports Courts appealed the judgment denying reinstatement, but, on January 10, 1990, Sports Courts voluntarily dismissed its appeal.

On November 15, 1988, some 7 months after the district court had dismissed the first action on the note, Sports Courts filed a second suit on the promissory note. Meginnis was the only defendant in this second action. On May 12, 1989, Sports Courts dismissed the second action without prejudice.

The Lancaster County Action.

On November 13, 1989, 2 months before dismissal of its appeal from Douglas County, Sports Courts sued Meginnis in the district court for Lancaster County in an action essentially identical to its previous actions in Douglas County. Sports Courts alleged that, although the trustee had sold Tom-Har's real estate in 1985 under the deed of trust, there was still an unpaid balance on the note given by Tom-Har, Schuessler, and Meginnis. On June 30, 1989, the district court granted summary judgment to Meginnis on the grounds that (1) the district court for Lancaster County lacked subject matter jurisdiction because Sports Courts' appeal from Douglas County was pending when the action was filed in Lancaster County; (2) dismissal by the court in Douglas County operated as a res judicata bar to the action in Lancaster County; and (3) the action was barred by the 3-month statute of limitations concerning an action to collect a deficiency after liquidation pursuant to a deed of trust, that is, the statute of limitations

expressed in § 76-1013, which in pertinent part provides:

> At any time within three months after any sale of property under a trust deed, as hereinabove provided, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in such action the complaint shall set forth the entire amount of the indebtedness which was secured by such trust deed and the amount for which such property was sold and the fair market value thereof at the date of sale, together with interest on such indebtedness from the date of sale, the costs and expenses of exercising the power of sale and of the sale.

Relying on Neb. Rev. Stat. § 25-824(2) (Reissue 1989), Meginnis requested an attorney fee "due to the frivolous nature of the action filed by the plaintiff." The district court denied Meginnis' request for an attorney fee.

ASSIGNMENTS OF ERROR

Sports Courts contends that (1) the district court for Lancaster County had subject matter jurisdiction; (2) the applicable statute of limitations is § 25-205 (an action on any agreement, contract, or promise in writing must be brought within 5 years), rather than § 76-1013 and its 3-month limitation; and (3) the doctrine of res judicata is inapplicable to bar Sports Courts' suit in Lancaster County.

In his cross-appeal, Meginnis argues that the trial court erred by refusing to award an attorney fee.

SUBJECT MATTER JURISDICTION

The district court ruled that it lacked subject matter jurisdiction to consider Sports Court's suit because an appeal from the Douglas County action was pending when Sports Courts filed the Lancaster County action against Meginnis.

"When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the trial court." *State v. Miller*, 240 Neb. 297, 300, 481 N.W.2d 580, 582 (1992). Accord, *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991); *Andrews v. City of*

Lincoln, 224 Neb. 748, 401 N.W.2d 467 (1987). Therefore, before we can consider the merits of Sports Courts' present appeal, we must first decide whether the district court had jurisdiction to dispose of Sports Courts' action on its merits.

"Jurisdiction is the inherent power or authority to decide a case." *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 365, 417 N.W.2d 757, 763 (1988). Accord, *State ex rel. Gaddis v. Gaddis*, 237 Neb. 264, 465 N.W.2d 773 (1991); *In re Interest of Adams*, 230 Neb. 109, 430 N.W.2d 295 (1988). "Subject matter jurisdiction is a court's power to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court." *State ex rel. Gaddis v. Gaddis*, 237 Neb. at 266-67, 465 N.W.2d at 775. Accord *In re Interest of Adams, supra*.

A district court is divested of subject matter jurisdiction over a particular case when an appeal of that case is perfected to an appellate court. See *State v. Battershaw*, 220 Neb. 661, 371 N.W.2d 313 (1985) (district court lacked jurisdiction to consider a motion for new trial filed after an appeal had been perfected); *State v. Allen*, 195 Neb. 560, 239 N.W.2d 272 (1976) (district court lacked power to rule on a motion to withdraw a guilty plea after an appeal had been perfected).

However, the present case may be distinguished from *Battershaw* and *Allen*. In those cases, the issue was whether an appeal from a district court judgment divested the district court of jurisdiction over the particular case involved in the appeal. In the present case, Sports Courts appealed from a judgment of the Douglas County District Court and then filed another action in Lancaster County during pendency of the appeal. Because Sports Courts' appeal now before this court involves an action maintained in a court distinct from the site of the previous action, the rule expressed in *Battershaw* and *Allen* is inapplicable to preclude the district court's jurisdiction over Sports Courts' Lancaster County action. Therefore, the trial court had subject matter jurisdiction to dispose of Sports Courts' suit against Meginnis and erroneously concluded that it lacked jurisdiction to dispose of the case. For that reason, we now proceed to examine the merits of Sports Courts' present

appeal.

NEBRASKA TRUST DEEDS ACT

Upholding the constitutionality of the Nebraska Trust Deeds Act, §§ 76-1001 to 76-1018 (Reissue 1990), this court stated in *Blair Co. v. American Savings Co.*, 184 Neb. 557, 558-59, 169 N.W.2d 292, 293-94 (1969):

> The Nebraska Trust Deeds Act was enacted by the 1965 Legislature. Laws 1965, c. 451, p. 1423. It authorizes the use of trust deeds to secure the performance of obligations and prescribes, generally, the procedures for their execution and enforcement. The act provides that a trust deed may confer a power of sale upon the trustee. In the event of a default, the trust property may be sold by the trustee to satisfy the obligation secured. The act also provides for the substitution of trustees, reinstatement after default, and the procedure for the sale and conveyance of the trust property by the trustee.
>
> . . . .
>
> The Nebraska Trust Deeds Act authorizes the use of a security device which was not available prior to its enactment. The act permits the use of an instrument which may be foreclosed by sale without the necessity of judicial proceedings. It authorizes and permits a method of financing which was not formerly available, since trust deeds have been considered to be subject to the same rules and restrictions as mortgages. See *Comstock v. Michael*, 17 Neb. 288, 22 N.W. 549 [(1885)]. The act is complete in that it prescribes in detail the procedures to be followed in the execution and enforcement of trust deeds.

As observed in *Blair*, the Nebraska Trust Deeds Act provides a specific statutory plan to obtain performance of an obligation, prescribes a distinct procedure to dispose of security for performance of an obligation, and, generally, authorizes a form of financing quite apart from other methods recognized under Nebraska law.

In this appeal, the question of first impression before this court is: Which statute of limitations, § 25-205 or § 76-1013, controls the time for commencement of an action to recover the

balance due on the obligation secured by a deed of trust?

To answer the principal question concerning the applicable statute of limitations, we recognize that Meginnis was not the owner of the real estate which was the subject of the trust deed; rather, the real estate was owned by Tom-Har.

"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 *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992).

"A special statute of limitations controls and takes precedence over a general statute of limitations because the special statute is a specific expression of legislative will concerning a particular subject." *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 278, 481 N.W.2d 422, 426 (1992). See, also, *Nebraska Mil-Nic, Inc. v. Hall County*, 187 Neb. 656, 193 N.W.2d 450 (1972), amended in part, 188 Neb. 345, 196 N.W.2d 522 (1972); *Stacey v. Pantano*, 177 Neb. 694, 131 N.W.2d 163 (1964); *Ray v. Sanitary Garbage Co.*, 134 Neb. 178, 278 N.W. 139 (1938).

Section 76-1013 states that the 3-month statute of limitations applies to actions to recover an amount owed "upon the obligation for which the trust deed was given as security." This language unambiguously expresses that the 3-month statute of limitations applies to an action to recover a deficiency on any obligation, such as a promissory note or other contract, after sale of the real estate which secured the obligation pursuant to the Nebraska Trust Deeds Act. Section 76-1013 contains nothing that restricts application of the 3-month limitation only to an action against one who owned, or had title to, the real estate that secured an obligation and was liquidated pursuant to the Nebraska Trust Deeds Act. Thus, the obligation secured by a deed of trust, not the title to the security, determines applicability or availability of the 3-month statute of limitations under § 76-1013.

For payment of the purchase price in the sale, Sports Courts required and accepted the promissory note with Meginnis as a

comaker of the note. Hence, Meginnis assumed the obligation to pay the promissory note. To assure performance of the Meginnis obligation on the note, Sports Courts used the Nebraska Trust Deeds Act and took the act with its beauty, blemishes, and whatever may be good or not so good in the act, including the 3-month statute of limitations. When the liquidation of the security in 1985 under Tom-Har's trust deed failed to produce proceeds sufficient to pay the promissory note, Sports Courts, in 1989, some 4 years after the liquidation sale, sued Meginnis for the balance due on the note. At that point, however, the 3-month period for commencement of a deficiency action pursuant to the Nebraska Trust Deeds Act had long since expired. For that reason, the district court correctly concluded that the 3-month statute of limitation, prescribed by § 76-1013, barred Sports Courts' action against Meginnis on the promissory note. Consequently, the district court properly granted Meginnis the summary judgment based on the statute of limitations expressed in § 76-1013.

DISALLOWANCE OF AN ATTORNEY FEE

In his cross-appeal, Meginnis claims that the district court should have awarded him an attorney fee pursuant to § 25-824(2):

> Except as provided in subsections (5) and (6) of this section, . . . the court shall award as part of its judgment and in addition to any other costs otherwise assessed 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.

Section 25-824(5) states: "No attorney's fees or costs shall be assessed if a claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in this state . . . ."

A legal position is "frivolous" for purposes of § 25-824(2) if the position is "wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit." *Lutheran Medical Center v. City of Omaha*, 229 Neb. 802, 814, 429 N.W.2d 347, 354 (1988).

Accord, *Millard v. Hyplains Dressed Beef*, 237 Neb. 907, 468 N.W.2d 124 (1991); *Behrens v. American Stores Packing Co.*, 236 Neb. 279, 460 N.W.2d 671 (1990); *Peterson v. Don Peterson & Assoc. Ins. Agency*, 234 Neb. 651, 452 N.W.2d 517 (1990); *Shanks v. Johnson Abstract & Title*, 225 Neb. 649, 407 N.W.2d 743 (1987). An action is frivolous or in bad faith if a party attempts to relitigate the same issue previously resolved in an action involving the same party. *Stratman v. Hagen*, 221 Neb. 157, 376 N.W.2d 3 (1985); *Graham v. Waggener*, 219 Neb. 907, 367 N.W.2d 707 (1985). See, also, *Shanks v. Johnson Abstract & Title, supra*. Any doubt whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question. See, *Millard v. Hyplains Dressed Beef, supra*; *First Nat. Bank v. Chadron Energy Corp.*, 236 Neb. 199, 459 N.W.2d 736 (1990); *Shanks v. Johnson Abstract & Title, supra*. On appeal, a trial court's decision allowing or disallowing an attorney fee under § 25-824 will be upheld in the absence of the trial court's abuse of discretion. Cf., *Ritchie v. Ritchie*, 226 Neb. 623, 413 N.W.2d 635 (1987) (a trial court's awarding an attorney fee, authorized by Neb. Rev. Stat. § 42-351 (Reissue 1988) in a marital dissolution action, is a matter within a trial court's discretion and is upheld on appeal in the absence of an abuse of discretion by the trial court); *Young v. Dodge Cty. Bd. of Supervisors, ante* p. 1, 493 N.W.2d 160 (1992) (amount of an attorney fee, if allowed, is within a trial court's discretion and is upheld on appeal in the absence of an abuse of discretion).

Although Sports Courts' litigation in Lancaster County was preceded by actions that resolved nothing on the merits of the claim against Meginnis, the action in Lancaster County did present a question which had yet to be answered by an appellate court in Nebraska, namely, the issue of the 3-month statute of limitations expressed in § 76-1013. We are unable to characterize Sports Courts' conduct, resisting Meginnis' affirmative defense based on the statute of limitations and litigating the issue involving the statute of limitations, as a frivolous legal position under the circumstances. Consequently, we are unable to conclude that the trial court abused its discretion in disallowing an attorney fee for Meginnis.

CONCLUSION

Since we have determined that the statute of limitations expressed in § 76-1013 barred Sports Courts' action on Meginnis' promissory note, we do not need to address the question regarding res judicata as a bar to Sports Courts' action. We, therefore, affirm the district court's judgment based on the statute of limitations as a bar to Sports Courts' action.

AFFIRMED.

C.R. LAMBERT AND CHARLOTTE K. LAMBERT, HUSBAND AND WIFE, APPELLEES, V. CITY OF COLUMBUS, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.

496 N.W.2d 540

Filed March 12, 1993. No. S-90-657.

1. **Directed Verdict.** A directed verdict is proper when reasonable minds cannot differ and can only draw one conclusion from the evidence.
2. _____. A trial court should only direct a verdict as a matter of law when the facts are conceded or undisputed.
3. **Uniform Commercial Code: Contracts: Sales.** There are four requirements which must be established before a seller's performance may be excused under Neb. U.C.C. § 2-615 (Reissue 1992): (1) a contingency has occurred which has made performance impracticable; (2) the nonoccurrence of that contingency was a basic assumption on which the contract was made; (3) the seller has not assumed a greater obligation; and (4) the seller has seasonably notified the buyer that there will be a delay or nondelivery.
4. **Contracts: Sales.** Generally, the partial failure of a seller's source of supply has been treated as a foreseeable contingency, the risk of which is allocated to the seller absent a specific provision to the contrary in the contract.

Appeal from the District Court for Platte County: JOHN M. BROWER, Judge. Affirmed.

Douglas R. Milbourn, of Tessendorf, Milbourn, Fehringer, Stilmock & Peetz, P.C., for appellant.

Clark J. Grant and Thomas M. Maul, of Grant, Rogers, Maul & Grant, for appellees.

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

BOSLAUGH, J.

This case arises out of a dispute concerning a contract entitled "Settlement Agreement" between the plaintiffs, C.R. Lambert and Charlotte K. Lambert, and the defendant, City of Columbus, Nebraska. The contract was entered into because of the Lost Creek Flood Control Project which was to be constructed by the U.S. Army Corps of Engineers pursuant to an agreement with the city.

As a part of the project the city was required to purchase 12.08 acres of land owned by the plaintiffs so that as a part of Phase II of the project a flood control channel could be constructed across the plaintiffs' land. The contract provided that the plaintiffs would convey 12.08 acres of land to the city and the city agreed to pay $25,500 to the plaintiffs. The contract further provided that the city would deliver to the plaintiffs the excess dirt, excavated from the property conveyed to the city by the plaintiffs, amounting to approximately 61,440 cubic yards. The city also agreed to sell to the plaintiff an additional minimum of 25,000 cubic yards of dirt arising out of the construction of the project for $.15 per cubic yard. The plaintiffs agreed to buy such additional dirt as the city might desire to sell to them at the same rate.

The plans of the Corps of Engineers for the project projected that construction of phase II of the project would produce approximately 336,130 cubic yards of excess dirt. The defendant was obligated under the agreement with the Corps of Engineers to find a place for the disposal of this dirt. There was no provision in the contract excusing the defendant's performance in the event the construction of the project failed to yield the excess dirt that was anticipated.

As construction of the project proceeded there was some deviation from the original plans in that the bottom of the flood channel was raised and excess dirt was deposited on the sides of the channel so as to create a berm on each side of the channel. Although a substantial quantity of dirt was delivered to the plaintiffs, the total amount of dirt delivered was substantially

less than the collective 86,440 cubic yards provided in the contract.

On June 12, 1986, Merlin Lindahl, the defendant's City Engineer, sent a letter to the plaintiffs which stated:

> I contacted Don Adams of the Army Corps of Engineers and according to his calculations and load count there is 61,300 C.Y. of dirt in the disposal area along 48th Avenue.
>
> The contractor has stated that he will haul a minimum of 1,000 more cubic yards into this disposal area.
>
> The contract between the City and you states that approximately 61,400 C.Y. of excess dirt will be placed on your land. Based on the above statements, it appears the Contract will be satisfied.
>
> If you have any questions, please contact me.

This action was commenced to recover damages for the defendant's failure to deliver the amount of dirt provided in the contract. The amended petition filed May 12, 1989, alleged that the plaintiff had been damaged in the amount of $247,979.

The defendant's third amended answer alleged that performance of the contract was made impossible by the failure of the project to create the excess dirt originally contemplated and that the city had notified the plaintiffs that all of the dirt provided in the contract would not be delivered. The defendant contends that since, through no fault of its own, the Corps of Engineers used substantially more of the excavated dirt in constructing the project than was originally contemplated, and less excess dirt was produced, the defendant was excused from performance under the contract as provided in Neb. U.C.C. § 2-615 (Reissue 1992).

At the close of all the evidence, the trial court directed a verdict for the plaintiffs on the issue of liability. The case was then submitted to the jury on the issue of damages. The jury returned a verdict for the plaintiffs in the amount of $144,613. The defendant has appealed to this court.

The defendant's assignments of error all relate to the trial court's direction of a verdict on the issue of liability in favor of the plaintiffs.

With respect to the defendant's claim that its performance

under the contract was excused by the failure of the project to create the excess dirt originally contemplated, Neb. U.C.C. § 2-615 (Reissue 1992) provides in pertinent part:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> . . . .
>
> (c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

In *Barbarossa & Sons, Inc. v. Iten Chevrolet, Inc.*, 265 N.W.2d 655, 658 (Minn. 1978), the Supreme Court of Minnesota held that this section of the U.C.C. contains four requirements which must be established before a seller's performance may be excused:

> (1) a contingency has occurred which has made performance impracticable; (2) the nonoccurrence of that contingency was a basic assumption on which the contract was made; (3) the seller has not assumed a greater obligation; and (4) the seller has seasonably notified the buyer that there will be a delay or nondelivery.

The partial failure of a seller's source of supply has generally "been treated as a foreseeable contingency, the risk of which is allocated to the seller absent a specific provision to the contrary in the contract." *Id.* at 659 citing to *Center Garment Co., Inc. v. United Refrigerator Co.*, 341 N.E.2d 669 (Mass. 1976); *Canadian Industrial Alcohol Co. v. Dunbar Molasses Co.*, 258 N.Y. 194, 179 N.E. 383 (1932).

In *Barbarossa, supra*, the defendant contracted with the

plaintiff to deliver a certain model truck. In late June or early July, General Motors canceled the defendant's order for the plaintiff's truck. The defendant did not inform the plaintiff until sometime in August. The Minnesota Supreme Court concluded that since the defendant did not make its obligation to deliver the plaintiff's truck contingent upon General Motors' agreement to manufacture the truck, the defendant had assumed the responsibility of General Motors' possible cancellation of the order. Accordingly, General Motors' cancellation of the order for the truck was not a contingency which excused the defendant's performance under U.C.C. § 2-615.

As to the defendant's claim that it seasonably notified the plaintiffs that it would not deliver the dirt it had promised to deliver, the defendant relies upon the June 12, 1986, letter from its City Engineer to the plaintiffs as notice of nondelivery. We think it is clear from the language of the letter that, as a matter of law, it was not notice of nondelivery. Thus, there was no issue as to the failure of notice of nondelivery as required by the statute.

A directed verdict is proper when reasonable minds cannot differ and can only draw one conclusion from the evidence. *Stoco, Inc. v. Madison's, Inc.*, 235 Neb. 305, 454 N.W.2d 692 (1990). A trial court should only direct a verdict as a matter of law when the facts are conceded or undisputed. *Youngs v. Potter*, 237 Neb. 583, 467 N.W.2d 49 (1991).

In the present case, it is undisputed that the contract between the plaintiff and defendant did not provide that the defendant would be excused from performance if the supply of dirt was diminished and the record shows that the plaintiffs did not receive all of the dirt that was provided in the contract.

It is clear from the record that only one conclusion could be drawn from the evidence, and the trial court was correct in directing a verdict for the plaintiff on the issue of liability.

The judgment is affirmed.

AFFIRMED.

KAREN PARRISH, SPECIAL ADMINISTRATOR OF THE ESTATE OF ELDON E. PARRISH, DECEASED, APPELLANT, V. OMAHA PUBLIC POWER DISTRICT ET AL., APPELLEES.

496 N.W.2d 902

Filed March 12, 1993. No. S-90-665.

1. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
2. **Negligence: Contractors and Subcontractors: Liability.** Generally, one who employs an independent contractor is not liable for the contractor's negligence.
3. _____: _____: _____. The employer of an independent contractor may be liable if the employer retains control over the contractor's work, or if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor.
4. **Negligence: Contractors and Subcontractors.** If an owner of premises retains control over a contractor's work, the owner has a duty to use reasonable care in taking measures to prevent injury to employees who are working on the premises.
5. _____: _____. Although an owner generally relinquishes possession of the property during construction, and, thus, is not in control of the premises, an owner might maintain possession if the owner's involvement in overseeing the construction is substantial.
6. **Negligence: Liability: Contractors and Subcontractors: Words and Phrases.** A nondelegable duty means that an employer of an independent contractor by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed.
7. **Negligence: Liability: Contractors and Subcontractors.** Liability for breach of a nondelegable duty is an exception to the general rule that one who employs an independent contractor is not liable for the independent contractor's negligence.
8. **Negligence: Contractors and Subcontractors.** Nondelegable duties include the duty of an owner in possession and control of premises to provide a safe place for work by a contractor's employee; a duty imposed by statute or rule of law; and the duty of due care imposed on an employer of an independent contractor when the contractor's work involves special risks or dangers, including work that is dangerous in the absence of special precautions.
9. _____: _____. A general contractor, in control of the premises where work performance under a contract with the owner is being carried out, owes a duty to persons rightfully on the premises to keep the premises in a reasonably safe condition while the contract is in the course of performance.
10. _____: _____. When a general contractor assumes a contractual duty for the safety of workers at a construction site, the contractor's duty cannot be delegated to a subcontractor.
11. **Negligence: Liability: Contractors and Subcontractors.** To impose liability on a general contractor for injury to a subcontractor's employee, the general contractor must have (1) supervised the work that caused the injury to the

employee; (2) had actual or constructive knowledge of the danger which ultimately caused the injury; and (3) had the opportunity to prevent the injury, but negligently failed to prevent the injury.

12. **Negligence.** A violation of a safety regulation is evidence of negligence.
13. **Negligence: Liability: Contractors and Subcontractors.** If a general contractor hires an independent contractor to perform work which the general contractor "should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken," the general contractor may be liable for physical harm caused to employees of the subcontractor if the general contractor fails to exercise reasonable care to take such precautions, even though the general contractor has provided, in the contract or otherwise, that the subcontractor be responsible for such precautions.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and remanded for further proceedings.

The Law Offices of Ronald J. Palagi, P.C., for appellant.

Rex A. Rezac and Lon A. Licata, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee Omaha Public Power District.

Terry J. Grennan and Theodore J. Stouffer, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee Hawkins Construction Company.

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

SHANAHAN, J.

Karen Parrish, special administrator of the Estate of Eldon Parrish, deceased, brought a wrongful death action against the Omaha Public Power District (OPPD) and Hawkins Construction Co. The district court for Douglas County granted summary judgment for OPPD and Hawkins and dismissed Parrish's action.

STANDARD OF REVIEW

"On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists." *Newman v. Hinky Dinky*, 229 Neb. 382, 385, 427 N.W.2d 50, 53 (1988). Accord, *Dowis v.*

Continental Elev. Co., 241 Neb. 207, 486 N.W.2d 916 (1992); *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992). "[A] summary judgment is an extreme remedy because a summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed." *Wachtel v. Beer*, 229 Neb. 392, 399, 427 N.W.2d 56, 61 (1988). Accord, *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992); *Wiles v. Metzger*, 238 Neb. 943, 473 N.W.2d 113 (1991).

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

Union Pacific RR. Co. v. Kaiser Ag. Chem. Co., 229 Neb. 160, 162-63, 425 N.W.2d 872, 875 (1988). Accord, *Dowis v. Continental Elev. Co., supra*; *Anderson v. Service Merchandise Co., supra*; *Murphy v. Spelts-Schultz Lumber Co., supra*. See Neb. Rev. Stat. § 25-1330 et seq. (Reissue 1989) (summary judgments).

"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 *Ehlers v. Perry, ante* p. 208, 494 N.W. 2d 325 (1993).

BACKGROUND

On June 9, 1987, Eldon Parrish was killed when he fell from a portable platform at the construction site of OPPD's Energy Plaza Building. OPPD owned the building, and Hawkins was the general contractor in the construction work. Eldon Parrish was an employee of Northwest Erection Services (Northwest),

Hawkins' subcontractor for installation of structural steel in OPPD's building.

The Construction Contracts.

The construction contract between OPPD and Hawkins provided that Hawkins would act as the general contractor for all phases of the construction, would furnish all supervision, labor, and materials, and would have control over the daily operations in the construction project. Specifically, the OPPD-Hawkins contract stated:

> 3.00 SITE CONDITIONS
>
> 3.01 The Contractor shall keep himself fully appraised throughout the performance of the contract of existing conditions at the site, including the status and progress of other work thereat, which may affect the performance of this contract. . . .
>
> . . . .
>
> 5.00 SITE SUPERVISION
>
> 5.01 The Contractor shall maintain on the site at all times during the progress thereof, a competent resident general superintendent and any necessary assistants, all satisfactory to the District.
>
> . . . .
>
> 6.00 SUBCONTRACTORS
>
> . . . .
>
> 6.02 If the Contractor shall subcontract any part of this contract, the Contractor shall be as fully responsible to the District for the acts and omissions of his subcontractors and of the persons directly or indirectly employed by his subcontractors as he is for the acts or omissions of persons directly employed by himself.
>
> . . . .
>
> 13.00 INSPECTION
>
> 13.01 The District reserves the right to conduct inspections and by any such inspectors as it sees fit and hereby requires that such inspectors shall have the right to inspect all Work as it progresses and shall have access to all data relevant to the performance of this contract. . . .
>
> . . . .

23.00 OCCUPATIONAL SAFETY AND HEALTH

23.01 At all times during the performance of the Work, the Contractor shall exercise precaution for the protection of persons and property. The safety provisions of applicable laws, building and construction codes shall be observed. . . .

23.02 The Contractor agrees to comply with the provisions of the Occupational Safety and Health Act of 1970 including any and all applicable amendments and the standards and regulations issued thereunder and interpretations thereof. . . .

23.03 The Contractor agrees to take immediate remedial action to correct any unsafe condition and when so ordered, to stop any part of the Work which the District deems unsafe until appropriate corrective measures have been taken, and further agrees to make no claim for additional costs or damages resulting from such stoppages. Should Contractor, after due notice, fail to adopt the corrective measures, the District may have them implemented and deduct the cost from payments otherwise due the Contractor. Failure on the part of the District, or their representatives to notify the Contractor of any unsafe condition or practices shall not relieve the Contractor of his responsibility.

. . . .

25.00 PROTECTION OF PROPERTY AND PUBLIC LIABILITY

25.01 The Contractor shall be liable for any damages resulting from his operations. [Hawkins] shall be fully responsible for the protection of all persons including members of the public, employees of the District, other contractors or subcontractors . . . .

. . . .

27.00 CONTROL OF WORK DURING CONSTRUCTION

27.01 The Work from commencement of Work to completion shall be under the charge and control of the Contractor . . . .

Under the construction agreement, OPPD retained the right of inspection to determine that all work conformed with OPPD's plans and specifications, the right to monitor overall progress of the work, and the right to take over the construction in the event that Hawkins failed "to perform said Work according to the provisions of the contract documents, or if for any other cause or reason whatsoever the Contractor shall fail to carry on said Work in an acceptable manner."

As expressed in the subcontract between Hawkins and Northwest, "the terms and provisions" of the OPPD-Hawkins contract "are incorporated into this Subcontract by reference thereto and the Subcontractor agrees to be bound to the Contractor and the Owner by the terms and provisions therefor." The subcontract required that Northwest comply with all safety regulations and the "safety measures called for by the Contractor" and that Northwest "search for, discover and correct any and all unsafe conditions." Similar to the OPPD-Hawkins contract, the subcontract contained the provision that, if Northwest failed to comply with any provision of the subcontract, Hawkins had the right to "remedy the situation at the cost of the Subcontractor."

The Work Site.

To monitor the construction work, OPPD stationed Steven Bottum, a licensed professional engineer, at the construction site for daily contact with work on the Energy Plaza project. Bottum reported to OPPD concerning the status of construction work in progress and any problems that had arisen in the project. Bottum even exerted some supervisory control over the construction involved in the OPPD project. For instance, Bottum required alternative courses in construction, indicated a procedure for dynamiting in the demolition of part of OPPD's old structure which was replaced by the new construction, resolved "submittal deficiencies, i.e., welding procedures," and directed removal of certain structural supports and additional steps for reinforcement of steel work in OPPD's new building. Marc Nichols, OPPD's project manager, was involved in coordinating and supervising Hawkins' work during all phases of the construction, including safety during

the construction. Nichols' role regarding hazards that might be a violation of safety regulations is illustrated by one of his letters to Hawkins in which he wrote to call "attention to OSHA [Occupational Safety and Health Act] requirements for toe boards and handrail protection. Please investigate and respond."

The Fatal Accident.

Eldon Parrish was welding steel cross-members to steel columns as part of the framework inside OPPD's building. The cross-members had previously been installed and temporarily welded to the columns by Northwest's employees. Parrish was positioned in a portable platform, known as an "angel wing," attached to the cross-member on which he was making final welds to permanently hold the cross-member in place. There was no safety net beneath the area where Parrish was working, nor was there a temporary or permanent floor within two levels below Parrish's location in the construction. When the cross-member supporting the angel wing broke free from the temporary welds, Parrish plunged over 50 feet to his death.

Suit and Summary Judgment.

Karen Parrish, special administrator of Eldon Parrish's estate, filed suit against OPPD and Hawkins, alleging that they were negligent in failing to exercise reasonable care to assure a safe workplace and that they were liable for Northwest's negligence in the project. OPPD and Hawkins moved for summary judgment. Several depositions, affidavits, photographs, and documents were submitted relative to the requested summary judgment.

Depositions included that of Darryl Charlson, Northwest's supervisor on the project, who testified that there was "no concern at all" that men would be working high above the nearest solid level. Although Charlson said that safety was emphasized, he did not recall giving any instruction to Northwest's employees regarding the proper method of "tying off" safety lines. Charlson did not know whether Eldon Parrish "tied off" his safety line before the fatal fall.

Charles Schultz, a specialist in inspecting construction sites to help contractors provide a safe workplace, testified:

"Hawkins being in complete charge of the construction work should have seen that the subcontractor that they hired provide a safe and proper workplace for their workers." Specifically, Schultz stated that, since Northwest was "under the direct control of Hawkins" in the project, Hawkins had a duty to inspect the work site daily to assure that there was "a safe workplace for the workers that were employed on that job site." Also, Hawkins had the duty to supervise Northwest's work and was negligent in failing to ascertain that steel workers were working without a safety net at a height more than two stories or 30 feet above the last "planking" or floor area beneath Parrish's location. Schultz also testified that, if Hawkins had properly supervised Northwest's work, Hawkins would have learned that, contrary to regulation under the Occupational Safety and Health Act, steel erection was being performed in an unsafe setting without a safety net or proper floor or decking at the site where Parrish was working. According to Schultz, Hawkins failed to supervise or inspect Northwest's work in progress and, consequently, violated the Occupational Safety and Health Act by failing to require proper protection against a steel worker's falling from the framework within OPPD's structure. Finally, Schultz testified that Hawkins was negligent when it failed to warn Eldon Parrish about the "unsafe conditions" at the location of Parrish's work.

Gary Tackett, a construction engineer, testified that

> because of their [OPPD's and Hawkins'] failures, Parrish fell to his death. And by "their failures," I mean their failures to have an ongoing safety program and a written hazard analysis, or as Hawkins calls it, a safety phase plan, made on how the work is to be performed. Had that been done, I don't believe the accident would have ever happened.

Tackett also testified that Hawkins, as the general contractor, had the primary duty to see that Northwest's work on the project was being "done in a safe manner" and that Northwest had the responsibility to comply with Hawkins' safety program, although it appeared that Hawkins had no safety program for the OPPD project. Tackett, referring to the presence of OPPD's on-site representatives, concluded that

OPPD had the "obligation anytime [it] sees an unsafe condition to correct it, no matter what the chain of command is." Moreover, OPPD "failed to correct a dangerous situation or bring it to Hawkins' attention," notwithstanding that OPPD had the "responsibility to have Hawkins correct those [safety] deficiencies, and they didn't."

Both Schultz and Tackett testified that Eldon Parrish probably would not have been killed if safety netting or a temporary floor were used in conjunction with the steel framework inside OPPD's building. Also, Schultz and Tackett testified that, under the circumstances existing at the time of Eldon Parrish's fall from the angel wing, a safety line was inadequate protection because there was no suitable place where the safety line might be "tied off."

After receiving all the foregoing evidence, the court granted summary judgment to OPPD and Hawkins.

ASSIGNMENTS OF ERROR

Karen Parrish assigns two errors: (1) The trial erred by granting OPPD and Hawkins a summary judgment based on the conclusion that neither OPPD nor Hawkins had any duty to protect Eldon Parrish and, consequently, erred by dismissing the Parrish action; and (2) the trial court erred by considering certain affidavits offered by OPPD and Hawkins.

NEGLIGENCE

> "For actionable negligence there must be a defendant's legal duty to protect the plaintiff from injury, a failure to discharge that duty, and damage resulting from such undischarged duty. [Citations omitted.]
>
> " ' "Duty" ' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in light of the apparent risk. . . .
>
> " 'A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.' Prosser and Keeton on the Law of Torts, *Limited Duty* § 53 at 356 (5th ed. 1984)."

Union Pacific RR. Co. v. Kaiser Ag. Chem. Co., 229 Neb. 160, 172-73, 425 N.W.2d 872, 881 (1988) (quoting *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987)). The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. See *Dieter v. Hand*, 214 Neb. 257, 333 N.W.2d 772 (1983).

Thus, the fundamental question is whether OPPD or Hawkins had the duty to protect Eldon Parrish from the hazard of falling from the steel framework in OPPD's building. Karen Parrish contends that OPPD had the duty to protect as a result of OPPD's retained control over the construction site and work, and that, as owner of the premises, OPPD had a nondelegable duty to protect Eldon Parrish from the hazard that caused his death. Parrish also contends that Hawkins, as the general contractor in control of the project, had a duty to provide Eldon Parrish with a safe place to work and that due to the danger inherent in the work performed by Eldon Parrish, Hawkins is liable for Northwest's negligence.

OPPD'S DUTY

Direct Liability.

Generally, one who employs an independent contractor is not liable for the contractor's negligence. See *Sullivan v. Geo. A. Hormel and Co.*, 208 Neb. 262, 303 N.W.2d 476 (1981). However, the employer of an independent contractor may be liable if the employer retains control over the contractor's work, or if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor. See *Erickson v. Monarch Indus.*, 216 Neb. 875, 347 N.W.2d 99 (1984).

In *Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972), we held that OPPD and its general contractor were liable for injuries to a subcontractor's employee who fell through an opening in the floor at a construction site supervised by the general contractor. In its contract with the general contractor, OPPD had reserved the right to control all phases of the work. OPPD also had a supervisor on site who was the acknowledged " 'over-all head of everything there.' " 189 Neb. at 187, 202 N.W.2d at 161. In *Simon*, after noting that the "safe

place to work" doctrine was an accepted component of Nebraska tort law in the employer-employee context, this court refused to restrict the doctrine to situations in which the injured person was employed by the owner of the premises. Therefore, in *Simon*, this court observed that

> a large construction project . . . has many dangers which are inherent in or normal in construction work. Under these circumstances a safe place to work requires that the owner in possession and control of the premises should recognize that the work is likely to create during its progress a peculiar risk of physical harm to others *unless special precautions are taken*.

(Emphasis in original.) 189 Neb. at 193, 202 N.W.2d at 164. Thus, if an owner of premises retains control over a contractor's work, the owner has a duty to use reasonable care in taking measures to prevent injury to employees who are working on the premises.

As OPPD points out, in *Hand v. Rorick Constr. Co.*, 190 Neb. 191, 206 N.W.2d 835 (1973) and *Sullivan v. Geo. A. Hormel and Co., supra*, we required that an owner must have retained "control of the premises" before liability could be imposed for injuries sustained by a contractor's employee. Although an owner generally relinquishes possession of the property during construction, and, thus, is not in "control of the premises," an owner might maintain "possession" if the owner's "involvement in overseeing the construction is 'substantial.' " *Farris v. General Growth Development Corp.*, 354 N.W.2d 251, 254 (Iowa App. 1984) (citing *Lunde v. Winnebago Industries, Inc.*, 299 N.W.2d 473 (Iowa 1980).

Consequently, we turn to the question whether OPPD's involvement in the construction process was sufficient to establish a duty to prevent injury to Eldon Parrish. Construing the evidence in the light most favorable to Karen Parrish, see *Dowis v. Continental Elev. Co.*, 241 Neb. 207, 486 N.W.2d 916 (1992), it appears that OPPD did retain substantial control over the premises and had the authority to require that Hawkins and Northwest observe adequate safety precautions. Under the OPPD-Hawkins contract, OPPD had the right to require whatever "may be necessary to secure the safe and proper

coordination of the progress of Work under this contract." The OPPD-Hawkins contract in its entirety was incorporated into the Hawkins-Northwest subcontract. Both contracts expressly required safety in work at the construction site.

Pursuant to the OPPD-Hawkins contract, OPPD reserved the right to inspect all work at the construction site and suspend "unsafe [work] until appropriate corrective measures have been taken," and even take over work in the project if for "any reason whatsoever [Hawkins] shall fail to carry on said Work in an acceptable manner." OPPD's personnel at the construction site were active participants, not just passive observers, in the over-all work done at the construction site. Steven Bottum directed the manner in which some construction work was done. Marc Nichols, in addition to overseeing work at the project, directed safety concerns to Hawkins for correction and compliance with the Occupational Safety and Health Act. All this indicates that OPPD, as authorized by its contract, went beyond simply watching work in progress to assure that the completed project complied with its plans and specifications. Also, the gist of testimony from Schultz and Tackett is that the workplace for steel workers at the construction site failed to conform with governmental safety regulations and that OPPD, as the result of its active role in the project, had the obligation to eliminate that noncompliance. Thus, there is a factual question concerning the precise control that OPPD exercised over work on its new building. Correspondingly, whether OPPD's control over the project was sufficient to impose the duty to protect Eldon Parrish from the hazard of falling to his death is an issue of material fact. See *Dowis v. Continental Elev. Co., supra.* Although OPPD offered several affidavits reciting that OPPD exercised no authority or control over the construction process, the evidence presented for the summary judgment raises a factual question in reference to Karen Parrish's allegations that OPPD had a duty to provide a safe place to work for construction workers on the OPPD project.

Nondelegable Duty.

"A nondelegable duty means that an employer of an independent contractor, . . . by assigning work consequent to a

duty, is not relieved from liability arising from the delegated duties negligently performed." *Foltz v. Northwestern Bell Tel. Co.*, 221 Neb. 201, 213, 376 N.W.2d 301, 309 (1985). Accord, *McKinstry v. County of Cass*, 228 Neb. 733, 424 N.W.2d 322 (1988); *Greening v. School Dist. of Millard*, 223 Neb. 729, 393 N.W.2d 51 (1986). "Liability for breach of a nondelegable duty is an exception to the general rule that one who employs an independent contractor is not liable for the independent contractor's negligence." *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 885, 485 N.W.2d 170, 178 (1992).

In *Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972) this court acknowledged that an owner of premises has a nondelegable duty to provide a safe place for work by a contractor's employee, that is, a duty which "cannot be delegated or avoided by contract where the owner retains possession and control of the premises." 189 Neb. at 194, 202 N.W.2d at 164. An owner's nondelegable duty " 'is based upon the theory that certain responsibilities of a principal are so important that the principal should not be permitted to bargain away the risks of performance.' " *Erickson v. Monarch Indus.*, 216 Neb. 875, 879-880, 347 N.W.2d 99, 105 (1984) (quoting *Arsand v. City of Franklin*, 83 Wis. 2d 40, 264 N.W.2d 579 (1978)). Nondelegable duties include the duty of an owner in possession and control of premises to provide a safe place for work by a contractor's employee, see *Simon, supra*; a duty imposed by statute or rule of law, see *McKinstry v. County of Cass, supra*; and the duty of due care imposed on an employer of an independent contractor when the contractor's work involves special risks or dangers, including work that is dangerous in the absence of special precautions, see *Rooney v. United States*, 634 F.2d 1238 (9th Cir. 1980). The aspect of special risks, dangers, and precautions is discussed later in reference to Hawkins.

If OPPD maintained possession and control of the construction site, OPPD had the nondelegable duty to provide a safe place for Northwest's employees to work under the Hawkins-Northwest subcontract. Considering the evidence in a light favorable to Parrish, see *Dowis v. Continental Elev. Co., supra*, we conclude that a factual question exists whether

OPPD retained possession and control over the construction site and, therefore, had the nondelegable duty to provide a safe place for Eldon Parrish to work at the construction site.

HAWKINS' DUTY

" 'A general contractor, in control of the premises where work performance under a contract with the owner is being carried out, owes a duty to persons rightfully on the premises to keep the premises in a reasonably safe condition while the contract is in the course of performance.' " *McKinstry v. County of Cass*, 228 Neb. at 744, 424 N.W.2d at 329 (quoting *Sullivan v. Geo. A. Hormel and Co.*, 208 Neb. 262, 303 N.W.2d 476 (1981)).

In *Farris v. General Growth Development Corp.*, 354 N.W.2d 251 (Iowa App. 1984), a case strikingly similar to the Parrish case, a subcontractor's employee brought a negligence action against the general contractor (GGDC) for injuries which the employee sustained when he fell from a third floor deck at a construction site. In affirming a verdict for the employee, the court held that the general contractor, having possession of and control over the premises, had the duty to provide a safe place to work for the plaintiff as an employee of the subcontractor, and that such duty could not be contractually delegated to the subcontractor. In *Farris*, the court noted, "[t]he duty imposed upon GGDC, as general contractor, to exercise reasonable care to prevent injuries on the job site may be premised upon its possession and control of the premises," 354 N.W.2d at 254, and stated:

> Normally when a general contractor has a supervisor on the site, it will be able to exercise control over the premises. . . . GGDC's supervisor, Dick Cable, was in charge of coordinating all subcontractors and inspecting the work as it was completed on this job. Cable had a trailer on the job site and was present on the construction site daily.

354 N.W.2d at 254. Moreover, when a general contractor assumes a contractual duty for the safety of workers at a construction site, the contractor's duty cannot be delegated to a subcontractor. See *Farris, supra*. See, also, *Hickman v. Parks*

Construction Co., 162 Neb. 461, 76 N.W.2d 403 (1956). See, further, *Giarratano v. The Weitz Co., Inc.*, 259 Iowa 1292, 1305, 147 N.W.2d 824, 832 (1967): " 'Where one person owes another a contractual duty to act, the law imposes upon the person owing that duty the further duty of acting with due care in the performance of his contract so as not to injure the contractee's person or property. This duty is nondelegable.' " (Quoting *Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co.*, 201 Minn. 500, 277 N.W. 226 (1937).)

A conclusion analogous to that in *Farris* was expressed in *C. B. & Q. R. R. Co. v. Clark*, 26 Neb. 645, 42 N.W. 703 (1889), wherein the railroad had hired a contractor to lay a 29-mile section of track. The railroad agreed to furnish all engines, cars, and the men needed to operate the equipment. This court determined that, because the railroad had control over the men and equipment used by the contractor, the railroad was liable for injuries caused by its employees while working for the contractor. Similarly, § 414 of Restatement (Second) of Torts (1965), provides:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

The rule imposing liability on an employer who retains control over work of an independent contractor

> is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job. In such a situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know that the subcontractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself.

Restatement (Second) of Torts § 414 Comment b. See, also,

Smith v. United States, 497 F.2d 500 (5th Cir. 1974); *Summers v. Crown Construction Company*, 453 F.2d 998 (4th Cir. 1972); *Weber v. Northern Ill. Gas Co.*, 10 Ill. App. 3d 625, 295 N.E.2d 41 (1973). Thus, to impose liability on a general contractor for injury to a subcontractor's employee, the general contractor must have (1) supervised the work that caused the injury to the employee; (2) had actual or constructive knowledge of the danger which ultimately caused the injury; and (3) had the opportunity to prevent the injury, but negligently failed to prevent the injury.

Under its contract with OPPD, Hawkins was required to keep itself informed about existing conditions at the construction site and "[a]t all times during the performance of the Work, [Hawkins] shall exercise precaution for the protection of persons and property." Also, Hawkins agreed to correct any unsafe condition and was "fully responsible for the protection of all persons including members of the public, employees of the District, other contractors or subcontractors . . . ." Unquestionably, Eldon Parrish was within the class of persons entitled to protection under Hawkins' contractual duty. Schultz and Tackett testified about violations of the Occupational Safety and Health Act, such as the absence of a safety net and adequate floor beneath the location of Parrish's work on the steel framework for OPPD's building. A violation of a safety regulation is evidence of negligence. See, *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992); *Tank v. Peterson*, 219 Neb. 438, 363 N.W.2d 530 (1985). Even under its subcontract with Northwest, Hawkins had contractual authority to prescribe and order "safety measures" for Northwest's work and take steps to correct any noncompliance by Northwest in its subcontract with Hawkins. Schultz and Tackett also testified about the readily observable and dangerous condition existing at the construction site as the result of the absent safety net or floor beneath Northwest's steel workers. Both Schultz and Tackett concluded that Hawkins had breached its duty to see that Northwest's work was being done in a safe manner. Further, the evidence indicates that Hawkins was in control of the premises while work was being performed pursuant to its contract with OPPD. Because

Hawkins had control over the construction site, the question whether Hawkins knew or should have known of the danger which caused Eldon Parrish's death and whether Hawkins had the opportunity to correct that danger were disputed issues of material fact.

Apart from a duty to provide a safe place to work, Hawkins may be liable for failing to ensure that Northwest utilized adequate safety precautions. Holding that a general contractor may be liable for injury sustained when a subcontractor's employee fell through a roof at a construction site, the Supreme Court of Michigan explained in *Funk v General Motors Corp*, 392 Mich. 91, 104, 220 N.W.2d 641, 646 (1974):

> The policy behind the law of torts is more than compensation of victims. It seeks also to encourage implementation of reasonable safeguards against risks of injury.
>
> Placing ultimate responsibility on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas.

The court further stated that it was "part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen." 392 Mich. at 104, 220 N.W.2d at 646. See, also, *Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972). As expressed in Restatement (Second) of Torts § 416 (1965), if a general contractor hires an independent contractor to perform work which the general contractor "should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken," the general contractor may be liable for physical harm caused to employees of the subcontractor if the general contractor fails to exercise reasonable care to take such precautions, even though

the general contractor has provided, in the contract or otherwise, that the subcontractor be responsible for such precautions. Comment d of § 416 distinguishes a "peculiar risk" from "the common risks to which persons in general are commonly subjected by the ordinary forms of negligence which are usual in the community. It must involve some special hazard resulting from the nature of the work done, which calls for special precautions." Therefore, notwithstanding a contractual provision to the contrary, a general contractor may be liable for the negligence of a subcontractor when injury results from the general contractor's failure to ensure that precautions are taken against special hazards inherent in the work of the subcontractor. See, *Simon v. Omaha P. P. Dist., supra*; *Frickel v. Lancaster County*, 115 Neb. 506, 213 N.W. 826 (1927); Restatement (Second) of Torts § 416 (1965). Cf. *Palmer v. The City of Lincoln*, 5 Neb. 136 (1876) (when an injury results directly from the acts which a contractor agrees and is authorized to do, the party who employs the contractor and authorizes the work may also be liable to the injured person).

Without question, steel construction work involves risks which an average person does not ordinarily encounter on a day-to-day basis. Consequently, because Eldon Parrish's work involved a "peculiar risk," Hawkins was required to exercise reasonable care to ensure that Northwest utilized proper safety precautions, regardless of any language to the contrary in the contract between Hawkins and Northwest.

Without restating all the evidence which we have noted relative to the summary judgment hearing, we conclude that there was evidence sufficient to present an issue of material fact concerning Hawkins' duty to protect Eldon Parrish from harm and whether Hawkins breached that duty by failing to exercise due care to protect Eldon Parrish from the hazard that resulted in his death.

CONCLUSION

At the hearing for summary judgment in the Parrish case, the evidence presented issues of material fact as previously noted. Summary judgment was unavailable under the circumstances. Therefore, we reverse the judgments of the

district court and remand this cause to the district court for further proceedings. Since we have reversed the summary judgments granted to OPPD and Hawkins, it is unnecessary for us to consider Karen Parrish's assignment of error concerning affidavits which OPPD and Hawkins offered and which were used as a basis for the summary judgments.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GRANT, J., not participating.

JORGE VILAS, JR., APPELLEE AND CROSS-APPELLEE, V. BILL STEAVENSON ET AL., APPELLEES AND CROSS-APPELLANTS, STATE OF NEBRASKA, APPELLANT, AND W.A. BIBA ENGINEERING COMPANY, A CORPORATION, APPELLEE.

JORGE VILAS, JR., APPELLEE AND CROSS-APPELLEE, V. BILL STEAVENSON ET AL., APPELLANTS, SEAN D. OELKERS ET AL., APPELLEES AND CROSS-APPELLANTS, AND W.A. BIBA ENGINEERING COMPANY, A CORPORATION, APPELLEE.

496 N.W.2d 543

Filed March 12, 1993. Nos. S-90-730, S-90-969.

1. **Summary Judgment: Records: Appeal and Error.** Affidavits, depositions, and other evidence considered at a hearing on a motion for summary judgment must be preserved in a bill of exceptions filed in the court before an order on such a motion may be reviewed.
2. **Tort Claims Act: Appeal and Error.** The findings of fact of the trial court in a proceeding under the State Tort Claims Act will not be set aside unless such findings are clearly incorrect.
3. **Trial: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong.
4. _____: _____. 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.
5. **Negligence: Motor Vehicles.** The driver of an automobile is legally and mandatorily obligated to keep such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can

stop it and avoid a collision with any object in front of him.

6. **Negligence: 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.
7. **Proximate Cause: Trial.** The determination of causation is, ordinarily, a matter for the trier of fact.
8. **Motor Vehicles: Minors: Negligence: Liability: Damages.** An owner of a motor vehicle, who knowingly entrusts it to an under-age, unlicensed minor in violation of statute, is guilty of negligence and liable for damages proximately resulting from the negligent operation of the motor vehicle.
9. **Motor Vehicles: Negligence: Proximate Cause: Pleadings: Proof.** The plaintiff must also allege and prove that defendant's negligence was the proximate cause of the accident and injury. In order to establish that proximate causation, the plaintiff must allege and prove that the driver operated the automobile negligently, and that his negligence was a proximate cause of that accident.
10. **Motor Vehicles: Negligence: Liability.** The initial permission of an automobile owner to members of his family to use a family-purpose car does not include authority to delegate the driving of the automobile to a third person not a member of the family. Consequently, liability does not attach to the owner for the negligence of such third person.
11. **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 original conduct and the injury.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Robert M. Spire, Attorney General, and Lynne R. Fritz for appellant State.

Joseph W. Grant, of Gaines, Mullen, Pansing & Hogan, for appellants Steavenson and Hilgenkamp.

Thomas K. Harmon and John J. Respeliers, of Respeliers and Harmon, P.C., for appellee Vilas.

Edward G. Warin and Michael C. Schilken, of Gross & Welch, P.C., for appellees Oelkers.

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

BOSLAUGH, J.

This is an action for damages for injuries caused by an automobile accident that occurred on May 16, 1987.

The plaintiff, Jorge S. Vilas, Jr., was a passenger in an automobile, which was owned by Bill Steavenson and operated by Matthew Hilgenkamp, when it collided with a pickup truck owned by Michael Hampton. As a result of an injury to his right leg, the plaintiff now has a permanent limp and a 10 percent permanent disability to his right leg.

The defendants in this action are Bill Steavenson, Billy Steavenson, Matthew Hilgenkamp, Sean Oelkers, David Oelkers, the State of Nebraska, and W.A. Biba Engineering Company. After a bench trial, the district court found generally in favor of the plaintiff against all defendants except the engineering company and awarded the plaintiff damages in the amount of $50,000. All defendants except the engineering company have appealed from the judgment. There is no issue concerning the injuries to the plaintiff or the amount of damages which he recovered.

The record shows that a series of collisions occurred on May 16, 1987, at about 11:30 p.m. on Highway 30, approximately seven-tenths of a mile west of Ames, Nebraska. At the time of the accident, W.A. BIBA Engineering Company, a private contractor engaged by the State, was resurfacing Highway 30. The road surface was fresh asphaltic concrete. There was a 4 to 5 inch "drop-off" from the edge of the pavement to the unpaved dirt shoulder.

The initial collision occurred when both the right front and rear wheels on the passenger side of an automobile driven by Sean Oelkers, and owned by David Oelkers, encountered the pavement "drop-off" and left the paved portion of the highway going on to the unpaved shoulder. As the Oelker vehicle returned to the paved portion of the highway, it swerved across the center line and was struck by the pickup truck owned and operated by Michael Hampton. The Hampton vehicle spun clockwise and came to rest in the eastbound lane of the highway facing in a westerly direction. Later, the automobile in which Vilas was a passenger collided with the Hampton vehicle. Subsequently a fourth vehicle also collided with the Hampton

vehicle.

Nebraska State Patrol Officer Gurney Pittenger, who investigated the accident, testified that the speed of the Oelkers' vehicle upon returning to the paved portion of the highway was 66 miles per hour. Pittenger further testified that prior to colliding with the Hampton vehicle, the vehicle driven by Hilgenkamp left skid marks approximately 97 feet in length. The force of the impact from the collision between the two vehicles moved the Hampton pickup approximately 55 feet farther down the roadway.

On September 26, 1989, the plaintiff moved for summary judgment on the issue of liability against the State of Nebraska. In support of the motion, the plaintiff referred to the trial court's finding in *Mandel v. State*, a similar case arising out of the same facts, that the State was negligent. In *Mandel* a motion for summary judgment on the issue of the State's liability was granted based upon the trial court's finding of the State's negligence in a similar case, *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992).

The trial court sustained the plaintiff's motion for summary judgment against the State of Nebraska on October 31, 1989. The court's order provided:

> On October 10, 1989, this matter came on for hearing upon the plaintiff's Motion for Summary Judgment against the defendant, State of Nebraska. Argument was had and the matter taken under advisement.
>
> The Court now being fully advised in the premises does Find and Order that said Motion for Summary Judgment against the defendant, State of Nebraska, on the issue of liability should be and the same is hereby sustained.

The State of Nebraska has assigned numerous errors with regard to the order sustaining the plaintiff's motion for summary judgment as to the State of Nebraska's liability.

Although the trial court's order indicated that a hearing was held on the motion for summary judgment, no record was made and there is no record of what evidence was offered and considered with regard to the motion. Presumably, the trial court took notice of the proceedings in the *Maresh* case, as the *Maresh* record accompanies the record of this case. However,

there is nothing in the record of this case that shows that the *Maresh* record was offered at the hearing or that the trial court did in fact take notice of the *Maresh* record.

In the present state of the record we do not consider any of the evidence from the *Maresh* case. Affidavits, depositions, and other evidence considered at a hearing on a motion for summary judgment must be preserved in a bill of exceptions filed in the court before an order on such a motion may be reviewed. *Keystone Ranch Co. v. Central Neb. Pub. Power & Irr. Dist.*, 237 Neb. 188, 465 N.W.2d 472 (1991); *Peterson v. George*, 168 Neb. 571, 96 N.W.2d 627 (1959); *Brown v. Shamberg*, 190 Neb. 171, 206 N.W.2d 846 (1973).

Since the state failed to preserve and present a record of the hearing on the motion for summary judgment, this court is unable to review the order sustaining the plaintiff's motion for summary judgment. In the absence of a bill of exceptions concerning the evidence which may have been offered at the hearing on the motion for summary judgment, there is nothing to review, and this court cannot determine whether error occurred. Consequently, the State's assignments of error relating to the motion for summary judgment are without merit.

The findings of fact of the trial court in a proceeding under the State Tort Claims Act will not be set aside unless such findings are clearly incorrect. *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992). Likewise, in a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *Broekemeier Ford v. Clatanoff*, 240 Neb. 265, 481 N.W.2d 416 (1992).

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. *Anderson v. Transit Auth. of City of Omaha*, 241 Neb. 771, 491 N.W.2d 311 (1992).

When considering a negligence action, this court has previously stated:

> [t]he burden of proving negligence is on the party alleging

> it and merely establishing that an accident happened does not prove it . . . "Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred. In the absence of such proof, negligence cannot be presumed."

Himes v. Carter, 219 Neb. 734, 735, 365 N.W.2d 840, 841 (1985); quoting *Porter v. Black*, 205 Neb. 699, 705, 289 N.W.2d 760, 764 (1980). See, also, *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987).

At the time of the accident at issue in this appeal, the plaintiff was a passenger in the automobile owned by Bill Steavenson and operated by Matthew Hilgenkamp. The Steavenson automobile was provided for the use of Steavenson's son, Billy Steavenson, who was also a passenger in the automobile at the time of the accident. The defendants, Matthew Hilgenkamp and Bill and Billy Steavenson, have assigned the following errors:

> 1. The evidence was insufficient to support a judgment in favor of plaintiff against the defendants Hilgenkamp and Steavenson, and the judgment was therefore contrary to law.
>
> 2. With respect to defendant Hilgenkamp only, the Court Order of July 30, 1990, failed to reflect the Court's prior sustaining of said Defendant's Demurrer Ore Tenus with respect to the plaintiff's second cause of action relating to medical special damages allegedly assigned to plaintiff by the plaintiff's parents.

With respect to the defendant Hilgenkamp, the plaintiff alleged in his petition that Hilgenkamp was negligent in failing to keep a proper lookout, failing to maintain proper control over the vehicle, operating the vehicle at an excessive rate of speed under the circumstances, and failing to take reasonable efforts to avoid the collision with the Hampton vehicle.

The evidence at trial was sufficient for the trial court to determine that Hilgenkamp was operating the Steavenson vehicle at an excessive rate of speed. There was evidence that Hilgenkamp had been driving in excess of the speed limit just prior to the collision. Sergeant Pittenger testified that based on his observations at the accident scene, the vehicle driven by

Hilgenkamp left approximately 97 feet of skid marks prior to the impact. Additionally, the force of the impact carried the Hampton pickup, which had been completely at rest, 55 feet farther down the roadway. The length of the skid marks and the distance the Hampton vehicle traveled, support the allegation that Hilgenkamp was operating the Steavenson vehicle at an excessive rate of speed.

There also was evidence for the trial court to conclude that Hilgenkamp failed to keep a proper lookout. This court has previously stated:

> . . . the driver of an automobile is legally and mandatorily obligated to keep such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop it and avoid a collision with any object in front of him.

Kasper v. Carlson, 232 Neb. 170, 174, 440 N.W.2d 195, 197 (1989); See, also, *Mantz v. Continental Western Ins. Co.*, 228 Neb. 447, 422 N.W.2d 797 (1988).

Accordingly, there was evidence before the trial court to support the determination that Hilgenkamp was negligent in the operation of the Steavenson vehicle at an excessive speed and in his failure to keep a proper lookout and maintain control of the vehicle. Therefore, Hilgenkamp could be found liable to Vilas if Hilgenkamp's negligence was a proximate cause of Vilas' injury. With regard 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." ' "

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

The determination of causation is, ordinarily, a matter for the trier of fact. In this case, the trial court's determination that

Hilgenkamp's negligence was a proximate cause of Vilas' injuries was not clearly erroneous.

Hilgenkamp also assigned as error the trial court's order of July 30, 1990, which failed to reflect the court's prior sustaining of defendant Hilgenkamp's Demurrer Ore Tenus with respect to the plaintiff's second cause of action. Vilas' second cause of action, allegedly assigned to Vilas by his parents, related to medical special damages. The trial court sustained the Demurrers Ore Tenus of the defendant BIBA Construction Company and the defendant Hilgenkamp because the assignment, from the plaintiff's parents to the plaintiff, did not include claims against the defendants BIBA Construction or Hilgenkamp. Although the trial court sustained the demurrers, the court's final order made no reference to the trial court's action in sustaining the demurrer of the defendant Hilgenkamp. The judgment against Hilgenkamp should be modified by reducing it to the extent that it includes any damages sustained by Vilas' parents, the cause of action for which was subsequently assigned to the plaintiff Vilas. Because the record is not adequate to show what part of the judgment against Hilgenkamp may have been for damages alleged in the second cause of action, it is necessary to remand the cause as to Hilgenkamp to the district court for further proceedings.

With respect to the defendants Bill and Billy Steavenson, the plaintiff alleged in his petition that the Steavensons were negligent in entrusting their motor vehicle to Hilgenkamp, a person allegedly lacking the skill and experience necessary to properly operate a motor vehicle. At the time of the accident Hilgenkamp was 15 years old. However, at the time of the accident, he had been driving with a school permit for over a year and a half and had some experience driving at night. Hilgenkamp testified that he was familiar with the highway where the accident occurred and had previously driven over this particular stretch of the highway on several occasions.

In Nebraska, the rule with regard to the doctrine of negligent entrustment is as follows: ". . . an *owner* of a motor vehicle, who *knowingly* entrusts it to an under-age, unlicensed minor in violation of statute, is guilty of negligence and liable for damages proximately resulting from the negligent operation of

the motor vehicle." (Emphasis supplied.) *Gertsch v. Gerber*, 193 Neb. 181, 184, 226 N.W.2d 132, 134 (1975). See, also, *Keller v. Wellensiek*, 186 Neb. 201, 181 N.W.2d 854 (1970).

However, the fact that the owner may be negligent in entrusting the vehicle to a minor does not dispose of the issue. In addition to being negligent in entrusting the vehicle:

> [t]he plaintiff must also allege and prove that defendant's negligence was the proximate cause of the accident and injury. In order to establish that proximate causation, the plaintiff must allege and prove that the driver operated the automobile negligently, and that his negligence was a proximate cause of that accident.

Id. at 185, 226 N.W.2d at 134. See, also, *Wagner v Mines*, 203 Neb. 143, 277 N.W.2d 672 (1979).

In the present case, regardless of whether Hilgenkamp negligently operated the vehicle, there is no evidence that the owner of the vehicle, Bill Steavenson, knowingly entrusted the vehicle to Hilgenkamp. The Steavenson vehicle was provided for the use of Bill Steavenson's son, Billy. Billy was a passenger in the vehicle at the time of the accident, and Matthew Hilgenkamp was operating the vehicle with Billy's permission. However, there is no evidence in the record that the owner of the vehicle, Bill Steavenson, gave his permission for Hilgenkamp to drive the car, nor is there any evidence that Bill Steavenson even knew that someone other than his son was driving the car.

In *Christensen v. Rogers*, 172 Neb. 31, 108 N.W.2d 389 (1961), this court considered the question of whether the owner of a vehicle, while permitting his son to use his car, can be held liable for an accident occasioned while the car was being operated by a third person, with the son's permission, but without the father's knowledge or consent. The court discussed the "family purpose doctrine" and noted that the doctrine holds the owner of a car, who gives it over to the use of his family and permits it to be operated by the members thereof, liable for injuries inflicted while being negligently operated by a member of the family.

In the *Christensen* case, the court was asked to expand the family purpose doctrine to impose liability on the father for negligence while the family car was being operated by a third

party with the son's permission but without the father's knowledge or consent. This court concluded that:

> the initial permission of an automobile owner to members of his family to use a family-purpose car does not include authority to delegate the driving of the automobile to a third person not a member of the family. Consequently, liability does not attach to the owner for the negligence of such third person.

Id. at 34, 108 N.W.2d at 392.

Therefore, the doctrine of negligent entrustment is not applicable to Bill Steavenson since he did not "knowingly entrust" his vehicle to Hilgenkamp. It also appears that the doctrine of negligent entrustment does not apply to Billy Steavenson since he did not own the vehicle. Accordingly, the trial court was clearly wrong in its determination of liability against the defendants Bill and Billy Steavenson.

As stated previously, the initial collision in this four vehicle series of accidents occurred between a vehicle driven by the defendant Sean Oelkers and a vehicle driven by Michael Hampton. The Oelkers' vehicle was owned by Sean Oelkers' father, David Oelkers. With respect to defendants Sean and David Oelkers, the plaintiff alleged in his petition that Sean Oelkers was negligent in failing to maintain a proper lookout, failing to maintain reasonable control of the automobile and operating the vehicle at an excessive rate of speed. Vilas' petition alleged that Sean Oelkers' negligence was imputed to his father David Oelkers under the family purpose doctrine.

In this appeal the defendants Sean and David Oelkers assigned the following errors:

> 1. The district court erred in finding that the plaintiff presented sufficient evidence to sustain his burden of proof that Sean Oelkers was negligent, and by application of the family purpose doctrine that David Oelkers was also negligent.
>
> 2. The district court erred in finding that the Oelkers action was the proximate cause of the plaintiff's injuries.
>
> 3. The district court erred in not finding that the negligence of the plaintiff's driver, Matthew Hilgenkamp, was the sole and proximate cause of the plaintiff's injuries.

4. The district court erred in not finding that Matthew Hilgenkamp's negligence was an efficient intervening cause of the plaintiff's injuries.

5. The district court erred, as a matter of law, by dismissing the defendants', Sean D. Oelkers and David Oelkers, cross-petition.

6. The district court erred, as a matter of law, in finding generally in favor of the plaintiff and against the defendants, Sean Oelkers and David Oelkers.

The series of four vehicle collisions involved in this appeal was initiated when the vehicle driven by the defendant Sean Oelkers encountered the pavement "drop off" and both the right front and rear wheels on the passenger side of the vehicle went off the paved portion of the road and onto the unpaved shoulder. As the vehicle reentered the paved portion of the highway, Sean Oelkers lost control, and the automobile swerved across the highway and was struck by the pickup owned and operated by Michael Hampton.

Sergeant Pittenger testified that based on the physical evidence, including critical speed scuff marks and a series of tests performed, the Oelkers' vehicle was traveling 66 m.p.h. when it returned to the roadway. Based on the speed at which Oelkers tried to return to the pavement and his inability to properly control the vehicle, it cannot be said that the trial court was clearly wrong in finding that the Oelkers were negligent.

The Oelkers argue that Hilgenkamp's negligence was an efficient intervening cause of Vilas' injuries, thereby precluding their liability. Also, the Oelkers argue that Hilgenkamp's negligence was the sole proximate cause of the accident. As stated previously, the third basic requirement in establishing proximate cause is " ' " 'that there be no efficient intervening cause.' " ' " *Maresh, supra.* " ' " '[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. . . .' " ' " *Id.*, quoting *Looney v. Pickering*, 232 Neb. 32, 37, 439 N.W.2d 467, 471 (1989). The *Maresh* court further noted:

> 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. 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.

Maresh at 515, 489 N.W.2d at 312.

There is no evidence in this case that Hilgenkamp's negligence was not reasonably foreseeable. Therefore, Hilgenkamp's negligence was not an efficient intervening cause. Accordingly, the district court did not err in finding that Sean Oelkers was negligent and that this negligence was a proximate cause of the accident causing the plaintiff's injuries.

Accordingly, the judgment of the district court should be affirmed with respect to the $50,000 judgment against the State of Nebraska and against the defendants, Sean Oelkers and David Oelkers. The judgment is reversed with regard to the defendants Bill and Billy Steavenson. As to the defendant Matthew Hilgenkamp the judgment is reversed and the cause remanded for further proceedings.

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

FAHRNBRUCH, J., concurs in the result.

WHITE, J., dissents.

KATHERINE LOUISE SMITH, NOW KNOWN AS KATHERINE LOUISE HADLEY, APPELLANT, V. TIMOTHY ROY SMITH, APPELLEE, AND JOHN SMITH AND LENORA SMITH, INTERVENORS-APPELLEES.

497 N.W.2d 44

Filed March 12, 1993. No. S-90-907.

1. **Adoption: Appeal and Error.** In an appeal from a denial of consent to adoption, the appellate court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge,

whose judgment will be upheld in the absence of an abuse of discretion, subject to the best interests of the children.

2. **Divorce: Child Custody: Child Support: Courts: Jurisdiction.** Neb. Rev. Stat. § 42-351(1) (Reissue 1989) provides that the district court shall have jurisdiction to inquire into such matters, make such investigations, and render such judgments and make such orders as are appropriate concerning the status of the marriage, and the custody and support of minor children.
3. _____: _____: _____: _____: _____. Full and complete general jurisdiction over child custody and support is vested in the district court in which a petition for dissolution is properly filed.
4. **Adoption: Abandonment.** The question of whether the parent did in fact abandon the child, for the purpose of adoption, is exclusively for the county court.
5. **Adoption.** The issue of the children's best interest in the context of adoption is within the dominion of the county court. If, upon the hearing, the county court finds that such adoption is for the best interests of such minor child of the adopting person's spouse, a decree of adoption shall be entered. Neb. Rev. Stat. § 43-109 (Cum. Supp. 1990).
6. **Statutes: Appeal and Error.** It is the duty of this court, as far as practicable, to give effect to the language of a statute and to reconcile the different provisions of it so they are consistent, harmonious and sensible.
7. **Statutes: Legislature: Intent.** As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act 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.
8. **Adoption: Courts: Jurisdiction.** Neb. Rev. Stat. § 24-517(8) (Reissue 1989) provides that the county courts shall have exclusive, original jurisdiction over all adoption matters. The consent of the district court means only that the opposing parent must defend against the adoption sought in the county court.
9. **Divorce: Adoption: Courts.** If the district court has already made determinations within the dissolution proceedings which are decisive on the issue of adoption or the fitness of a parent, it is unnecessary for the county court to rehear these issues and the district court may deny consent based upon such findings.
10. **Adoption: Child Custody.** A determination of custody is not, on its face, determinative as to later petitions for adoption made by either the custodial or noncustodial parent.
11. **Adoption: Divorce: Courts: Jurisdiction.** In addition to considering jurisdictional factors and prior determinations in deciding whether to grant consent to an adoption proceeding, the district court may, at its volition, make a written recommendation to the county court concerning the resolution of the proceedings in the context of knowledge obtained through the dissolution proceedings.

Appeal from the District Court for Polk County: WILLIAM H. NORTON, Judge. Reversed and remanded with directions.

Brian C. Bennett, of Dunlap & Bennett, P.C., for appellant.

James A. Wagoner for appellee.

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

LANPHIER, J.

The appellant, Katherine L. Hadley, formerly Katherine L. Smith, is the natural mother of the children sought to be adopted by Terrell S. Hadley, her present husband. The appellee, Timothy R. Smith, is the natural father of the children.

PROCEDURAL BACKGROUND

On March 1, 1990, appellant filed a motion for approval of adoption in the District Court of Polk County, requesting consent to the adoption of the children by Terrell S. Hadley. Upon the date of filing of the adoptions, Hadley's petition for adoption of the minor children was pending in the County Court of Lancaster County. The district court declined to approve the adoption and overruled and dismissed the motion. The court determined that voluntary abandonment by appellee had not occurred, and that in view of the grandparent visitation previously determined, it would not be in the best interests of the children to permit adoption at this time. Appellant timely appealed to this court. We reverse and remand with directions.

FACTUAL BACKGROUND

Appellant and appellee were married on January 28, 1981. There were two children born as issue of this marriage: M.R., born April 29, 1981, and R.L., born July 23, 1984. Appellant filed a petition for dissolution of marriage on May 7, 1986, seeking custody of the two children. John and Lenora Smith, the paternal grandparents of the children, were granted leave by the court to intervene in the action.

The matter was tried in the Polk County District Court, where appellant received physical possession of the children, to be monitored by the Lancaster County Department of Social Services. The court retained legal custody of the children, and the appellee was granted visitation rights. Custody was later

granted to appellant on November 17, 1987.

On March 9, 1988, the grandparents filed a "Petition for Grandparents' Visitation Rights," after they were unable to reconcile differences with the appellant. Thereafter, appellant filed a motion to restrict appellee's visitation rights, alleging that appellee had physically assaulted her husband and made death threats toward her and her husband in front of the children. The district court granted the grandparents' visitation and required that appellee's visits be monitored by the Nebraska Department of Social Services. After both children reported that they were being emotionally abused by appellee during these visits, appellee's rights of visitation were suspended pending arrangement for supervised visitation.

Terrell Hadley, who married appellant on December 5, 1987, filed a petition for the adoption of the children in the Lancaster County Court on January 10, 1990, alleging that appellee had abandoned the children. At the time of trial, appellee had not visited the children for a period of two and one-half years. Appellee testified that he had not visited the children because he was under a condition of bail which prohibited him from having any contact with Terrell Hadley. The appellee did not show up for any visits arranged by appellant, however, nor did he attempt to set up any visitation on his own.

STANDARD OF REVIEW

In an appeal from a denial of consent to adoption, the appellate court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion, subject to the best interests of the children. See, *Huffman v. Huffman*, 232 Neb. 742, 441 N.W.2d 899 (1989); *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988).

CONSENT TO ADOPTION

Appellant's motion to the district court for consent to adoption was made pursuant to Neb. Rev. Stat. § 43-104 (Reissue 1988), which provides in relevant part:

> [N]o adoption shall be decreed unless the petition therefor is accompanied by written consents thereto executed by

> . . . (2) any district court . . . having jurisdiction of the custody of a minor child by virtue of divorce proceedings had in any district court or separate juvenile court in the State of Nebraska, and (3) both parents if living . . . except that consent shall not be required of any parent who . . . (b) has abandoned the child for at least six months next preceding the filing of the adoption petition . . . .

It is evident that the district court in the instant case had jurisdiction to hear appellant's motion. Neb. Rev. Stat. § 42-351(1) (Reissue 1988) provides, in part, that "the court shall have jurisdiction to inquire into such matters, make such investigations, and render such judgments and make such orders as are appropriate concerning the status of the marriage, [and] the custody and support of minor children." We have held that "it is clear that by this statute full and complete general jurisdiction over . . . child custody and support, is vested in the district court in which a petition for dissolution of a marriage is properly filed." *Robbins v. Robbins*, 219 Neb. 151, 154, 361 N.W.2d 519, 521 (1985). Here the petition for dissolution was filed in the District Court of Polk County, Nebraska, the same court which heard appellant's motion for approval of adoption.

The district court overruled and dismissed appellant's motion to consent to adoption upon a finding that:

> [V]oluntary abandonment has not occurred on the part of [appellee], and that in view of the grandparent visitation previously determined, it would not be in the best interests of the children to grant permission to adopt at this time.

Although the factors to be considered by the district court in granting or denying its consent under § 43-104 are not enumerated in the statute itself or in the legislative history, it is clear that the district court is not to consider the issue of abandonment. In *Klein v. Klein*, 230 Neb. 385, 431 N.W.2d 646 (1988), we held that "the question of whether the [parent] did in fact abandon the [child], for the purpose of adoption, is *exclusively* for the county court." (Emphasis supplied.) *Id.* at 386, 431 N.W.2d at 647 (citing *In re Guardianship of Sain*, 211 Neb. 508, 319 N.W.2d 100 (1982)).

The district court, in overruling and dismissing appellant's motion, found that "voluntary abandonment has not occurred

on the part of [appellee]." Consideration of the issue of abandonment constitutes plain error.

Generally, the issue of the children's best interests in the context of adoption is also within the dominion of the county court: "If, upon the hearing, the [county] court finds that such adoption is for the best interests of such minor child . . . of the adopting person's spouse, a decree of adoption shall be entered." Neb. Rev. Stat. § 43-109 (Cum. Supp. 1990). The district court's consideration of the children's best interests outside the context of the dissolution proceedings had before the district court was therefore also improper.

FACTORS TO BE CONSIDERED BY THE DISTRICT COURT

This is the first opportunity for this court to address the question of what factors are to be considered by the district court in evaluating requests for consent to adoption. It is the duty of this court, as far as practicable, to give effect to the language of a statute and to reconcile the different provisions of it so they are consistent, harmonious and sensible. *Malone v. Benson*, 219 Neb. 28, 361 N.W.2d 184 (1985). As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act 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. *Indian Hills Comm. Ch. v. County Bd. of Equal.*, 226 Neb. 510, 412 N.W.2d 459 (1987); *Wounded Shield v. Gunter*, 225 Neb. 327, 405 N.W.2d 9 (1987). In construing the statutes involved in this appeal, we are not restricted to tunnel vision focused on one statute isolated from its related statutory companions. Rather, we read the various sections of the adoption statutes in conjunction with, and in light of, one another. *Indian Hills, supra.*

Neb. Rev. Stat. § 24-517(8) (Reissue 1989) provides that the county courts shall have exclusive, original jurisdiction over all adoption matters. "The consent of the district court means only that the [opposing parent] must defend against the adoption sought in the county court." *Klein v. Klein, supra* at 387, 431 N.W.2d at 647. Should an adoption be granted by the county

court, the opposing parent would then be free to appeal that decision as provided by law. It is not appropriate that the district court, in order to determine consent, consider abandonment, the children's best interests, and other issues outside of the dissolution proceeding and other issues that are within the province of the county court. Requiring proof of abandonment and best interests at the district court level, prior to county court resolution of the same issues, runs afoul of judicial economy and eviscerates the "exclusive jurisdiction" of the county court on adoption matters. The Legislature has delegated that responsibility to the county court, and allows review of the county court's decision in the district court upon appeal.

While appellant would have us hold that § 43-104 is therefore only a bookkeeping device intended to keep the district court informed of the status of parties over which it has jurisdiction, we do not believe that to be the case either. Rather, we hold that the statute gives the district court two opportunities to influence an adoption proceeding. First, the district court may have already made determinations within the dissolution proceedings which are decisive on the issue of adoption or the fitness of a parent. If such is the case, it would be unnecessary for the county court to rehear these issues and the district court may deny consent based upon such findings. It should be understood, however, that a determination of custody is not, on its face, determinative as to later petitions for adoption made by either the custodial or non-custodial parent. See, *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977).

Second, the district court may be in the position to make a significant contribution to the determination of the county court based on its experience from the parties' dissolution proceedings. In addition to considering jurisdictional factors and prior determinations in deciding whether to grant consent to an adoption proceeding, the district court may, at its volition, make a written recommendation to the county court concerning the resolution of the proceedings in the context of

knowledge obtained through the dissolution proceedings. This recommendation should be accompanied by, whenever possible, a reference to the record of the dissolution action. Such a recommendation would only be necessary when the district court has granted consent to the adoption proceedings.

CONCLUSION

The issues of abandonment and best interests outside of the context of dissolution are clearly not within the scope of the district court's inquiry when it is considering a request for consent to adoption. These issues and all others concerning adoption proceedings are within the exclusive jurisdiction of the county court. The district court is not, however, restricted to merely ascertaining whether the parties before it are properly within its jurisdiction under § 42-351. The district court may also either deny consent based upon findings from the dissolution proceedings, or the district court may submit a written recommendation to the county court based upon findings in the dissolution proceedings on issues relevant to the adoption proceeding. The weight to be given such a recommendation lies within the discretion of the county court.

Accordingly, the judgment in this case is reversed and the cause remanded to the district court with directions that the court follow the standards set out above in determining whether or not to grant consent to adoption.

REVERSED AND REMANDED WITH DIRECTIONS.

FAHRNBRUCH, J., not participating in the decision.

EDITH KRZYCKI, APPELLANT AND CROSS-APPELLEE, V. GENOA NATIONAL BANK, APPELLEE AND CROSS-APPELLANT.

496 N.W.2d 916

Filed March 12, 1993. No. S-90-981.

1. **Declaratory Judgments.** Whether an action for declaratory judgment under the provisions of Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 1989) is to be treated as one at law or one in equity is to be determined by the nature of the

dispute.

2. **Trial: Appeal and Error.** When a jury has been waived, the factual findings of the trial court have the effect of a verdict and will not be set aside unless clearly erroneous.
3. **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 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.
4. **Contracts.** In interpreting contracts, the court as a matter of law must first determine whether the contract is ambiguous.
5. _____. Whether a contract is ambiguous is a question of law initially determined by a trial court.
6. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
7. **Contracts: Words and Phrases.** An instrument is ambiguous if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
8. **Contracts.** The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous.
9. **Contracts: Intent.** It is well established that if a contract is unambiguous, the intent of the parties must be established from the contents thereof.
10. **Contracts: Parol Evidence.** A written instrument is open to explanation by parol evidence only when it is ambiguous in its terms.
11. **Contracts.** Where general and specific terms in a contract may relate to the same thing, the more specific provision controls.
12. **Contracts: Appeal and Error.** Where a contract has been entered into which determines the legal rights between the parties, this court will not disturb it but will leave the parties to abide by its consequences.
13. **Contracts.** It is a well established rule that one who signs a written agreement is bound by it terms whether or not she has read the document.
14. **Breach of Contract: Pleadings: Proof.** In order to recover on an action for a breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, and damages.
15. **Contracts.** If the essence of the dispute sounds in contract, the action is one at law.

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

Vince Kirby for appellant.

Larry D. Bird, of Treadway, Bird & Nespor, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., MERRITT, D.J., and COLWELL, D.J., Retired.

LANPHIER, J.

The plaintiff-appellant in this case, Edith Krzycki, appeals from a judgment entered by the District Court for Nance County. The court found generally for the defendant-appellee, Genoa National Bank (the Bank), on a guaranty claimed to be secured by a mortgage entered into between the plaintiff and the Bank. The Bank cross-appeals the court's second holding, where it found generally for the plaintiff on the Bank's cross-claim to recover sums received by plaintiff.

PROCEDURAL BACKGROUND

Plaintiff initially brought an action for declaratory judgment in the district court, seeking a determination of her legal rights under a mortgage and guaranty executed by her in favor of the Bank. The Bank had acquired $35,000 from the plaintiff under an agreement which released the mortgage and provided that plaintiff had satisfied the guaranty.

In its answer, the Bank counterclaimed for sums received by plaintiff under a later agreement relating to the Bank's retention of the $35,000. In her reply, plaintiff again asked for a declaratory judgment as to the parties' rights under the mortgage and guaranty.

The case was tried by the Nance County District Court, sitting without a jury. Judgment was initially entered for the Bank on plaintiff's petition and against the Bank on its cross-petition. Thereafter, however, a motion for a new trial was granted by the court. A second trial was held, on the pleadings and transcript from the first trial, as stipulated by the parties. The court again entered judgment for the Bank on plaintiff's petition and for plaintiff on the Bank's counterclaim.

Plaintiff timely appealed to this court, contending, in summary, that the district court erred in finding that the mortgage was intended to secure the obligation, if any, created by the guaranty. On cross-appeal, the Bank charged that the district court erred in finding for plaintiff on its counterclaim. For purposes of clarity, the discussion concerning the declaratory judgment and the discussion concerning the

cross-appeal will be separated below.

STANDARD OF REVIEW

Whether an action for declaratory judgment under the provisions of Neb. Rev. Stat. §§ 25-21,149 through 25-21,164 (Reissue 1989) is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *Drew v. Walkup*, 240 Neb. 946, 486 N.W.2d 187 (1992). The test is whether, in the absence of a prayer for declaratory judgment, the issues presented should be properly disposed of in an equitable as opposed to a legal action. *Chadron Energy Corp. v. First Nat. Bank*, 221 Neb. 590, 379 N.W.2d 742 (1986). The relief sought by plaintiff in the instant case is the recovery of $35,000; the construction of the mortgage and guaranty is a deciding factor to that end. Since no equitable relief is sought, the action is to be treated as one at law. *Boren v. State Farm Mut. Auto Ins. Co.*, 225 Neb. 503, 406 N.W.2d 640 (1987). A jury having been waived, the factual findings of the trial court have the effect of a verdict and will not be set aside unless clearly erroneous. *Albee v. Maverick Media, Inc.*, 239 Neb. 60, 474 N.W.2d 238 (1992); *Oddo v. Speedway Scaffold Co.*, 233 Neb. 1, 443 N.W.2d 596 (1989). 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. *Albee v. Maverick Media, Inc., supra*; *Oddo v. Speedway Scaffold Co., supra.*

BACKGROUND

On June 10, 1975, plaintiff and her husband, Joe Krzycki, executed an installment note and a mortgage in favor of the Bank in order to finance a center pivot irrigation device for their farm. The mortgage, which encumbered various real estate, provided that it was given as security not only for the instant loan, but for "any and all sums, indebtedness and liabilities of every kind now or hereafter owing and to become due from the mortgagor to the mortgagee." Additional notes were signed by plaintiff after the initial loan, which also stated that they were secured by this "open end mortgage."

Joe Krzycki died in 1979, at which time plaintiff assumed all of the promissory notes which she and Joe had signed by signing new notes individually. The note for the center pivot was satisfied on January 8, 1980. After Joe's death, Richard Krzycki, the son of Joe and plaintiff, returned home to help with the farm. On May 21, 1980, due to Richard's inability to acquire financing for the farm, plaintiff signed a guaranty in the amount of $35,000, guaranteeing the debts of her son Richard. There was some dispute as to whether plaintiff was aware that the guaranty was in the amount of $35,000, or whether she thought it was to cover only the $7,000 or $8,000 needed to cover the year's farming expenses. At the time of the plaintiff's guaranty, Richard owed the Bank $86,900 on a commercial debt.

Richard subsequently defaulted on his debt and declared bankruptcy. Amounts due to creditors after liquidation exceeded $35,000. On January 2, 1986, an agreement was entered into between the Bank and plaintiff whereupon she sold the tract of land upon which the Bank had the 1975 mortgage, in order to pay the Bank $35,000. The agreement stated that plaintiff had signed the guaranty and that the bank was releasing its mortgage on the land in order that it could be sold to cover the guaranty. Plaintiff was represented by counsel in that transaction.

On February 5, 1986, the parties entered into a second agreement under which plaintiff received $1,166.67 of proceeds from Richard's bankruptcy estate with the stipulation that these sums could be recovered by the Bank in the event plaintiff sued the Bank for the money paid to satisfy the guaranty per the earlier agreement. This latter agreement is the subject of the Bank's counterclaim and cross-appeal.

THE MORTGAGE, THE GUARANTY, AND THE AGREEMENT

The dispute in this case centers around the contract provisions contained in the mortgage, the guaranty, and the 1986 agreement. The relevant sections of the 1975 mortgage state:

> This mortgage is given . . . to secure the payment of all

> the promissory notes made by the mortgagor, payable to the Genoa National Bank, and all extensions and renewals, and for the further purpose of securing the payment of any and all sums, indebtedness and liabilities of any and every kind now or hereafter owing and to become due from the mortgagor to the mortgagee or to the holder of said note or to the assignee of the mortgagee during the term of this mortgage, howsoever created, incurred, evidenced, acquired or arising, whether under the note or this mortgage or under any other instrument, obligations, contracts or agreements, or dealings of any and every kind now or hereafter existing or entered into between the mortgagor and the mortgagee.

The mortgage was signed by Joseph W. Krzycki and Edith S. Krzycki, "each in his and her own right and as spouse of the other."

The guaranty signed by plaintiff in 1980 provides, in pertinent part:

> For value received and to enable Richard Krzycki . . . hereinafter designated as "Debtor," to obtain credit from time to time, of Genoa National Bank . . . we hereby request said Bank to extend to said Debtor such credit as said Bank may deem proper, and we hereby jointly and severally guarantee the full and prompt payment to said Bank at maturity, and at all times thereafter . . . of any and all indebtedness, liabilities and obligations of every nature and kind of said Debtor to said Bank . . . to the extent of Thirty five thousand and 00/100 Dollars . . . .
>
> . . . .
>
> In case of the . . . insolvency or bankruptcy of said Debtor, all of said indebtedness . . . to the extent of the amount of this guaranty, shall, at the option of said Bank, become immediately due from . . . the undersigned.

This document was signed by plaintiff individually.

The agreement of January 2, 1986 states in pertinent part:

> WHEREAS, Richard Krzycki and MaDonna Krzycki are indebted to the Genoa National Bank; and
>
> WHEREAS, Edith Krzycki has signed a guaranty dated May 21, 1980; and

WHEREAS, the Bank has a mortgage and a lien on personal property which must be released before the property can be sold.

IT IS, THEREFORE, AGREED between the Genoa National Bank and Edith Krzycki as follows:

1. The Bank will receive the sum of $35,000 from the sale.

2. The Bank will release its mortgage and lien on the personal property.

3. The payment to the Bank and the granting of the release is not an accord and satisfaction between the parties. Each party retains all rights they had against the other prior to the payment to the Bank and delivery of the release.

4. Edith Krzycki retains the right to litigate to determine the enforceability of the guaranty, and if a Court determines that the guaranty was not enforceable . . . the Bank will reimburse . . . the $35,000 . . . .

The numerous assignments of error claimed by plaintiff, as well as her lengthy presentation of facts, can be distilled into a single argument: It was not plaintiff's intent that the mortgage signed in 1975 cover the obligation, if any, created by the guaranty signed in 1980. We do not reach the matter of the mortgage, however, as the guaranty and subsequent agreement entered into between the parties are determinative of this first issue.

The 1986 agreement and the guaranty are contracts. In interpreting contracts, the court as a matter of law must first determine whether the contract is ambiguous. *Crowley v. McCoy*, 234 Neb. 88, 449 N.W.2d 221 (1989). Whether a document is ambiguous is a question of law initially determined by a trial court. *Albee v. Maverick Media, Inc., supra*; *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987). 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. *Albee v. Maverick Media, Inc., supra*; *Wurst v. Blue River Bank*, 235 Neb. 197, 454 N.W.2d 665 (1990); *Huffman v. Huffman*, 232 Neb. 742, 441 N.W.2d 899 (1989).

An instrument is ambiguous if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989). "The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous." *Id.* at 391, 446 N.W.2d at 4.

Applying the foregoing rules of construction, we find, as a matter of law, that there is no ambiguity in the language of the 1986 agreement. The extrinsic evidence upon which plaintiff relies so heavily therefore becomes irrelevant. It is well established that if a contract is unambiguous, the intent of the parties must be determined from the contents thereof. *Crowley v. McCoy, supra*; *Nogg Bros. Paper Co. v. Bickels*, 233 Neb. 561, 446 N.W.2d 729 (1989). A written instrument is open to explanation by parol evidence only when it is ambiguous in its terms. *Olds v. Jamison*, 195 Neb. 388, 238 N.W.2d 459 (1976). See, also, *Washington Heights Co. v. Frazier*, 226 Neb. 127, 409 N.W.2d 612 (1987).

Applying the above-cited rules, we find the intent of the parties to the 1986 agreement to be easily discernible: The Bank agreed to release the mortgage in exchange for plaintiff's payment of the guaranty, preserving plaintiff's right to litigate the enforceability of the guaranty. While paragraph 3 of the agreement seems to generally indicate that all of plaintiff's rights were preserved, including those concerning the mortgage, the specificity of paragraph 4 makes it clear that only her rights as to the guaranty were preserved. Where general and specific terms in a contract may relate to the same thing, the more specific provision controls. *Corso v. Creighton University*, 731 F.2d 529 (8th Cir. 1984); *State v. Commercial Cas. Ins. Co.*, 125 Neb. 43, 248 N.W. 807 (1933); *Coad v. London Assur. Corp.*, 119 Neb. 188, 227 N.W. 925 (1929). We hold, therefore, that the agreement's intent was to preserve only plaintiff's rights as to the validity of the guaranty, and the validity of the mortgage (if any) has been decided between the parties. Where a contract has been entered into which determines the legal rights between the parties, this court will

not disturb it but will leave the parties to abide by its consequences. *Jones v. Burr*, 223 Neb. 291, 389 N.W.2d 289 (1986). A party is thereafter estopped from asserting any legal remedies which he may have surrendered in such a contract. *Jelsma v. Scottsdale Ins. Co.*, 231 Neb. 657, 437 N.W.2d 778 (1989).

Accordingly, we are left only to determine the validity of the guaranty itself. The guaranty is also a contract and is subject to the rules of construction set out above. Initially, we find that the guaranty is not subject to conflicting interpretations or meanings, but is unambiguous as a matter of law. *Knox v. Cook, supra*. The intent of the parties must therefore be determined from the contents of the guaranty itself. *Crowley v. McCoy, supra*; *Nogg Bros. Paper Co. v. Bickels, supra*.

The guaranty unequivocally states that plaintiff agreed to guarantee the payment of any and all indebtedness, liabilities and obligations owed by Richard Krzycki in favor of the Bank, up to $35,000. There is some dispute in the record as to the definiteness of the terms of the guaranty when signed by plaintiff. However, this matter was decided by the lower court and we do not find that such decision was clearly erroneous. *Albee v. Maverick Media, Inc., supra*; *Oddo v. Speedway Scaffold Co.,supra*. We therefore find that the guaranty was valid against plaintiff up to the $35,000 limit provided therein.

Plaintiff also attacks the application of the guaranty on another front. Although her brief is not entirely clear, she appears also to contend that she did not read the instruments relevant to this case and that they therefore should not be enforced against her. It is a well established rule, however, that one who signs a written agreement is bound by its terms whether or not she has read the document. See, *Nichols v. Ach*, 233 Neb. 634, 447 N.W.2d 220 (1989) (overruled on other grounds); *Mangan v. Landen*, 219 Neb. 643, 365 N.W.2d 453 (1985); *Int'l Multifoods Corp. v. D & M Feed & Produce, Inc.*, 470 F. Supp. 654 (D.C. Neb. 1979). Plaintiff's contentions on this point are thus without merit, and the guaranty and 1986 agreement are valid and enforceable against her. The trial court's holding on this first issue is therefore affirmed.

THE CROSS-APPEAL

We turn next to the Bank's cross-appeal, where it is contended that the lower court erred in finding for the plaintiff on the Bank's counterclaim. As stated earlier, the Bank had counterclaimed against plaintiff in the trial court for sums received by plaintiff which the Bank claims were also under its lien. The court below generally found for plaintiff on the counterclaim. In its cross-appeal, the Bank contends that the district court erred in so finding. Plaintiff did not address this cross-appeal.

Briefly, the record shows the following relevant facts concerning the cross-appeal: On January 2, 1986, plaintiff sold the real property secured by the Bank's mortgage. She did so under an agreement which provided that the Bank would receive $35,000 of the proceeds of the sale.

On February 5, 1986, discussions were apparently held between plaintiff's attorney and the Bank's attorney, concerning sums the Bank felt it was due under its settlement agreement with Richard Krzycki. Prior to February, 1986, Richard Krzycki had recovered a $10,000 judgment in a rental dispute. At the time of this recovery, the Bank had a perfected security interest in all of Richard's interests in and to all contracts and leases concerning lands. The Bank alleges that an agreement between plaintiff and the Bank was entered into which provided that the $10,000 would be divided as follows: $5,500 would go to the Bank; $3,333.33 would go to the Krzycki's attorney as a contingent fee; and $1,166.67 would go to plaintiff. The Bank claims plaintiff received her share on the condition that the Bank would retain the right to counterclaim against her for recovery of the $1,166.67 if she sued the Bank for recovery of the $35,000 paid pursuant to the guaranty. Subsequently, plaintiff brought an action against the Bank to recover the moneys paid under the guaranty, and the Bank counterclaimed.

In order to recover on an action for a breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, and damages. *K.M.H. v. Lutheran Gen. Hosp.*, 230 Neb. 269, 431 N.W.2d 606 (1988); *Department of Banking, Receiver v. Wilken*, 217 Neb. 796, 352 N.W.2d 145 (1984).

These are determinations of fact. An action for breach of contract and the recovery of money is an action at law. *White v. Medico Life Ins. Co.*, 212 Neb 901, 327 N.W.2d 606 (1982). In a bench trial of a law action, the trial court's factual findings have the effect of a verdict and will not be set aside on appeal unless they are clearly erroneous. *Nebraska Builders Products Co. v. Industrial Erectors, Inc.*, 239 Neb. 744, 478 N.W.2d 257 (1992).

After reviewing the record in the case at bar in light of the above rules, we find no reason to overturn any finding by the district court that no enforceable contract between the Bank and plaintiff on this matter existed. The only evidence presented by the Bank of such an agreement is a letter from its attorney to the attorney of plaintiff, which sets out the dollar amounts discussed above. There is no evidence on the record of acquiescence by plaintiff, nor is there any evidence of acquiescence by her attorney. The district court properly found that the alleged contract at bar did not rise to the level of a promise, applying the applicable standard of review. We affirm the district court's holding on this second issue.

CONCLUSION

The issue of plaintiff's obligations under the mortgage and guaranty was controlled by the agreement entered into between plaintiff and the Bank on January 2, 1986. This agreement effectively settled the parties' rights as to the mortgage and its validity, and left only the enforceability of the guaranty at issue. The guaranty was unambiguous and made plaintiff liable in favor of the Bank for any liabilities owed by plaintiff's son, Richard Krzycki, up to $35,000.

As to the Bank's cross-appeal concerning plaintiff's liability to the Bank under discussions which took place in February of 1986, evidence adduced at trial in support of any such agreement does not rise to the standard of a contract enforceable against plaintiff.

The district court's holdings are therefore affirmed in all respects.

AFFIRMED.

RICK E. ROBINSON, APPELLANT, V. CUSHMAN, INC., APPELLEE.

496 N.W.2d 923

Filed March 12, 1993. No. S-90-995.

1. **Federal Acts: Labor and Labor Relations: Courts: Jurisdiction: Actions: Contracts.** Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) (1988), grants federal courts jurisdiction over actions for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce.
2. **Federal Acts: Labor and Labor Relations: Actions.** Section 301 preempts state-law causes of action in situations where resolution of the state-law claim depends substantially upon interpreting the terms of the collective bargaining agreement.
3. **Labor and Labor Relations: Actions: Contracts.** If a state-law cause of action is inextricably intertwined with consideration of the terms of the labor contract, it is preempted.
4. **Labor and Labor Relations: Actions.** When the elements of a state-law claim do not require reference to a collective bargaining agreement, the cause is not preempted by federal law.

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

Robert F. Bartle, of Healey Wieland Law Firm, for appellant.

Andrew D. Strotman and, on brief, Kathleen A. Jaudzemis, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

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

BOSLAUGH, J.

The plaintiff, Rick E. Robinson, has appealed from the order of the district court sustaining the demurrer of the defendant, Cushman, Inc., and dismissing the plaintiff's petition.

As we are required to do, we accept as true all facts which were well pled in the plaintiff's amended petition and any proper and reasonable inferences of law and fact which can be drawn therefrom, the record shows the following.

The plaintiff was employed by the defendant from June 1984 until he received a notice of discharge on February 28, 1990.

On August 25, 1989, the plaintiff was injured in the course of

his employment. As a result of this injury, he was required to discontinue working.

In January 1990, the plaintiff informed his supervisor that he could return to work but that his physician advised him that he should not attempt to lift more than 15 pounds of weight. The plaintiff's supervisor told him to return home and not to report back until he could work without restriction.

On February 28, 1990, the plaintiff was notified by the defendant that his employment had been terminated. The plaintiff was not allowed any opportunity for grievance and arbitration procedures as provided in the collective bargaining agreement.

The plaintiff filed a petition in the district court alleging a violation of the Nebraska Civil Rights Act, breach of contract and a violation of Nebraska public policy. The defendant demurred to the plaintiff's first amended petition, and the demurrer was sustained and the petition dismissed.

The labor contract between the plaintiff's union and the defendant provided the terms and conditions governing the plaintiff's relationship with the defendant. Excerpts from the labor contract are attached to and made a part of the amended petition. Article III of the collective bargaining agreement between the defendant and the union provides that in the event an employee is to be discharged, the defendant must ask the employee if he desires union representation. The appropriate union representative is to be notified immediately and allowed a reasonable amount of time to discuss the matter with the employee. The union representative may file a grievance on behalf of the discharged employee with the Director of Industrial Relations within 48 hours of discharge. If the Director fails to resolve the grievance, the employee has 10 days to appeal to arbitration. The arbitrator's decision is "final and binding on the Union, its members, the employee involved and the Company."

The sole issue upon the appeal is whether the district court erred in sustaining the defendant's demurrer and dismissing the plaintiff's petition. The defendant contends that the plaintiff's causes of action are preempted by federal law. The plaintiff argues that his causes of action are not preempted by federal

law because they are independent state causes of action that can be resolved without interpreting the collective bargaining agreement.

Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) (1988), grants federal courts jurisdiction over actions "for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce." The United States Supreme Court has interpreted § 301 as preempting state-law causes of action in situations where resolution of the state-law claim depends substantially upon interpreting the terms of the collective bargaining agreement. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220, 105 S.Ct. 1904, 1915, 85 L.Ed.2d 206 (1985). If the state-law cause of action is "inextricably intertwined with consideration of the terms of the labor contract," it is preempted. *Id.* at 213, 105 S.Ct. at 1912.

Section 301 is not applicable in all situations in which a collective bargaining agreement is involved. When the resolution of a state-law cause of action does not require construction of the collective bargaining agreement, preemption is inapplicable. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407, 108 S.Ct. 1877, 1882, 100 L.Ed.2d 410 (1988).

In determining whether resolution of a state law cause of action requires interpretation of the collective bargaining agreement, defenses as well as the allegations found in the complaint must be considered. *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620, 623 (8th Cir. 1989). When the elements of the state law claim do not require reference to a collective bargaining agreement, the cause is not preempted by federal law. *Id.* at 625.

The plaintiff's first cause of action alleges a violation of Neb. Rev. Stat. § 20-148 (Reissue 1987) in that his civil rights were violated because he was wrongfully terminated without just cause and there was no hearing regarding the plaintiff's discharge. The plaintiff's second cause of action alleges that the defendant breached the collective bargaining agreement by failing to follow the procedures outlined in Article III stated above. The plaintiff's final cause of action alleges that he was

discharged without just cause and due process while on workers' compensation disability in violation of Nebraska public policy.

In all three causes of action the plaintiff's rights are dependent upon the provisions of the labor contract. The plaintiff has alleged that the defendant failed to pursue the grievance procedures provided in the collective bargaining agreement. A number of courts have determined that state law claims involving allegations of failure to pursue grievance procedures are preempted by federal law. See, *Hyles v. Mensing*, 849 F.2d 1213 (9th Cir. 1988), where employee's claim for emotional distress under California law which was grounded on assertion that employer failed to process grievance was held preempted; *Izzo v. AT&T Communications, Inc.*, 1987 WL 26102 (N.D. Ill.) where employee's state-law claim for intentional infliction of emotional distress for failure to pursue grievance was preempted; and *Seamon v. Bell Telephone Co.*, 571 F.Supp. 1073 (W.D. Pa. 1983) where employee's cause of action for breach of collective bargaining agreement was held to state a federal cause of action which was properly removed to federal district court.

In *United SteelWorkers v. Rawson*, 495 U.S. 362, 110 S.Ct. 1904, 109 L.Ed.2d 362 (1990), the United States Supreme Court held that a wrongful death action by survivors of miners who were killed in an underground fire against the United Steelworkers of America was preempted by federal law. In that case, the collective bargaining agreement between the union and the Sunshine Mine provided that the union would be responsible for accident prevention programs. The complaint alleged that the miners' deaths were proximately caused by fraudulent and negligent acts of the union in failing to perform its duties as provided in the collective bargaining agreement.

The Supreme Court held:

> If the Union failed to perform a duty in connection with inspection, it was a duty arising out of the collective-bargaining agreement signed by the Union as the bargaining agent for the miners. Clearly, the enforcement of that agreement and the remedies for its breach are matters governed by federal law.

Id. at 371, 110 S.Ct. at 1910.

In this case, all three of the plaintiff's causes of action require reference to the collective bargaining agreement's section on grievance procedures in order to resolve the claims. Any duty to follow grievance procedures arose out of the collective bargaining agreement, the enforcement of which and the remedy for its breach are governed by federal law. Thus, all three of the plaintiff's causes of action are "inextricably intertwined with the collective bargaining agreement and . . . preempted by section 301." *Johnson, supra* at 624.

The plaintiff's claims are preempted by federal law and the demurrer was properly sustained. The judgment is affirmed.

AFFIRMED.

HASTINGS, C.J., not participating.

KAY YAMADA AND LOIS T. YAMADA, HUSBAND AND WIFE, APPELLANTS, V. GERING NATIONAL BANK & TRUST COMPANY, A CORPORATION, AND FEDERAL DEPOSIT INSURANCE CORPORATION, A CORPORATION, AS RECEIVER FOR GERING NATIONAL BANK & TRUST COMPANY, APPELLEES, AND FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS CORPORATE CAPACITY, INTERVENOR-APPELLEE.

497 N.W.2d 1

Filed March 12, 1993. No. S-90-1017.

1. **Equity: Appeal and Error.** In an appeal of an equity action, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Appeal and Error.** This court will not consider assignments of error which are not discussed in the brief.
3. _____. An issue not presented to and passed upon by the trial court is not appropriate for consideration on appeal.

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

Richard Scott, of Watkins-Scott-Hoppe, for appellants.

Chip Lowe and Burns H. Davison III, of Adams, Howe & Zoss, P.C., for appellee and intervenor-appellee FDIC.

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

LANPHIER, J.

The Yamadas filed a petition in equity to rescind a written agreement between themselves and the defendant Gering National Bank, (hereinafter, the bank). The agreement is essentially a stipulation to allow the bank to foreclose certain real estate and for the bank to lend funds in its discretion for a cattle operation on the foreclosed real estate to be leased back to the plaintiffs' son, Ken. The plaintiffs claim the agreement was breached. Plaintiffs brought the action against the Bank and the FDIC in its corporate capacity as receiver. The bank had been closed by the Comptroller of Currency, and the FDIC intervened as the real party in interest since it was the owner and holder of the subject real estate. The plaintiffs appeal the District Court's finding that there was no breach of the agreement between the plaintiffs and the defendant. We affirm.

FACTS

On January 26, 1984, during the pendency of mortgage foreclosure proceedings, the plaintiffs entered into a letter agreement with the bank, through its then president Henry J. Rahmig. The plaintiffs agreed not to resist foreclosure and waived their right to file statutory stays. This was in exchange for promises from the bank which included, (1) that the bank would bid up to $250,000 to purchase the property at the Sheriff's sale; (2) if the bid was successful, that the bank would lease the property to the plaintiffs' son, Ken Yamada, for the 1984-1986 growing season; and (3) to finance a 700-head cattle operation during the course of the lease if Ken Yamada's financial statement, "in the bank's opinion" merited financing. The letter agreement was not referenced in the bank's minutes of loan committee meetings nor in Board committee meetings.

The Yamadas complied with the terms of the agreement by waiving statutory stays and allowing foreclosure without delay.

The bank was successful in its bid of $250,000 for the property at the sheriff's sale, and purchased the Yamada premises.

Ken Yamada made large expenditures in preparation for the 700 head of cattle, including growing enough silage to feed the cattle, and erecting new cattle pens. In the fall of 1984 the bank declined to finance the 700 cattle operation. However, during the years of 1984, 1985 and 1986, the bank financed Ken Yamada's operations for as much as $800,000. These operations included the purchase of approximately 900 "cull" cows, which, being inferior cattle, used only a portion of the silage Ken Yamada had.

Ken's parents, as parties to the January 26, 1984 agreement claimed the bank was in breach by not fully financing Ken's cattle operation. On July 31, 1986, the bank was closed and the FDIC was appointed as Receiver of the bank. Through the Receiver, the FDIC in its corporate capacity acquired some of the bank's assets including the Yamada farm. The Yamadas brought this action against the bank and the FDIC as receiver, on January 26, 1988, to rescind the agreement, to set aside the sheriff's deed and to confirm their right to a stay of execution. They filed an amended petition on April 28, 1988.

STANDARD OF REVIEW

In an appeal of an equity action, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Waite v. A.S. Battiato Co.*, 238 Neb. 151, 469 N.W.2d 766 (1991); *Citizens State Bank v. Jennings State Bank*, 236 Neb. 307, 461 N.W.2d 78 (1990).

The appellants contend that the judgment of the trial court was contrary to the evidence. However, they do not address the assignment in their brief. This court will not consider assignments of error which are not discussed in the brief. *Schlup v. Auburn Needleworks, Inc.*, 239 Neb. 854, 479 N.W.2d 440 (1992).

CLAIM OF BREACH OF AGREEMENT

We find that the Gering National Bank did not breach the agreement in the letter. The bank successfully bid $250,000 for the Yamada Home place, and leased it to Ken Yamada from 1984 to 1986. The Yamada's argue that the bank breached the agreement by not fully financing Ken's cattle operation as stated in the agreement. The agreement gave the bank the discretionary authority to determine whether Ken Yamada's financial statement warranted a loan for the 700-head of cattle, and the amount of funds to be made available to him.

It does not appear from the record that the defendant acted capriciously or arbitrarily. The bank president, Mr. Rahmig, stated that the cattle market was not doing very well at the time, and expressed his concern to Ken Yamada when he initially declined to loan the money for the 700 head of cattle. Regardless, Mr. Rahmig did not refuse all loans to Ken Yamada. The bank financed in excess of $800,000 for Ken's operation between 1984 and 1986.

The plaintiffs, by the record presented on appeal, must affirmatively establish the existence of claimed error. See *Forehead v. Galvin*, 220 Neb. 578, 371 N.W.2d 271 (1985). The plaintiffs have not set forth facts establishing that the court's finding that the contract was not breached, was contrary to the evidence. We agree with the trial court. The defendant bank did not breach the contract.

FDIC RULE REGARDING "SECRET" AGREEMENTS

Even if the bank had breached the letter agreement, the Yamada's claim would not be valid against the FDIC.

12 U.S.C. § 1823(e) (1988) provides:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation [FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the

> asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

Plaintiffs claim that the letter agreement was approved by the bank's loan committee. However, they point to no evidence in the record to support this contention. We find none. Defendant correctly points out that the only evidence regarding an agreement between the bank and the plaintiffs is in the loan committee minutes of September 1, 1983 which reflect the following discussion:

> Discussed the foreclosure of Kay Yamada and it was agreed that the bank could bid $225,000 on the home place as an inducement to Kay to waive his stay rights . . . Kay wants us to go $250,000 on the home place and there was general agreement that $225,000 was the most desirable, but we might consider the $250,000 level.

The manager of the real estate properties in title to FDIC testified that he did not find any reference to the letter agreement between the bank and Mr. Rahmig in any of the board or loan committee minutes. Furthermore, when asked if there were formal minutes authorizing the agreement with the plaintiffs, Mr. Rahmig, president of the bank and party to the agreement, could not recall any.

In enacting 12 U.S.C. section 1823(e), Congress codified the United States Supreme Court holding known as the *D'Oench* doctrine. In *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), the FDIC, as the successor in interest, brought an action to collect on a borrower's promissory note. The borrower asserted as a defense a purported agreement with the lending bank that he was not obligated to pay. The Supreme Court held that in attempting to defeat the FDIC's claim, the borrower could not rely on "secret" agreements which were outside the documents maintained by the bank. *Id.* at 460-461, 62 S. Ct. at 681, 86 L. Ed. at 963-64. The Court stated:

> The test is whether the note was designed to deceive the

> creditors or the public authority or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank was or was likely to be misled.

Id. at 460, 62 S. Ct. at 680-81, 86 L. Ed. at 963-64.

In *Langley v. FDIC Corp.*, 484 U.S. 86, 108 S. Ct. 396, 98 L. Ed. 2d 340 (1987), an FDIC insured bank financed a land purchase for the defendant. When the defendant defaulted on the loan, the bank initiated an action for the principal and interest. Defendant claimed as a defense that the bank misrepresented the value of the land. No reference to such representations were made in any documents executed by the bank and the defendant. The bank was subsequently closed and the FDIC was appointed as Receiver, and substituted as plaintiff. The Court held that any representations made regarding the value of the land must conform to the requirements of 12 U.S.C. § 1823(e). Since the representations that the defendants alleged did not meet the written requirement, the Court found that they could not be asserted as a defense. "One purpose of § 1823(e) is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets." *Id.* at 91, 108 S. Ct. at 401, 98 L. Ed. 2d at 347. The Court further stated that § 1823(e) is meant to "ensure more than just the FDIC's ability to rely on bank records at the time of examination or acquisition. The statutory requirements that an agreement be approved by the bank's board or loan committee and filed contemporaneously in the bank's records assure prudent consideration of the loan before it is made . . . ." *Id.* at 95, 108 S. Ct. at 403, 98 L. Ed. 2d at 349.

Langley, supra, and its progeny have consistently held that an agreement not reflected in loan committee or board minutes, and not part of the bank's records, can not be used to diminish the title or interest of the FDIC. See, *FDIC v. Wright*, 942 F.2d 1089 (7th Cir. 1991), *cert. denied* ____ U.S. ____, 112 S. Ct. 1937, 118 L. Ed. 2d 544 (1992); *Bauman v. Savers Federal Savings & Loan*, 934 F.2d 1506 (11th Cir. 1991), *cert. denied* ____ U.S. ____, 112 S. Ct. 1936, 118 L. Ed. 2d 543 (1992). This rule applies even if there is "fraud in inducement," but may not

if there is "fraud in factum." *Langley, supra* at 92-93, 108 S. Ct. at 401-402, 98 L. Ed. 2d at 346-48. See, also, *In re 604 Columbus Ave. Realty Trust*, 968 F.2d 1332 (1st Cir. 1992). Since there appears to be no appropriate record of the letter agreement entered into by the bank and the plaintiffs, it can not be used to diminish the FDIC's title to the farm house property.

Howell v. Continental Credit Corp., 655 F.2d 743 (7th Cir. 1981), cited by appellants, has no application to this case. In *Howell*, the FDIC attempted to enforce a lease which imposed bilateral obligations on the lessor and the lessee. The plaintiff-lessee asserted as a defense that the lessor bank had not complied with its obligations under the lease. The court held that the FDIC could not invoke the protections of the *D'Oench* doctrine or § 1823 "where the document the FDIC seeks to enforce is one...which facially manifests *bilateral* obligations and serves as the basis of the [promisor's] defense." (Emphasis in original.) *Howell, supra* at 746. Further, in regard to 12 U.S.C. § 1823, the court stated "When...the asset upon which the FDIC is attempting to recover is *the very same agreement* that the makers allege has been breached by the FDIC's assignors, § 1823(e) does not apply." (Emphasis in original.) *Id.* at 747.

This case is distinguishable. The FDIC did not rely on the "secret" agreement to acquire title to the Yamada farm home. An explanation of the dual role of the FDIC may be helpful. The FDIC, as receiver, manages the assets of failed banks. The FDIC in its corporate capacity insures the failed bank's deposits. When an insured bank fails, the FDIC may either liquidate or take a purchase and assumption option. When it elects the purchase and assumption option, as in this case, the FDIC, as Receiver, sells the banks assets to the assuming bank with the promise that the assuming bank will pay the failed bank's depositors. The assuming bank may return "bad" assets of the failed bank to the FDIC as Receiver, who in turn sells these assets to FDIC in its corporate capacity. The proceeds of the sale are paid to the assuming bank to make up the difference between what is paid to the failed bank's depositors and what the assuming bank paid for the good assets. The FDIC in its corporate capacity converts bad assets to cash and then

replenishes the insurance fund. *In re 604 Columbus Ave. Realty Trust, supra.*

The FDIC's title to the Yamada farm house arose from the purchase of it as "bad" asset through the Receiver, not from the letter agreement entered into by the bank and the plaintiffs. The FDIC had no knowledge of the letter agreement until this action was initiated, nor did the FDIC attempt to establish its title to the farm house property through enforcement of the letter. It was the plaintiffs who sought to set aside the sheriff's deed based on the alleged breach of the letter agreement. The exception pronounced in *Howell*, does not support plaintiffs' claims: " 'When the enforcement of a separate collateral or secret agreement would alter the terms of an asset acquired by the FDIC so that the FDIC's right, title, or interest in the asset would be defeated or diminished, § 1823(e) comes into play.' " *Howell, supra* at 747 (quoting *Riverside Park Realty Co. v. FDIC*, 465 F. Supp. 305, 313 (M.D. Tenn. 1978)).

The plaintiffs, by requesting the court set aside the Sheriff's sale, attempted to diminish the interest the FDIC has in the Yamada farm home. As set forth in § 1823(e), the agreement is unenforceable against the FDIC. There was no record of approval of the letter agreement in the loan or board committee minutes.

REMAINING ASSIGNMENTS OF ERROR

Plaintiffs also assert that the contract lacked consideration and was therefore void and that there was an improper foreclosure on their personal property. These issues were not addressed to the trial court. The issues tried to the trial court were:

1. Was there an agreement between the bank and the plaintiffs to which the FDIC is bound?

2. If there was an agreement, was there a modification of the agreement and what were the terms of the agreement before and after modification?

3. Do the plaintiffs have standing to claim a breach of the agreement?

4. Are the plaintiffs estopped or have they waived their right to ask for a recision of the sheriffs deed after accepting the

benefits of the agreement?

5. Does the FDIC-Corp. have title to the property?

6. Was the property an asset of the bank on the date it was closed by the Comptroller of Currency?

7. If the Sheriff's Deed is rescinded, is the FDIC entitled to have the notes and mortgages of the plaintiff's reinstated?

8. If there was an agreement, was there a breach of the agreement?

There is no indication from the record that the plaintiff raised the issue of consideration or improper foreclosure at the trial court level. This court will not address these issues because an issue not presented to and passed upon by the trial court is not appropriate for consideration on appeal. *K & K Farming Inc. v. Federal Intermediate Credit Bank of Omaha*, 237 Neb 846, 468 N.W.2d 99 (1991); *Hensman v. Parsons*, 235 Neb. 872, 458 N.W.2d 199 (1990).

CONCLUSION

We affirm the judgment of the trial court.

AFFIRMED.

ECONOMY PREFERRED INSURANCE COMPANY, APPELLANT, V. CYNTHIA ANN MASS, PERSONAL REPRESENTATIVE OF THE ESTATE OF DWIGHT E. EHLERT, DECEASED, AND MARK E. EHLERT, APPELLEES.

497 N.W.2d 6

Filed March 12, 1993. No. S-90-1076.

1. **Summary Judgment: Appeal and Error.** In the appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and the moving party is entitled to judgment as a matter of law.
3. **Insurance: Contracts: Intent.** An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was

made. When the terms of the contract are clear, they are to be accorded their plain and ordinary meaning.

4. **Insurance: Contracts.** When a clause of an insurance policy can be fairly interpreted in more than one way, there is an ambiguity to be resolved by the court as a matter of law.
5. _____: _____. While an ambiguous policy will be construed in favor of the insured, an ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.
6. **Insurance: Contracts: Proof.** The burden to prove that an exclusionary clause applies rests upon the insurer.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Reversed and remanded with directions.

Mark J. Peterson, of Erickson & Sederstrom, P.C., for appellant.

Thomas J. Walsh, Jr., of Walsh, Fullenkamp & Doyle, for appellee Mark E. Ehlert.

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

BOSLAUGH, J.

This action for a declaratory judgment was brought by the plaintiff, Economy Preferred Insurance Company (Economy), against the defendants, Cynthia Ann Mass as personal representative of Dwight E. Ehlert, deceased and Mark E. Ehlert, to determine coverage under a homeowners insurance policy issued by the plaintiff to Dwight E. Ehlert and containing an exclusion for "bodily injury or property damage expected or intended by an insured."

The facts are not in dispute, and are stated in a stipulation submitted by the parties on motions for summary judgment.

Dwight Ehlert was the named insured under the homeowners insurance policy issued by Economy Preferred Insurance Company to him. The insurance policy insured the family home of Dwight Ehlert located at 8533 Templeton Drive in Omaha, Nebraska. Mark Ehlert, Dwight Ehlert's son, was included as an insured under the policy. On June 18, 1988, Mark Ehlert began arguing with his father, Dwight Ehlert at the family residence. Immediately thereafter, Mark Ehlert removed a rifle

from his bedroom and proceeded to shoot and kill his father, Dwight Ehlert. Mark Ehlert also shot and injured his father's friend, Stanley Rozell. The district court for Douglas County determined that Mark Ehlert was not competent to stand trial for the crimes of killing his father and the injury of Stanley Rozell and was not guilty by reason of insanity.

Subsequent to the shooting, Stanley Rozell sued Mark Ehlert for damages for the injuries he sustained in the incident. Mark Ehlert tendered the defense of that claim to Economy under the terms of the homeowners policy. Economy then brought this declaratory judgment action to determine its rights and obligations under the homeowners policy.

The policy excludes coverage for "intentional" acts by an insured which cause bodily injury. The policy provides, in relevant part: "1. Coverage E—Personal Liability and Coverage F—Medical Payments to Others do not apply to bodily injury or property damage: a. which is expected, anticipated, foreseeable or intended by the insured;. . . ."

Economy contends that it has no liability under the policy because Mark Ehlert intentionally shot Stanley Rozell. The parties stipulated to the facts and submitted the matter to the district court upon cross-motions for summary judgment. The district court sustained Mark Ehlert's motion, and found that the policy issued by Economy provided coverage and that Economy was obligated to defend Ehlert in any and all lawsuits filed by Stanley Rozell arising out of the incident occurring at Ehlert's home. The trial court found that because Mark was legally insane at the time of the incident, his acts were not "intentional" so as to fall within the purview of the "intentional acts" exclusion of the policy. Therefore, Economy was required to provide liability coverage to Mark Ehlert for the claims alleged by Stanley Rozell. Economy also was ordered to pay Mark Ehlert's costs and attorneys fees. Economy appealed from that judgment.

Economy has assigned as error that the trial court erred in denying Economy's motion for summary judgment and in sustaining Mark Ehlert's motion for summary judgment. Economy also assigns as error the district court's award of attorneys fees to Mark Ehlert.

In the 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. *Metropolitan Life Ins. Co. v. Beaty, ante* p. 169, 493 N.W.2d 627 (1993).

Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and the moving party is entitled to judgment as a matter of law. *Id.*

An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. When the terms of the contract are clear, they are to be accorded their plain and ordinary meaning. When a clause can be fairly interpreted in more than one way, there is an ambiguity to be resolved by the court as a matter of law. *Thorell v. Union Ins. Co., ante* p. 57, 492 N.W.2d 879 (1992). While an ambiguous policy will be construed in favor of the insured, an ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract. *Id.*

Under Nebraska law, the burden to prove that an exclusionary clause applies rests upon the insurer. *Jaramillo v. Mercury Ins. Co., ante* p. 223, 494 N.W.2d 335 (1993).

The issue on this appeal is whether insurance coverage is precluded as a matter of law by an exclusion for bodily injury coverage when the injury was "expected, anticipated, foreseeable or intended by the insured" and the insured is mentally ill or insane. Specifically, we must determine whether the fact that the insured, Mark Ehlert, was found to be insane and therefore not criminally liable for the injury to Stanley Rozell, is a sufficient ground to preclude application of the intentional act exclusion under the terms of the homeowners policy. This is a question of first impression for this court. However, this issue has been extensively litigated in other jurisdictions, and two conflicting lines of authority have emerged. One line of authority holds that if an insured is insane

or is suffering from a mental illness, the insured's act cannot be treated as "intentional" so as to exclude the resulting loss from coverage under an insurance policy containing an "intentional or expected" injury exclusion. See, *Ruvolo v. American Casualty Co.*, 39 N.J. 490, 189 A.2d 204 (1963); *Globe v. American Casualty Co. v. Lyons*, 131 Ariz. 337, 641 P.2d 251 (1981).

However, we believe the better reasoned view is that while an insane or mentally ill insured may be unable to form the criminal intent necessary to be guilty of a crime, such an individual can still intend or expect the results of injuries he or she causes. Several recent decisions in other jurisdictions support this view. See, *Auto-Owners Ins. Co. v. Churchman*, 440 Mich. 560, 489 N.W.2d 431 (1992); *Public Employees Mut. Ins. v. James F.*, 65 Wash. App. 357, 828 P.2d 63 (1992); *Mallin v. Farmers Ins. Exchange*, 839 P.2d 105 (Nev. 1992); *Shelter Mut. Ins. v. Williams*, 248 Kan. 17, 804 P.2d 1374 (1991).

The decision of the Virginia Supreme Court in *Johnson v. Ins. Co. of North America*, 232 Va. 340, 350 S.E.2d 616 (1986), also supports this view. In *Johnson*, a mentally ill person shot and severely injured the plaintiff. The mentally ill person had specifically planned to kill the plaintiff, telling police that he simply wanted to shoot the plaintiff, so he did. The *Johnson* court stated:

> Here, when Davis aimed the pistol at Johnson, he knew that he was shooting a human being. Acting deliberately and methodically, Davis had searched for and found a pistol, loaded it, travelled to the victim's home, waited for him, begun talking with him, and shot him from close range. He acted with resolve and determination, not knowing that what he was doing was wrong because God had ordered him to act. In pointing the pistol at Johnson, Davis did not think, for example, that he was peeling a banana; he wasn't psychotic to an extreme degree, as the victim readily recognizes when he notes that Davis 'did have this minimal degree of awareness of his actions.' That is sufficient. The shooting was not accidental, a risk insured against, but intentional.

Id. at 347-348, 350 S.E.2d at 620. The *Johnson* court concluded

that a finding of not guilty by reason of insanity does not negate intent, it merely excuses the act of the individual committing the crime. Such an individual can have every intention of performing an act and can also fully intend or expect the consequences of his act.

On the trial docket in this case the trial court noted, "The court holds that an insane individual cannot commit an intentional act within the meaning of an intentional injury clause." We believe, however, that the test for capacity in criminal cases is necessarily different from the test that must be applied in a civil context. Our consideration turns to whether there is any relationship between the insanity defense in criminal cases and a person's mental capacity to perform intentional acts in a civil context.

In *Mallin v. Farmers Ins. Exchange, supra*, a man shot and killed three individuals in his home, after which he shot and killed himself. Representatives of the deceased victims brought suit against the estate of the assailant, claiming that the shootings were not "intentional acts" within the meaning of the assailant's homeowners policy. The representatives of the victims argued that the assailant lost control of himself and thus lost control over his actions. However, the court in the *Mallin* case held that there was no evidence that the casualties did not result from intentional acts of the insured. The court stated that the assailant's "supposed inability to *control* his acts is not the same as an inability to *intend* his acts." *Mallin*, 839 P.2d at 107. The court noted that the testimony at the trial indicated that the assailant, at the time of the homicides, did not have the mental capacity to commit a crime.

> "The offered testimony on [the assailant's] supposed criminal insanity is necessarily based on claimants' supposition that there is some relationship between the insanity defense in criminal cases and a person's mental capacity to perform volitional or intentional acts in a civil context. Any such relationship, if one exists at all, is tenuous at best."

Id. at 108. The *Mallin* court concluded:

> Insanity and the consequent freedom from criminal liability are much different from the mental capacity to

> perform a legal act, an act which will be deemed effective under the civil law. If this were a will contest case, for example, a person challenging the mental capacity of a testator to execute a will would have to introduce evidence showing that the testator did not have the capacity to understand the nature of the estate and the ordinarily expected objects of the will rather than testimony relating to the testator's incompetency to commit a crime. If a person's capacity to marry or to make a contract were the subject of litigation, testimony based on the M'Naghten rule would not be very useful or pertinent to the issues at hand. The issue in this case is whether, under the terms of this insurance policy, Alex intended to kill his victims. The claimants' expert witness, Dr. Glovinsky, testified that [the assailant] did intend to kill the victims. There is no evidence to the contrary.

Id.

We conclude that the test for capacity in criminal cases is not the same as the test for capacity in the present case. An adjudication of criminal insanity does not preclude a contrary finding in a related civil action.

As stated previously, the homeowners's policy in this case provided, in relevant part: "1. Coverage E—Personal Liability and Coverage F—Medical Payments to Others do not apply to bodily injury or property damage: a. which is expected, anticipated, foreseeable or intended by the insured;. . . ."

Under this provision of the insurance policy, if Mark Ehlert intended to injure Stanley Rozell, the exclusionary clause applies and Economy has no duty to defend or indemnify Mark Ehlert. A nearly identical insurance provision has previously been interpreted by this court in *State Farm Fire & Cas. Co. v. Van Gorder*, 235 Neb. 355, 455 N.W.2d 543 (1990), and in *State Farm Fire & Cas. Co. v. Victor*, 232 Neb. 942, 442 N.W.2d 880 (1989). In those cases this court concluded that an injury is expected or intended from the standpoint of the insured if a reason for an insured's act is to inflict bodily injury or if the character of the act is such that an intention to inflict an injury can be inferred as a matter of law.

In the case at bar, the parties stipulated to the facts upon the

motions for summary judgment. Included in the stipulated facts was Mark Ehlert's statement to the Omaha Police Department made after the shootings. Also, the reports of two psychiatrists that examined Mark Ehlert after the incident were included with the stipulated facts. Although psychotic, and legally insane at the time of the shooting, one expert concluded that Mark Ehlert was competent to stand trial for the crimes.

The evidence is clear that Mark Ehlert intended to shoot and injure Stanley Rozell. In his statement to the Omaha Police Department, Mark Ehlert admitted that he intended to shoot and injure Stanley Rozell:

> Q. How many times did you shoot Dwight?
>
> A. Once.
>
> Q. Did you shoot anyone else?
>
> A. Yes I shot I shot his friend Stan also.
>
> Q. OK when you got home today what happened at the house prior to the shooting?
>
> A. Ohh upon entering the house I found him painting in the bathroom and I was so worked up and so angry at my father forsaking me my true father that I took it out on him I just said hey where was I born and he said why you were born in Omaha and I said no I wasn't I told him I was born in Israel so I punched him I punched him once in the ribs and uhh then went for my gun and shot him and then shot the other guy in the back yard as he was trying to get away.
>
> . . . .
>
> Q. Ok Stan was painting with uhh with your father or with Dwight and he after you shot Dwight he ran out the door?
>
> A. Uhh Huh (Affirmative).
>
> Q. Ok and then you followed him out of the house?
>
> A. Out the back door.
>
> Q. Where was he at when you shot him?
>
> A. In the back yard just just rounding the turn on the side of our uhh around uhh around an aluminum shed and going for the gate to head out into the front yard and just as he was turning the corner I shot him and then he fell and rolled up against the fence and (unclear).

> Q. So how many shots were fired total?
>
> A. Uhh I think I fired three one one at Dwight and uhh two at Stan I think I shot him the second time when he was on the ground I wasn't sure.

One of the psychiatrists, Dr. Bruce Gutnik, specifically asked Mark Ehlert why he shot Stanley Rozell. Ehlert answered that Mr. Rozell "is a dirty old fool who made homosexual advances towards me when I was 13 years old and he was drunk." Ehlert told the other psychiatrist, Dr. Stan Moore, that "it was God's will that his father Dwight Ehlert and his father's friend, Stanley Rozell, be killed." Ehlert readily admitted to Dr. Moore that he shot his father and Stanley Rozell with the intent to kill them. Dr. Moore noted that Mark Ehlert "described pointing an M1 automatic rifle at his father's chest and stated that he then followed Mr. Rozell out of his father's house and shot him."

We conclude that the evidence was sufficient to support the allegation that Mark Ehlert intended to shoot and injure Stanley Rozell. Regardless of Ehlert's reasons for shooting his father and Stanley Rozell, the evidence is that he was aware of what he was doing and intended the resulting injury. The fact that Ehlert was found to be insane at the time of the shooting and consequently not criminally responsible for his actions does not affect the determination that he intended his actions. As stated above, we hold that while an insane or mentally ill insured may be unable to form the criminal intent necessary to be criminally liable for his or her actions, such an individual can still intend or expect the results of the injuries he or she causes.

In the case at bar, there was no evidence that the shooting injury of Stanley Rozell did not result from the intentional acts of the insured. Specifically there was no contrary evidence that Ehlert did not intend to shoot and injure Stanley Rozell. Accordingly, we hold that the exclusionary clause at issue in this appeal applies and Economy Preferred Insurance Company is not obligated to defend Mark Ehlert and indemnify Stanley Rozell.

The judgment of the district court of Douglas County is reversed, and the cause remanded with directions to enter summary judgment in favor of Economy Preferred Insurance

Company. The award of attorney's fees to Mark Ehlert also is reversed.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., not participating in the decision.

LANPHIER, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM EUTZY, APPELLANT.

496 N.W.2d 529

Filed March 12, 1993. No. S-90-1212.

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 the 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. **Postconviction.** The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989), requires that a prisoner seeking relief under the act must be in actual custody in Nebraska under a Nebraska sentence.

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

William H. Allen, Arvid E. Roach II, Timothy C. Hester, and Douglas M. Gleason, of Covington & Burling, and Richard L. Goos for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

LANPHIER, J.

The appellant in this case, William Eutzy, appeals from the District Court for Douglas County's denial of his motion for postconviction relief. The motion sought to set aside a 1958 armed robbery conviction which was relied upon as an aggravated circumstance by a Florida court in sentencing Eutzy

to death for murder. Appellant assigns as error the district court's denial of his motion to set aside the conviction. We dismiss the appeal.

FACTUAL BACKGROUND

Appellant was arrested in Nebraska on February 28, 1958, in connection with the holdup of a convenience store. He was eighteen years old at the time. On March 6, 1958, appellant was arraigned in the Douglas County District Court and charged with armed robbery. Appellant, represented by the Douglas County public defender, pled guilty to the charges and was thereafter sentenced to nine years at hard labor in the State Reformatory.

On August 16, 1990, appellant filed a motion for postconviction relief in the Douglas County District Court, seeking to vacate and set aside the 1958 judgment. He contended that his guilty plea had not been knowing and intelligent, and that the 1958 conviction was therefore unconstitutional. Appellant based this contention on assertions that his court-appointed attorney did not meet with him until moments before his hearing; that he was told to plead guilty so as not to make the judge mad; that he was never informed of the consequences of such a plea; and that the judge did not inquire as to whether appellant's plea was made voluntarily and intelligently. The district court denied appellant's motion without opinion.

Appellant's motivation for seeking postconviction relief some 32 years after he was convicted was due largely to sentencing proceedings occurring in the State of Florida. In July 1983, appellant was tried and convicted in Florida on a charge of first-degree murder. He was sentenced to death upon a statutory scheme which requires that specific aggravating factors be present before the death sentence can be imposed. 23 Fla. Stat. Ann. § 921.141 (West 1985). His 1958 conviction was relied upon as one of those factors.

THE QUESTION OF MOOTNESS

Since the district court's denial of his motion, appellant has been resentenced to life imprisonment with a possibility of consideration for parole in 25 years. Accordingly, the State of

Florida is no longer using the 1958 conviction as a basis for sentencing appellant to death. Appellant nonetheless urges this court to consider his appeal from the district court's order due to the possible adverse effect which the conviction could have on his chances for parole. A threshold question is therefore presented as to whether this appeal should be allowed to continue considering the relevant circumstances.

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. *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992); *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986). Mootness does not prevent appellate jurisdiction and consideration of a question or issue, however, which relates to the 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. *Maack v. School Dist. of Lincoln, supra*. See, also, *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).

Our review of the record indicates that the issues initially presented by appellant no longer exist, as the 1958 conviction is no longer being relied upon by the State of Florida to sentence appellant to death. Further, appellant has failed to demonstrate that he still has a legally cognizable interest in the outcome of the litigation. The record is without proof of any benefit which would flow to appellant if he prevailed in this litigation. The only indication that appellant has any interest at all in this proceeding is a letter from counsel stating that the 1958 conviction may have an adverse effect on appellant's opportunity for parole. That is not sufficient. A concrete case of fact or right must be shown. *Hafeman v. Gem Oil Co.*, 163 Neb. 438, 80 N.W.2d 139 (1956). Appellant's appeal is therefore moot.

As noted above, mootness does not prevent appellate jurisdiction and consideration of a recurring question or issue which relates to the general public interest and which may elude judicial review. Actions for postconviction relief, however,

while likely to recur, generally do not evade review as a result of a transitory setting. Appellant's appeal is therefore not one which can be heard under this exception to mootness.

In passing, we note that appellant's first basis for collateral review, the Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989), is available only to prisoners "in custody under sentence" who are claiming a right to set aside their judgment or sentence. We recently construed this statement in *State v. Harper*, 233 Neb. 841, 448 N.W.2d 407 (1989), where we held that "the phrase 'in custody under sentence'. . . requires that a prisoner seeking relief under the act must be in actual custody in Nebraska under a Nebraska sentence." *Id.* at 843, 448 N.W.2d at 408. See, also *State v. Whitmore*, 234 Neb. 557, 452 N.W.2d 31 (1990). The record before us shows that at all times during which any of the motions in the case before us were filed, appellant was incarcerated in the State of Florida. The Postconviction Act would therefore not have been available as an avenue of relief in any event.

CONCLUSION

In light of our finding that appellant's resentencing has rendered this appeal moot, and since his appeal does not concern a recurring matter of public interest likely to evade review, appellant's appeal is dismissed.

APPEAL DISMISSED.

SHAKUR ABDULLAH, APPELLANT, V. FRANK O. GUNTER, APPELLEE.

497 N.W.2d 12

Filed March 12, 1993. No. S-91-004.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Appeal and Error.** Generalized and vague assertions do not advise the Supreme Court of the issue submitted for decision and in such circumstances decision

appealed from will be affirmed unless Supreme Court elects to note plain error.

3. **Appeal and Error: Words and Phrases.** "Plain error" is error which was unasserted or uncomplained of at trial or on appeal, but is plainly evident from record, which prejudicially affects litigant's substantial right and which is of such nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to integrity, reputation, and fairness of judicial process.
4. **Constitutional Law: Due Process: States.** Liberty interests protected by the 14th Amendment may arise from two sources: Due Process and laws of the state.
5. **Constitutional Law: States.** In order to create a liberty interest, state regulations must use explicit mandatory language "in connection with the establishment of 'specific substantive predicates' to limit official discretion."
6. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
7. **Constitutional Law: Statutes: Presumptions.** A statute is presumed constitutional, and one claiming that a statute is unconstitutional has the burden to show that the statute is unconstitutional.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Shakur Abdullah, pro se.

Don Stenberg, Attorney General, and Terri M. Weeks for appellee.

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

LANPHIER, J.

Plaintiff, an inmate of the Nebraska State Penitentiary, sued the Director of the Department of Correctional Services (DCS) over the confiscation of inmates non wage money and the Department's promulgation of rules governing the treatment of inmate money. The district court granted summary judgment in favor of defendant and he appeals from that order. We affirm.

FACTS

Neb. Rev. Stat. § 83-183(3) (Reissue 1987) states:

> Except as provided in section 83-183.01, wage payments to a person committed to the department shall be set aside by the chief executive officer of the facility in a separate fund. The fund shall enable the offender to contribute to

the support of his dependents, if any, to make necessary purchases from the commissary, and to set aside sums to be paid to him at the time of his release from the facility.

When an inmate is assigned to a state facility maintained by the DCS an institutional account is established for him. On March 1, 1989, the DCS adopted a new accounting procedure whereby an inmate could place money received from outside sources in his institutional account only if he agreed to restrict his use of non-wage monies to those uses consistent with state law. Those uses included making payments for support of inmate's dependents, making necessary purchases from the commissary, saving funds for release, and paying part or all of the cost of housing the inmate. If the inmate chose not to sign the waiver, the funds received were placed in a confiscated fund, where it would remain until the inmate's release. Interest gained on the confiscated fund was used for the general welfare of the DCS residents. Inmates were also allowed to maintain personal accounts in private banks. Plaintiff alleged he received two $10 money orders, one on March 9 and the other on May 5. According to his institutional account, the amount confiscated was $10. Because the plaintiff did not sign the waiver, the non wage money he received from outside sources was placed in a confiscated fund. On August 9, 1989, the plaintiff filed a petition pro se against the defendant, the director of the DCS, in the District Court challenging the waiver requirement. He alleged the procedure went beyond the defendant's authority because § 83-183(3) affected only wages earned by the plaintiff, and therefore non wage money received by plaintiff could not be restricted. The plaintiff also claimed that the procedure was invalid because it was not promulgated in accordance with the Administrative Procedure Act Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1987). Furthermore, the plaintiff claimed the defendant violated his constitutional rights by implementing this procedure, and that § 83-183(3) was unconstitutionally overbroad. On September 2, 1989, a new rule promulgated pursuant to the Administrative Procedures Act came into effect. The new rule discontinued the waiver policy and instead required all funds, regardless of source, be posted to an inmates institutional account, and limited the use of such monies to

statutory purposes. On October 11, 1989, inmates were notified of the new policy by the posting of a notice and by delivery of the notice to all inmates.

STANDARD OF REVIEW

Motions for summary judgment were filed by both parties and the District Court found that there were no genuine issues of material fact and that defendants were 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. *State v. Union Pacific RR. Co.*, 241 Neb. 675, 490 N.W.2d 461 (1992); *Scott v. Mattingly*, 241 Neb. 276, 488 N.W.2d 349 (1992).

We have stated that generalized and vague assertions do not advise the Supreme Court of the issue submitted for decision and in such circumstances the decision appealed from will be affirmed unless the Supreme Court elects to note plain error. *In re Interest of Rasmussen*, 236 Neb. 572, 462 N.W.2d 621 (1990). See, also, *Meis v. Grammer*, 226 Neb. 360, 411 N.W.2d 355 (1987). "Plain error" is error which was unasserted or uncomplained of at trial or on appeal, but is plainly evident from the record, which prejudicially affects a litigant's substantial right and which is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *GFH Financial Services Corp. v. Kirk*, 231 Neb. 557, 437 N.W.2d 453 (1989). Litigants proceeding pro se are obligated to follow the same appellate rules and procedures applicable to counsel. *Id.*

DISPOSITION

The plaintiff contends in his sole assignment of error that the trial court erred in granting the defendant's summary judgment "because genuine issues of material fact remained unresolved or in dispute between all parties." No indication is given in regards to what issues the plaintiff intends to raise in his argument. Plaintiff concludes his argument by stating that both his petition and the defendant's answer are in dispute "on both

matters of law and facts." It does not appear from the record that there were issues of material fact that were in dispute. Although the plaintiff and defendant disagree on the amount of money confiscated by the defendant, that determination is not necessary for the resolution of the case and is therefore immaterial. Since no plain error is evident from the record, the trial court's determination that defendant was entitled to judgment as a matter of law should be affirmed.

Plaintiff, in his argument, sets out various issues he alleges were not resolved in the trial court. He alleges that the trial court did not resolve the issues of whether: (1) § 83-183(3) authorizes the DCS to restrict the use of non wage monies; (2) § 83-183(3) is constitutional; (3) the adoption of the waiver policy was subject to the provisions of the Administrative Procedure Act Neb. Rev. Stat. § 84-901 et seq. (Reissue 1987); (4) DCS' adoption of the waiver policy violated the Division of Powers provision of the Nebraska Constitution.

DCS' RESTRICTION OF NON WAGE MONEY

Regarding the DCS's authority to restrict non wage funds received by the inmate, § 83-183(3) grants authority to the DCS to restrict wages earned by inmates, but the DCS also acquires authority to maintain and administer Nebraska's correctional facilities, including the Nebraska State penitentiary in which the plaintiff is housed, through Neb. Rev. Stat. § 83-171 (Reissue 1987). Therefore, unless § 83-183 has created a liberty or property interest in the manner in which non wage funds are spent, the DCS has the authority to restrict such expenditures.

Liberty interests protected by the 14th Amendment may arise from two sources: Due Process and laws of the state. *Hewitt v. Helms*, 459 U.S. 460, 103 S. Ct. 865, 74 L. Ed. 2d 646 (1983). In order to create a liberty interest, state regulations must use explicit mandatory language "in connection with the establishment of 'specific substantive predicates' to limit official discretion." *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 463, 109 S. Ct. 1904, 1910, 104 L. Ed. 2d 506, 517 (1989) (quoting *Hewitt v. Helms, supra*). In *Thompson*, a Kentucky prison regulation listed types of prison visitors who could be excluded. The state reformatory then

issued its own regulations which included the language of the statute and set forth additional instances in which a visitor could be refused admittance. After the reformatory refused to admit several visitors, the inmates brought an action claiming their Due Process rights were violated because the state had created a liberty interest in receiving visitors who were not excludable under the list. The Court held that the state prison regulation listing the types of visitors who could be excluded from visitation did not give inmates a liberty interest in receiving visitors protectable under the Due Process Clause because the language used by the state was not mandatory. *Id.* at 464-65, 109 S. Ct. at 1910-11, 104 L. Ed. 2d at 517-18.

The U.S Court of Appeals for the Eighth Circuit recently held in *Abdullah v. Gunter*, 949 F.2d 1032 (1991), *cert. den.* ____ U.S. ____, 112 S. Ct. 1995, 118 L. Ed. 2d 591 (1992), that plaintiff's due process was not violated by a prison regulation restricting distribution of funds only to recognized religions. The plaintiff inmate, relying on § 83-183(3) and prison regulations established pursuant to § 83-183(3), argued that the state had created a constitutionally protected property interest in the use of his inmate account for religious donations. The court noted that the statute did not mention religious contributions by inmates and held the statute did not create a right of inmates to use non wage monies in inmate trust funds for religious donations, without restrictions. We find that the same principles apply to the question of whether the DCS has authority to restrict non wage monies. The question is whether by prescribing the manner in which inmates may spend wage earnings in § 83-183, the legislature created a property right to spend non wage monies without restrictions. We find similarly to *Abdullah v. Gunter, supra*, that no protected interest was created in spending non wage earnings. The language in § 83-183(3) mandates that wage payments made to an inmate be set aside for specific purposes. However, the statute does not address other sources of funds. Accordingly, summary judgment was proper because defendant was entitled to judgment as a matter of law.

CONSTITUTIONALITY OF § 83-183(3) AND DIVISION OF POWERS

Plaintiff also asserts that § 83-183(3) is unconstitutional, and that the defendants, as members of the executive branch, infringed on the legislative powers by passing a policy that affected plaintiff's substantive rights. We note that Neb. Ct. R. of Prac. 9E (rev. 1992) requires a plaintiff challenging the constitutionality of a statute to file and serve a separate written notice with the Supreme Court clerk at the time he files his brief. There is no record of such notice in the transcript filed. Plaintiff asserts in his brief that these issues were not resolved and therefore genuine issues of fact remain. Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *State v. Union Pacific RR. Co., supra*; *Scott v. Mattingly, supra*. The trial court determined that as a matter of law, defendant was entitled to judgment. Plaintiff has provided no legal argument in his brief which sets forth authority supporting a contrary holding. In addition, a statute is presumed constitutional, and one claiming that a statute is unconstitutional has the burden to show that the statute is unconstitutional. *State v. Nebraska Association of Public Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991). Plaintiff's assertions of unconstitutionality are insufficient to overcome the burden of unconstitutionality. No legal argument is set forth by the plaintiff to support this assertion. As this court restricts its review to matters which are assigned and argued in the brief, and as there is no plain error evident in the record, this court will not address the matter. Neb. Ct. R. of Prac. 9D(1)d (rev. 1992); *Schlup v. Auburn Needleworks, Inc.*, 239 Neb. 854, 479 N.W.2d 440 (1992).

WAIVER POLICY AND ADMINISTRATIVE PROCEDURES ACT

Plaintiff also asserted the waiver policy was invalid because it was not promulgated pursuant to the Administrative

Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1987). § 84-911 authorizes a court to invalidate a rule or regulation if it finds that it was adopted without compliance with the statutory rule-making or regulation-making procedures. The question of whether the waiver policy should be invalidated because it was not promulgated pursuant to the Administrative Procedure Act is a moot question. The waiver policy was discontinued, and the new policy was promulgated consistent with the Administrative Procedures Act. Therefore, we do not address the matter as we do not sit to give opinions on moot questions on abstract propositions. *Braesch v. DePasquale*, 200 Neb. 726, 265 N.W.2d 842, *cert. denied* 439 U.S. 1068, 99 S. Ct. 836, 59 L. Ed. 2d 34 (1978).

CONCLUSION

The judgment of the lower court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GLORIANN NAVRKAL, APPELLANT.

496 N.W.2d 532

Filed March 12, 1993. Nos. S-91-239, S-91-240, S-92-255, S-92-256.

1. **Pretrial Procedure: Evidence: Trial: Appeal and Error.** When a court overrules a motion in limine to exclude evidence, the movant must object when the particular evidence, previously sought to be excluded by the motion, is offered during trial and cannot predicate error on the admission of evidence to which no objection was made when the evidence was adduced.
2. **Effectiveness of Counsel: Proof.** In order to prevail on a claim of ineffective assistance of counsel, the defendant must establish that her attorney failed to perform at least as well as a lawyer with ordinary training and experience in criminal law and how she was prejudiced in the defense of her case as a result of her attorney's actions or inactions.
3. **Trial: Evidence: Records: Appeal and Error.** Where evidence or rulings do not appear in the record, they cannot be considered on appeal.
4. **Trial: Attorneys at Law.** Trial counsel should be afforded due deference to formulate trial strategy.

5. **Trial: Judges: Juries: Appeal and Error.** A claim of improper conduct on the part of the trial judge in the presence of the jury will not be reviewed on appeal in the absence of a timely objection.
6. **Sentences: Probation and Parole: Appeal and Error.** The denial of probation and the imposition of a sentence that is within statutorily prescribed limitations will not be disturbed on appeal absent an abuse of discretion.

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

Martin Cahill, Dakota County Public Defender, and, on brief, Richard L. McCoy for appellant.

Gloriann Navrkal, pro se.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

BOSLAUGH, J.

After trial to a jury, in case No. S-91-239, the defendant, Gloriann Navrkal, was convicted of false reporting to a police officer and was sentenced to 3 months in jail. In case No. S-91-240 the defendant was convicted of attempt to commit theft by deception and was sentenced to 6 months in jail, the sentences to run concurrently.

In three other cases the defendant was acquitted of three charges of theft by deception.

Case No. S-92-255 and case No. S-92-256 are attempts by the defendant to appeal from orders overruling her motions to amend the bill of exceptions.

In her appeal from the judgments in case No. S-91-239 and case No. S-91-240 the defendant has assigned as error the overruling of her motion in limine, various rulings on evidentiary matters, that she had ineffective assistance of trial counsel, that the trial court did not conduct the trial in a fair and impartial manner, and that the sentences imposed are excessive.

The record shows that on November 19, 1989, the defendant reported to the South Sioux City police that her home had been burglarized while she was out of town for the weekend. She

claimed that two televisions, a typewriter, a stereo, two VCRs, a Nintendo game, a microwave and valuable jewelry, including a diamond cocktail ring valued at $1404, a diamond solitaire valued at $1000, a diamond cocktail ring valued at $500, and a diamond and sapphire ring valued at $525, had been stolen. She also reported that she did not have any insurance.

Beverly Burcham, a cousin who lived with the defendant at the time of the alleged burglary, testified that the defendant was home during the weekend the alleged burglary took place, and that the defendant asked Beverly to move some things over to the defendant's sister's house in Sioux City, Iowa.

On Saturday night, November 18, 1989, Beverly had a party with some friends at the defendant's house. About 10:30 p.m. the defendant came home and was very upset that Beverly had people over and asked everybody to leave the house. The defendant threatened to make Beverly move out of the house and again asked Beverly to take some things over to the defendant's sister's house.

After spending the night elsewhere, Beverly and Pat Cadwallader went to the defendant's house the next morning. Beverly thought that if she moved the items that the defendant had requested, the defendant would change her mind about making Beverly move out.

Beverly and Pat then moved two TVs, a VCR, a stereo and a microwave to the defendant's sister's house in Sioux City, Iowa. Later Sunday evening when they went back to the defendant's house, the defendant's children told them that the defendant's house had been robbed.

Beverly testified that the defendant had:

> . . . already told the police that she had been robbed with the stuff that we had taken over to her sister's house and I said that she had better make sure we were clear otherwise I was going to turn her in because at the time I was on probation, and she was making up excuses for us to tell the police department if they would question us. . . .

The defendant's ex-husband, Jim Peterson, testified that during their marriage, their home was originally insured with Tower Insurance, but after two claims, one of which was for lost or stolen jewelry that was later found but never reported

found to Tower, the company considered them risky and discontinued the policy.

The house was then insured by State Farm. They made four claims against that policy, two of them being for the mysterious disappearance of the defendant's wedding rings. To Peterson's knowledge, the wedding rings were never found after the first claim. The second claim for the jewelry was in March of 1988 for the defendant's lost replacement wedding rings.

The rings claimed to be stolen from the defendant's home on November 19, 1989, were the same rings for which the defendant had received compensation from State Farm when they were lost in 1988.

On November 22, 1989, the defendant reported to her insurance company, American Family Insurance, the loss alleged to have resulted on or about November 19, 1989. When the insurance agent asked her to explain what happened, she related that she had been gone over the weekend, and when she returned home on Sunday she discovered that her house had been robbed.

The defendant had been insured by American Family since March 1989. On her application to American Family she indicated she had no past losses.

American family denied the defendant's claim because of statements from Beverly Burcham and Pat Cadwallader; the defendant's misrepresentation of items involved in the theft, particularly the rings which had previously been submitted as lost or stolen to State Farm; and the defendant's lack of cooperation in processing the claim.

The defendant's motion in limine was made prior to the testimony of defense witness, Randy Hisey. The defendant requested the trial court to prohibit the State on cross-examination from inquiring about the witness' representation of the defendant in several matters. The trial court overruled the defendant's motion, reserving ruling until the evidence was offered.

Randy Hisey, an attorney, testified that he had represented the defendant in the past. When asked what types of cases he had handled for the defendant, Hisey testified he had represented the defendant on an assault charge. When asked

whether he had represented the defendant at any hearings, Hisey responded that he had represented the defendant at a city housing hearing where the city was attempting to remove the defendant from city housing for having too many inhabitants in her dwelling.

Since no objection was made to either of these questions, the defendant's assignment of error regarding the trial court's overruling her motion in limine is without merit.

> 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. Cox, 231 Neb. 495, 437 N.W.2d 134 (1989).

The defendant assigns as error the trial court's sustaining the State's untimely objections. She argues the trial court should not have sustained the State's objections because the objections were not made at the time the questions were asked but were made after the questions were answered.

In every instance, the objection made by the State was that the answer was not responsive to the question or that the answer involved hearsay evidence. The questions as asked were not objectionable, but the responses were. The trial court did not err in sustaining the State's objections to those responses.

The defendant claims the trial court erred in sustaining the State's hearsay objection to an answer by Randy Hisey, one of the defendant's witnesses. According to the defendant, the testimony was necessary to impeach testimony made by Beverly Burcham.

The record shows the following occurred during examination of Randy Hisey about a telephone conversation that he had with Beverly Burcham:

> Q. What was the nature of that conversation?
>
> A. I called her to find out what was going on with respect to the burglary. And I called her over there and left my name and number with somebody and she was supposed to be home at some specific time or by some specific time that night. And I waited like 45 minutes or an

hour past that time and she didn't call me, so I called her back and talked to her at that time. And I asked her basically what was going on with this burglary, was there some kind of a faked burglary and so forth.

Q. And what else?

A. Well, she said as far as she knew, it was not a faked burglary.

Mr. LUEBE: Objection. That's hearsay, Your Honor.

THE COURT: Sustained.

Hisey's response to the question related to an out of court statement, and if offered to prove the truth of the matter asserted was hearsay. The trial court was correct in sustaining the State's hearsay objection and striking the statement from the record.

The defendant made no offer of proof that the statement was offered for the purpose of impeachment. She cannot now complain that the trial court erred in excluding Hisey's hearsay response from evidence. See *In re Estate of Woodward*, 147 Neb. 270, 23 N.W.2d 75 (1946).

The defendant asserts that her trial counsel was ineffective in failing to object to the State's questions of Hisey regarding his representation of the defendant discussed in her earlier assignment of error; in failing to have the false reporting charge dismissed; in failing to ask her questions she had prepared for him to use during her testimony; in failing to object to exhibits offered by the State; in failing to introduce certain evidence; in agreeing to let the State amend the information; in failing to ask impeachment questions of one of the State's witnesses; and in failing to move to suppress evidence of a telephone conversation between the defendant and Beverly Burcham.

In order to prevail on a claim of ineffective assistance of counsel, the defendant must establish that her attorney failed to perform at least as well as a lawyer with ordinary training and experience in criminal law and how she was prejudiced in the defense of her case as a result of her attorney's actions or inactions. *State v. Meis*, 223 Neb. 935, 395 N.W.2d 509 (1986).

While it was necessary to object to the questions of Hisey regarding his prior representation of the defendant in order to preserve for appeal any objection the defendant may have had

concerning the trial court's ruling on her motion in limine, the defendant has failed to show that she was prejudiced by the failure to object to those questions. If we assume the evidence was inadmissible, the error in receiving it was harmless because the evidence produced by the State overwhelmingly established the defendant's guilt of the charges for which she was convicted. See, *State v. Cox, supra*; *State v. Greeno*, 230 Neb. 568, 432 N.W.2d 547 (1988).

Regarding the defendant's allegation of ineffective assistance of counsel, based on her claim that the false reporting charge should have been dismissed because she was not brought to trial within 6 months, there is nothing in the record to support this claim. "Where evidence or rulings do not appear in the record, they cannot be considered on appeal." *State v. Meis, supra.*

The defendant's other allegations of ineffective assistance all relate to matters of trial strategy, and trial counsel should be afforded due deference to formulate trial strategy. *Id.* The record does not show the defendant was prejudiced by her attorney's trial strategy.

The defendant's claim of ineffective assistance of counsel based on the admission of the transcript of a phone conversation between the defendant and Beverly Burcham is not supported by the record.

Out of the presence of the jury, the State offered a cassette tape recording and a transcript of the conversation; however, counsel for the defendant objected to the offer. The trial court reserved ruling on the objection until it heard further foundational evidence. Further evidence was presented, but the State never reoffered the exhibits, and the record shows they were withdrawn as evidence.

The defendant's next assignment of error pertains to inappropriate comments made by the State during closing arguments. The closing arguments were not made a part of the record, and it appears no objection was made to the State's closing argument; therefore, as stated above, we cannot consider this assignment of error.

The defendant contends the trial court did not conduct the trial in a fair and impartial manner because she was instructed to answer the questions as asked. The record shows the

following occurred on direct examination:

> Q. While you were in the hospital, were you visited by your sister Val Reising?
>
> A. Yes. The hospital called my sister the night that I came into the hospital.
>
> THE COURT: I think maybe I'm going to interject at this time, Ms. Navrkal. When a question calls for a yes or no answer, I would like very much to have you respond yes or no or we're never going to get done. You're giving a narrative to every question and I can't allow you to do that.

Because no objection was made to the trial court's statement, we do not consider the matter further. "[A] claim of improper conduct on the part of the trial judge in the presence of the jury will not be reviewed on appeal in the absence of a timely objection." *Pitt v. Checker Cab Co.*, 217 Neb. 600, 606, 350 N.W.2d 507, 511 (1984).

The defendant claims that her sentences are excessive. She argues that the trial court should have ordered probation.

The defendant was convicted of attempt to commit theft by deception and false reporting to a police officer.

Theft by deception is a class III felony if the item involved is valued over a thousand dollars. Neb. Rev. Stat. §§ 28-512 and 28-518(1) (Reissue 1989). Criminal attempt is a class IV felony when the crime attempted is a class III felony. Neb. Rev. Stat. § 28-201(1)(a), (b) and (4)(c) (Reissue 1989). The maximum penalty for a class IV felony is 5 years' imprisonment, a $10,000 fine or both. There is no minimum.

False reporting to a police officer is a class I misdemeanor under Neb. Rev. Stat. § 28-907(1)(a) and (2) (Reissue 1989). The maximum penalty for a class I misdemeanor is not more than 1 year imprisonment, a $1000 fine or both. There is no minimum.

The defendant was sentenced to 6 months in jail on the attempt conviction and 3 months in jail for the false reporting conviction. The sentences run concurrently.

The denial of probation and the imposition of a sentence that is within statutorily prescribed limitations will not be disturbed on appeal absent an abuse of discretion. *State v. Morley*, 239

Neb. 141, 474 N.W.2d 660 (1991).

The sentences imposed in this case were within the statutory limits and were minimal. Given the circumstances and facts of this case, the trial court did not abuse its discretion in sentencing the defendant.

Case No. S-92-255 and case No. S-92-256 are attempts to appeal separately from the trial court's denial of her motion to amend the bill of exceptions.

On December 17, 1991, after the State had filed its brief for the defendant's appeal from her convictions, the defendant filed a motion to amend the bill of exceptions so as to include the closing argument in the bill of exceptions. A verbatim record was not made or preserved of the hearing on the defendant's motion to amend the bill of exceptions. On March 3, 1992, the trial court denied the defendant's motion by an order stating: "As a factual finding the Court determined that there was no objection made at the time of the closing argument of Laura Knox and that no objection to any part of the closing argument was made at any time thereafter."

Ordinarily, a party who does not object to an argument of the prosecutor which is alleged to constitute misconduct will be held to have waived his right to complain. *State v. Boss*, 195 Neb. 467, 238 N.W.2d 639 (1976). In *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985), we held that the failure to make a timely objection to the closing argument of the prosecuting attorney is equivalent to failing to make any objection at all and waives any right to complain.

The record fails to show an abuse of discretion by the trial court in denying the defendant's motion to amend the bill of exceptions. See *In re Interest of D.A.B. and J.B.*, 240 Neb. 653, 483 N.W.2d 550 (1992).

The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ELAINE M. TASICH, ALSO KNOWN AS ELAINE BAKER, APPELLANT.

496 N.W.2d 538

Filed March 12, 1993. No. S-91-247.

Statutes: Time. When a statute requires an act to be done a certain number of days before a known event, the fact that the last day for the action to be done in order to give the appropriate number of days, falls on a Saturday, Sunday, or legal holiday postpones the time for performance to the next business day.

Petition for further review from the Nebraska Court of Appeals, CONNOLLY, HANNON, and IRWIN, Judges, on appeal thereto from the District Court for Douglas County, JOHN E. CLARK, Judge, on appeal thereto from the County Court for Douglas County, JOSEPH S. TROIA, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Thomas M. Kenney, Douglas County Public Defender, Brian S. Munnelly, and Kelly S. Breen 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 December 17, 1990, defendant, Elaine Tasich, appeared in the County Court for Douglas County, with court-appointed counsel, for arraignment on a charge of driving a motor vehicle while under the influence of intoxicating liquor. Defendant pled not guilty and trial of the case was set for January 30, 1991. On January 22, 1991, defendant filed a motion to suppress evidence seized at the time of her arrest. January 22, 1991, was a Tuesday, the day after the Monday statutory holiday observing the birthday of Martin Luther King, Jr. See Neb. Rev. Stat. § 25-2221 (Reissue 1989).

The county court denied defendant a hearing on her motion to suppress, after the court determined that the motion was not filed at least 10 days before trial as required by Neb. Rev. Stat. § 29-822 (Reissue 1989). Defendant preserved her objection to this ruling, and agreed to a bench trial on stipulated facts.

Defendant was found guilty and sentenced. She timely appealed to the district court and then to the Court of Appeals. In each court defendant's sentence was affirmed. This court then granted defendant's petition for further review. We reverse and remand with directions.

Defendant assigns as error the action of the trial court in finding that her motion to suppress was not timely filed and, accordingly, not allowing the motion to be argued. Defendant contends that the proper application of § 25-2221 would permit the filing of her motion on January 22, 1991, 8 days before her trial.

Section 25-2221 provides, in part:

> Time; how computed; offices may be closed, when; federal holiday schedule observed; exceptions. Except as may be otherwise more specifically provided, the period of time within which an act is to be done in any action or proceeding shall be computed by excluding the day of the act, event, or default after which the designated period of time begins to run. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a day during which the offices of courts of record may be legally closed as provided in this section, in which event the period shall run until the end of the next day on which the office will be open.
>
> All courts and their offices may be closed on Saturdays, Sundays, and these holidays: . . . Birthday of Martin Luther King, Jr., the third Monday in January; . . . .

Defendant alleges that the tenth day before the trial was Sunday, January 20; that court filings could not be made on that day; and that filings could not be made on the succeeding day, which was the third Monday in January. Defendant then filed her motion on Tuesday, January 22, 1991, the day which she contends was "the next day on which the [court's] office will be open."

The State contends that § 25-2221 is concerned only with counting forward—that is, if one has a specified period of time after an event (e.g., a judgment) to perform an act (e.g., filing a motion for new trial), § 25-2221 comes into play, and when the last day of the period falls on a Saturday, Sunday, or legal

holiday, the specified period of time would be extended. The State points out that under § 29-822, one must count backward to determine a date 10 days before a trial. In that situation, the State contends that a person required to perform an act within a certain time gets no benefit from § 25-2221. In the case before us, under the State's contention, the motion to suppress had to have been filed on January 18, 1991, a date 12 days before trial.

We recognize that some jurisdictions have adopted the position that statutes providing for filings of pleadings "at least" or "not less than" a certain number of days before an event, do not postpone the time for performance to the next business day when the last filing day falls on a Saturday, Sunday, or holiday. See 98 A.L.R.2d 1331.

Nonetheless, in determining the case before us, we determine that such an approach should not be followed, and we adopt the position set out in several jurisdictions to grant the benefit of extending time periods to persons required to act a certain number of days before a known event.

In *City of Athens v. White*, 274 N.E.2d 760 (Ohio 1971), the question arose whether a defendant had waived his right to a jury trial by failing to make a timely demand for a jury on a charge of driving a motor vehicle while under the influence of alcohol. Ohio statutes required that a demand for a jury trial had to be made in writing not less than 3 days before the date set for trial. Defendant White filed a jury demand on a Monday, when the case was set for trial on the next day. The Supreme Court of Ohio stated that if only the 3-day statute were applied, the defendant's demand would have been untimely, but held that another Ohio statute controlled. That statute stated that when the last day for an act was a day on which the public office was closed, the act could "be performed on the next succeeding day which is not a Sunday or a legal holiday. . . ." *Id.* at 762. The court held that the Saturday preceding the Tuesday trial was the last day on which the act could be performed, but that since the office was closed on that day and the succeeding day, Sunday, a written demand filed on Monday, which was the day before the trial, satisfied the statutory requirement that such demands had to be filed 3 days before trial.

In *First National Bank of Oregon v. Mobil Oil Corp.*, 538

P.2d 919 (Or. 1975), the Supreme Court of Oregon held that an Oregon statute providing that an act required to be performed on a holiday may be performed on the next succeeding business day, extended to acts to be done in contracts. The Oregon court held that where a lease required a notice to renew be given at least 30 days prior to expiration of the lease, and where the 30th day prior to expiration was a Sunday, a notice of renewal executed on the succeeding Monday constituted compliance with the contractual terms.

In *Delight Oak Flooring Co. v. Ark. La. Gas Co.*, 684 S.W.2d 271 (Ark. App. 1985), the Arkansas Court of Appeals held that where a trial was set for September 23, 1983, a request for jury trial filed on September 6 was timely even though a rule required that requests for jury trial must be made "not later than 20 days prior to the trial date." *Id.* at 272. The court applied a different rule providing that where the last day of a period ended on a Saturday, Sunday, or legal holiday, the time ran "until the end of the next day which is not a Saturday, Sunday, or legal holiday. Since September 3, 1983 [which was the 20th day before the trial] was a Saturday, and the next day was Sunday, and September 5, 1983 was Labor Day, the September 6, 1983 filing was timely." *Id.*

In the case before us, we hold that when a statute requires an act to be done a certain number of days before a known event, the fact that the last day for the action to be done in order to give the appropriate number of days, falls on a Saturday, Sunday, or legal holiday postpones the time for performance to the next following business day.

Accordingly, we determine that the trial court erred in refusing to hear defendant's motion to suppress certain evidence. The judgment of the Court of Appeals is reversed with directions to remand the case to the district court for remand to the trial court for further proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. DEBRA A. REYNOLDS, APPELLANT.

496 N.W.2d 872

Filed March 12, 1993. No. S-91-403.

1. **Sentences: Appeal and Error.** When a sentence imposed by a court is within statutorily prescribed limits, an appellate court will not disturb the sentence unless there has been an abuse of discretion.
2. **Sentences.** An abuse of discretion occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.
3. **Sentences: Appeal and Error.** Except under certain circumstances when the Supreme Court is reviewing a sentence of death, an appellate court does not conduct a de novo review of the record to determine whether the sentence is appropriate.
4. _____: _____. A comparative analysis of sentences is useful only to validate an initial judgment that a sentence is so grossly disproportionate to a crime as to be excessive, but such an analysis by an appellate court is not mandatory.
5. **Sentences.** The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and WRIGHT, Judges, on appeal thereto from the District Court for Scotts Bluff County, ROBERT O. HIPPE, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Byron M. Johnson, Scotts Bluff County Public Defender, and Bernard J. Straetker for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

WHITE, J.

This case comes before us on the State's petition for further review, pursuant to Neb. Rev. Stat. § 24-1107 (Cum. Supp. 1992), of a decision of the Court of Appeals reported at 1 NCA 1429 (1992). The State challenges the decision of the Court of Appeals to modify the criminal sentence imposed by the district

court upon the defendant-appellant, Debra Reynolds. The State asserts that the Court of Appeals erred in modifying defendant's sentence because the court (1) has failed to consistently apply a standard of appellate review to this and other claims of an excessive sentence without explanation or distinction; (2) failed to afford deference to the findings of the district court regarding an appropriate sentence; (3) failed to apply an "abuse of discretion" standard to the evaluation of the excessive sentence claim; (4) concluded that § 29-2308 allows the appellate courts to resentence the defendant de novo on appeal; and (5) evaluated elements in its de novo resentencing that were not in the record before the court.

A review of the factual background reveals that around 6 p.m. on August 16, 1990, defendant Reynolds walked into a bar carrying a rifle. Reynolds appeared intoxicated and was escorted back outside by a friend, Patty Moore. While standing outside the bar, Reynolds fired the rifle into the air in view of an approaching police cruiser driven by Officer Phil Martindale. Officer Martindale, who was on duty at the time, exited his cruiser and instructed the defendant to put the gun down. Upon observing the defendant aim the rifle in his direction, Martindale crouched behind his cruiser door and heard a second shot pass over his head. Subsequently, Moore, Martindale, and a third police officer were able to subdue and disarm the defendant.

Reynolds was charged and convicted by a jury of attempted first degree assault on a police officer under Neb. Rev. Stat. §§ 28-201 and 28-929 (Reissue 1989), and use of a firearm to commit a felony under Neb. Rev. Stat. § 28-1205(1) (Reissue 1989), both Class III felonies. The district court sentenced defendant to consecutive jail terms of 5 to 10 years' imprisonment on the first degree assault offense, and 5 to 10 years' imprisonment on the firearm offense.

On appeal to the Nebraska Court of Appeals, Reynolds asserted that the evidence was insufficient to support the convictions and that the sentences were excessive and constituted an abuse of discretion by the trial court. The Court of Appeals found that the record contained relevant and sufficient evidence to support the jury's verdicts. The court

further found that the imposed sentences were within statutory limits, and that it was evident Reynolds needed to be incarcerated for a substantial amount of time. Despite these findings, the court then held that the sentences appeared excessive because they were only three years less than the longest possible minimum sentence of 13 years, 4 months. Citing Neb. Rev. Stat. § 29-2308 as authority for an appellate court to reduce a sentence deemed to be excessive, the Court of Appeals then reduced the defendant's sentences to 3 to 7 years' imprisonment on each count to run consecutively.

Defendant has not sought further review of the Court of Appeals' finding that there was relevant and sufficient evidence to support the convictions. Perceiving no plain error, this finding will not be disturbed on further review.

As correctly observed by the Court of Appeals, when a sentence imposed by a court is within statutorily prescribed limits, an appellate court will not disturb the sentence unless there has been an abuse of discretion. *State v. Philipps, post* p. 894, 496 N.W.2d 874 (1993); *State v. Riley, post* p. 887, 497 N.W.2d 23 (1993).

An abuse of discretion occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *State v. Philipps, supra.*

Here, where defendant was convicted of two separate and distinct Class III felonies, the sentences were within the statutory limits provided by Neb. Rev. Stat. § 28-105 (Reissue 1989), and imposed consecutively in keeping with § 28-1205(3) (Reissue 1989). The record before the trial court and the Court of Appeals profiled the defendant's social history, past criminal record, active and prolonged abuse of alcohol and drugs, the significant potential for injury associated with the present crime, and the likelihood of recurrence of criminal activity.

Except under certain circumstances when the Supreme Court is reviewing a sentence of death, an appellate court does not conduct a de novo review of the record to determine whether the sentence is appropriate. *State v. Philipps, supra*; *State v. Hall*, 242 Neb. 92, 492 N.W.2d 884 (1992). Furthermore, a comparative analysis of sentences is useful only to validate an

initial judgment that a sentence is so grossly disproportionate to a crime as to be excessive, but such an analysis by an appellate court is not mandatory. *State v. Riley, supra.*

The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *State v. Riley, supra*; *State v. Bell*, 242 Neb. 138, 493 N.W.2d 339 (1992). The Court of Appeals failed to articulate, nor do we comprehend, why a sentence which is only approximately three years under the longest possible minimum sentence constitutes an abuse of the sentencing court's discretion and is therefore excessive. Recognizing that minimum sentencing limitations are a matter for the Legislature, and a sentence imposed within those limitations a matter left to the discretion of the sentencing court, we hold that the sentence imposed by the district court was not excessive.

Finding that the sentence was within the statutory limits, that the district court did not abuse its discretion, and that the sentence is not so grossly disproportionate to the crime as to be excessive, we reverse the judgment of the Nebraska Court of Appeals to the extent it modifies the sentences imposed by the district court. We remand the cause to the Court of Appeals with directions to affirm the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. ROBERT T. FARRELL, APPELLANT.

497 N.W.2d 17

Filed March 12, 1993. No. S-91-545.

1. **Trial: Motions to Suppress.** The duty rests on the defendant, after denial of a motion to suppress, to object at trial to the admission of the evidence and to state the specific grounds of the objection if a specific ground is not apparent from the context in which the objection was made.

2. **Trial: Evidence: Appeal and Error.** Unless the objection to offered evidence be sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objection and to observe the alleged harmful bearing of the evidence from the standpoint of the objector, no question can be presented therefrom in the court of appeal.
3. **Probable Cause: Words and Phrases.** Probable cause is defined as a reasonable suspicion founded on articulable facts.
4. **Rules of Evidence: Other Acts: Proof.** 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.
5. **Evidence: Other Acts: Appeal and Error.** In reviewing the admission of prior acts, the reviewing court should consider the relevance of the evidence, the purpose for its introduction, and the probative value balanced against its potential for unfair prejudice.
6. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

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

Lawrence G. Whelan for appellant.

Don Stenberg, Attorney General, and Joseph P. Loudon for appellee.

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

GRANT, J.

Defendant, Robert T. Farrell, appeals his conviction, after jury trial, of unlawful possession of a controlled substance, methamphetamine. He was sentenced to imprisonment of 20 months to 3 years, with credit for time served. Defendant timely appealed, and, in this court, assigns four errors. He contends that the trial court erred: (1) "by determining the defendant had no standing to attack the 'wiretap' used to satisfy the probable cause requirement necessary for the issuance of the search warrant"; (2) in failing to suppress the evidence of methamphetamine found in the pocket of a pair of shorts

defendant put on after his arrest; (3) in failing to suppress testimony or evidence regarding marijuana located at 312 North 54th Street; and (4) in failing to determine that the evidence was insufficient to establish defendant's guilt.

The record shows the facts hereinafter set out. During an investigation in January 1989, the Federal Bureau of Investigation determined that Gary Apker, who was affiliated with the Hell's Angels' motorcycle group, was a prime suspect as a distributor of methamphetamine in the Omaha area. During that investigation in 1989 and 1990, it was discovered that defendant and Sandra Volkir had an association with Apker. Defendant and Volkir had known each other since 1972, had renewed dating in 1987, and had married on May 23, 1990.

Pursuant to federal and state court orders, a wiretap on Gary Apker's telephone and a listening device in Apker's residence were authorized. Apker's telephone communications were intercepted between June 24 and September 7, 1990. Oral communications inside Apker's residence were intercepted by a listening device between August 9 and October 17, 1990. 780 conversations were intercepted. After this electronic surveillance, search warrants were issued for the residence of defendant's wife, Sandra Volkir, at 507 South 68th Street in Omaha; and the residence, owned by the estate of defendant's deceased mother at 312 North 54th Street, also in Omaha. Defendant had not lived at the North 54th Street residence after May of 1990 when he moved into Volkir's residence after their daughter was born. Defendant testified at trial that he stayed with Volkir in the master bedroom at the South 68th Street house, and kept his clothes there. He also testified that after he moved in with Volkir, he visited the 54th Street residence on an approximately daily basis to check for newspapers and mail and for security reasons. At the time the search warrants were executed, only a hired housekeeper was staying there.

Both search warrants were executed on October 17, 1990, at 7:00 a.m. After knocking on the door and receiving no response, officers forcibly entered the home on South 68th Street. Once inside, the officers heard a barking dog behind a locked bedroom door and forced their way into the room. Inside the room they found the defendant standing nude at the

foot of the bed, near a window. Sandra Volkir was in the bed beneath some covers, and their baby was in a crib. In another bedroom, officers found Volkir's sister. After the officers handcuffed defendant, he requested permission to dress. An officer asked him what he needed, and the defendant responded by nodding toward a pair of shorts on the floor of the bedroom. The officer picked up the pair of shorts, asked if they were what defendant wanted; and, after receiving an affirmative response, helped the defendant to don them.

All the persons found in the home were taken to the living room. Once there, two of the officers overheard the defendant whisper to Volkir, "I've got it." Later, defendant requested to use the bathroom. At that time an officer conducted a search of the defendant and, in the right front pocket of the shorts, found a small plastic bag containing a substance later determined to be methamphetamine.

One of the deputy sheriffs who entered the bedroom where the defendant and Volkir were found had noticed at that time that the screen of the window by which the defendant was standing, was pushed out and torn. At approximately 1 p.m. the officer searched outside the house, and directly below the window of the bedroom where the defendant was seized, the officer found a plastic container and several plastic "baggies" later determined to contain methamphetamine residue. The officer also noticed the ground directly beneath the window was covered with a fine, white powder.

In the bedroom where the defendant was seized, the officers discovered $3200 in a shoe box in the closet, several bongs for marijuana consumption, and several small scales. On top of the dresser in the bedroom, the officers found a sifter and phone guard, and on the chest of drawers, two bottles of inositol powder, a cutting agent for methamphetamine. In the chest of drawers, the officers found several plastic bags containing a powdery residue, a snow seal, two small spoons, and a metal box. Other items found in the home included a bag of marijuana and several marijuana pipes. At trial, testimony presented by the State explained the usage of these items, for purposes of using, selling, or distributing methamphetamine.

The house on North 54th Street was searched at

approximately the same time. A woman serving as a housekeeper resided at this location. The officers executing the search warrant there found a quantity of marijuana in a desk located on the second floor. In a bathroom adjacent to the defendant's bedroom in that house, an officer discovered a snow seal containing methamphetamine in a false bottomed can.

Defendant was charged with unlawfully and knowingly or intentionally possessing methamphetamine. He filed motions to suppress any statements made by him and any evidence seized pursuant to the search warrants. After an evidentiary hearing, the court overruled his motions. The trial was later held and a verdict of guilty was returned.

Defendant's first assignment of error contends that the trial court erred in determining the defendant had no standing to attack the 'wiretap' at the Apker residence. The court need not address this issue if it finds that the defendant failed to properly preserve the issue for appellate review.

We first note that defendant's filed motion to suppress on this issue sought an order suppressing the evidence

> because of an illegal search and seizure; that the evidence was not in plain view; and that there was no probable cause based upon an insufficient affidavit; and if there was probable cause to search . . . there was no probable cause to arrest, absent a warrant; that this was done in violation of the common law, the Nebraska State Constitution at Sec. 7, Art. 1, the United States Constitution at Article 4 of the Amendments.

At the pretrial hearing on this motion, the State offered the search warrants for each of the houses searched and the affidavit in support of each warrant. Defendant had no objection to the receipt of that evidence for the purposes of the hearing, and the trial court received the warrants and affidavits as evidence at the hearing. The State offered no other evidence at the pre-trial hearing.

Defendant then informed the court that he wanted to present evidence as to the information relied on by a United States district judge and a Douglas County district judge in issuing the order allowing electronic surveillance of Gary Apker. The

prosecuting attorney contended that such evidence was not relevant

> for purposes of this particular hearing. The purpose of this hearing is whether or not probable cause existed for the issuance of the warrants. . . . This hearing is not scheduled for . . . [judging] the procedural correctness of any and all wiretaps that were involved through the federal or state court system and I don't see that as the determination that should be made by this court at this time.

The trial court ruled that the exhibits offered by defendant were irrelevant and constituted "a collateral attack on something that's not before the court." Later the court told defendant that the court was "going to buttress my sustaining of the objections . . . on the grounds that this defendant has no standing to challenge the wiretaps or the bugs that were put on Mr. Apker's house."

It is this later statement which defendant seems to think controls the court's ruling on the issue he seems to want to raise. Defendant does not, in his assignment of error, attack the order refusing to suppress the evidence obtained as a result of the serving of the search warrant. Defendant does not attack the trial court's ruling that defendant's proffered evidence was irrelevant to the issues before the court and that defendant's exhibits at the pre-trial hearing constituted "a collateral attack on something that's not before the court."

Defendant was arraigned on November 8, 1990. His motion to suppress was filed on November 19, 1990, and heard and ruled on on January 11, 1991. The trial began on March 11, 1991. The record does not show that defendant at any time sought an order for the trial court under the provisions of Neb. Rev. Stat. § 86-705(11) (Cum. Supp. 1988), which provides, in part:

> Any aggrieved person in any trial, . . . in or before any court, . . . may move to suppress the contents of any intercepted wire, electronic, or oral communication or evidence derived therefrom on the grounds that the communication was unlawfully intercepted, the order of authorization or approval under which it was intercepted

> is insufficient on its face, or the interception was not made in conformity with the order of authorization or approval. Such motion shall be made before the trial. . . .

The issues which defendant tangentially raises in his first assignment of error were not properly presented to the trial court. In that state of the record, we hold that the defendant has made no showing that the trial court erred in its refusal to suppress the evidence obtained as a result of the search warrant.

On this issue, we further note that Neb. Rev. Stat. § 27-103 (Reissue 1989) (Nebraska Evidence Rules, Rule 103) provides, in part, "Error may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected, and: (a) . . . a timely objection or motion to strike appears of record, stating the specific ground of objection. . . ."

The duty rests on the defendant, after denial of a motion to suppress, to object at trial to the admission of the evidence and to state the specific grounds of the objection if a specific ground is not apparent from the context in which the objection was made. *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992); *State v. Douglas*, 238 Neb. 11, 468 N.W.2d 612 (1991). In *State v. Richard*, 228 Neb. 872, 885, 424 N.W.2d 859, 868 (1988), we held:

> Unless the objection to offered evidence be sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objection and to observe the alleged harmful bearing of the evidence from the standpoint of the objector, no question can be presented therefrom in the court of appeal.

Whatever grounds defendant was relying on to support his objections cannot be determined from the record in this case. The first objection at trial was stated by defendant to be ". . . for the reason as previously noted by the defendant in a motion filed . . . and also for the issue of relevancy . . ." Other objections were "Same objection." These were several objections worded, "Same objection as Exhibit 12"; and the objection to Exhibit 12 was "Same objections, plus it's duplicative of Exhibit No. 9." It is difficult to determine the reason for defendant's objections on review when the court has the luxury of reviewing the record to try to determine the

grounds for defendant's objections. It had to be extremely difficult for the trial judge in the give and take of the trial. Defendant's first assignment of error is without any merit.

In his second assignment of error, defendant contends that the district court erred in failing to suppress the "baggie" containing methamphetamine found in the defendant's pocket. Defendant's reliance on *Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979), is misplaced. In *Ybarra*, the Supreme Court held that a search conducted on specified premises pursuant to a warrant did not give officers authority to search persons on the premises without probable cause. The court held that "a search or seizure of a person must be supported by probable cause particularized with respect to that person." *Id.* at 91. The complaint filed in support of the warrant in *Ybarra*, gave no indication that persons on the premises, other than the bartender named in the warrant, were involved in the sale or purchase of illegal drugs. The defendant in *Ybarra* made no movements that might suggest criminal conduct, nor did he say anything of a suspicious nature. In addition, the State was unable to articulate any specific fact that would justify the search of Ybarra.

The case before us presents different facts. Defendant is specifically mentioned in the application for the search warrant as being suspected of possession, distribution, financing, and laundering of monies received from the sale of illegal drugs. Testimony at trial showed that defendant was not searched until he requested to use the bathroom. Prior to this request, officers overheard defendant whispering to Volkir, "I've got it." "Probable cause is defined as a reasonable suspicion founded on articulable facts." *State v. Hodge and Carpenter*, 225 Neb. 94, 99, 402 N.W.2d 867, 872 (1987). The officers had sufficient articulable facts to believe that defendant was involved in criminal activity. From the statement made by the defendant and overheard by the officers, it was reasonable for the officers to believe that defendant was concealing evidence on his person. Defendant's request to use the bathroom indicated that defendant might attempt to destroy the evidence. Under these circumstances, the trial court was correct in admitting the evidence. Defendant's second assignment of error is without

merit.

Defendant's third assignment of error alleges that the trial court erred in not suppressing the evidence found at the 312 North 54th Street address. This assignment is also without merit. As set forth in Neb. Rev. Stat. § 27-404(2) (Reissue 1989):

> 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.

In reviewing the admission of prior acts, the reviewing court should consider the relevance of the evidence, the purpose for its introduction, and the probative value balanced against its potential for unfair prejudice. *State v. Stephens*, 237 Neb. 551, 555, 466 N.W.2d 781, 785 (1991). It should also consider whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted. *Id.* Defendant did not make such a request and therefore that factor will not be addressed. Defendant testified that he did not know there were illegal drugs in either house. He maintained that the shorts in which the methamphetamine was found, although his, were worn by both him and his wife. The evidence of marijuana found at 312 North 54th Street was relevant to show that the defendant did in fact know there were illegal drugs present in both houses and is also probative of defendant's knowledge and absence of mistake regarding the methamphetamine found in the pocket of the shorts defendant was wearing. Defendant's third assignment of error is without merit.

Defendant's final assignment of error questions the sufficiency of the evidence to sustain his conviction. In reviewing a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient

evidence to support it. *State v. Williams*, 239 Neb. 985, 989, 480 N.W.2d 390 (1992).

The defendant was convicted of violating Neb. Rev. Stat. § 28-416(3) (Reissue 1989), which states in pertinent part: "A person knowingly or intentionally possessing a controlled substance, except marijuana, . . . shall be guilty of a Class IV felony." Defendant resided in the home in which the methamphetamine was found. When the officers entered the bedroom, defendant was standing next to a window with the screen pushed out. Later that same day evidence of methamphetamine was discovered directly below that window. "[C]ircumstantial evidence is proof of collateral facts and circumstance from which the mind infers the conclusion that the facts sought to be established in fact existed." *State v. Morley*, 239 Neb. 141, 149-50, 474 N.W.2d 660, 667 (1991). The jury could infer from defendant's position when the officers entered the room, the condition of the window screen, and the later discovery of the methamphetamine under the window that the defendant had attempted to rid himself of the evidence before the officers forcibly entered the home. Testimony given at trial also demonstrated the evidence found in defendant's bedroom was consistent with materials used in the distribution and sale of methamphetamine.

Furthermore, the valid search of the defendant produced a "baggie" containing methamphetamine. The shorts containing the illegal substance were admittedly his. Although defendant stated his wife also wore them during her pregnancy because they were comfortable, according to defendant's testimony, his wife delivered the child in May of 1990, 5 months before the searches were conducted. In addition, viewing the evidence in the light most favorable to the State, defendant himself requested the shorts which contained the methamphetamine. "A defendant possesses a controlled substance when the defendant knows of the nature or character of the substance and its presence and has dominion or control over the substance." *State v. Lonnecker*, 237 Neb. 207, 213, 465 N.W.2d 737, 742 (1991). Defendant's knowledge of the substance contained in his pocket is established by his whispered statement to Volkir, "I've got it." The evidence was sufficient to

sustain the conviction of the defendant. Defendant's fourth assignment of error is without merit.

There was no error in the trial court's actions as alleged by defendant. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RANDALL P. RILEY, APPELLANT.

497 N.W.2d 23

Filed March 12, 1993. No. S-91-899.

1. **Sentences: Appeal and Error.** Generally a sentence within the statutory limits will not be disturbed on appeal absent an abuse of discretion.
2. _____: _____. An appellate court may reduce the sentence rendered by the district court against the accused when the sentence is excessive, and it shall be the duty of the appellate court to render such sentence against the accused as in its opinion may be warranted by the evidence.
3. _____: _____. It is the duty of an appellate court to disturb a sentence on appeal which was within the statutory limits only if the sentence imposed was an abuse of judicial discretion.
4. **Trial: Words and Phrases.** "Judicial abuse of discretion" means that the reasons or rulings of the trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
5. **Sentences.** In considering a sentence, the sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
6. _____. In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
7. _____. The seriousness of the offense as well as the amount of violence used in the commission of a crime are important factors in determining the appropriateness of a sentence.
8. **Sentences: Appeal and Error.** Comparative analysis of sentences is useful only to validate an initial judgment that a sentence is so grossly disproportionate to a crime as to be excessive, but such analysis by an appellate court is not mandatory.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and WRIGHT,

Judges, on appeal thereto from the District Court for Dodge County, MARK J. FUHRMAN, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Larry C. Johnson, of Johnson & Vaughan, P.C., for appellant.

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

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

HASTINGS, C.J.

The State of Nebraska has petitioned this Court under the provisions of Neb. Rev. Stat. § 24-1107 (Cum. Supp. 1992) for further review of the decision of the Nebraska Court of Appeals which is reported in 1 NCA 629 (1992). The State claims the Court of Appeals erred in modifying the sentence imposed by the district court, specifically in its application of the Eighth Amendment analysis and cross-crime proportionality review to determine whether an abuse of discretion had been exercised by the sentencing court; and in failing to accord proper deference to the judgment of the district court and instead substituting its own judgment as to the dangerousness of the defendant. We reverse.

The defendant, Randall P. Riley, was originally charged with robbery, abduction, use of a firearm to commit a felony, and felon in possession of a firearm. Following a plea agreement, all charges were dropped except the robbery charge to which Riley pled guilty. Robbery is a Class II felony, Neb. Rev. Stat. § 28-324 (Reissue 1989), for which the statutory penalty is imprisonment for not less than 1 year nor more than 50 years. See Neb. Rev. Stat. § 28-105 (Reissue 1989).

Riley was sentenced to a term of imprisonment of not less than 14 nor more than 30 years. Finding that the district court abused its discretion, the Court of Appeals reduced the sentence to 5 to 10 years in prison.

The Court of Appeals correctly cited the general rule that a sentence within the statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Coleman*, 241

Neb. 731, 490 N.W.2d 222 (1992).

It also cited *State v. Spiegel*, 239 Neb. 233, 474 N.W.2d 873 (1991), for the proposition that an appellate court may reduce a sentence rendered by a district court against an accused when, in the opinion of the court, the sentence is excessive. In *Spiegel*, the trial court had imposed a sentence which exceeded the limits provided by statute at the time of the commission of the crime, but which was permitted by a later amendment to the statute. We held that application of the later amendment to that case violated the ex post facto clause of Neb. Const. art. I, § 16. However, rather than reversing and remanding the judgment for resentencing by the trial court, we utilized the provisions of Neb. Rev. Stat. § 29-2308 (Reissue 1989) which provides in relevant part that the Supreme Court "may reduce the sentence rendered by the district court against the accused, when in its opinion the sentence is excessive, and it shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion may be warranted by the evidence."

The sentence in the instant case was not excessive by reason of being outside the limitations provided by statute. Under our many prior holdings, and as set forth above, it is the duty of an appellate court to disturb a sentence on appeal which was within the statutory limits only if the sentence imposed was an abuse of judicial discretion.

"Judicial abuse of discretion" means that the reasons or rulings of the trial judge are clearly untenable and deny a just result to the defendant. *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991).

In considering a sentence, the sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *State v. Bell*, 242 Neb. 138, 493 N.W.2d 339 (1992); *State v. Wounded Arrow*, 240 Neb. 44, 480 N.W.2d 205 (1992).

In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past

criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Bell, supra*; *State v. Smith*, 240 Neb. 97, 480 N.W.2d 705 (1992). The seriousness of the offense as well as the amount of violence used in the commission of a crime are important factors in determining the appropriateness of a sentence. *State v. Wounded Arrow, supra.*

Without repeating all of the facts surrounding this incident, suffice it to say that the defendant, on April 2, 1991, entered a bar with a .22-caliber revolver and after having several drinks, pulled out his revolver and commenced the robbery. Riley demanded and received $310 from the cash register and then handed the money to the janitor, stating that he had no need for it. He then ordered the female bartender to lie on the floor and told a male patron to lie on top of her. He next demanded that the two get on their knees with their backs to him and he then asked for another drink. Riley then cocked his gun several times and pointed it at the three individuals present. He told the male patron to stand up and undress and go over by the door and get on his knees with his back to the others. Finally, announcing that he wanted to go to another bar to shoot a certain individual, Riley ordered all three persons outside and into his automobile. After he was in the car, Riley fired a single shot into the roof and a fragment struck the shoulder of the janitor. When they had reached the other bar, the male patron was able to grab the gun from Riley, ordered Riley to stop the car, and the female bartender got out and called the police.

The terror through which these three victims lived during this ordeal is difficult to appreciate; i.e., they were subjected to humiliation and unspeakable degradation, fear of execution by being shot in the back, and the horror of the brandishment and firing of Riley's revolver. True, no one was seriously injured, but the victims had no way of knowing that. It was in this environment that the trial judge determined the seriousness of the crime and the need for punishment.

It must be remembered also that the defendant, under the plea agreement, escaped convictions for abduction, use of a firearm to commit a felony, and felon in possession of a

firearm. These crimes are a Class IA or II felony, a Class III felony mandatorily consecutive to the underlying crime, and a Class IV felony.

Under the circumstances and the record available to the trial judge, we do not believe there was an abuse of discretion. Consequently the sentence was not excessive.

The Court of Appeals held that an important factor to be considered when addressing a claim of excessiveness of a sentence is the doctrine of proportionality. Cited by that court in support of the proposition is *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983), wherein the Court held that the Eighth Amendment proscription against cruel and unusual punishments prohibited not only barbaric (methods of) punishments, but also sentences that are disproportionate to the crime committed. Helm had been sentenced by the trial court to life imprisonment under a South Dakota recidivist statute upon being convicted for uttering a "no account" check for $100.

However, with the Court's decision in *Harmelin v. Michigan*, ____ U.S. ____, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991), the precedential value of *Solem* became extremely doubtful. Petitioner Harmelin, convicted under Michigan law of possessing more than 650 grams of cocaine and with no prior felony convictions, was sentenced to a mandatory life term in prison without possibility of parole. The petitioner claimed that his sentence was unconstitutionally cruel and unusual first, because it was "significantly disproportionate" to the crime committed and second, because the sentencing judge was statutorily required to impose it, without taking into account the particularized circumstances of the crime and of the criminal. The Michigan Court of Appeals, and the U.S. Supreme Court, rejected his argument that such a sentence constituted cruel and unusual punishment.

In announcing the judgment of the Court, Justice Scalia, in his separate opinion joined by the Chief Justice, stated: "We conclude from this examination that *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee." *Harmelin v. Michigan*, 111 S. Ct. at 2686.

While that opinion recognized that *Solem* correctly

discerned that the Eighth Amendment prohibition was derived from the "cruell and unusuall Punishments" provision of the English Declaration of Rights of 1689, it criticized the conclusion in *Solem* that the Amendment also embodies a right to be free from disproportionate sentences.

Justice Scalia further declared that *Solem* had hung its hat upon three considerations—the inherent gravity of an offense, the sentences imposed for similarly grave offenses in the same jurisdiction, and the sentences imposed for the same crime in other jurisdictions—of which, the first and second fail for lack of an objective standard of gravity. As to the third consideration, Justice Scalia's opinion indicates that it has no conceivable relevance to the Eighth Amendment, since each state is entitled to determine its own sanctions. The diversity of statutes that Americans have enacted in various jurisdictions demonstrates enormous variation in opinions as to what constitutes a serious offense, inviting judges, the opinion contends, to impose their own subjective values; comparing for purposes of proportionality only what they thought was "comparable."

Justice Kennedy, with whom Justice O'Connor and Justice Souter joined, concurred in the judgment, and indicated a reluctance to agree with either the analysis of *Solem* by Justice Scalia or the dissent authored by Justice White and joined by Justice Blackmun and Justice Stevens. In his opinion, Justice Kennedy stated:

> Consistent with its admonition that "a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate," *id.*, at 290, n. 16, 103 S.Ct. at 3009 n. 16, *Solem* is best understood as holding that comparative analysis within and between jurisdictions is not always relevant to proportionality review. The Court stated that "it *may* be helpful to compare sentences imposed on other criminals in the same jurisdiction," and that "courts *may* find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions." *Id.*, at 291-92, 103 S.Ct., at 3010 (emphasis added). It did not mandate such inquiries.

Harmelin v. Michigan, 111 S. Ct. at 2707. The opinion of Justice Kennedy concludes on the subject with the following:

> The proper role for comparative analysis of sentences, then, is to validate an initial judgment that a sentence is grossly disproportionate to a crime. This conclusion neither "eviscerate[s]" *Solem*, nor "abandon[s]" its second and third factors, as the dissent charges. . . . In light of the gravity of petitioner's offense, a comparison of his crime with his sentence does not give rise to an inference of gross disproportionality, and comparative analysis of his sentence with others in Michigan and across the Nation need not be performed.

111 S. Ct. at 2707.

The Nebraska Court of Appeals cited in its opinion *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991). In *Haynie* we did engage, perhaps inadvisably, in what appears to be a proportionality review of sentences imposed in other cases. However, we were reviewing sentences imposed by the trial court totalling not less than 68 years nor more than 185 years. Although we did not make reference to an "inference of gross disproportionality," it is quite apparent that we reached such a conclusion in declaring that "the sentences constitute an abuse of discretion"; i.e., they shocked the court's conscience. *Id.* at 493, 476 N.W.2d at 915.

The problem with an appellate court reviewing other "similar" cases is the difficulty of determining that they were similar. Referring only to the printed opinions found in our published reports, we are not able to fully comprehend the facts and circumstances with which the sentencing judge had to deal.

We agree with the language of Justice Kennedy's concurring opinion in *Harmelin* and hold that comparative analysis of sentences is useful only to validate an initial judgment that a sentence is so grossly disproportionate to a crime as to be excessive, but such analysis by an appellate court is not mandatory.

Having found that the trial court did not abuse its discretion in imposing a sentence within the limitations of the statutory law, we determine that the sentence was not excessive. Accordingly, we reverse the judgment of the Nebraska Court of

Appeals and remand the cause with direction to affirm the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. CARLA PHILIPPS, APPELLANT.

496 N.W.2d 874

Filed March 12, 1993. No. S-91-1016.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.
2. _____: _____. The issue in reviewing a sentence is not whether someone else in a different case received a lesser sentence, but whether the defendant in the subject case received an appropriate one.
3. _____: _____. To the sentencing court and not to an appellate court is entrusted the power to impose sentences for the commissions of crimes against the State; the judgment of the sentencing court cannot be interfered with in the absence of an abuse of discretion.
4. **Sentences.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
5. _____. In imposing a sentence, a sentencing court is to consider the defendant's age, mentality, education, experience, and social and cultural background, as well as her or his past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and WRIGHT, Judges, on appeal thereto from the District Court for Lancaster County, PAUL D. MERRITT, JR., Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Mark E. Ford for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

PER CURIAM.

Pursuant to a plea bargain, the defendant-appellant, Carla Philipps, pled nolo contendere to and was adjudged guilty of two counts of attempted theft of property of a value less than $1,000, in violation of Neb. Rev. Stat. §§ 28-201 and 28-511 (Reissue 1989), and one count of theft of property valued at less than $300, in violation of § 28-511. As Class I misdemeanors, § 28-201 and Neb. Rev. Stat. § 28-518 (Reissue 1989), each count carries a maximum penalty of up to 1 year's imprisonment and a $1,000 fine. Neb. Rev. Stat. § 28-106 (Reissue 1989). The district court sentenced Philipps to a term of 1 year's imprisonment on each count, the sentences to run concurrently. Philipps appealed, asserting that the sentences were excessive. The Nebraska Court of Appeals agreed and vacated the sentences, remanding the cause to the district court with the direction that Philipps be sentenced to probation under such terms and conditions as the district court deemed appropriate. The plaintiff-appellee State successfully petitioned this court for further review; we reverse the judgment of the Nebraska Court of Appeals and remand the cause to that court with the direction that it affirm the judgment of the district court.

Philipps was employed by a Lincoln car washing business for nearly 5 years. Her tasks included bookkeeping, keeping the daily receipts, making deposits, and handling money. In early April 1991, she told the assistant manager that the cash register was $350 short. This event caught the attention of the owner of the business, who, on or about April 23, 1991, began closely examining the daily receipts. On that very day, he discovered a shortage of $150 cash. He then began going back through the books over a period of 3 years and discovered a deficit of $350 on both November 8, 1989, and June 11, 1990.

The owner contacted the Lincoln police, who then talked with Philipps. Philipps admitted taking money on April 23, 1991, and opened her purse to reveal $1,080, which she handed over to the police. The money included amounts taken on occasions other than April 23. Philipps also admitted taking money on November 8, 1989, and June 11, 1990.

Although the owner originally estimated that $24,000 could

have been stolen from his business, he, the prosecutor, defense counsel, and Philipps arrived at $10,000 as an approximation of the total amount Philipps had pilfered during her employment. In an effort to make restitution, Philipps turned over to her former employer her profit-sharing program funds, totaling $7,960.14. Also returned was the $1,080 confiscated from Philipps at the time of her arrest, and Philipps paid an additional $959.86 on August 16, 1991.

Philipps has no prior criminal record, took the money because of financial pressures arising at least in part from family medical expenses and home repairs, appeared remorseful, and was, at the time of sentencing, 29 years old and pregnant.

Neb. Rev. Stat. § 29-2308 (Cum. Supp. 1992) provides:

> In all criminal cases that now are or may hereafter be pending in the Court of Appeals or Supreme Court, the appellate court may reduce the sentence rendered by the district court against the accused when in its opinion the sentence is excessive, and it shall be the duty of the appellate court to render such sentence against the accused as in its opinion may be warranted by the evidence. No judgment shall be set aside, new trial granted, or judgment rendered in any criminal case on the grounds of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure if the appellate court, after an examination of the entire cause, considers that no substantial miscarriage of justice has actually occurred.

Relying on the foregoing statute, the Court of Appeals concluded that notwithstanding that the district court had not abused its discretion in sentencing Philipps as it did, the Court of Appeals nonetheless had the statutory duty to reduce the sentences because it deemed them excessive. In doing so, the Court of Appeals cited *State v. Spiegel*, 239 Neb. 233, 474 N.W.2d 873 (1991), which recites that this court may reduce a sentence which in its opinion is excessive, and *State v. Foutch*, 196 Neb. 644, 244 N.W.2d 291 (1976), which proclaims that § 29-2308 authorizes this court to reduce a sentence which appears excessive.

However, the statements in *Foutch* and *Spiegel* must be read in the context of the longstanding and consistently applied rule that a sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. See, e.g., *State v. Reynolds, ante* p. 874, 496 N.W.2d 872 (1993); *State v. Riley, ante* p. 887, 497 N.W.2d 23 (1993); *State v. Tucker, ante* p. 336, 494 N.W.2d 572 (1993); *State v. Hall, ante* p. 92, 492 N.W.2d 884 (1992); *State v. Coleman*, 241 Neb. 731, 490 N.W.2d 222 (1992); *State v. Kincaid*, 203 Neb. 495, 279 N.W.2d 152 (1979).

Indeed, the abuse of discretion standard was found to be intertwined with that of excessiveness at least as early as 1954 in *Taylor v. State*, 159 Neb. 210, 66 N.W.2d 514 (1954), wherein we wrote: "Contrary to defendant's contention, we find nothing in the record before us which could lawfully sustain a conclusion that the trial court abused its discretion and thereby imposed an excessive sentence upon defendant." *Id.* at 215, 66 N.W.2d at 517. See, also, *State v. Etchison*, 188 Neb. 134, 195 N.W.2d 498 (1972) (sentence within statutory limits ordinarily not disturbed unless abuse of discretion occurs; when sentence excessive or not warranted by evidence, § 29-2308 contemplates correction on appeal).

Nor is the fact that on occasion this court has referred to sentences imposed in other cases as a means of illustrating an abuse of discretion, see, e.g., *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991), to be interpreted as meaning that in a nondeath sentence an appellate court is to conduct a de novo review of the record to determine whether a sentence is proportionate and thus appropriate. *State v. Reynolds, supra*; *State v. Riley, supra*; *State v. Hall, supra*. As noted in *State v. Sianouthai*, 225 Neb. 62, 402 N.W.2d 316 (1987), the issue in reviewing a sentence is not whether someone else in a different case received a lesser sentence, but whether the defendant in the subject case received an appropriate one. Moreover, to the sentencing court and not to an appellate court is entrusted the power to impose sentences for the commissions of crimes against the State; the judgment of the sentencing court cannot be interfered with in the absence of an abuse of discretion. See *State v. Hall, supra*.

In rejecting the defendant's argument that § 29-2308 impowered this court to reduce a sentence which in its opinion was excessive, we, in *State v. Orner*, 192 Neb. 523, 222 N.W.2d 819 (1974), wrote:

> The thrust of the defendant's argument is to the effect that this court should sit as an original sentencing court and to determine de novo what the sentence should be. This court has consistently held, as we have noted, that the standard of review in this court is whether there has been an abuse of discretion by the lower court. This court construed the meaning of section 29-2308, R.R.S. 1943, in the case of Bell v. State, 159 Neb. 474, 67 N.W.2d 762, when it said as follows: "Section 29-2308, R.R.S. 1943, which authorizes the Supreme Court to reduce a sentence when in its opinion the sentence is excessive, was not intended by the Legislature as a directive to the court to reduce the sentence in every instance where it is asked, but only in those cases where it is apparent that the *trial court has abused its judicial discretion and fixed a penalty which is clearly excessive.*"

(Emphasis in original.) *Id.* at 524, 222 N.W.2d at 820. See, also, *State v. Cano*, 191 Neb. 709, 217 N.W.2d 480 (1974).

An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Reynolds, supra*; *State v. Riley, supra*; *State v. Hall, supra*; *State v. Coleman, supra*. In imposing a sentence, a sentencing court is to consider the defendant's age, mentality, education, experience, and social and cultural background, as well as her or his past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Reynolds, supra*; *State v. Riley, supra*; *State v. Tucker, supra*; *State v. McCaslin*, 240 Neb. 482, 482 N.W.2d 558 (1992); *State v. Haynie, supra*.

In imposing the sentences at issue, which are within the statutory limits, the district court, acting in accordance with Neb. Rev. Stat. § 29-2260 (Reissue 1989), stated:

> Having regard for the nature and circumstances of the

> crimes, and the history, character and condition of the defendant, the Court finds that imprisonment of the defendant is necessary for the protection of the public because a lesser sentence would depreciate the seriousness of the defendant's crimes and would promote disrespect for the law.

Notwithstanding Philipps' pregnancy and lack of a criminal record, the facts are that she stole from one who placed his trust in her and, through her plea bargain, escaped prosecution as a felon for her violation of that trust.

As the Nebraska Court of Appeals itself concluded, the sentences at issue do not constitute an abuse of discretion. Having so concluded, the analysis of the Nebraska Court of Appeals should have ended and it should have affirmed the judgment of the district court.

Accordingly, as written in the first paragraph of this opinion, we reverse the judgment of the Nebraska Court of Appeals and remand the cause to it with the direction that it affirm the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTION.

FAHRNBRUCH, J., not participating.

SHANAHAN, J., dissenting.

The majority correctly notes that the appellate standard of review in examining an excessive sentence claim is whether the sentencing court abused its discretion in the sentence imposed. However, as pointed out by the State in its petition for further review, the question remains whether the sentence imposed on Carla Philipps must be affirmed in "deference" to the district court which was "in the best position to observe and evaluate the history and current attitude" of a convicted defendant. If an appellate court yields to a sentencing court's judgment for the reason expressed by the State, then a meaningful appellate review of a sentence imposed is but an illusory aspect of due process. For that reason, lest Carla Philipps' appeal become nothing more than a semantic spree, this court should have determined whether the sentencing court abused its discretion by an excessive sentence imposed on Philipps.

Carla Philipps was 29 years of age when she committed the

offenses, and was 30 years old when she was sentenced. Carla's first marriage ended in divorce in November 1985. During that marriage, Carla had two daughters, one of whom is now 11 years old, while the other is 7. Under the divorce decree, Carla's former husband was ordered to pay $200 per month as child support for their daughters, but, by 1991, he was $11,000 delinquent in child support.

Carla married Robert Philipps in 1988. Philipps' son by another marriage also lives with Carla, Robert, and Carla's daughters. I assume that there has been still another addition to the Philipps family, for the record states that Carla was pregnant when sentenced in September 1991 and expected to deliver her child in January 1992.

Carla has no criminal record, is a high school graduate, and has attended a community college where she maintained a GPA of 3.5 on a 4.0 scale. Before committing the offenses charged against her, Carla attended church regularly, took her daughters to Sunday school, and participated in church and school activities. None of her friends has a criminal record.

Carla's husband, Robert, an electrician's apprentice, is sent to a new job location every 6 months, requiring that he be away from home for "extended periods of time," sometimes "weeks at a time."

Extensive medical expenses have been incurred for Robert Philipps' son which are not covered by medical insurance. Carla and Robert owe nearly $7,000 for various reasons, including dental expenses and repairs to their house. Monthly house payments are $533. During her pregnancy, and while awaiting sentencing, Carla obtained a part-time job to help her family. Quite obviously, financial stress on her family was a substantial factor prodding Carla to misappropriate funds from her employer.

Before sentencing, and as acknowledged by both the State and court, Carla made full restitution of $10,000 to her employer. Through her lawyer at the sentence hearing, Carla Philipps asked for a sentence of probation, including electronic monitoring in her home if the court believed that such monitoring was necessary under the circumstances. The probation program available for Carla Philipps was

comprehensive and stringent but reasonable. The sentencing court readily acknowledged: "I am confident that you wouldn't disappoint me on probation. I am confident that you would successfully complete probation." Nevertheless, the court sentenced Carla to 1 year in the Nebraska Center for Women at York because the sentencing judge felt an "obligation to see that the mores, the morals and the standards of society are protected, and the only way that society is protected in that regard is for me to sentence or punish, I mean, somebody so that a message is sent out."

The statutory standard for sentencing contains 11 grounds which "shall be accorded weight in favor of withholding [a] sentence of imprisonment," including the six following factors:

> (f) The offender has compensated or will compensate the victim of his or her crime for the damage or injury the victim sustained;
>
> (g) The offender has no history of prior delinquency or criminal activity and has led a law-abiding life for a substantial period of time before the commission of the crime;
>
> (h) The crime was the result of circumstances unlikely to recur;
>
> (i) The character and attitudes of the offender indicate that he or she is unlikely to commit another crime;
>
> (j) The offender is likely to respond affirmatively to probationary treatment; and
>
> (k) Imprisonment of the offender would entail excessive hardship to his or her dependents.

Neb. Rev. Stat. § 29-2260(3) (Reissue 1989).

Also, more recently, the Nebraska Legislature, referring to a program of intensive supervision as part of a sentence of probation, has expressed its legislative intent and Nebraska's public policy regarding sentencing:

> The Legislature finds and declares that intensive supervision probation programs are an effective and desirable alternative to imprisonment. It is the Legislature's intent to encourage the establishment of programs for the intensive supervision of selected probationers. It is further the intent of the Legislature that

> such programs be formulated to protect the safety and welfare of the public in the community where the programs are operating and throughout the State of Nebraska.

Neb. Rev. Stat. § 29-2262.02 (Cum. Supp. 1992). The foregoing statutory expression is bolstered by the conclusion that probation is preferable to punishment by imprisonment because probation:

> (1) maximizes the liberty of the individual while vindicating the authority of the court; (2) eases the reintegration of the offender into the community; (3) minimizes the hidden costs that imprisonment places on the family of the offender, in the form of both reduced income and enforced separation; and (4) is the most economic form of correctional supervision.

ABA Standards for Criminal Justice at 18.75-76 (2d ed. 1986).

According to the U.S. Supreme Court, the basic purpose of probation is

> to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for his original offense in the event that he abuse this opportunity.

Roberts v. United States, 320 U.S. 264, 272, 64 S. Ct. 113, 117, 88 L. Ed. 41 (1943). See, also, *Burns v. United States*, 287 U.S. 216, 220, 53 S. Ct. 154, 155, 77 L. Ed. 266 (1932): probation is "designed to provide a period of grace in order to aid the rehabilitation of a penitent offender"; Arthur W. Campbell, Law of Sentencing § 5:1 at 100 (2d ed. 1991): the basic goal of probation "is to deter crime by rehabilitating unhardened offenders."

Thus, the objective of sentencing is to individualize the sentence imposed, judging the offender and not just punishing for the offense, or, as Cicero observed some 2,000 years ago: "The punishment shall fit the offense," but "[c]are should be taken that the punishment should not be out of proportion to the offense." In that manner, the punishment should fit both

the offense and the offender to avoid disproportionality between the offense and a sanction for the violation.

As the U.S. Supreme Court has instructed: "It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender . . . ." *Burns v. United States*, 287 U.S. at 220, 53 S. Ct. at 155-56. Moreover, "the punishment should fit the offender and not merely the crime." *Williams v. New York*, 337 U.S. 241, 247, 69 S. Ct. 1079, 1083, 93 L. Ed. 1337 (1949).

On appeal, when Carla claimed that her sentence was excessive, especially in view of her growing family and the family's needs, the State responded: "The fact is that Philipps' breeding habits are wholly irrelevant." Brief for appellee at 6. To refer to parenthood in terms of "breeding habits," likening a human being to some beast or type of livestock, is absolutely outrageous and indefensible, although such unreasonableness does supply insight into the State's view of the sentencing process.

Most assuredly, no one, including Carla Philipps, believes that taking money from one's employer is "business as usual" and, therefore, should go without punishment. However, the severity of the sentence imposed on Carla Philipps appears rather curious when it is compared to sentences imposed on some others. For instance, as reflected in *State v. Jordan*, 240 Neb. 919, 485 N.W.2d 198 (1992), Jordan was initially charged in a two-count information for felony thefts of property valued between $300 and $1,000 and, therefore, was charged with commission of a Class IV felony in each count. A Class IV felony is punishable by a term of 5 years as the maximum imprisonment on conviction and no minimum term of imprisonment. See Neb. Rev. Stat. § 28-105(1) (Reissue 1989). As the result of a plea bargain, the State dismissed one count against Jordan. The district court for Lancaster County, in fact, the same judge who sentenced Carla Philipps, sentenced Jordan to probation with residential electronic monitoring in addition to other standard provisions for probation. Jordan made restitution for his felony theft; Carla Philipps made restitution for her misdemeanor convictions. Jordan's restitution was a factor for probation; restitution in Carla

Philipps' case did not avoid imprisonment, notwithstanding that the sentencing court expressed no doubt whatsoever that Carla Philipps would comply with whatever might be contained in a probation order. Just as curious is the case of Daniel Muratella who was initially charged with intending to distribute cocaine in his possession, a Class II felony punishable by imprisonment for 1 to 50 years, but who later entered his guilty plea to the reduced charge of simple possession of cocaine, a Class IV felony. Muratella was sentenced to probation by the district court for Lancaster County. Muratella's probation included electronic monitoring in his residence. See *State v. Muratella*, 240 Neb. 567, 483 N.W.2d 128 (1992). Muratella got probation for a felony drug conviction; Carla Philipps got a jail term for misdemeanor theft. This does not imply that the sentencing courts in *Jordan* or *Muratella* were incorrect in the sentences imposed in those cases. Rather, in *State v. Riley, ante* p. 887, 893, 497 N.W.2d 23, 27 (1993), we noted that, although a comparative analysis of sentences is not mandatory in examining an excessive sentence claim, comparative analysis may be used "to validate an initial judgment that a sentence is so grossly disproportionate to the crime as to be excessive."

Thus, while this court has rejected a mandatory comparative analysis and proportionality review in reference to an excessive sentence claim, the mind boggles and then blushes when the sentence imposed on Carla Philipps is placed beside the sentences of probation for Jordan and Muratella.

In Carla Philipps' case, the sentencing court completely ignored her past life and habits as important factors for determination of an appropriate sentence. Moreover, 6 of the 11 factors in § 29-2260, favoring probation over imprisonment, are present in Carla Philipps' case. The record contains nothing to indicate that Carla Philipps' offenses received any notoriety. Regarding a "message" sent by imprisonment of Carla Philipps, the Nebraska Court of Appeals made a common sense observation:

> Imprisoning a woman who works in a carwash seems unlikely to have any deterrent effect on those in positions of substantial trust, power, and influence who might be tempted to help themselves to substantial funds entrusted

> to their care. This is not to excuse in any way Philipps' behavior or the seriousness of the crime that she has committed. It is, however, to say that the deterrent effect to others which might occur from her imprisonment is quite minimal.

State v. Philipps, 1 NCA 1251, 1255 (1992). In the same vein, there is

> doubt whether most sentences ever register on the consciousness of the community. Only a smattering of the thousands of sentences imposed each day throughout the nation are reported in the mass media. Even the few sensational cases that are reported seldom present the judge's sifting of subtle competing factors, particularly those found in confidential reports and studies.

Arthur W. Campbell, Law of Sentencing § 2:3 at 27 (2d ed. 1991). Since the mores and morals of Lancaster County did not, at last report, disintegrate as the result of the sentences of probation granted to Jordan and Muratella, it is extremely unlikely that allowing Carla Philipps to remain with her family through probation would unravel the county's moral fabric.

Moreover, offenders sentenced to probation can be supervised at a fraction of the cost for their incarceration and can continue to support their own families. Nevertheless, Philipps was sentenced to 1 year's imprisonment. Currently, the State spends $68.89 per day to maintain a prisoner in the Nebraska Center for Women. Consequently, it will cost the State between $12,500 and $25,000 to keep Carla Philipps behind bars, depending on whether she serves the full term of her 1 year sentence or is released after serving the minimum time of incarceration. See Neb. Rev. Stat. § 83-1,107 (Cum. Supp. 1992).

There is every reasonable indication that probation with a prudent program of rehabilitation will eliminate Carla Philipps' criminal inclination because "the best way to discourage criminal activity is to offer skills, motivation, and employment opportunities that will reorient offenders toward socially productive behavior." Campbell, *supra* § 2:4.

In conclusion, there was an abuse of discretion by imposing an excessive sentence on Carla Philipps. The Nebraska Court of

Appeals was correct in remanding Carla Philipps' case to the district court for a sentence of probation. "The quality of mercy is not strain'd" in Carla Philipps' case; it's ruptured.

LANPHIER, J., joins in this dissent.

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

497 N.W.2d 346

Filed March 12, 1993. No. S-92-095.

1. **Parental Rights: Appeal and Error.** An appellate court must decide a case involving termination of parental rights de novo on the record.
2. _____: _____. In an appeal from a judgment terminating parental rights, an appellate court tries factual questions de novo on the record, which requires an appellate court to reach a conclusion independent of the findings of the trial court, but when evidence is in conflict, an appellate court considers and may give weight to the fact that the trial court observed witnesses and accepted one version of the facts rather than another.
3. **Parental Rights.** The primary consideration in determining whether to terminate parental rights is the best interests of the child.
4. _____. When a parent is unwilling or unable to rehabilitate herself or himself within a reasonable period of time after the adjudication hearing, the best interests of the child usually require that a final disposition be made without delay.
5. _____. When a parent fails to make reasonable efforts to comply with a court-ordered rehabilitative plan, the parent's failure presents an independent reason justifying termination of parental rights.
6. **Parental Rights: Juvenile Courts.** After an adjudication under § 43-247(3)(a) of the Nebraska Juvenile Code and before entering an order containing a rehabilitative plan for a parent, a juvenile court shall inform the juvenile's parent that the court may order a rehabilitative plan. Thereafter, the court shall hold an evidential hearing to determine reasonable provisions material to the parental plan's rehabilitative objective of correcting, eliminating, or ameliorating the situation or condition on which the adjudication has been obtained.
7. **Parental Rights: Rules of Evidence.** Because the evidential hearing for a rehabilitative plan is a dispositional hearing, the Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-101 to 27-1103 (Reissue 1989), shall not apply at such hearing.
8. **Parental Rights: Juvenile Courts: Records.** The record of proceedings before a juvenile court shall contain the evidence presented at the dispositional hearing held for the purpose of the parental rehabilitative plan. The juvenile court's

specific findings of fact supporting the provisions contained in the parental rehabilitative plan shall be stated in the record.

9. **Parental Rights: Rules of Evidence: Due Process.** Regardless of the fact that the Nebraska Rules of Evidence are inapplicable to a dispositional hearing, the requirements of due process control a proceeding to terminate parental rights and the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated.

10. _____: _____: _____. It is obvious that fundamental due process is difficult to define. With reference to the evidence that is to be considered in a parental rights termination case, it is further obvious that in determining whether or not fundamental due process has been afforded to all persons interested in the proceedings, the Nebraska Rules of Evidence provide a guidepost to that determination.

11. **Parental Rights: Evidence: Due Process.** Fundamental fairness, at the very least, requires the adducing of appropriate evidence as a factual foundation for a rehabilitative plan which eventually may be used as a ground or condition for termination of parental rights. If a court's order for a rehabilitative plan is not supported by the record, the plan may be some pro forma judicial inscription of activity which occurred outside the open courtroom or an unsubstantiated order which necessarily would be characterized as an arbitrary act. Either situation may deny due process.

12. **Collateral Attack: Jurisdiction.** Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter.

13. **Parental Rights: Evidence: Appeal and Error.** The improper admission of evidence by the trial court in a parental rights termination proceeding does not, in and of itself, constitute reversible error, for, as long as an appellant properly objected at trial, this court will not consider any such evidence in its de novo review of the record.

14. **Parental Rights: Proof.** To justify termination of parental rights under the provisions of Neb. Rev. Stat. § 43-292(2) (Reissue 1988), the State must prove by clear and convincing evidence that a parent has substantially and continuously or repeatedly neglected the child.

15. _____: _____. In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, termination of parental rights is permissible when the basis for such termination is provided by clear and convincing evidence.

16. _____: _____. Regarding parental noncompliance with a court-ordered rehabilitative plan, under Neb. Rev. Stat. § 43-292(6) (Reissue 1988), as a ground for termination of parental rights, the State must prove by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child.

17. **Parental Rights.** A provision in a rehabilitative plan is material to rehabilitation of a parent if such provision tends to correct, eliminate, or ameliorate the

situation or condition on which an adjudication is obtained under the Nebraska Juvenile Code.

18. **Evidence: Words and Phrases.** Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
19. **Parental Rights: Juvenile Courts.** It is the court, not the parent, which determines whether a recommendation by a counselor is unreasonable.
20. **Parental Rights.** The right of a parent to custody and control of his or her children is not an inalienable right. The public has a paramount interest in the protection of children from neglect.
21. **Pretrial Procedure: Proof: Appeal and Error.** A party who challenges a trial court, asserting that the court abused its discretion with regard to sanctions imposed for discovery violations, must show that the ruling of a court was clearly untenable, depriving the litigant of a substantial right and denying a just result in the matter submitted for disposition.
22. **Constitutional Law: Statutes.** Statutory provisions do not overcome constitutional rights.
23. **Parental Rights.** A child cannot, and should not, be suspended in foster care, or be made to await uncertain parental maturity.
24. _____. It is not necessary that the court await the time that the child shows permanent scars of a parent's anger and impulsivity before acting to terminate the relationship.

Appeal from the County Court for Platte County: GERALD E. ROUSE, Judge. Affirmed.

Eugene G. Schumacher, of Luckey, Sipple, Hansen, Emerson & Schumacher, for appellant.

Jeffrey S. Golden, Deputy Platte County Attorney, and Clark J. Grant, guardian ad litem, for appellee.

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

HASTINGS, C.J.

Appellant, D.H., appeals the termination of her parental rights to her son, J.H., pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1988).

The child who was born July 24, 1990, was placed in protective custody of the Department of Social Services (DSS) at 2 months of age, after being brought to the hospital by two teenagers who had been caring for him. Upon admission to the hospital, the child was 13 oz. below his birth weight, had severe diaper rash, and a gag reflex that only permitted him to ingest

small amounts of food at a time. The protective service worker found, although she gave no basis for her findings, that the child's 18-year-old mother had little or no awareness of the child's basic needs, showed no remorse, lacked the knowledge, skill, or motivation necessary in parenting to protect the child, and could not explain the child's condition.

The mother attended scheduled visits sporadically and on May 10, 1991, left the state of Nebraska for Texas for a period of roughly 3 months. Although the mother did phone DSS on her child's birthday, she had not attempted to initiate contact with him since the previous April and ultimately did not visit him until August 28, 1991—a period of 4½ months. She offered no explanation for her absence, although she asserts that a friend had represented to her that her parental rights had already been terminated, and thus, the mother saw little reason to continue directing efforts toward reunification with her son.

The State and the child's guardian ad litem (GAL) jointly filed a motion to terminate parental rights on November 15, 1991. After 5 days of hearing, the court entered an order terminating appellant's parental rights on January 14, 1992.

The mother alleges, in summary, that the county court, sitting as a juvenile court, erred in the following respects:

1. Overruled the motion to strike where the court had failed to hold an evidential hearing to determine reasonable provisions material to the case plan's rehabilitative objectives of correcting, eliminating, or ameliorating the situation or condition on which the adjudication had been obtained and had further failed to make specific findings of fact supporting the provisions contained in the case plan;

2. Overruled the mother's motion for declaratory judgment challenging the constitutionality of Neb. Rev. Stat. § 43-285(2) (Reissue 1988) to the extent that the court relied upon the statute for purposes of overruling the motion to strike;

3. Found clear and convincing evidence that the mother had failed to follow the court-ordered case plan to rehabilitate herself so that her son could be returned to her;

4. Failed to find that the provisions of the case plan were not material, reasonable, and necessary to correct, eliminate, and ameliorate the situation or condition on which the adjudication

had been obtained;

5. "Impermissibly" delegated its judicial responsibility by leaving the nature and frequency of the counseling to be administered through the rehabilitative plan to the discretion of DSS;

6. Found that clear and convincing evidence established that the mother substantially, continually, and repeatedly neglected her minor child;

7. Found clear and convincing evidence that the child's interests were best served by terminating the parental rights of his mother;

8. Allowed a caseworker to render an opinion that the mother's rights should be terminated and that it was in the juvenile's best interest that the mother's rights be terminated;

9. Granted the motion in limine filed by the State and GAL, prohibiting the mother from adducing testimony of Dr. Sanders, and denying the mother due process of law;

10. Denied the mother's motion to strike testimony of a Dr. Huebner after granting the State's motion in limine;

11. Admitted exhibits and testimony which consisted of hearsay and which deprived the mother of her right to confront and cross-examine; and

12. Sustained the State's objection which prevented the mother from adducing testimony as to whether the natural father's parental rights had been terminated.

An appellate court must decide a case involving termination of parental rights de novo on the record, in keeping with our holdings in *In re Interest of S.B.E. and D.E.*, 240 Neb. 748, 484 N.W.2d 97 (1992); *In re Interest of C.W., M.W., K.W., and J.W.*, 239 Neb. 817, 479 N.W.2d 105 (1992).

In an appeal from a judgment terminating parental rights, an appellate court tries factual questions de novo on the record, which requires an appellate court to reach a conclusion independent of the findings of the trial court, but, when evidence is in conflict, an appellate court considers and may give weight to the fact that the trial court observed witnesses and accepted one version of the facts rather than another. *In re Interest of M.P.*, 238 Neb. 857, 472 N.W.2d 432 (1991).

The primary consideration in determining whether to

terminate parental rights is the best interest of the child. When a parent is unwilling or unable to rehabilitate herself or himself within a reasonable period of time after the adjudication hearing, the best interests of the child usually require that a final disposition be made without delay. *In re L.J., M.J., and K.J.*, 238 Neb. 712, 472 N.W.2d 205 (1991). Furthermore, when a parent fails to make reasonable efforts to comply with a court-ordered rehabilitative plan, the parent's failure presents an independent reason justifying termination of parental rights. *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

In the mother's first two assignments of error, she contests first the court's overruling of a motion to strike where the court had failed to hold an evidential hearing to determine reasonable provisions material to the case plan's rehabilitative objectives of correcting, eliminating, or ameliorating the situation or condition on which the adjudication had been obtained and had further failed to make specific findings of fact supporting the provisions contained in the case plan. Secondly, she complains that the court ought not to have overruled her motion for declaratory judgment challenging the constitutionality of § 43-285(2) to the extent that the court relied upon the statute for purposes of overruling the mother's motion to strike.

It is well settled in Nebraska law that after an adjudication under § 43-247(3)(a) of the Nebraska Juvenile Code and before entering an order containing a rehabilitative plan for a parent, a juvenile court shall inform the juvenile's parent that the court may order a rehabilitative plan. Thereafter, the court shall hold an evidential hearing to determine reasonable provisions material to the parental plan's rehabilitative objective of correcting, eliminating, or ameliorating the situation or condition on which the adjudication has been obtained. Because the evidential hearing for a rehabilitative plan is a dispositional hearing, the Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-101 to 27-1103 (Reissue 1989), shall not apply at such hearing. The record of proceedings before a juvenile court shall contain the evidence presented at the dispositional hearing held for the purpose of the parental rehabilitative plan. The juvenile court's specific findings of fact supporting the

provisions contained in the parental rehabilitative plan shall be stated in the record. *In re Interest of J.S., A.C., and C.S., supra.*

Regardless of the fact that Nebraska's Rules of Evidence are inapplicable to a dispositional hearing, the requirements of due process control a proceeding to terminate parental rights and the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated. See, also, *In re Interest of C.W., M.W., K.W., and J.W.*, 239 Neb. 817, 479 N.W.2d 105 (1992); and *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

As this court commented in *In re Interest of C.W., et al., supra* at 823, 479 N.W.2d at 111:

> "[i]t is obvious that fundamental due process is difficult to define. With reference to the evidence that is to be considered in a parental rights termination case, it is further obvious that in determining whether or not fundamental due process has been afforded to all persons interested in the proceedings, the Nebraska Rules of Evidence provide a guidepost in that determination."

Fundamental fairness, at the very least, requires the adducing of appropriate evidence as a factual foundation for a rehabilitative plan which eventually may be used as a ground or condition for termination of parental rights. If a court's order for a rehabilitative plan is not supported by the record, the plan may be some pro forma judicial inscription of activity which occurred outside the open courtroom or an unsubstantiated order which necessarily would be characterized as an arbitrary act. Either situation may deny due process. *In re Interest of J.S., A.C., and C.S., supra.*

As a threshold matter, the court did hold a dispositional hearing in which the parties *stipulated* that DSS had "made reasonable efforts for the child to be in the home, or that reasonable efforts could not be made and that the child has to be out of the home because it would be in danger." Counsel for the mother stated to court verbatim, as follows:

> MR. SCHUMACHER: Your Honor, I've gone over the case plan with my client and she had previously gone over it with the members from the Department of Social

Services. And she's aware of—of what the recommendations are and what the program that's outlined in the case plan and she's aware that the visitations will increase after the first of the year at least duration wise. And she's willing to follow the recommendations or at least the schedule and the—the—the various goals and services which have been outlined in it. And we'd have—We have no objection to the case plan and—and would ask that the Court approve it.

THE COURT: She's willing to undergo the educ—or the counseling and the family assessment and the psychological evaluation?

(THE MOTHER): Yes, Your Honor.

THE COURT: And this is—Does she understand the permanency objective for (the child) is reunification with her?—See what—Do you understand that?

(THE MOTHER): Yes, I do.

THE COURT: And this is suppose [sic] to be accomplished by June of 1991?

(THE MOTHER): Yes, I do.

THE COURT: I noticed in the report that some of the visitations were not kept. Some of 'em—A couple of 'em were excused, but some of 'em weren't. Do—I would like to stress to you that because of the age of (the child), it would be important that you keep all visitations so that his bonding to you could be met. And you're agreeable to that?

(THE MOTHER): Yes.

Our review of the plan admitted into evidence at this evidential hearing revealed a rather vague set of descriptions of the goals (e.g., work on self esteem, identify how actions or inactions brought the child to the attention of the court system, identify how past experiences have affected current functioning in relation to herself, others, and the child); and the instrumentalities (e.g., individual counseling) in which those goals were to be met. While we realize that psychology and mental health are, in no way considered to be exact sciences, we do expect mental health professionals to be clear in their

explanations of the behaviors and goals they are expecting. While the court did not read a verbatim account of the rehabilitative plan into the record, he did ask the mother in plain terms to determine whether she did indeed understand the various goals she would need to accomplish in order to gain custody of her son again. The mother stated that she understood and approved of the plan. Her attorney stipulated with the State and GAL a joint acceptance of the finding of reasonable efforts and the terms of the plan and furthermore, affirmatively asked that the plan be approved.

Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter. *In re Interest of C.W., M.W., K.W., and J.W.*, 239 Neb. 817, 479 N.W.2d 105 (1992). On that basis alone, we find it unnecessary that we address that issue further.

As for the constitutionality of Neb. Rev. Stat. § 43-285(2) (Reissue 1988 & Cum. Supp. 1992), we find that due process was indeed accorded to the mother. The concern surrounding the statute (which allows the court to disapprove a plan when any party proves by a preponderance of the evidence that the plan is not in the juvenile's best interests) and its constitutionality focuses on the right of a parent to not be required to perform unreasonable tasks nor prove a negative burden—that the plan is not in the child's best interests.

While the concern is certainly a legitimate one, not to mention constitutionally grounded, nothing in the statute or constitution relieves a party of the responsibility for objection at an evidential hearing held precisely for that purpose. As we have held, the improper admission of evidence by the trial court in a parental rights termination proceeding does not, in and of itself, constitute reversible error, for, as long as an appellant properly objected at trial, this court will not consider any such evidence in its de novo review of the record. *In re C.K., L.K., and G.K.*, 240 Neb. 700, 484 N.W.2d 68 (1992); *In re Interest of C.W., M.W., K.W., and J.W., supra.*

As the mother voiced no objection to the rehabilitation plan, with the exception of the reunification date, her first two assignments of error are without merit.

In her fourth assignment of error, the mother alleges that the provisions of the case plan were not material, reasonable, and necessary to correct, eliminate, and ameliorate the situation or condition on which the adjudication had been obtained. As previously discussed, the mother did not object, properly or otherwise, that any of the provisions of the case plan were in any way unacceptable or unreasonable. This assignment is without merit.

We next address the mother's assignment that the court "impermissibly" delegated its judicial responsibility by leaving the nature and frequency of the counseling to be administered through the rehabilitative plan to the discretion of DSS. Again, the mother did not object to the counseling provision in the dispositional hearing. In any event, the assignment is, at the very least, an erroneous and misleading statement. The court must depend, to some extent, on the recommendations of DSS in determining what course of rehabilitation is appropriate or there would be no need for DSS to exist. While the name of the counselor, and the nature and frequency of the counseling could have been specified in the plan, such a mandate would not be advisable. The initial counselor selected for a client may not be well suited to the client's needs and selecting a different counselor may be appropriate. Furthermore, the nature and frequency would necessarily and should be determined by the counselor or therapist who is trained to assess the mental state and estimate what course of therapy is advisable. Tailoring the rehabilitation plan too narrowly in these circumstances can only serve to undermine the parent's progress and require needless court time to re-approve necessary changes.

We next address the mother's third, sixth, and seventh assignments which alleged court error in finding clear and convincing evidence that (a) the mother had failed to follow the court-ordered case plan to rehabilitate herself so that her son could be returned to her, and (b) that she substantially, continually, and repeatedly neglected her minor child, and furthermore, (c) that the child's interests were best served by terminating the parental rights of his mother. This Court has consistently maintained, as a common tenet of Nebraska law, that to justify termination of parental rights under the

provisions of Neb. Rev. Stat. § 43-292(2) (Reissue 1988), the State must prove by clear and convincing evidence that a parent has substantially and continuously or repeatedly neglected the child. *In re Interest of S.B.E. and D.E.*, 240 Neb. 748, 484 N.W.2d 97 (1992).

In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, termination of parental rights is permissible when the basis for such termination is provided by clear and convincing evidence. *In re Interest of S.B.E. and D.E., supra*; *In re Interest of T.C.*, 226 Neb. 116, 409 N.W.2d 607 (1987).

Regarding parental noncompliance with a court-ordered rehabilitative plan, under Neb. Rev. Stat. § 43-292(6) (Reissue 1988), as a ground for termination of parental rights, the State must prove by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child. *In re Interest of L.H.*, 227 Neb. 857, 420 N.W.2d 318 (1988).

A provision in a rehabilitative plan is material to rehabilitation of a parent if such provision tends to correct, eliminate, or ameliorate the situation or condition on which an adjudication is obtained under the Nebraska Juvenile Code. *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of M.P.*, 238 Neb. 857, 472 N.W.2d 432 (1991); *In re Interest of J.S., A.C., and C.S., supra*.

Turning to the evidence gleaned from the record, we found some of the behaviors of this DSS' office less than satisfactory. When the mother was late to an appointment or if the appointment had to be cancelled due to weather, a holiday, or if the child was ill, DSS would count the appointment as a missed appointment (or a no-show). Caseworker Joy Loeschen admitted that, once the GAL filed his initial motion to

terminate parental rights in this case, her goal became focused on termination. Loeschen testified in her deposition that, even if the mother had—on her return to Nebraska in August, 1990—been consistent with visitation and the requirements of the case plan, her decision to terminate still would not have changed. DSS checked up on the mother after she had cancelled visits due to a doctor appointment and for an interview out of town and, upon learning that she did not have a doctor appointment or a job interview at that location, made no effort to ascertain whether there had been a reasonable explanation for the incongruencies. (As for the job interview, the mother did show up at the IBP facility at the time she asserted that she had 'an interview' and filled out an application.)

DSS was well aware that the mother herself had been a ward of the State up until recently, with little guidance in the way of role modeling for effective parenting skills. Her father was an alcoholic and her mother suffered from severe emotional problems and was still suffering the consequences of a suicide attempt via ingesting DRANO. It seems logical to assume that this particular mother would need more assistance in an advocative relationship with DSS than she received.

Any request of a parent in a rehabilitation plan must be reasonable and in keeping with the specific provisions of the rehabilitation plan approved by the court. If a parent does not comply with an unreasonable request of a counselor, the parent should not be penalized. *By the same token*, a parent should be made aware that it is the court, not the parent, which determines whether a recommendation by a counselor is unreasonable. See *In re D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992).

We do not see evidence that the requests by DSS were unreasonable. We do recognize that DSS was somewhat uncooperative, adversarial, and frustrating about the matter. Nevertheless the evidence was clear and convincing that the mother failed to follow the court-ordered rehabilitative plan, that she continued to neglect her son, and that her son's interests were best served by termination.

While DSS' adversarial tactics and lack of cooperativeness are not to be endorsed or condoned and we certainly

understand the mother's frustration with the matter, the evidence remains clear that she was the party ultimately responsible for her failure to correct the conditions which led to the juvenile court's intervention. Indeed the mother took a situation—which initially appeared to be an infant's neglect as a result of a mother's immaturity—and exacerbated the matter into what comes dangerously close to the legal definition of abandonment.

She asserted that the reason for her disappearing act was due to the fact that the visits were too emotional for her and that she "felt as if [DSS] was not working towards reunification . . . sometimes stated goals and underlying goals are two different things".

The mother martyred her cause when her son was not responding to her like a son should, "He had his foster parents. He had his own babysitter. He had everything he needed. I was unwanted baggage in his life at that point in time". She tended to avoid her obligations by "forgetting", not following through, and generally believing that she's doing a better job at something than she is. The mother cancelled appointments to see her son because she "had to clean her house", or was too tired. She agreed that she was intelligent with no difficulty in learning, but qualified that "I do lack a lot of common sense".

Often during visits, the mother would simply leave her son in his car seat. If he cried, she would leave him in the seat and give him a bottle. Rather than interact with her child, she would talk to the supervising caseworker about what she needed to do in order to get her son back, while he lay on the floor or sat in the car seat.

The record is replete with indications that the mother's priorities were not located with her son until termination proceedings were implemented and, effectively, it was too late.

As Dr. Huebner testified, "[I]t's very poor for a child's healthy development to have lots of changes in caregivers or instability in their caregivers" When asked how long the child could wait for his mother to mature, Dr. Huebner responded "that some evidence suggests it's already too late . . . the foundation of whole attachment relationships are basically done in the first year of life . . . [C]hildren with disrupted

attachments early in infancy and early childhood show the . . . greater degree of disturbance in relationships . . . and normal maturational functioning later in life."

The right of a parent to custody and control of his or her children is not an inalienable right. The public has a paramount interest in the protection of children from neglect. *In re L.J., M.J., and K.J.*, 238 Neb. 712, 472 N.W.2d 205 (1991).

These assignments of error are without merit.

We consider the mother's contention that the court erred in allowing a caseworker to render an opinion that the mother's rights should be terminated and that it was in the juvenile's best interest that the mother's rights be terminated. Such opinions were just that, and although not required, it was certainly within the court's discretion to ask for recommendations from "experts" on the case, in this case the case-worker, the doctor conducting the psychological evaluation, and the GAL. The court received such opinions, not as conclusive evidence which relieved the court of the ultimate responsibility for determination, but as opinions from experts—whom the court could choose to rely upon or not. That assignment is without merit.

Regarding the mother's complaint that the sustaining of the motion in limine filed by the State and GAL not only prohibited the mother from adducing testimony of Dr. Sanders, but also denied the mother due process of law, we look to the record.

While it is unclear from the record whether the mother's counsel turned over the entire case file or just a portion of it, the court concluded that the documents submitted for Dr. Sanders' review in his capacity as an expert witness included sensitive court records which were subject to the court's protection order.

A party who challenges a trial court, asserting that the court abused its discretion with regard to sanctions imposed for discovery violations, must show that the ruling of the court was clearly untenable, depriving the litigant of a substantial right and denying a just result in the matter submitted for disposition. *In re Interest of C.W., M.W., K.W., and J.W.*, 239 Neb. 817, 479 N.W.2d 105 (1992).

The protective order itself directed, "[t]hat those documents to be produced by the State of Nebraska and the Nebraska

Department of Social Services shall be regarded as confidential and shall not be used by the Defendant for any purpose whatsoever *except for use in preparing for and in trial of the above-titled matter*; . . . ." (Emphasis supplied.)

Dr. Sanders had been asked by counsel for the mother to perform a psychological evaluation on the mother. The psychologist was furnished various DSS records including police records, a psychological report of Dr. Huebner, hospital records, court orders, case plans, visitation notes, case plan reviews, correspondence, Foster Care Review Board reports and other related documents which he deemed necessary in order to adequately conduct such an evaluation. In his words: "[T]he more information that's available, the more data I have the more accurate and more complete the psychological evaluation can be. And its [sic] always necessary to have background information on the individual that I'm evaluating." Dr. Sanders' report of some seven pages is found in the record as exhibit 49 received only as an offer of proof.

In the first place, the record does not establish that any of the materials supplied to Sanders came within the purview of the protective order. However, even if the record had established such to be the case, the record fails to demonstrate that the materials were used for any purpose other than in the preparation for and the trial of this cause, just as the order permits. Accordingly, the juvenile court erroneously concluded that the mother had violated its protective order.

That brings us to Neb. Rev. Stat. § 43-2,108 (Reissue 1988), which provides that with certain exceptions not relevant here, "the medical, psychological, psychiatric, and social welfare reports and the records of juvenile probation officers as they relate to individual proceedings in the juvenile court shall not be open to inspection, without order of the court . . . but shall not be made available by such judge to the parties or their counsel." It is possible that this section formed the basis for the juvenile court's protective order.

However, statutory provisions do not overcome constitutional rights. *State ex rel. Caldwell v. Peterson*, 153 Neb. 402, 45 N.W.2d 122 (1950) (Legislature cannot lawfully act beyond limits of Constitution). Since Star Chamber

proceedings were abolished long ago, *Parker v. Roth*, 202 Neb. 850, 278 N.W.2d 106 (1979), it may be that a statute which undertakes to secrete from a party information provided to the tribunal which uses that same information in adjudicating that party's parental rights offends due process. See, also, *In re Complaint Against Staley*, 241 Neb. 152, 486 N.W.2d 886 (1992) (juvenile court is not Star Chamber where proceedings may be conducted in secrecy). However, inasmuch as this case mounts no constitutional attack on § 43-2,108, it is unnecessary to reflect further upon the constitutional concerns that statute evokes.

Having determined that the trial court erred in failing to permit the evidence tendered by the mother from Dr. Sanders, we conclude that the mother suffered no prejudice because we consider his evaluation from the offer of proof in our de novo review of the record.

Dr. Sanders found nothing remarkable about this case. Much of his information came from sources which have previously been quoted in this opinion. He found that the mother was defensive because of her previous experience with DSS. She maintained a clean, adequate home. The mother blamed some of her shortcomings on the fact that she lived with her grandmother, from ages 11 to 17, whom she described as one who condemned "everything and everybody." Dr. Sanders agreed that there was sufficient evidence of the child's poor physical condition "to take action to protect (the child), and upon his release from the hospital he was placed in a foster home by DSS." It was also recited by Dr. Sanders that the mother's visits with her son were somewhat irregular, many visits having been cancelled by the mother, some listed as "no show, no call", and that the mother was often late.

Dr. Sanders concluded his evaluation with the opinion that the mother "has the potential to become a responsible loving and nurturing parent." He then listed 11 components of a suggested "new plan" for reunification.

Having reviewed the evidence consisting of Dr. Sanders' evaluation against the testimony of Dr. Huebner and the many exhibits in this voluminous record, we conclude that his evaluation is not sufficient to overcome the conclusions which

we must and do draw from the whole record, as our later decision will demonstrate.

The court's denial of the mother's motion to strike testimony of Dr. Huebner was appropriate. Dr. Huebner testified as the court's expert witness and performed the court-ordered psychological evaluation of the mother. She presents no evidence that Dr. Huebner received confidential information in violation of the protection order or any statute, namely, § 43-2,108(4).

The mother next contends that the court abused its discretion and committed prejudicial error by admitting exhibits and testimony containing hearsay and depriving the mother of her rights to confront and cross-examine.

The mother first contests the admission of exhibit 2. The court clearly and appropriately admitted the exhibit as a business record "—for the purpose of showing what interest the Department of Social Services had in the matter. And not necessarily that—as to whether or not the facts stated in the business record are true or not true by other witnesses, but that [DSS] . . . had this information available to him [sic] and they were acting on it."

The mother generally further alleges that exhibits 5, 10, 12, and 13 all are replete with hearsay and double hearsay, but does not specify in what ways. As mentioned above, the Nebraska Rules of Evidence do not apply to juvenile proceedings, but merely provide a guidepost in the determination of fundamental due process. See *In re Interest of C.W., et al., supra*. The mother's due process rights were not violated and the assignment is without merit.

Finally, as to the mother's contention that she ought to have been allowed to adduce testimony as to whether the child's father's parental rights had been terminated, the assignment is without merit. Such evidence is in no way relevant upon the issue of whether the mother's own parental rights should be terminated. Certainly, such evidence is not only appropriate, but required at such time as the child would be placed and decreed for adoption, but not at the termination level of the proceedings.

In light of a thorough evaluation of the foregoing

assignments of error, this appears to be classic example of a mother giving birth and electing to keep a child when she is too emotionally immature to effectively handle the responsibility. We recognize that, while the initial circumstances which brought the child into the court system were not particularly alarming in light of the lack of experience an 18-year-old brings to child rearing, we would expect some common sense and initiative to be utilized by a young mother to ensure prevention of a "repeat performance." While the mother may well be an intelligent young woman with an abundance of potential, the fact remains that she has chosen a path of uncooperativeness in which she has been refusing to make anything more than an insignificant effort to utilize that potential or exhibit sufficient motivation to take the measures necessary to regain custody of her child. While we cannot condone the sloppy and adversarial manner in which this DSS office handled this matter, the blame for the failure to correct the conditions remains with the mother.

A child cannot, and should not, be suspended in foster care, or be made to await uncertain parental maturity. *In re D.A.B. and J.B.*, 240 Neb. 653, 658, 483 N.W.2d 550 (1992); *In re L.J., M.J., and K.J.*, 238 Neb. 712, 472 N.W.2d 205 (1991). As we held in *In re Interest of C.W., M.W., K.W., and J.W., supra*, "[T]he evidence supports a causal relationship between the mother's behavior and likely damage to the children, and we will not ask the children to wait and see whether their mother grows up in the future. She has not found the incentive to mature and change her lifestyle over the years this case has been progressing through the juvenile court, when that was the only obstruction to having her children returned to her." *Id.* at 831.

It is not necessary that the court await the time that the child shows permanent scars of a parent's anger and impulsivity before acting to terminate the relationship. *In re Interest of J.D.M.*, 230 Neb. 273, 430 N.W.2d 689 (1988).

At this time, the child is over 2 years of age and has been in the State's custody since he was 2 months old. He needs stability and parental figures in his life upon whom he can depend. We will not ask him to wait any longer. The best interests of the child cry for stabilization of his environment.

The termination of the mother's parental rights is affirmed, with a directed reminder to expeditiously, yet comporting with due process, commence proceedings to determine the rights of the biological father, so that the child's rehabilitation and stabilization will not be delayed any longer than necessary.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TERRANCE L. JOHNSON, APPELLANT.

497 N.W.2d 28

Filed March 12, 1993. No. S-92-179.

1. **Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** The denial of a motion to transfer to juvenile court is reviewed for an abuse of discretion.
2. **Criminal Law: Courts: Juvenile Courts: Jurisdiction.** The statutory factors used to determine whether to transfer a criminal case to the juvenile court are weighed in a practical, nonarithmetic fashion, balancing the needs of society with those of individual justice.
3. **Criminal Law: Pleas.** A criminal defendant has no absolute right to have his or her plea of guilty or nolo contendere accepted, even if the plea is voluntarily and intelligently made.
4. **Pleas: Appeal and Error.** An appellate court will only overturn the trial court's refusal to accept a guilty plea where there is an abuse of discretion.
5. **Pleas.** In order to support a finding that a guilty plea was entered intelligently, voluntarily, and understandingly, the record must establish, among other things, that a factual basis for the plea exists.
6. **Plea Bargains.** The State may withdraw from a plea arrangement at any time prior to, but not after, actual entry of the defendant's guilty plea or before the defendant's other action constituting detrimental reliance on the plea arrangement.
7. _____. Principles of contract law do not govern enforcement of a plea arrangement prior to the acceptance of the plea.
8. **Confessions.** Among those circumstances to be considered when determining whether a confession was knowing, intelligent, and voluntary are the accused's minority and the role of the accused's parents. However, these are merely factors to be given consideration and are not dispositive.

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

Alan G. Stoler for appellant.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

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

WHITE, J.

Terrance Johnson appeals his district court convictions for first degree murder and use of a firearm to commit a felony. Johnson was sentenced to life imprisonment for the murder conviction, and a consecutive sentence of 5 to 10 years' imprisonment for the firearm conviction. We affirm.

On June 18, 1991, when he was 15 years old, Johnson shot his friend's uncle with a .22-caliber rifle. The victim, Reginald Porchia, subsequently died from the gunshot wound. Police later questioned Johnson, his twin brother, and the victim's nephew, all of whom were present at the incident. Johnson was interviewed at approximately 6 a.m. at the police station. After waiving his rights and after being informed that his twin had revealed him as the gunman, Johnson confessed to the shooting. He then agreed to make a taped statement, on which he again waived his rights and reiterated his earlier confession. Johnson had not spoken to his mother or an attorney before waiving his rights.

Prior to trial Johnson requested that the district court transfer the case to the separate juvenile court. In a detailed order the district court denied the motion. Johnson then moved to suppress his confession, alleging that it had not been made knowingly, voluntarily, and intelligently. This motion was also denied.

On the day of trial, pursuant to a plea agreement, Johnson offered to plead guilty to a reduced charge of second degree murder and use of a firearm in the commission of a felony. However, because Johnson denied intending to kill the victim, the court rejected the plea. After further discussions between Johnson, his counsel, and the judge, the prosecutor withdrew the plea agreement. The charge was reinstated to first degree murder and Johnson was convicted by a jury of both the murder and weapons charges. The district court then denied Johnson's motion to enforce the plea agreement or for new

trial.

Restated, Johnson alleges that the district court erred by (1) denying his motion to transfer the case to the juvenile court; (2) refusing to accept his guilty plea, on which he had detrimentally relied; (3) allowing the prosecution to withdraw the plea agreement after Johnson had attempted to plead guilty; and (4) finding that Johnson's confession was made voluntarily.

Johnson first asserts that the district court erred when it refused to transfer his case to the separate juvenile court pursuant to Neb. Rev. Stat. § 43-261 (Reissue 1989). We review the denial of a motion to transfer to juvenile court for an abuse of discretion. *State v. Garza*, 241 Neb. 934, 492 N.W.2d 32 (1992); *State v. Doyle*, 237 Neb. 60, 464 N.W.2d 779 (1991). The general rule is that the district court, upon request, shall transfer a juvenile criminal case to the juvenile court unless there is a sound basis for retaining it. *Doyle, supra*. Furthermore, the statutory factors used to determine whether to transfer the case are weighed in a practical, nonarithmetic fashion, balancing the needs of society with those of individual justice. Neb. Rev. Stat. § 43-276 (Reissue 1988); *Garza, supra*; *State v. Alexander*, 215 Neb. 478, 339 N.W.2d 297 (1983).

The record is abundantly clear that the district court did not abuse its discretion in denying the motion to transfer. Although Johnson was 15 years old at the time of the shooting, the severity of the crime and the public's security weighed against the transfer. The juvenile court could retain jurisdiction over Johnson only until his 19th birthday—less than three years from the time of trial. See Neb. Rev. Stat. §§ 43-247 and 43-2101 (Reissue 1988). Testimony at the hearing on the motion further indicated that the juvenile court system would be ill-suited to effectively rehabilitate Johnson.

In its order the district court painstakingly addressed each statutory factor by which transfer is determined. We find no abuse of discretion in the court's denial of the motion to transfer. Johnson's first assignment of error is without merit.

Johnson next argues that the district court erred in refusing to accept his guilty plea to the charge of second degree murder. Johnson claims that his plea was knowing, intelligent, and voluntary, and therefore should have been accepted.

"It is well established that a criminal defendant has no absolute right to have his or her plea of guilty or nolo contendere accepted even if the plea is voluntarily and intelligently made." *State v. Perez*, 235 Neb. 796, 801, 457 N.W.2d 448, 453 (1990); *State v. Leisy*, 207 Neb. 118, 295 N.W.2d 715 (1980). See, also, *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), *overruled on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1976). Furthermore, the trial court is given discretion as to whether to accept a guilty plea; this court will only overturn that decision where there is an abuse of discretion. *Perez, supra*; *Leisy, supra*.

In order to support a finding that a guilty plea was entered intelligently, voluntarily, and understandingly, the record must establish, among other things, that a factual basis for the plea exists. *State v. Sianouthai*, 225 Neb. 62, 402 N.W.2d 316 (1987); *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). The record before us establishes that no factual basis existed for Johnson's guilty plea.

Prior to trial Johnson offered a plea of guilty to second degree murder. The district court judge explained the results attendant to such a plea, including a recitation of Johnson's constitutional rights. The judge then attempted to establish whether a factual basis for the plea existed. Under Neb. Rev. Stat. § 28-304 (Reissue 1989), a person commits second degree murder if "he causes the death of a person *intentionally*, but without premeditation." (Emphasis supplied). When the judge questioned Johnson about the shooting, the following discussion occurred:

> THE COURT: Before I can accept your plea of guilty, Mr. Johnson, I have to be certain there is a sufficient factual basis for your plea. Will you tell me in your own words what you did to commit these two crimes . . . ?
>
> THE DEFENDANT: Well, I shot somebody.
>
> . . . .
>
> THE DEFENDANT: Somebody pressured me into it, and I [sic] just happened — he just handed [the gun] to me and told me to do it and if I didn't, he said he would beat me up so I done it.
>
> . . . .

> THE COURT: I certainly don't want to pressure you into a plea, Mr. Johnson, but you've told me that it's your desire to plead guilty to 2nd degree murder. A person commits 2nd degree murder if he causes the death of another person intentionally. Did you cause the death of Mr. Porchia — Reginald Porchia intentionally?
>
> THE DEFENDANT: No.
>
> THE COURT: When you fired a gun at his midsection and hit him in the head, you didn't intent [sic] to kill him?
>
> THE DEFENDANT: No.
>
> THE COURT: What did you intend?
>
> THE DEFENDANT: Just intended to shoot him. I didn't really intend to kill him.

Following this exchange, Johnson's counsel restated willingness to enter the plea. However, the prosecution expressed Johnson's doubt as to proceeding with the agreement. The judge then stated that he was unwilling to accept the plea at that point.

After conferring with his client, Johnson's counsel again expressed the desire to go forward with the plea agreement, stating that although Johnson felt that he was pressured into shooting the victim, the act was also attributable to his own volition. The judge again expressed doubt that a factual basis for second degree murder had been shown. The prosecution then withdrew the plea agreement and the charge was reinstated to first degree murder.

Based on the foregoing facts, it is clear that the record did not establish a sufficient factual basis to sustain the guilty plea. Neither at the plea hearing nor in any of the previous proceedings did Johnson state that he intended to kill the victim. The district court did not abuse its discretion in refusing to accept the plea.

Johnson next argues that the court erred by allowing the prosecution to withdraw the plea agreement. We disagree.

In *State v. Dillon*, 224 Neb. 503, 398 N.W.2d 718 (1987), we stated: "The State may withdraw from a plea arrangement at any time prior to, but not after, actual entry of the defendant's guilty plea or before the defendant's other action constituting detrimental reliance on the plea arrangement." *Id.* at 506, 398

N.W.2d at 720. No guilty plea was ever entered in the district court. Although a plea was *tendered* to the court, that plea was rejected for lack of a factual basis. The prosecution was thus free to withdraw the plea unless Johnson detrimentally relied on the arrangement. He did not.

Johnson did not compromise his position by attempting to plead guilty to second degree murder. The only action Johnson took was the tendering of his plea; nothing in that action prejudiced him in any way. He argues, however, that because he "fully performed" his part of the agreement, the prosecution should not be able to shirk its obligation. We first note that principles of contract law do not govern enforcement of a plea arrangement prior to the acceptance of the plea. *Dillon, supra.* Furthermore, if any party "breached" the agreement, it was Johnson. Johnson agreed to plead guilty in exchange for a reduction in the charge. When questioned as to the crime, however, he repeatedly denied one of the necessary elements for that charge. Such action hardly constitutes "full performance." Johnson's third assignment of error is without merit.

Johnson's last argument focuses on the district court's denial of his motion to suppress his confession. Johnson argues that his age, the time he gave the confession, being confronted with his brother's accusation, and his lack of contact with his mother all combined to prevent his confession from being knowing, intelligent, and voluntary. Again, we disagree.

An appellate court, when reviewing the ruling on a motion to suppress, will uphold the trial court's findings of fact unless those findings are clearly erroneous. *Garza, supra* (citing *State v. Coleman*, 241 Neb. 731, 490 N.W.2d 222 (1992)). Moreover, when making this determination, we do not reweigh the evidence or resolve evidentiary conflicts, but recognize the trial court as the finder of fact and consider that the trial court has observed the witnesses. *State v. Walker, ante* p. 99, 493 N.W.2d 329 (1992); *Garza, supra.* Thus, the trial court's factual finding that a confession was voluntary will only be disturbed on appeal if clearly wrong. *Garza, supra.*

Whether a confession, statement, or admission was made knowingly, intelligently, and voluntarily depends on the totality of the circumstances. *Stewart, supra.* See, also, *State v. Melton,*

239 Neb. 506, 476 N.W.2d 842 (1991). Among those circumstances to be considered are the accused's minority and the role of the accused's parents. However, these are merely factors to be given consideration and are not dispositive as to the knowingness, intelligence, and voluntariness of the confession. *State v. Smith*, 203 Neb. 64, 277 N.W.2d 441 (1979); *Stewart, supra*; *State v. Lytle*, 194 Neb. 353, 231 N.W.2d 681 (1975).

The record is sufficient to support the trial court's finding that Johnson's confession was knowing, intelligent, and voluntary. Although the hour was late when the statement was given, Johnson told the interviewing officer that he was "awake" while being interviewed. Johnson never complained during the interview, expressed a desire to stop, or stated that he did not understand what was taking place. The record also indicates that although Johnson did not speak to his mother before waiving his rights and confessing, his mother was aware that he had been taken to the station. Moreover, Johnson stated that he had not been drinking or taking drugs before the interview and that he could both read and write.

Johnson was *Mirandized* twice before giving the taped confession, as was evidenced by a written "Rights Advisory Form" that was completed in his presence. He also stated that he had not been coerced or made promises in exchange for making a statement. While it is true that being implicated by one's brother might shake a defendant, such an occurrence, of itself, does not run afoul of the Constitution. Johnson was informed of his right to remain silent, his right to an attorney, and his other constitutional rights. Nothing in the record shows that the district court erred by finding that Johnson's decision to waive those rights was knowing, intelligent, and voluntary.

Based on the record before us and our standard of review, we cannot say that the trial court was clearly wrong in its denial of Johnson's motion to suppress. As was the case with Johnson's other arguments, his final assignment of error is without merit. We therefore affirm the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CLYDE WAYNE BRONSON, APPELLANT.

496 N.W.2d 882

Filed March 12, 1993. No. S-92-219.

1. **Convictions: Appeal and Error.** A conviction will not be set aside unless the defendant meets his or her burden of showing that the claimed error created actual prejudice and not the mere possibility of prejudice.
2. **Miranda Rights.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) prohibits the use of statements stemming from the custodial interrogation of a defendant unless the prosecution demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.
3. **Miranda Rights: Words and Phrases.** For purposes of the *Miranda* rule prohibiting the prosecution from using statements stemming from a custodial interrogation of a defendant without the use of such procedural safeguards a "custodial interrogation" means 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.
4. **Miranda Rights.** A noncustodial situation is not converted to one in which the *Miranda* rule applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a coercive environment.
5. _____. Police officers are not required to administer *Miranda* warnings to everyone whom they question, or simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Rather, *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody."
6. **Miranda Rights: Arrests: Search and Seizure: Words and Phrases.** One is in custody for *Miranda* purposes when there is a formal arrest or a restraint on his or her freedom of movement of the degree associated with such an arrest. Determinations as to whether a person has been seized in this context are questions of fact.
7. **Police Officers and Sheriffs: Search and Seizure.** The question of whether a person's consent to accompany law enforcement officials was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of the circumstances.
8. **Confessions: Proof: Appeal and Error.** To be admissible in evidence, an accused's statement must be shown by the State to have been freely and voluntarily given and not to have been the product of any promise or inducement—direct or indirect—no matter how slight. However, this rule is not to be applied on a strict, per se basis. Rather, the determination of voluntariness is based upon an assessment of all of the circumstances and factors surrounding the occurrence when the statement is made and the determination made by the trial court in this regard will not be disturbed on appeal unless clearly wrong.
9. **Rules of Evidence: Other Acts.** Neb. Rev. Stat. § 27-402(2) (Reissue 1989) acts

as an inclusionary rule which permits the use of evidence of other crimes, wrongs, or acts if relevant for any purpose other than the defendant's propensity or disposition to commit the crime with which he or she is charged.

10. **Trial: Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine admissibility of evidence of other wrongs or acts and the trial court's decision will not be reversed absent abuse of that discretion.
11. **Homicide: Intent: Proof.** While proof of motive is not an element of first degree murder, any motive for the crime charged is relevant to the State's proof of the intent element.
12. **Criminal Law: Words and Phrases.** Motive is defined as that which leads or tempts the mind to indulge in a criminal act.
13. **Hearsay.** An extra-judicial statement not offered to prove the truth of the matter asserted is not hearsay.
14. **Juries: Discrimination: Proof.** In order to make a prima facie case of discrimination in the selection of a jury under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), a criminal defendant must show that (1) she or he is a member of a cognizable racial group, (2) the prosecutor used peremptory challenges to remove members of the defendant's race from the venire, and (3) the facts and other relevant circumstances give rise to an inference that the prosecutor used those challenges to exclude potential jurors because of their race.
15. **Juries: Discrimination: Intent: Appeal and Error.** Deference is given to the trial court's findings on the issue of discriminatory intent because the finding will largely turn on the evaluation of credibility.
16. **Juries: Discrimination.** The explanation of the State to provide a neutral explanation of a challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), need not rise to the level of a challenge for cause, but neither may the prosecutor rebut defendant's prima facie case by stating that potential jurors were struck based on the intuitive judgment that they would be partial to the defendant because of their shared race.
17. _____: _____. The prosecutor's basis for his or her strikes need not even rise to the level of rationality. The trial court need not determine if the explanation is reasonable, but only that it is nondiscriminatory and is constitutionally permissible.
18. **Juries.** In striking peremptory challenges in the context of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), it is important and permissible to achieve a venire made up of jurors who, at least during voir dire, (1) respond to the attorneys, (2) do not give off the impression through body language, eye contact, or otherwise that he or she has already made up his or her mind, and (3) exhibit a receptiveness to follow the administrative instructions, as well as courtroom testimony in order to make a fair and impartial decision in the matter at hand.
19. **Motions for Mistrial: Appeal and Error.** A mistrial is properly granted only when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. The decision to grant a

motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion.

20. **Motions for Mistrial: Attorneys at Law.** In order for error to be predicated upon misconduct of counsel, it must be so flagrant that neither retraction nor rebuke from the court can entirely destroy its influence.
21. **Motions for Mistrial: Prosecuting Attorneys: Proof.** Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice occurred.
22. **Trial: Testimony: Appeal and Error.** In the absence of an abuse of discretion, a trial court's ruling regarding the extent, scope, and course of cross-examination will be upheld on appeal.
23. _____: _____: _____. Although a witness is erroneously permitted to be cross-examined as to matters not brought out on direct examination, the judgment will not be reversed when it appears that no prejudice could have resulted.
24. **Trial: Testimony.** As a general rule, the method of cross-examination which recapitulates a great deal of prior testimony is disapproved.
25. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within the jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed in a light most favorably to the State, is sufficient to support that verdict.

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

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

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

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

HASTINGS, C.J.

Clyde Bronson appeals his conviction by a jury of first-degree murder and using a weapon to commit a felony. Bronson was sentenced to life imprisonment on the murder conviction and a consecutive sentence of 20 years for using a weapon to commit a felony.

Bronson alleges the trial court committed error in the following respects:

1. admitted into evidence appellant's custodial statements made prior to being "mirandized";
2. admitted irrelevant and unfairly prejudicial testimony concerning appellant's usage of controlled substances;
3. admitted out-of-court statements made by deceased's husband to the deceased;
4. denied appellant's "motion for a mistrial or alternatively to reinstate onto the jury panel certain African-American jurors peremptorily stricken by the prosecutor";
5. overruled appellant's objections and motion for mistrial which were based upon prosecutorial misconduct in the method of cross-examination of the appellant;
6. sustained conviction for murder despite the fact that the evidence presented at trial was so lacking in probative value that it was insufficient as a matter of law to sustain the conviction.

We affirm.

Barbara Smith was found dead by her husband the morning of June 28, 1991. The cause of death was determined to be multiple stab wounds to the chest and blunt injuries to the face and head. No evidence indicated forcible entry. As the Omaha Police Division crime lab searched the scene for fingerprints and other physical evidence, other officers contacted persons in the area regarding any information they may have had about the murder. Bronson, who lived two homes away from the victim, was questioned as he was returning from work. He indicated that he had last been to the Smith residence on June 27 to borrow $5 from Ken Smith, the victim's husband. On June 29 the police requested that appellant, as well as all other individuals known to have been in the Smith residence recently, go over to another neighbor's residence to be fingerprinted. One of Bronson's latent palm prints was found on the refrigerator and one of his patent fingerprints was observed in apparent blood on exhibit 9, a glass vase at the crime scene. Dr. Reena Roy, a forensic serologist, testified that a presumptive test for blood on the vase was positive. Linda Brokofsky, a fingerprint examiner for the Nebraska State Patrol, stated that she found a fingerprint in blood on the vase. Patricia Osier, a

senior crime lab technician with the Omaha Police Division examined the vase and found a fingerprint in what appeared to be blood.

On Monday, July 1, Police Officer Bill Jadlowski and Detective Wilson went to Bronson's home to ask him to accompany them to police headquarters for further interview. The officers arrived at the house and at about the same time Bronson was walking up the sidewalk. According to Jadlowski, the officers asked Bronson if they could step inside his residence and, once inside, explained to Bronson that they would like to "talk to him at Central Police Headquarters." Bronson was then taken to the police station. According to the officer, Bronson was not threatened, coerced, or promised anything, was not told he was under arrest, was not handcuffed, and rode in the back seat of the unmarked police car with the two officers in the front. Bronson, according to Jadlowski, was calm and cooperative.

Prior to having his *Miranda* rights explained to him, Bronson relayed the same story as to when he had last been in the Smith residence, and admitted that he was a recreational user of crack cocaine. When the police questioned him about several cuts on his hands, he explained that he had received a cut on his finger at work, and the other cuts on his hands were as a result of cleaning a crack-pipe with a wire coat hanger. At this point, the officers left the interrogation room for a short period, obtained a search warrant, returned to the interrogation room, and read Bronson his Miranda rights. Because Bronson indicated he wanted to see his attorney, the interrogation ceased. The officers returned Bronson to his home and proceeded with the execution of the warrant to search the Bronson residence. Sometime later Bronson was allowed to leave his home.

On Wednesday Bronson learned that a warrant for his arrest for first degree murder had been issued, and by arrangements made with the police by his lawyer, Bronson turned himself in on Friday morning.

At trial, Bronson supplemented his original statement, saying that while he had been in the house to borrow money, he also had visited the deceased, Barbara Smith, in her home

earlier that week for the purpose of carrying on a romantic affair with her.

A conviction will not be set aside unless the defendant meets his or her burden of showing that the claimed error created actual prejudice and not the mere possibility of prejudice. *State v. Valdez*, 239 Neb. 453, 476 N.W.2d 814 (1991).

I. CUSTODIAL STATEMENTS

Bronson first assigns as error the admission into evidence of certain alleged custodial statements made by him to Omaha police officers before being apprised of his rights to counsel and against compulsory self-incrimination in compliance with *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Miranda prohibits the use of statements stemming from the custodial interrogation of a defendant unless the prosecution demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

For purposes of the *Miranda* rule prohibiting the prosecution from using statements stemming from a custodial interrogation of a defendant without the use of such procedural safeguards a "custodial interrogation" means 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. *Oregon v. Mathiason*, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977). In that case, Mathiason had come down to the police station of his own accord in response to a note that a police officer had left for him at his residence indicating that the officer wanted to discuss something with him. The officer told him that he was not under arrest, but that the officer believed Mathiason had been involved in a specific burglary. After falsely stating that Mathiason's fingerprints had been found at the scene and within 5 minutes after arriving at the station, Mathiason confessed to the burglary. The officer then read Mathiason his *Miranda* warnings and obtained a taped confession.

The *Mathiason* Court found that a noncustodial situation is not converted to one in which the *Miranda* rule applies simply because a reviewing court concludes that, even in the absence of

any formal arrest or restraint on freedom of movement, the questioning took place in a coercive environment. Police officers are not required to administer *Miranda* warnings to everyone whom they question, or simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Rather, *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody."

One is in custody for *Miranda* purposes when there is a formal arrest or a restraint on his or her freedom of movement of the degree associated with such an arrest. *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990), citing *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). Determinations as to whether a person has been seized in this context are questions of fact. *State v. Victor, supra*, citing *State v. Bowersmith*, 224 Neb. 6, 395 N.W.2d 527 (1986).

The question of whether a person's consent to accompany law enforcement officials was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of the circumstances. *State v. Victor, supra*, citing *United States v. Mendenhall*, 466 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). In *Victor*, this court said:

> In the initial contact with Victor, a police officer merely asked the defendant to voluntarily accompany him to Central Police Station for questioning. Victor asked if he could leave his car where it was parked. The defendant was very cooperative, readily agreed to accompany the police, and was transported in an unmarked police car. Victor was not handcuffed.

235 Neb. at 782, 457 N.W.2d at 440.

Also, to be admissible in evidence, an accused's statement must be shown by the State to have been freely and voluntarily given and not to have been the product of any promise or inducement—direct or indirect—no matter how slight. However, this rule is not to be applied on a strict, per se basis. Rather, the determination of voluntariness is based upon an assessment of all of the circumstances and factors surrounding the occurrence when the statement is made, and the

determination made by the trial court in this regard will not be disturbed on appeal unless clearly wrong. *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991).

In *California v. Beheler*, 463 U.S. 1121, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983), Beheler and his stepbrother attempted to steal hashish from an individual who resisted. The stepbrother killed the individual and Beheler called the police and told them what had happened. Beheler voluntarily accompanied the police to the police station and was told that he was not under arrest. Beheler talked about the murder with the officers, but was not advised of his *Miranda* rights. He was permitted to leave, pending the district attorney's decision as to what charges to file, and 5 days later was arrested for aiding and abetting the murder. The Supreme Court held that *Miranda* warnings are not required if a suspect is not placed under arrest, voluntarily comes to the police station, and is allowed to leave unhindered by the police after a brief interview. The Court also stated that the fact that a person who voluntarily engages in an interview with police is unaware of the consequences of his participation does not transform a voluntary interview into a custodial one so as to require *Miranda* warnings. The warnings specified in *Miranda* are required only when there has been a restriction on a person's freedom as to render such person in custody. *Miranda* warnings are not required simply because the questioning takes place in a station house or because the questioned person is one whom the police suspect.

The question remains, was Bronson in custody for the purposes of *Miranda*?

In the matter at hand, Bronson had been explicitly told he was not under arrest, but that the officers wanted to discuss further the matter of the Smith murder investigation downtown. The officers testified that Bronson appeared calm, composed, and cooperative, and agreed to accompany them to the police station. He was escorted down to the station by officers without handcuffs in an unmarked detective's police car, during which time the men talked about Bronson's job, background, and family. Although Bronson asserts that he did not feel he had a choice, he voluntarily accompanied the officers down to the station.

The evidence indicates that despite the fact that Bronson was interrogated in "privacy" and in "unfamiliar surroundings", factors on which *Miranda* placed great stress, see *Miranda*, *Id.*, at 449-450, 86 S. Ct. 1602, 16 L. Ed. 694, considered from a totality of the circumstances, the interrogation here clearly does not rise to the level defined by the Supreme Court to be custodial interrogation. This assignment of error is without merit.

II. EVIDENCE OF CONTROLLED SUBSTANCES USAGE

Bronson alleges in his second assignment of error that the trial court erroneously admitted statements he made to Omaha police officers regarding his history of crack cocaine abuse. The officers testified over objection that Bronson had informed them that he was a recreational user of crack cocaine and that he did not believe he had a problem with the drug. He then admitted that he was addicted to crack on payday, which was twice per month.

Bronson contends that the sole purpose of admitting this testimony was to aid in the establishment of a motive based on circumstantial evidence, that Bronson must have murdered Barbara Smith because she refused to loan or give him money to buy crack cocaine. Bronson further points out that no evidence existed that any money or valuables were missing from the Smith home.

Neb. Rev. Stat. § 27-404 (Reissue 1989) embodies Rule 404 of the Federal Rules of Evidence, which states in pertinent part, as follows:

> (1) Evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion, except:
>
> (a) Evidence of a pertinent trait of his or her character offered by an accused, or by the prosecution to rebut the same;
>
> . . . .
>
> (2) 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.

Subsection 2 of this section, we have held, acts as an inclusionary rule which permits the use of evidence of other crimes, wrongs, or acts if relevant for any purpose other than the defendant's propensity or disposition to commit the crime with which he or she is charged. *State v. Christian*, 237 Neb. 294, 465 N.W.2d 756 (1991); *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1990); *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990); *State v. Methe*, 228 Neb. 468, 422 N.W.2d 803 (1988); *State v. Stewart* 219 Neb. 347, 363 N.W.2d 368 (1985).

It is within the discretion of the trial court to determine admissibility of evidence of other wrongs or acts and the trial court's decision will not be reversed absent abuse of that discretion. *State v. Christian*, 237 Neb. 294, 465 N.W.2d 756 (1991).

While proof of motive is not an element of first degree murder, any motive for the crime charged is certainly relevant to the State's proof of the intent element. Motive is defined by Black's Law Dictionary (6th Ed., 1990, p. 1014) as distinguished from "intent" as: "the moving course, the impulse, the desire that induces criminal action on the part of the accused." Similarly, this court has defined motive as that " 'which leads or tempts the mind to indulge in a criminal act.' " *State v. Ruyle*, 234 Neb. 760, 767, 452 N.W.2d 734, 739 (1990); *State v. Coca*, 216 Neb. 76, 82, 341 N.W.2d 606, 610 (1983).

The trial court properly admitted the testimony that Bronson had admitted to being a recreational crack user and that he was only occasionally addicted, if that were possible, to the substance. The testimony was admitted for a proper purpose and the assignment is without merit.

III. STATEMENTS MADE BY DECEASED'S HUSBAND TO DECEASED

Bronson argues that the trial court committed reversible error through its admission into evidence of testimony

concerning out of court statements made by Kenneth Smith to the deceased. Bronson specifically claims the State was erroneously allowed to elicit testimony from Mr. Smith, husband of the deceased, that he had instructed his wife not to loan money to Clyde Bronson. Bronson contends that the admission of this testimony was not only hearsay and not within any exception, but also was extremely and unfairly prejudicial, and was admitted only to bolster the State's motive theory that Bronson had committed a hideous homicide for the purpose of obtaining money to support his crack cocaine habit.

We agree that the admission of testimony was proper as it was not hearsay. The difference lies in the obvious fact the prosecutor clearly did not try to submit the testimonial substance of any out-of-court statement made by the deceased to her husband and was not offered for the truth of the matter asserted therein. The testimony by Kenneth Smith was admitted for the permissible purpose of informing the jury that Smith had instructed his wife not to give Bronson any money. At no point was Smith asked what the deceased said in response to her husband's instructions, nor was he asked to convey or reveal the content of anything Barbara Smith may have said in response through his testimony of his own end of the conversation, which would have directly violated *United States v. Check*, 582 F.2d 668 (2d Cir. 1978).

In *United States v. Check, supra*, the prosecutor artfully inquired of an undercover narcotics agent what the agent had said to a confidential informant who did not testify. The agent was able to reveal via his own end of the conversation exactly what the informant had revealed to him. The Court of Appeals held that this testimony was inadmissible hearsay since the agent's testimony, although couched in terms of his own end of the conversation, revealed the precise substance of the statements made to him by the confidential informant.

An extra-judicial statement not offered to prove the truth of the matter asserted is not hearsay. *Gray v. Maxwell*, 206 Neb. 385, 389, 293 N.W.2d 90, 93 (1980). Kenneth Smith's testimony did not include any hearsay statements made by his wife and its admission was not improper. The assignment is without merit.

IV. USE OF PEREMPTORY CHALLENGES TO STRIKE BLACK JURORS

Bronson alleges that the district court committed reversible error when it overruled his motion for mistrial attacking the prosecutor's use of peremptory challenges striking two of the three black venirepersons, Miles Gilreath and Louise Woolridge.

The prosecuting attorney offered the following response as to why he struck these jurors:

> ". . . Taking . . . Miles Gilreath, first, if I got it correctly, he was a program manager for ENCOR, which in effect is social work. And I've found that over the years people who are in that type of work have a tendency to blame misconduct or conduct of people on everyone except the people that are responsible for it. It's always some outside influence that caused them to act as they did, and I simply, on a case of this seriousness, don't want to take a chance with someone with a background like that. I also noted he's got some type of a criminal justice background, but that in effect wasn't really why. It was because of the program manager job at ENCOR. Also, he's a single person, and he is fairly young.
>
> "The other juror, Louise Woolridge: if you take a look at all of my strikes, the only male I struck was Mr. Gilreath because, frankly, I was looking for males to be on this jury. And I may be mistaken about this, but I'd—I'd have to go through each of them individually, but I believe all of the other eleven jurors that I struck were women on the case, and I think—As a matter of fact, if you take—we must have had somewhat of the same idea because, if you look at at least the first six, seven or so of Mr. Riley's strikes, he was striking men off the jury. Obviously we were both going for a different—a different gender type of jury, and so we probably ended up just about half and half.
>
> "But the reason that Miss Woolridge was struck is because she's an unmarried woman who indicated she had no prior jury experience, and I'm not sure how this factors in, but there were a couple of different times noticeably—notable that I can recall when the juror that

took Mr. Raumaker's place, Miss Brady, took the number 3 jury position, I began to question her, and with a couple of the questions—because I was having some trouble frankly reading just how Miss Woolridge was accepting me; and a couple of different times that the whole panel, that group of twelve that were there, I said a couple of things to kind of lighten the mood, and she sat there the entire time with a scowl on her face with her arms crossed, looking at me. And over the years I can't tell you what the psychological reason is. I just know I haven't had very good luck with people that look at me like that in the jury box. There was one other person that did the same thing . . . who sat with the same mannerisms toward me. She was in the back row, and I struck her also for the same reason, so those—On those two particular jurors, those are my reasons."

The court responded by making the following ruling.

THE COURT: "The defendant's challenge to The State's peremptory challenge of Louise Woolridge and Miles Gilreath is denied. The Court finds that one black juror remains who was not challenged by The State. The Court finds that the reason given for the peremptory challenge of Mr. Gilreath was valid insofar as The State expressed a desire to avoid social workers and ENCOR, Eastern Nebraska Commission on Retardation, is that type of work; and also his reason given for the strike of Miss Woolridge is consistent with challenges made—The State made to white women jurors, for the same reason in an effort to get more men on the jury. There were three black jurors to commence with. One-third of those jurors remains on the jury. One-third of the white jurors remain after the exercise of the challenges, and therefore I find The State gave sufficient valid reasons for the exercise of the peremptory challenges, and the objections to that exercise are denied or overruled."

Bronson is correct in stating that *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), bars prosecutors, through application of the Equal Protection Clause of the 14th Amendment from challenging potential

jurors "solely on the account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." 476 U.S. at 89. In order to make a prima facie case of discrimination in the selection of a jury, a criminal defendant must show that (1) she or he is a member of a cognizable racial group, (2) the prosecutor used peremptory challenges to remove members of the defendant's race from the venire, and (3) the facts and other relevant circumstances give rise to an inference that the prosecutor used those challenges to exclude potential jurors because of their race. *Batson v. Kentucky, supra.*

The Supreme Court more recently has stated that deference to the trial court's findings on the issue of discriminatory intent makes particular sense because the finding will largely turn on the evaluation of credibility. See *Hernandez v. New York*, 111 S. Ct. 1859, 114 L. Ed. 2d 395, 59 U.S.L.W. 4501 (1991).

The explanation of the State to provide a neutral explanation of a challenge under *Batson*, need not rise to the level of a challenge for cause, but neither may the prosecutor rebut defendant's prima facie case by stating that potential jurors were struck based on the intuitive judgment that they would be partial to the defendant because of their shared race. *Id.*; *State v. Martin*, 239 Neb. 339, 476 N.W.2d 536 (1991); *State v. Venable*, 233 Neb. 309, 444 N.W.2d 907 (1989).

The prosecutor's basis for his strikes need not even rise to the level of rationality. As we said in both *State v. Martin*, 239 Neb. 339, 342, 476 N.W.2d 536, 539 (1991) and *State v. Walton*, 227 Neb. 559, 564, 418 N.W.2d 589, 593 (1988), "[T]he trial court need not determine if the explanation is reasonable, but only that it is nondiscriminatory and is constitutionally permissible."

In *Polk v. Dixie Ins. Co.*, 972 F.2d 83 (5th Cir. 1992) (cert. denied), the opinion recited that the original judgment of the district court was affirmed by the Court of Appeals, holding that *Batson's* prohibition of racial use of peremptory challenges did not extend to private parties. The Supreme Court however, holding that *Batson* did apply to civil suits between private parties, remanded the cause for further consideration. The Court of Appeals then directed the district court to hold a

hearing to determine whether the defendant could show non-racial reasons for its exercise of peremptory challenges. The district court determined that the defendant did show such reasons and the Court of Appeals affirmed, stating:

> After the court (district) found that the Polks had made a prima facie case, Dixie's counsel stated that she could not remember why she had struck the two black jurors, noting that three to four years had elapsed since the 1988 trial of the case. She asserted, however, that eyeball contact must have been the reason because "I can tell the Court for sure that the element of eyeball contact is the turning factor in every decision I make in every case I try."

Id. at 84.

The court went on to state:

> In the *Batson* context, subjective consideration might not be susceptible to objective rebuttal or verification. We nonetheless permit them because of the inherent nature of peremptory challenges, with the understanding that ultimate *Batson* findings "largely will turn on evaluation of credibility" of counsel's explanation.
>
> . . . .
>
> We cannot say that eye contact necessarily is a phony reason when it is proffered as justification for removal of all black jurors.

Id. at 86. See, also, *United States v. Nicholson*, 885 F.2d 481 (8th Cir. 1989).

We accept this reasoning and find that the prosecutor met his burden. He struck two out of three black venirepersons on the panel and gave completely nondiscriminatory, rational, and legitimate reasons for striking Mr. Gilreath. As to the basis for his strike of Miss Woolridge, we are cognizant of the importance of achieving a venire made up of jurors who, at least during voir dire, (1) respond to the attorneys, (2) do not give off the impression through body language, eye contact or otherwise that he or she has already made up his or her mind, and (3) exhibit a receptiveness to follow the administrative instructions, as well as courtroom testimony in order to make a fair and impartial decision in the matter at hand. Miss Woolridge exhibited nonverbal behaviors that indicated that

she may not have been capable of being a responsible venireperson and the prosecutor's peremptory strike of her was not racially based.

V. MOTION FOR MISTRIAL

In Bronson's fifth assignment he asserts that the court erred by refusing to sustain his motion for mistrial based on alleged prosecutorial misconduct in his method of cross-examination of Bronson. Bronson specifically argues that the prosecutor repeatedly engaged in argumentative questioning, recapitulating the testimony of previous State witnesses, and, in certain instances, allegedly recounted testimony inaccurately.

A mistrial is properly granted only when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion. *State v. Palser*, 238 Neb. 193, 469 N.W.2d 753 (1991). In order for error to be predicated upon misconduct of counsel, it must be so flagrant that neither retraction nor rebuke from the court can entirely destroy its influence. *State v. Valdez*, 239 Neb. 453, 476 N.W.2d 814 (1991).

Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice occurred. *State v. Zaritz*, 235 Neb. 599, 456 N.W.2d 479 (1990); *State v. Valdez, supra*.

In the absence of an abuse of discretion, a trial court's ruling regarding the extent, scope, and course of cross-examination will be upheld on appeal. *State v. Dixon*, 240 Neb. 454, 482 N.W.2d 573 (1992); *State v. Blair*, 230 Neb. 775, 433 N.W.2d 518 (1988).

Although a witness is erroneously permitted to be cross-examined as to matters not brought out on direct examination, the judgment will not be reversed when it appears that no prejudice could have resulted. *Sheppard v. State*, 168 Neb. 464, 96 N.W.2d 261 (1959).

While the prosecutor clearly did recapitulate a great deal of

testimony, a method of cross-examination of which we disapprove because it is likely to lead to prejudice, the information used was couched in questioning whether Bronson indeed remembered the testimony, requiring simple yes or no answers in a concerted effort to unveil apparent inconsistencies and illogical explanations in Bronson's testimonial account.

Bronson also complains that the prosecutor in cross-examining Bronson constantly referred to Bronson's fingerprint as having been found in blood on the vase. On objection at one point, at least, the court stated that the witness had testified both ways. "Found in blood" was a permissible inference that could be drawn from the evidence, and, as the trial court suggested, both the prosecutor and the defense counsel were trying to argue their case through questions and objections.

It was up to the jury to draw its own conclusion from the testimony of the witnesses and its observation of the photograph of exhibit 9. Bronson has not shown that or how he was prejudiced, or that a substantial miscarriage of justice actually occurred.

The trial court properly refused to grant Bronson's motion for mistrial, and accordingly, the assignment is without merit.

VI. INSUFFICIENCY OF THE EVIDENCE

In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within the jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed in a light most favorably to the State, is sufficient to support that verdict. *State v. Sexton*, 240 Neb. 466, 483 N.W.2d 567 (1992); *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987).

Of the nine latent prints taken into evidence by law enforcement officers, only a latent print found inside the deceased's wallet remained unidentified.

Clyde Bronson's palm print was found on the refrigerator and an imprint from his middle finger was found in apparent blood on a flower vase near Barbara Smith's body. Appellant

and Kenneth Smith both stated that when Bronson stopped over at the Smith residence to borrow money from Smith on the morning of June 27, 1991, Bronson did not venture any farther into the Smith home than the entryway. Type "O" blood (consistent with both the deceased and the defendant) was found in the Bronson home on a Tide bottle, two doorknobs, a section of a door, and a shower curtain.

Reena Roy testified on cross-examination as follows:

> Q. Could you tell the jury what percentage of the population has O type blood?
>
> . . . .
>
> A. (After looking in a briefcase) Among the Caucasian population, which is the white population, type O blood is found approximately in 45% of the population. Among blacks it is approximately 49 to 50% of the population.

Bronson had many fresh cuts on his hand. Bronson's wife testified that while one deep cut on his index finger had occurred prior to her departure for Texas during the week before the murder, the other fresh cuts in her husband's palm were not present. Bronson asserted that he had been in the Smith residence numerous times over the past few months to watch sports activities on television. Kenneth Smith stated that Bronson had only been in the Smith home once other than the day of the murder to borrow money. To Smith's knowledge, Bronson had only been in the basement of his home. Bronson had originally told officers that he had been engaging in sexual activity with a young female acquaintance the night of the murder, but she stated that she had stopped over at the Bronson home for a few minutes, but left immediately after he told her that she had to loan him money.

One of the primary functions of the criminal law is to protect individuals and society from the depredations of the criminally bent. *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991), *State v. Ethchison*, 188 Neb. 134, 195 N.W.2d 498 (1972).

The evidence is sufficient to sustain Bronson's conviction and we find no abuse of discretion from the record.

Finding no merit in any of the errors alleged by the appellant Bronson, judgment of the district court is affirmed.

AFFIRMED.

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