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# FRED E. HLAVA ET AL., APPELLANTS, V. E. BENJAMIN NELSON, GOVERNOR OF NEBRASKA, ET AL., APPELLEES.

528 N.W.2d 306

Filed March 3, 1995. No. S-93-1125.

1. **Constitutional Law: Declaratory Judgments: Statutes.** An action to declare a statute unconstitutional is more akin to relief through an equity action than to relief through a law action.
2. **Equity: Appeal and Error.** On appeal from an equity action, the appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court.
3. **Constitutional Law: Statutes: Proof.** One claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional.
4. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
5. **Constitutional Law: Statutes: Proof.** Unconstitutionality must be clearly established before a statute will be declared void.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Michael V. Smith, of Smith and King, P.C., for appellants.

Don Stenberg, Attorney General, Charles E. Lowe, and Dale A. Comer for appellees Nelson, Allen J. Beermann, and State of Nebraska.

HASTINGS, C.J., WHITE, CAPORALE, LANPHIER, and WRIGHT, JJ., and GRANT, J., Retired, and HOWARD, D.J., Retired.

HOWARD, D.J., Retired.

Fred E. Hlava and other residents, taxpayers, and voters of Sheridan County, the county of Sheridan, and the city of Gordon (collectively, Hlava) appeal the Lancaster County District Court's dismissal of their lawsuit challenging the constitutionality of 1991 Neb. Laws, L.B. 614, as amended by 1992 Neb. Laws, L.B. 7 and L.B. 15, codified at Neb. Rev. Stat. § 50-1101 et seq. (Reissue 1993). The district court found that L.B. 614, as amended, which revised the boundaries of certain legislative districts, was constitutional and dismissed the case.

We affirm the order of the district court.

## STANDARD OF REVIEW

An action to declare a statute unconstitutional "is more akin to relief through an equity action than to relief through a law action." *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 657, 477 N.W.2d 577, 581 (1991). Accord, *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992); *Day v. Nelson*, 240 Neb. 997, 485 N.W.2d 583 (1992). On appeal from an equity action, the appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court. See, *Robotham v. State, supra*; *Day v. Nelson, supra*; *State v. Nebraska Assn. of Pub. Employees, supra*.

## FACTS

This case arises from a statewide legislative redistricting following the 1990 decennial census, which established Nebraska's population at 1,578,385. This resulted in each of Nebraska's 49 legislative districts having an ideal population of 32,212 persons. The Legislature's Committee on Government, Military, and Veterans' Affairs, charged with formulating the redistricting guidelines, determined that no redistricting plan would be considered in which districts deviated more than plus or minus 2 percent from the ideal population.

The redistricting was accomplished pursuant to L.B. 614. We held L.B. 614 to be unconstitutional as to Madison County because Madison County's population fell into the ideal population range and the Legislature had failed to follow the county lines even though it was practical to do so. See *Day v. Nelson, supra*. The Legislature subsequently enacted L.B. 7 to redistrict Madison County in conformity with *Day*. At the same time, L.B. 15 was enacted to change the boundaries of two districts in southwest Nebraska.

As a result of L.B. 614, Sheridan County was divided and assigned to two legislative districts. Prior to the redistricting, all of Sheridan County had been in district 49. Following the redistricting, the two Gordon precincts adjacent to Cherry County were added to legislative district 43, while the

remainder of Sheridan County remained in district 49. The amendment of L.B. 614 by L.B. 7 and L.B. 15 had no effect on the division of Sheridan County.

Hlava filed a lawsuit in district court seeking a declaration that L.B. 614, as amended, violated article III, § 5, of the Nebraska Constitution because the Legislature's redistricting failed to follow county lines where practicable. Hlava further requested an injunction against the implementation and enforcement of the statute.

The district court found L.B. 614, as amended, to be constitutional and dismissed the case. Hlava timely appealed to this court.

## ASSIGNMENT OF ERROR

Hlava's sole assignment of error is that the district court erred in determining that L.B. 614, as amended by L.B. 7 and L.B. 15, does not violate Neb. Const. art. III, § 5.

## ANALYSIS

Initially, we note that one claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional. *State v. Philipps*, 246 Neb. 610, 521 N.W.2d 913 (1994); *Henry v. Rockey*, 246 Neb. 398, 518 N.W.2d 658 (1994). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.* Unconstitutionality must be clearly established before a statute will be declared void. *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990).

Article III, § 5, of the Nebraska Constitution, which requires the Legislature to redistrict the legislative districts of the state after each federal decennial census, provides that "[i]n any such redistricting, *county lines shall be followed whenever practicable*, but other established lines may be followed at the discretion of the Legislature." (Emphasis supplied.)

Hlava argues that article III, § 5, stands for the proposition that "[w]hen required to redistrict itself by . . . the Nebraska Constitution, the Nebraska Legislature *is bound to the use of county lines* for state legislative district boundaries *except for counties which must be divided into two or more legislative districts*." (Emphasis supplied.) Brief for appellants at 8. We disagree.

Hlava's argument appears to be based, at least in part, upon a misunderstanding of this court's holding in *Day v. Nelson*, 240 Neb. 997, 485 N.W.2d 583 (1992). Citing *Day*, Hlava states in his brief: "The Nebraska Supreme Court found that it was practicable to follow county lines in the redistricting process, and the Legislature's failure to do so by dividing Madison County violated Article III, Section 5 of the Nebraska Constitution." Brief for appellants at 7. Hlava then erroneously derives a broad rule that it is constitutionally impermissible to divide any county unless it has sufficient population to constitute more than one legislative district. That is not the rule enunciated in *Day*.

The sole issue in *Day* was whether a county with the ideal population size for a single legislative district may be divided, and the holding is a narrow one. The case stands *only* for the proposition that when a county possesses a population such that it can legally constitute a single legislative district, it is "practicable" to follow the boundaries of that county in any reapportionment plan, and the Legislature's failure to follow such boundaries violates Neb. Const. art. III, § 5. The *Day* opinion makes it clear that only two counties in the state, Madison and Lincoln, possess such populations as to constitute a single legislative district, and only Madison County had been divided by L.B. 614. The rule in *Day* cannot be further generalized.

Whether the Legislature may constitutionally divide a county with a population too small to constitute a single legislative district was not before the court in *Day*. However, the issue had previously been decided in *Carpenter v. State*, 179 Neb. 628, 139 N.W.2d 541 (1966). Accord *League of Nebraska Municipalities v. Marsh*, 253 F. Supp. 27 (D. Neb. 1966). In *Carpenter*, we held L.B. 925, 1965 Neb. Laws, ch. 22, p. 171, to be constitutional even though that statute provided for the division of some counties which had populations insufficient to entitle them to two or more districts. The argument that the boundaries of legislative districts must adhere to county lines except when a county must be divided into two or more districts is wholly without merit.

Hlava points out that there were other redistricting plans

considered by the Legislature which would not have resulted in the division of Sheridan County and which would have been practical for the Legislature to adopt. We note that two of the alternative plans would have unconstitutionally divided Lincoln County, in direct violation of this court's holding in *Day*. Two other alternative plans would have left Sheridan County intact, but would have resulted in the division of counties which remained intact under the plan adopted by the Legislature. Those two plans would doubtless satisfy the residents of Sheridan County, but would do so at the expense of residents of other counties. Article III, § 5, clearly gives the Legislature the discretion to determine which counties ultimately are to be divided in the redistricting process.

Hlava also takes issue with the Legislature's self-imposed guideline that districts not deviate more than plus or minus 2 percent from the ideal population size of 32,212. According to Hlava, it would have been possible for the Legislature to honor county lines had it relaxed its guidelines "to the extent geography and socio-economical realities require." Brief for appellants at 11.

In support of this argument, Hlava cites several U.S. Supreme Court cases permitting greater variation in district populations than the guideline utilized by the Legislature. The fact that the Court may *permit* a greater deviation does not mean that it *requires* such deviation.

Certainly, the Legislature may adhere to a more stringent standard in order to best achieve proportional representation for the citizens of Nebraska. Indeed, such a strict standard is consistent with the requirement of article III, § 5, that any reapportionment of legislative districts be based solely on population. See *Carpenter v. State, supra*.

Although Hlava has shown that the Legislature possibly could have chosen other ways to accomplish the constitutionally mandated legislative redistricting, he has failed in his burden to clearly establish that the redistricting plan actually chosen by the Legislature is unconstitutional. Therefore, L.B. 614, as amended, is presumed to be constitutional, as the district court held, and as we now hold.

## CONCLUSION

Having found that L.B. 614, as amended, is constitutional, we affirm the order of the district court finding the statute constitutional and dismissing Hlava's petition.

AFFIRMED.

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GUS PICK AND WM. D. DENDINGER, APPELLANTS, V. E. BENJAMIN NELSON, GOVERNOR OF NEBRASKA, ET AL., APPELLEES.

528 N.W.2d 309

Filed March 3, 1995. No. S-94-014.

1. **Constitutional Law: Declaratory Judgments: Statutes.** An action to declare a statute unconstitutional is more akin to relief through an equity action than to relief through a law action.
2. **Equity: Appeal and Error.** On appeal from an equity action, the appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court.
3. **Constitutional Law: Statutes: Proof.** One claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional.
4. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
5. **Constitutional Law: Statutes: Proof.** Unconstitutionality must be clearly established before a statute will be declared void.
6. **Constitutional Law: Statutes: Special Legislation.** A legislative act violates Neb. Const. art. III, § 18, as special legislation in one of two ways: (1) by creating a totally arbitrary and unreasonable method of classification or (2) by creating a permanently closed class.
7. ____: ____: ____. The test for a statute challenged under the special laws prohibitions of Neb. Const. art. III, § 18, is whether it bears a reasonable and substantial relation to the legitimate objectives and purposes of the legislation.
8. **Constitutional Law: Due Process: Notice.** There is no constitutional due process requirement of notice and hearing applicable to legislative matters.

9. **Constitutional Law.** The constitutional guarantee of freedom of speech is the same under both the Nebraska and the U.S. Constitutions.
10. **Constitutional Law: Statutes.** In analyzing 1st and 14th Amendment challenges to specific provisions of state election laws, a court must first consider the character and magnitude of the asserted injury to the rights protected by the 1st and 14th Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.
11. **Constitutional Law.** The right to run for elective office is not a fundamental right.
12. **Constitutional Law: Voting.** Although certain rights of voters are fundamental, not all restrictions on voting impose constitutionally suspect burdens upon voters' rights.
13. **Constitutional Law: Equal Protection: Statutes: Presumptions.** Where a statute is challenged under the Equal Protection Clause, the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. There are two narrow exceptions to this rule. Statutes which classify by race, alienage, or national origin will be sustained only if they are suitably tailored to serve a compelling state interest. Likewise, statutes which classify by gender or illegitimacy must be substantially related to, respectively, either a sufficiently important governmental interest or a legitimate state interest.
14. **Constitutional Law: Equal Protection.** The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges.
15. ____: ____. Classifications that do not involve a suspect class or fundamental right are tested for rational basis.
16. **Constitutional Law: Equal Protection: Statutes: Proof.** A party attacking a statute as violative of equal protection under the state and federal Constitutions has the burden to prove that there was no rational basis for the classification.
17. **Constitutional Law: Equal Protection: Voting.** Redistricting serves the interests of equal protection as expressed in the "one person, one vote" principle, an essential element of the representative process.
18. **Constitutional Law: Statutes: Contracts.** In analyzing federal Contract Clause questions, the threshold inquiry is whether the state law has operated as a substantial impairment of a contractual relationship. If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation. Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.
19. **Statutes: Legislature: Intent: Contracts: Presumptions.** Absent some clear indication that the Legislature intends to bind itself contractually, the presumption

is that a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the Legislature shall ordain otherwise.

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

John M. Guthery, of Perry, Guthery, Haase & Gessford, P.C., for appellants.

Don Stenberg, Attorney General, Dale A. Comer, and Charles E. Lowe for appellees Nelson, Allen J. Beermann, and State of Nebraska.

HASTINGS, C.J., WHITE, CAPORALE, LANPHIER, and WRIGHT, JJ., and GRANT, J., Retired, and HOWARD, D.J., Retired.

HOWARD, D.J., Retired.

Gus Pick and William D. Dendinger (appellants), registered electors and taxpayers in Cedar County, appeal the Lancaster County District Court's dismissal of their lawsuit challenging the constitutionality of 1992 Neb. Laws, L.B. 7, an amendment to 1991 Neb. Laws, L.B. 614, those statutes being codified at Neb. Rev. Stat. § 50-1101 et seq. (Reissue 1993). The district court found that L.B. 7, which altered the boundaries of certain legislative districts, was constitutional and dismissed the case.

We affirm the order of the district court.

## STANDARD OF REVIEW

An action to declare a statute unconstitutional "is more akin to relief through an equity action than to relief through a law action." *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 657, 477 N.W.2d 577, 581 (1991). Accord, *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992); *Day v. Nelson*, 240 Neb. 997, 485 N.W.2d 583 (1992). On appeal from an equity action, the appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court. See, *Robotham v. State, supra*; *Day v. Nelson, supra*; *State v. Nebraska Assn. of Pub. Employees, supra*.

## FACTS

This case arises from a statewide legislative redistricting

following the 1990 decennial census. The redistricting was accomplished pursuant to L.B. 614. Based on the state's 1990 census population, the Legislature's Committee on Government, Military, and Veterans' Affairs had determined the optimum number of persons for each of the state's 49 legislative districts to be 32,212, plus or minus 2 percent. Madison County's population fell within that range. Nonetheless, L.B. 614 divided Madison County and placed it into districts 18 and 40, each of which contained all or portions of other counties as well. District 19, located generally north of Madison County, contained all or parts of five counties.

Residents of Madison County challenged the constitutionality of the division of that county into two districts. See *Day v. Nelson, supra*. In *Day*, this court held L.B. 614 to be unconstitutional as to Madison County because the Legislature had failed to follow the Madison County lines for the boundaries of one single legislative district even though it was practical to do so.

The Legislature, in special session, enacted L.B. 7 on August 12, 1992, in response to *Day*. The bill, which contained an emergency clause, was signed into law by the Governor on August 14 and went into effect immediately. As a result of L.B. 7, Madison County was redistricted to constitute legislative district 19, and the former district 19 was divided and added to the remaining portions of districts 18 and 40.

Appellant Pick had received the second highest number of votes in the May 1992 primary in the former district 19 and had received a certificate of nomination from the state board of canvassers. The *Day* decision, filed on July 2, and the enacting of L.B. 7 on August 12 followed the primary, but were prior to the November 1992 general election. Pick's residence following the enacting of L.B. 7 was in the new district 18, rather than in the old district 19, and Pick was no longer eligible to run for state legislator in the November election because only odd-numbered districts held elections for state legislator in November 1992.

The candidate who received the most votes in the former district 19 primary, De Carlson, is not a party to this case. Carlson filed a lawsuit in the U.S. District Court for the District

of Nebraska raising many of the same constitutional questions which Pick raises and seeking injunctive relief. That court denied Carlson injunctive relief. See Carlson v. Nelson, case No. 4:CV92-3300 (D. Neb. Sept. 3, 1992).

Appellant Dendinger, a voter in the former district 19, was denied the opportunity to vote for legislator in the November 1992 general election because he resided in the new district 18 after L.B. 7 was enacted.

Appellants filed in the district court for Lancaster County a declaratory judgment action against E. Benjamin Nelson, Governor of Nebraska, and other state officials, challenging the constitutionality of L.B. 7 and requesting that its implementation be enjoined. The plaintiffs in *Day v. Nelson, supra*, moved to intervene in the case and were given leave to do so by the district court. However, no petition in intervention was ever filed.

The district court found that the statute was not unconstitutional and denied appellants' request for an injunction. They timely appealed directly to this court, as the matter involves the constitutionality of a statute.

## ASSIGNMENTS OF ERROR

Appellants contend that the district court erred in failing to find that L.B. 7 (1) violates Neb. Const. art. III, § 5, in that it does not follow county lines where practicable; (2) constitutes an invalid special law in violation of Neb. Const. art. III, § 18; (3) violates Neb. Const. art. I, § 22, with regard to free elections; (4) denied Pick a constitutionally protected property right in his certificate of nomination; (5) denied Pick the right to free speech and association as guaranteed by federal and state Constitutions; (6) denied appellants equal protection of the laws; and (7) violates U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, with regard to impairment of contracts.

## ANALYSIS

Before turning to appellants' assignments of error, we note that one claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional. *State v. Philipps*, 246 Neb. 610, 521 N.W.2d 913 (1994); *Henry v. Rockey*, 246 Neb. 398, 518 N.W.2d 658 (1994). A statute is presumed to be constitutional, and all reasonable doubts will be

resolved in favor of its constitutionality. *Id.* Unconstitutionality must be clearly established before a statute will be declared void. *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990).

### Failure to Follow County Lines

Appellants allege that L.B. 7 violates Neb. Const. art. III, § 5, in that it does not follow county lines where practicable. We have disposed of this issue in *Hlava v. Nelson, ante* p. 482, 528 N.W.2d 306 (1995). In that case, we stated that except for those counties with populations of the ideal size for a single legislative district, the Legislature has the discretion to determine which counties are to be divided in the redistricting process. We specifically held in *Hlava* that L.B. 614, as amended by L.B. 7 and 1992 Neb. Laws, L.B. 15, was not unconstitutional. We decline to further revisit the issue, and we adopt the rationale and holding of the court in *Hlava*. This assignment of error is without merit.

### Special Law

Next, appellants argue that L.B. 7 is unconstitutional special legislation because it affected only the candidates and voters of district 19 among all the odd-numbered districts entitled to elect state legislators in the November 1992 general election. Article III, § 18, of the Nebraska Constitution prohibits the Legislature from passing special laws as to the opening and conduction of any election.

A legislative act violates Neb. Const. art. III, § 18, as special legislation in one of two ways: (1) by creating a totally arbitrary and unreasonable method of classification or (2) by creating a permanently closed class. *Henry v. Rockey, supra*; *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991). The test for a statute challenged under the special laws prohibitions of article III, § 18, is whether it bears a reasonable and substantial relation to the legitimate objectives and purposes of the legislation. *Id.*

Appellants do not allege that L.B. 7 creates a permanently closed class, and indeed, they cannot. Any classifications created by L.B. 7 can easily be changed through subsequent legislation. Rather, appellants argue that the classification

created by L.B. 7 was not rational because there existed other redistricting schemes which would not have affected the rights of the voters and candidates in district 19. We disagree.

The candidates and voters of district 19 were not "singled out" by the Legislature for special treatment. In fact, L.B. 7 was not directed at the voters and candidates of district 19 at all. Any classifications created thereby were neither arbitrary nor unreasonable and were merely incidental to the object sought to be accomplished by L.B. 7, that is, to correct a specific constitutional deficiency of L.B. 614 as mandated by this court in *Day v. Nelson*, 240 Neb. 997, 485 N.W.2d 583 (1992).

The resultant redistricting was reasonably and substantially related to the wholly legitimate legislative objective of L.B. 7. As noted above, the Legislature has the discretion to choose among competing redistricting schemes, and the fact that other schemes could have been selected does not support a finding that L.B. 7 is constitutionally infirm as special legislation.

### Free Elections

Article I, § 22, of the Nebraska Constitution states: "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." Appellants argue that L.B. 7 violates article I, § 22, because it effectively abolished the electoral process for qualified voters and candidates in district 19 who were placed in district 18 by the redistricting. Only odd-numbered legislative districts elected state senators in 1992.

This issue is controlled by our holding in *Carpenter v. State*, 179 Neb. 628, 139 N.W.2d 541 (1966). In that case, redistricting prevented some voters residing in odd-numbered districts from voting in the general election. The plaintiff contended that the redistricting statute, L.B. 925, 1965 Neb. Laws, ch. 22, p. 171, deprived the voters of the right to vote for the representative of their choice for a period of 2 years, in violation of Neb. Const. art. I, § 22.

We rejected plaintiff's argument, holding:

> With the staggered terms of Nebraska legislators provided for under Article III, section 7, of the Constitution of Nebraska, it would be a practical impossibility to redistrict

> without this effect. The regulations regarding the exercise of the elective franchise provided for under the Constitution of Nebraska, and as affected by L.B. 925, are reasonable, uniform, and impartial, and should not be treated as subverting or impeding the exercise of the elective franchise. L.B. 925 does not create any unconstitutional hindrance or impediment to the right of a qualified voter to exercise the elective franchise and does not violate Article I, section 22, of the Constitution of Nebraska.

179 Neb. at 636, 139 N.W.2d at 546. Accord *Barnett v. Boyle*, 197 Neb. 677, 250 N.W.2d 635 (1977) (holding that plaintiffs were not unconstitutionally disenfranchised by division of school district into districts for election of board members beginning in 1976 because plaintiffs would continue to be represented by members elected at large in 1974 and would be able to vote for members from their district in 1978).

Similarly, L.B. 7 does not operate to hinder or impede the right of a qualified voter to exercise the elective franchise in violation of article I, § 22. It merely requires that the voters from the old district 19 who have been placed in the new district 18 delay the exercise of that franchise for a period of 2 years. This assignment of error is without merit.

### Property Right

Appellant Pick asserts that he had a property right in his certificate of nomination and that L.B. 7 deprived him of that property right without due process of law, in violation of Neb. Const. art. I, § 3. He admits that he was permitted to speak at the legislative committee hearing on L.B. 7, but complains that this "should not equate with due process properly accorded by the judicial process." Brief for appellants at 22.

The short answer to this argument is that the formation of representative districts is not a judicial process, but a legislative process. See *Barnett v. Boyle, supra*. In *Barnett*, we held that "[t]here is no constitutional due process requirement of notice and hearing applicable to legislative matters." 197 Neb. at 679, 250 N.W.2d at 637. Therefore, L.B. 7, being a legislative matter, is not subject to any constitutional infirmity on due

process grounds.

FREE SPEECH AND FREE ASSOCIATION

Next, Pick asserts that L.B. 7 violates his rights to free speech and free association as guaranteed by the First Amendment to the U.S. Constitution and to free speech as guaranteed by Neb. Const. art. I, § 5, because he was denied the right to run as a candidate in the 1992 general election. Dendinger argues that his rights to free speech and free association were similarly violated because he was denied the right to vote in the 1992 general election.

The constitutional guarantee of freedom of speech is the same under both the Nebraska and the U.S. Constitutions. *State v. Simants*, 194 Neb. 783, 236 N.W.2d 794 (1975), *rev'd on other grounds sub nom., Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976). Therefore, we do not distinguish between the two constitutions in our analysis of this issue.

The U.S. Supreme Court, in *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983), has set forth the analytical framework for 1st and 14th Amendment challenges to specific provisions of state election laws:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Although L.B. 7 is a redistricting law and not an election law per se, appellants' First Amendment challenge to the statute is based upon its effects on Pick's rights as a candidate and Dendinger's rights as a voter. These are the same rights implicated in various state election statutes which have been the

subject of the U.S. Supreme Court's review. See, e.g, *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992); *Anderson v. Celebrezze, supra*; *Clements v. Fashing*, 457 U.S. 957, 102 S. Ct. 2836, 73 L. Ed. 2d 508 (1982). Therefore, we find it useful to adopt the reasoning and analytical framework of the Court in the election statute cases in our analysis of appellants' claims.

We first proceed to consider the character and magnitude of the asserted injury to appellants' rights. Appellants seek to characterize their First Amendment rights to run for elective office and to vote as fundamental rights, the violation of which is entitled to strict scrutiny by this court. However, the right to run for elective office is not a fundamental right. *Bullock v. Carter*, 405 U.S. 134, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972).

Furthermore, Pick is not forever prohibited from running for state legislator by L.B. 7. He is free to pursue his candidacy in future elections in his new district should he choose to do so. The U.S. Supreme Court has held that an election statute which specifically imposed a delay on the candidacy of certain individuals was not constitutionally unsound. See *Clements v. Fashing, supra*. In *Clements*, the Court held that a statute requiring state officers to await the conclusion of their terms of office before running for the Texas Legislature was a de minimis interference with candidacy which did not impair interests protected by the First Amendment.

In this case, the delay to candidacy occasioned by L.B. 7 is not directed at Pick or at any other candidate, but is merely incidental to the purpose of the statute. Therefore, we find that any alleged injury to Pick occasioned by the delay to his candidacy is a de minimis interference which does not violate Pick's fundamental rights under the First Amendment and will not invoke strict scrutiny of the offending statute.

As to the alleged violation of appellant Dendinger's rights, we note that, although certain rights of voters are fundamental, not all restrictions on voting impose constitutionally suspect burdens upon voters' rights. See *Anderson v. Celebrezze, supra*. This court has stated that because Nebraska staggers the terms of its state legislators, it would be a practical impossibility to redistrict without depriving some voters of the right to vote for

a legislative representative for a period of 2 years. See *Carpenter v. State*, 179 Neb. 628, 139 N.W.2d 541 (1966). In the absence of evidence that L.B. 7 was a form of invidious discrimination specifically directed at depriving the voters in the former district 19 of the right to exercise their elective franchise, the 2-year delay is no more than the inevitable result of redistricting. We conclude that L.B. 7 does not create any significant impairment of Dendinger's First Amendment rights.

Next, we examine the precise interests put forward by the State as justification for the burden imposed by L.B. 7. As previously noted, L.B. 7, an amendment to L.B. 614, was enacted in response to the mandate of this court in *Day v. Nelson*, 240 Neb. 997, 485 N.W.2d 583 (1992), because the Legislature had unconstitutionally divided Madison County in violation of Neb. Const. art. III, § 5. We find the State's interest in correcting an unconstitutional redistricting scheme in response to this court's mandate to be both strong and unquestionably legitimate.

Finally, in applying the *Anderson* balancing test, we consider the extent to which the State's interests make it necessary to burden the appellants' rights. It being mandatory that the Legislature redistrict Madison County and, of necessity, some surrounding districts, it was inevitable that the rights of some voters and some candidates would be affected.

Appellants do not claim that the redistricting process is directed at them personally or that the Legislature's objective was to single out a particular class of voters or candidates. The fact that appellants, rather than other voters and candidates, have been affected by L.B. 7 is merely a byproduct of the Legislature's exercise of its discretion pursuant to Neb. Const. art. III, § 5, in selecting a constitutionally permissible redistricting plan for Madison County. See *Hlava v. Nelson, ante* p. 482, 528 N.W.2d 306 (1995).

On balance, we find that the State's interest in devising a constitutional scheme of redistricting far outweighs any burden upon appellants' state and federal rights to free speech and free association which may have been occasioned by such redistricting. This assignment of error is without merit.

EQUAL PROTECTION

Appellants also argue that L.B. 7 violates their rights to equal protection of the laws; Pick because he was singled out for different treatment than other candidates, and Dendinger because he was denied his right to vote for state senator in the general election of 1992.

> Where a statute is challenged under the Equal Protection Clause, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." [Citation omitted.] There are two narrow exceptions to this rule. Statutes which classify by race, alienage, or national origin "will be sustained only if they are suitably tailored to serve a compelling state interest." [Citation omitted.] Likewise, statutes which classify by gender or illegitimacy must be "substantially related" to, respectively, either "a sufficiently important governmental interest" or "a legitimate state interest."

*Robotham v. State*, 241 Neb. 379, 385, 488 N.W.2d 533, 539 (1992), quoting *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges. See *Robotham v. State, supra*. Classifications that do not involve a suspect class or fundamental right are tested for rational basis. *Id.*; *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991). Thus, a party attacking a statute as violative of equal protection under the state and federal Constitutions has the burden to prove that there was no rational basis for the classification. *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989).

Appellants urge that they have been deprived of "fundamental rights" so as to invoke strict scrutiny of the statute. We have already determined in our First Amendment analysis that appellants have not been deprived of any fundamental rights.

Neither Pick's status as a candidate nor Dendinger's status as a voter falls within a classification of race, alienage, or national origin so as to require that L.B. 7 be suitably tailored to serve a compelling state interest. Neither classification is based upon

gender or illegitimacy, so L.B. 7 is not required to have a substantial relation to an important or legitimate governmental interest in order to survive constitutional attack. L.B. 7 is therefore presumed to be valid unless appellants prove that there is no rational basis for the classification.

As we have previously stated, the purpose of L.B. 7 was to correct a constitutional deficiency in L.B. 614, in response to this court's mandate in *Day v. Nelson*, 240 Neb. 997, 485 N.W.2d 583 (1992). Redistricting serves the interests of equal protection as expressed in the "one person, one vote" principle, an essential element of the representative process. See, *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964); *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), *on remand* 206 F. Supp. 341 (M.D. Tenn); *Campbell v. Area Vocational Technical School No. 2*, 183 Neb. 318, 159 N.W.2d 817 (1968).

While L.B. 7 may not be the redistricting scheme preferred by appellants, it is nevertheless rationally related to the goal of enacting a constitutional redistricting scheme in furtherance of the underlying interests of equal protection. Appellants have failed to prove otherwise and cannot prevail on this assignment of error.

### Impairment of Contracts

Finally, Pick argues that his certificate of nomination is a contractual right and that L.B. 7 is an unconstitutional impairment of the obligation of that contract in violation of U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16. The U.S. Constitution, art. I, § 10, provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." Neb. Const. art. I, § 16, provides that "[n]o . . . law impairing the obligation of contracts . . . shall be passed."

A three-step analytical framework for federal Contract Clause questions was enunciated by the U.S. Supreme Court in *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400, 411-12, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983):

> The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." . . .

> If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation . . . .
>
> Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption."

However, prior to determining whether L.B. 7 operates as a substantial impairment of the State's contractual obligation to Pick, we must determine whether the State has any contractual obligations to Pick within the purview of the Contract Clause. See *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982).

> [A]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." [Citations omitted.] This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. [Citation omitted.] Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body. . . . Thus, the party asserting the creation of a contract must overcome this well-founded presumption . . . .

*National R. Passenger Corp. v. A. T. & S. F. R. Co.*, 470 U.S. 451, 465-66, 105 S. Ct. 1441, 84 L. Ed. 2d 432 (1985).

Therefore, we must examine the state statutes which provide for the issuance of certificates of nomination to candidates to determine if such statutes evince an intent that the State bind itself contractually by such an action. Neb. Rev. Stat. § 32-534 (Reissue 1993) states that "[t]he county clerk, election commissioner, Secretary of State, or other officer charged with

the duty of canvassing the results of a primary . . . election shall, within forty days after the election, mail a certificate of nomination to each candidate nominated at such primary election . . . ." See, also, Neb. Rev. Stat. § 32-4,101 (Reissue 1993) (setting forth the duties of the board of canvassers); Neb. Rev. Stat. § 32-424 (Reissue 1993) (providing that the names of those candidates certified by the Secretary of State shall be placed on the ballot for the general election).

The language of §§ 32-534, 32-4,101, and 32-424 gives no clear indication that the Legislature intended the mailing of a certificate of nomination to constitute a binding contract of any type between a candidate and the State. None of these sections creates or speaks of such a contract. Therefore, we must presume that the Legislature did not intend to create any private contractual or vested rights by providing for certificates of nomination to be issued to candidates, absent any showing to the contrary by Pick.

In fact, Pick makes no argument that any statute, by virtue of providing for a certificate of nomination, creates a binding contract between a candidate and the State. Rather, Pick assumes that his certificate of nomination, "as a vested property interest, is a contractual right deserving of constitutional protection," brief for appellants at 33, and argues that L.B. 7 substantially impairs that right.

Because Pick has failed to overcome the presumption that a certificate of nomination issued pursuant to § 32-534 does not constitute a contract, we need proceed no further in our analysis of this issue. There being no contractual rights vested in Pick by virtue of his certificate of nomination, L.B. 7 does not unconstitutionally impair Pick's contractual rights under either the state or federal Constitutions.

## CONCLUSION

Upon our de novo review of the facts in this case, we find that appellants have failed in their burden to clearly establish that L.B. 7 is unconstitutional. Therefore, L.B. 7 is presumed to be constitutional. The order of the district court finding L.B. 7 to be constitutional and dismissing appellants' petition is affirmed.

AFFIRMED.

# DONALD G. ALEXANDER AND DEBRA L. ALEXANDER, APPELLEES, V. DEPARTMENT OF REVENUE, STATE OF NEBRASKA, APPELLANT.

527 N.W.2d 852

Filed March 3, 1995. No. S-94-016.

**Statutes: Due Process: Taxes: Controlled Substances.** Neb. Rev. Stat. § 77-4312(4) (Cum. Supp. 1994) as applied to indigent persons violates due process.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

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

Kirk E. Naylor, Jr., for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and BOSLAUGH, J., Retired.

LANPHIER, J.

This case is an appeal from the Lancaster County District Court's holding that Neb. Rev. Stat. § 77-4312(4) (Cum. Supp. 1994) violates the due process of indigent taxpayers. Section 77-4312(4) requires payment of an unpaid marijuana and controlled substances tax or the posting of security as a prerequisite to a hearing on the redetermination of such tax.

On April 17, 1992, the Nebraska Department of Revenue (Department) issued a notice of jeopardy determination and assessment to the appellees, Donald G. Alexander and Debra L. Alexander. The notice asserted the appellees were liable for taxes in the amount of $8,600 and an equal amount in penalty and interest, for a total of $17,407.81 pursuant to the marijuana and controlled substances tax statutes. Neb. Rev. Stat. § 77-4301 et seq. (Reissue 1990 & Cum. Supp. 1994). The notice further provided that the determination would become final and could not be reconsidered by the Tax Commissioner unless a petition for redetermination was filed within 10 days accompanied by security in the amount of $8,600. The appellees timely filed a petition for redetermination and enclosed an in forma pauperis declaration. In the in forma pauperis declaration, the appellees stated they were without the

means to post security in the amount of $8,600.

The Department dismissed the appellees' petition for redetermination for the reason that the required security was not posted and therefore the Tax Commissioner was without jurisdiction to decide the merits of the case. The appellees appealed the decision to the district court for Lancaster County and alleged that the marijuana and controlled substances tax statutes are unconstitutional in that they deny due process of law to indigent persons by denying them any hearing before the Department to contest the jeopardy determination and assessment made against them by the Department. The district court, on November 24, 1993, held that § 77-4312(4) as applied to indigent persons violated due process and remanded the matter to the Department for further proceedings on the appellees' petition for redetermination. From this order, the Department appeals.

We addressed the sole issue presented in this appeal in *Boll v. Department of Revenue, ante* p. 473, 528 N.W.2d 300 (1995), and held that § 77-4312(4) as applied to almost identical facts unconstitutionally deprived indigent taxpayers of due process. At oral argument, the parties agreed that our holding in *Boll* controls the outcome of this matter. For the reasons stated in *Boll*, we affirm the holdings of the district court.

AFFIRMED.

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STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. JOHN E. RUST, APPELLEE AND CROSS-APPELLANT.

528 N.W.2d 320

Filed March 3, 1995. No. S-94-376.

1. **Criminal Law: Judgments: Appeal and Error.** In general, in the absence of specific statutory authorization, the State has no right to appeal an adverse ruling in a criminal case.
2. **Constitutional Law: Double Jeopardy.** The Double Jeopardy Clause contained

in U.S. Const. amend. V forbids the retrial of a defendant who has been acquitted of the crime charged.

3. **Sentences.** The imposition of a particular sentence usually is not regarded as an acquittal of a more severe sentence that could have been imposed.
4. **Constitutional Law: Double Jeopardy: Sentences.** As a general matter, the Double Jeopardy Clause contained in U.S. Const. amend. V imposes no absolute prohibition of a harsher sentence at retrial after a defendant has succeeded in having an original conviction set aside.
5. **Constitutional Law: Double Jeopardy: Sentences: Death Penalty.** If the sentencing proceeding resembles in all relevant respects a trial on the guilt or innocence phase, the Double Jeopardy Clause contained in U.S. Const. amend. V prohibits the imposition of a death sentence after a sentence of life has been imposed.
6. **Convictions: Appeal and Error.** A conviction reversed on appeal is nullified and the slate wiped clean.
7. **Sentences: Death Penalty.** One cannot concurrently serve a term of years with a death sentence.
8. **Homicide: Sentences.** On being sentenced to life imprisonment for first degree murder, a defendant is not entitled to credit for time in custodial detention pending trial and sentence.
9. **Records: Appeal and Error.** The proper place to make a record is in the trial court, not in an appellate court.
10. **Appeal and Error.** Absent plain error, an issue raised for the first time in an appellate court is disregarded, as the trial court could not have committed an error on an issue not presented and submitted.
11. **Records: Appeal and Error.** A party's brief may not expand the evidentiary record.
12. ____: ____. An appellate brief must limit itself to arguments supported by the appellate record.

Appeal from the District Court for Douglas County: STEPHEN ILLINGWORTH, J. PATRICK MULLEN, and RONALD E. REAGAN, Judges. Affirmed.

Don Stenberg, Attorney General, and J. Kirk Brown for appellant.

Emil M. Fabian and Barbara Thielen, of Fabian & Thielen, for appellee.

John E. Rust, pro se.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and BOSLAUGH, J., Retired.

PER CURIAM.

Because of events which took place on February 21, 1975,

the defendant-appellee, John E. Rust, was found guilty in the district court of one count of felony murder and three counts of shooting with intent to kill, wound, or maim. He was thereafter, on October 30, 1975, sentenced to death on the murder conviction and to imprisonment for concurrent periods of not less than 16⅔ nor more than 50 years on each of the shooting convictions. He was later, on March 25, 1994, resentenced on the murder conviction to life imprisonment. This being a case in which a life sentence was imposed and a sentence of death is sought, the plaintiff State, under the provisions of Neb. Rev. Stat. § 24-1105 (Cum. Supp. 1994), appealed directly to this court, claiming the sentence to be excessively lenient. Rust resists that claim and cross-appeals, asserting he has been improperly denied credit for the time he has already served. We affirm.

## BACKGROUND

On Rust's direct appeal, we rejected his various challenges to the October 1975 judgment of the district court and affirmed. *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977), *cert. denied* 434 U.S. 912, 98 S. Ct. 313, 54 L. Ed. 2d 198.

Rust then unsuccessfully challenged his murder conviction and sentence under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1989). *State v. Rust*, 208 Neb. 320, 303 N.W.2d 490 (1981), *cert. denied* 454 U.S. 882, 102 S. Ct. 368, 70 L. Ed. 2d 194.

Rust next brought an action in the federal district court, but because certain claims had not been exhausted at the state level, he was required to seek further postconviction relief in the state courts; relief was again denied. *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986), *cert. denied* 481 U.S. 1042, 107 S. Ct. 1987, 95 L. Ed. 2d 826 (1987).

After unsuccessfully seeking state habeas corpus relief, *Rust v. Gunter*, 228 Neb. 141, 421 N.W.2d 458 (1988), Rust initiated a habeas corpus action in the federal district court.

The federal district court abstained from considering certain issues but ordered that Rust's murder sentence be reduced to life imprisonment unless the State initiated capital sentencing proceedings. Upon the respondent warden's appeal, the U.S.

Court of Appeals for the Eighth Circuit remanded the cause for consideration of the remaining issues. *Rust v. Clarke*, 960 F.2d 72 (8th Cir. 1992).

The federal district court then entered an additional order granting habeas relief on Rust's claim of ineffective assistance of counsel at the initial sentencing proceeding. Accordingly, the federal district court entered judgment in favor of Rust and again ordered that his murder sentence be reduced to life imprisonment unless the State initiated capital resentencing. Appeal was taken once again, whereupon the Eighth Circuit affirmed the federal district court's judgment, holding that this court's earlier finding that the existence of each of the aggravating factors was proven beyond a reasonable doubt violated due process. *Rust v. Hopkins*, 984 F.2d 1486 (8th Cir. 1993). The U.S. Supreme Court denied the State's request for certiorari. *Hopkins v. Rust*, ____ U.S. ____, 113 S. Ct. 2950, 124 L. Ed. 2d 697 (1993).

The State then instituted resentencing proceedings. A hearing was held before a three-judge panel, which ordered that Rust be sentenced to life imprisonment and that such sentence be served consecutively to the sentences previously imposed on the three shooting counts.

## STATE'S APPEAL

Claiming that the sentencing panel erred in its consideration of various aggravating circumstances, the State undertook this appeal under the authority found in Neb. Rev. Stat. § 29-2320 (Cum. Supp. 1994):

> Whenever a defendant is found guilty of a felony following a trial or the entry of a plea of guilty or tendering a plea of nolo contendere, the county attorney charged with the prosecution of such defendant may appeal the sentence imposed if such attorney reasonably believes, based on all of the facts and circumstances of the particular case, that the sentence is excessively lenient.

Rust argues that the imposition of a life sentence after the capital sentencing proceeding used here constitutes an acquittal of the death penalty and that as a result, the Double Jeopardy Clause contained in U.S. Const. amend. V prohibits any

reconsideration of such sentence.

We note that in *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990), we considered and affirmed a life sentence for a conviction of first degree murder which the State had appealed under § 29-2320 as being excessively lenient. We therein announced that the standard of review when the State appeals and claims that a sentence is excessively lenient is whether the sentencing court abused its discretion in the sentence imposed. We observe, however, that the parties did not raise, and we thus did not consider, the issue of whether the State may appeal under § 29-2320 a life sentence for a conviction of first degree murder. The question is therefore one of first impression.

In general, in the absence of specific statutory authorization, the State has no right to appeal an adverse ruling in a criminal case. *State v. Baird*, 238 Neb. 724, 472 N.W.2d 203 (1991); Neb. Rev. Stat. §§ 29-2315.01 and 25-1912 (Cum. Supp. 1994). Moreover, it is well established that the Double Jeopardy Clause forbids the retrial of a defendant who has been acquitted of the crime charged. *United States v. DiFrancesco*, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980); *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977); *Fong Foo v. United States*, 369 U.S. 141, 82 S. Ct. 671, 7 L. Ed. 2d 629 (1962).

However, the imposition of a particular sentence usually is not regarded as an "acquittal" of a more severe sentence that could have been imposed. *Bullington v. Missouri*, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981). Thus, as a general matter, the Double Jeopardy Clause imposes no absolute prohibition of a harsher sentence at retrial after a defendant has succeeded in having an original conviction set aside. *Bullington, supra*. See, also, *DiFrancesco, supra*; *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973); *Stroud v. United States*, 251 U.S. 15, 40 S. Ct. 50, 64 L. Ed. 103 (1919).

But because Missouri's presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence, the Court in *Bullington, supra*, reasoned that the first sentencer's imposition

of a life sentence operated as an acquittal of the death sentence. Thus, the Double Jeopardy Clause prevented imposition of the death sentence after the first sentence was vacated.

In so holding, the *Bullington* Court identified several characteristics of Missouri's sentencing proceeding that made it comparable to a trial for double jeopardy purposes. First, the discretion of the sentencer, the jury, was restricted to precisely two options: death or life imprisonment without possibility of release for 50 years. Second, the sentencer was to make its decision guided by substantive standards and based on evidence introduced in a separate proceeding that formally resembled a trial. Finally, the prosecution had to prove certain statutorily defined facts beyond a reasonable doubt in order to support a sentence of death. For those reasons, the *Bullington* Court determined that the Missouri sentencer had to determine that the prosecution failed to prove its case when it imposed a sentence of life imprisonment in a capital sentencing proceeding.

The *Bullington* Court explained that the sentencing procedures it had considered in the past did not have the hallmarks of a trial on guilt or innocence. The Court specifically noted that the sentencing procedures previously considered did not require a separate sentencing proceeding at which the prosecution was required to prove particular facts beyond a reasonable doubt to justify a particular sentence. Moreover, in the previously considered noncapital sentencing procedures, the sentencer's discretion was essentially unfettered. See, *Chaffin, supra*; *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); *Stroud, supra*. Thus, the *Bullington* Court reasoned that the values underlying the principle that a verdict of acquittal on the issue of guilt or innocence is absolutely final were equally applicable when a sentencer rejected the state's claim that a defendant deserved to die.

As stated in *Green v. United States*, 355 U.S. 184, 187–88, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be

> allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

The *Bullington* Court further reasoned that the " 'embarrassment, expense and ordeal' " and the " 'anxiety and insecurity' " faced by a defendant at the penalty phase of a Missouri capital murder trial were at least equivalent to that faced by any defendant at the guilt phase of a criminal trial. 451 U.S. at 445. The " 'unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant,' " thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment. *Id.*, quoting *United States v. DiFrancesco*, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980). The *Bullington* Court reasoned that Missouri's use of the reasonable doubt standard indicated that in a capital sentencing proceeding, it was the State, not the defendant, that should bear " 'almost the entire risk of error.' " 451 U.S. at 446, quoting *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

The *Bullington* Court also cautioned that its decision did not depend on the State's announced intention to rely only upon the same aggravating circumstances it sought to prove at petitioner's first trial or upon its statement that it would introduce no new evidence in support of its contention that the petitioner deserved the death penalty. The Court emphasized that its decision was based upon the principle that the state, having had " 'one fair opportunity to offer whatever proof it could assemble,' . . . is not entitled to another." 451 U.S. at 446.

The *Bullington* rationale was extended in *Arizona v. Rumsey*, 467 U.S. 203, 104 S. Ct. 2305, 81 L. Ed. 2d 164 (1984), to a capital sentencing scheme in which the judge, as opposed to a jury, had initially determined that a life sentence was appropriate.

The *Rumsey* jury convicted the defendant of first degree

murder resulting from an armed robbery. In accordance with Arizona's statutory capital sentencing scheme, the trial judge, without a jury, thereafter conducted a separate hearing on the appropriate sentence. Aggravating and mitigating circumstances were considered to determine whether death was the appropriate sentence. At the hearing, the state argued that three statutory aggravating circumstances were present. The defendant countered that no aggravating circumstances were present, but that several mitigating circumstances were.

The trial judge found no aggravating circumstances present and specifically found that the defendant did not commit the offense for the receipt or in expectation of anything of pecuniary value. Finding no aggravating circumstances present, the trial judge sentenced the defendant to life imprisonment without possibility of parole for 25 years, as statutorily mandated for first degree murder when the death penalty was not imposed. The trial judge also sentenced the defendant to a consecutive term of imprisonment for 21 years on the armed robbery conviction.

The defendant appealed, arguing that the imposition of consecutive sentences violated both federal and state law. Under Arizona law, the defendant's appeal permitted the state to file a cross-appeal from the life sentence. In the cross-appeal, the state contended that the trial court had committed an error of law in interpreting the pecuniary gain aggravating circumstance to apply only to contract killings. The state supreme court rejected the defendant's challenge to his sentence; however, it agreed that the trial court had misinterpreted an aggravating circumstance. Because of the trial court's misinterpretation, the Arizona Supreme Court concluded that the previously imposed sentence of life imprisonment would have to be set aside and the matter remanded for redetermination of aggravating and mitigating circumstances and resentencing. The sentence for armed robbery was left undisturbed.

On remand, the trial court held a new sentencing hearing; neither party presented any new evidence, but the defendant argued that imposing the death penalty would violate *Bullington v. Missouri*, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981). The trial court found that the aggravating circumstance

concerning commission of the murder for pecuniary gain was the only aggravating circumstance present and further found that no mitigating circumstances were sufficiently substantial to call for leniency. This time the trial court sentenced the defendant to death as required under Arizona statute.

In his mandatory appeal to the Arizona Supreme Court, the defendant argued that imposition of the death sentence on resentencing, after he had effectively been acquitted of death at his initial sentencing, violated the Double Jeopardy Clause of the Fifth Amendment. The Arizona Supreme Court agreed and ordered the defendant's sentence for first degree murder reduced to life imprisonment.

Granting certiorari, the U.S. Supreme Court determined that the Arizona sentencing proceeding shared the characteristics of the Missouri proceeding that made it resemble a trial for purposes of the Double Jeopardy Clause. Specifically, the Court noted that the sentencer, the trial judge, was required to choose between two options, death or life imprisonment, and that the decision was guided by detailed statutory standards defining aggravating and mitigating circumstances; in particular, death could not be imposed unless one aggravating circumstance was found, whereas death was required if there was one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency. The sentencer was required to make findings with respect to each of the statutory aggravating and mitigating circumstances, and the sentencing hearing involved the submission of evidence and the presentation of argument. The Court further noted that the usual rules of evidence governed the admission of evidence of aggravating circumstances and that the state had to prove the existence of aggravating circumstances beyond a reasonable doubt. The Court held that for double jeopardy purposes, these characteristics made the Arizona capital sentencing proceeding indistinguishable from the capital sentencing proceeding in Missouri.

The U.S. Supreme Court also noted that in making its findings, the trial court relied on a misconstruction of the statute defining the pecuniary gain aggravating circumstance. However, the Court reasoned that reliance on an error of law did not

change the double jeopardy effects of a judgment that amounts to an acquittal on the merits. The Court stated that the fact that acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles affects the accuracy of that determination, but does not alter its essential character. Therefore, the Court concluded that an acquittal on the merits barred retrial even if based on legal error.

The *Rumsey* Court further reasoned that the fact that the sentencer was the trial judge rather than the jury did not render the sentencing proceeding any less like a trial, citing *United States v. Morrison*, 429 U.S. 1, 97 S. Ct. 24, 50 L. Ed. 2d 1 (1976) (Double Jeopardy Clause treats bench and jury trials alike). The Court further explained that the availability of appellate review, including reweighing of aggravating and mitigating circumstances, did not make the appellate process part of a single continuing sentencing proceeding. The Court additionally determined that as no appeal need be taken if life imprisonment were imposed, the appellate reweighing could work only to a defendant's advantage. Therefore, the Court held that a sentence imposed after a completed Arizona capital sentencing hearing is a judgment which triggers the protections of the Double Jeopardy Clause.

Neb. Rev. Stat. § 29-2520 (Reissue 1989) requires that after one is found guilty of first degree murder, the trial judge or a three-judge panel conduct a separate hearing to determine the sentence to be imposed. The procedure is found in Neb. Rev. Stat. § 29-2522 (Reissue 1989):

> After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:
>
> (1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;
>
> (2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or
>
> (3) Whether the sentence of death is excessive or

disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Neb. Rev. Stat. § 29-2523 (Reissue 1989) defines a number of aggravating and mitigating circumstances. Although the Nebraska sentencer is not limited to a consideration of only the statutorily defined mitigating circumstances, *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), the situation with respect to aggravating circumstances is otherwise. What constitutes an aggravating circumstance is left neither to the discretion of the sentencer nor to this court, but is controlled by statute. *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986), *cert. denied*, 484 U.S. 905, 108 S. Ct. 247, 98 L. Ed. 2d 205 (1987). Aggravating circumstances must be proved beyond a reasonable doubt. *Id.*; *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984).

The capital sentencing procedure of this state shares the same characteristics which the U.S. Supreme Court found to resemble a trial in the Arizona and Missouri capital sentencing proceedings. Under Nebraska law, first degree murder is punishable by death or life imprisonment. Neb. Rev. Stat. §§ 28-303 and 28-105 (Reissue 1989). Therefore, the sentencer is not given unbounded discretion to select an appropriate punishment from a wide range authorized by statute. Rather, a separate hearing is required, and the sentencer is required to choose between the above-mentioned two options and only those options. See § 28-303. Moreover, statutory standards guide the sentencer's choice between a sentence of life or death. Furthermore, here the State did not simply recommend what it felt to be an appropriate punishment, it undertook the "burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts." *Bullington v. Missouri*, 451 U.S. 430, 438, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981).

The fact that the Nebraska sentencer is a three-judge panel instead of a single judge or a jury is not important. See *Arizona v. Rumsey*, 467 U.S. 203, 104 S. Ct. 2305, 81 L. Ed. 2d 164 (1984). Nor does the availability of appellate review make the appellate process part of a single continuing sentencing proceeding. *Id.*

Similarly, the discretion granted the sentencer with regard to the admission of evidence regarding nonstatutory mitigating circumstances does not destroy the trial analogy. See, Mo. Ann. Stat. § 565.012 (Vernon 1979); Ariz. Rev. Stat. Ann. § 13-703 (1989); *Bullington, supra*; *Rumsey, supra*. Moreover, as in Missouri and Arizona, in our sentencing proceeding the admission of evidence is restricted by the rules of relevancy. See, Neb. Rev. Stat. § 29-2521 (Reissue 1989); Mo. Ann. Stat. § 565.012.1; Ariz. Rev. Stat. Ann. § 13-703.

Nor is the fact that Rust was initially sentenced to death of any significance, for that sentence was found to be constitutionally infirm and thus of no force or effect. See *Poland v. Arizona*, 476 U.S. 147, 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986) (conviction reversed on appeal is nullified and slate wiped clean). We heretofore have acknowledged that an appellate finding of insufficient evidence to convict is tantamount to an acquittal. Therefore, once the reviewing court has found the evidence legally insufficient, the Double Jeopardy Clause precludes a second trial. *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987). We have also previously recognized that *Bullington, supra*, and *Rumsey, supra*, applied the protection of the Double Jeopardy Clause to certain capital sentencing procedures. *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986), *cert. denied* 481 U.S. 1042, 107 S. Ct. 1987, 95 L. Ed. 2d 826 (1987). We recognize that in *Poland*, the Double Jeopardy Clause was held not to prohibit the reimposition of a sentence of death after the original such sentence had been nullified on appeal. However, the difference between the situation presented here and that presented in *Poland* is that here, there was an intervening life sentence. It is the life sentence imposed at the resentencing hearing which served to acquit Rust of the harsher death sentence. Accordingly, the holdings of the U.S. Supreme Court in *Bullington*, *Poland*, and *Rumsey* make the protections of the Double Jeopardy Clause applicable to the capital resentencing procedure involved and prevent the State from challenging as excessively lenient the life sentence imposed in this case.

## RUST'S CROSS-APPEAL

In his cross-appeal, Rust asserts that the sentencing panel erred in not crediting the life sentence it imposed with the time he spent imprisoned on the earlier sentence of death for the first degree felony murder conviction.

First, he urges that as the original sentencer did not specify whether the death sentence on the murder conviction was to be served concurrently or consecutively with the sentences on the shooting convictions, the death sentence was to be served concurrently with those other sentences. But it is clear that one cannot concurrently serve a term of years with a death sentence.

> One may, while alive, simultaneously serve time to be applied to two sentences. He may not, however, be at the same time alive and dead, as the definition of one condition excludes the other. Consequently, any rule that in the absence of a consecutiveness direction two sentences pronounced at the same time by the same court are to be served concurrently can have no application when death has been imposed as one of the sentences.

*State v. Jones*, 218 Neb. 713, 715, 358 N.W.2d 765, 767 (1984). Thus, there is no merit to that argument.

Rust next argues that Neb. Rev. Stat. § 83-1,106 (Reissue 1994) mandates that credit be given for time an offender has spent in custody. That statute provides that an offender be given credit against the maximum term and any minimum term for time spent in custody as a result of the criminal charge for which a prison sentence is imposed. However, on being sentenced to life imprisonment for first degree murder, a defendant is not entitled to credit for time in custodial detention pending trial and sentence. *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994); *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994); *State v. Lynch*, 215 Neb. 528, 340 N.W.2d 128 (1983).

The purpose of credit under § 83-1,106

> is to avoid the situation where one convicted of a crime is incarcerated for a period greater than the maximum term of years prescribed as punishment for the particular offense. . . . By its very nature [a life] sentence is indefinite. . . . In the case of a life sentence, it is

> impossible to impose punishment exceeding the term prescribed by statute.

*Lynch*, 215 Neb. at 537, 340 N.W.2d at 134.

Thus, neither is there any merit to Rust's second argument.

Finally, Rust attempts to make an argument that by virtue of the manner in which, under the policy and procedure manual of the Nebraska Board of Parole, a prisoner becomes eligible for having a life sentence commuted to a definite number of years and thereby becomes eligible for parole consideration, he is disadvantaged by the fact that the correction of his death sentence occurred after he had already spent a number of years in prison. But not only was the manual not made a part of the record below, the record is silent as to how the policy is to be applied to Rust. We thus do not reach the argument.

In so ruling, we are not unmindful that we earlier rejected the parties' joint stipulation to expand the record to include a portion of the manual. But the proper place to make a record is in the trial court, not in an appellate court. See, *In re Estate of Trew*, 244 Neb. 490, 507 N.W.2d 478 (1993) (absent plain error, issue raised for first time in appellate court disregarded, as trial court could not have committed error on issue not presented and submitted); *State v. Brockman*, 231 Neb. 982, 439 N.W.2d 84 (1989); *Dunbier v. Rafert*, 170 Neb. 570, 103 N.W.2d 814 (1960). Nor does the fact that Rust included part of the manual in his brief change the situation, for a party's brief may not expand the evidentiary record. See, *Gables CVF v. Bahr, Vermeer & Haecker Architect*, 244 Neb. 346, 506 N.W.2d 706 (1993); *Home Fed. Sav. & Loan v. McDermott & Miller*, 243 Neb. 136, 497 N.W.2d 678 (1993). An appellate brief must limit itself to arguments supported by the appellate record. *Scott v. Hall*, 241 Neb. 420, 488 N.W.2d 549 (1992); *Father Flanagan's Boys' Home v. Goerke*, 224 Neb. 731, 401 N.W.2d 461 (1987).

## CONCLUSION

Accordingly, the judgment below is affirmed.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. CHRIS CAMPBELL, APPELLANT.

527 N.W.2d 868

Filed March 3, 1995. No. S-94-404.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
2. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.
3. ____. An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal.
4. **Appeal and Error: Words and Phrases.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
5. **Statutes: Intent: Appeal and Error.** In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of the court to read anything plain, direct, and unambiguous out of the statute.
6. **Restitution: Sentences: Time.** Under Neb. Rev. Stat. § 29-2281 (Reissue 1989), if the sentencing court decides that a hearing is necessary to determine the amount of restitution, that hearing must be held at the time of sentencing.
7. **Sentences.** One of the circumstances which renders a sentence void is that the court lacked a legal basis to impose it.
8. ____. A void sentence is no sentence.
9. **Criminal Law: Sentences.** In a criminal case, the judgment is the sentence.
10. **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.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Sentence of restitution vacated.

Mark M. Sipple, of Sipple, Hansen, Emerson & Schumacher, for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and BOSLAUGH, J., Retired.

CONNOLLY, J.

Chris Campbell appeals the Madison County District Court's order requiring Campbell to pay restitution as part of his

sentence on a conviction of theft by receiving stolen property. We vacate the district court's order of restitution because the restitution hearing held by the district court was untimely under Neb. Rev. Stat. § 29-2281 (Reissue 1989).

## FACTUAL BACKGROUND

Chris Campbell and another individual were involved in a break-in at Fashions Plus in Norfolk on or about March 3, 1992. Campbell was subsequently arrested and pled guilty to theft by receiving stolen property. He was sentenced by the Madison County District Court to 1 year's imprisonment in the state penal complex and was ordered to make restitution to Fashions Plus, within 2 years from the date of his final discharge, for "the actual loss" sustained by the store. At the time of sentencing, the district court stated that it would determine the amount of restitution at a hearing to be held prior to Campbell's release from incarceration.

Campbell served his 1-year prison sentence and was released from confinement on May 24, 1993. A restitution hearing was scheduled for December 23, 1993, but did not take place until February 25, 1994. Campbell objected to the restitution proceedings for the first time at the February hearing on the grounds that the hearing was untimely. The district court overruled the objection, finding that the delay caused no prejudice to either party.

At the conclusion of the hearing, the district court ordered Campbell to make restitution to Fashions Plus' insurer, United Fire and Casualty Insurance Company, in the sum of $7,018.78 and to Fashions Plus in the sum of $250. Campbell filed a motion for new trial, which the district court denied.

## ASSIGNMENTS OF ERROR

Campbell contends that the district court erred in (1) ordering Campbell to pay restitution for physical damage done to the premises occupied by Fashions Plus, (2) requiring Campbell to pay restitution in the sum of $7,268.78, (3) failing to give Campbell full credit for the merchandise recovered and returned to Fashions Plus, (4) allowing an insurance adjuster to testify concerning the value of the items taken from Fashions Plus, and (5) failing to grant Campbell's motion for new trial.

## STANDARD OF REVIEW

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994); *State v. Martin*, 246 Neb. 896, 524 N.W.2d 58 (1994); *State v. Wragge*, 246 Neb. 864, 524 N.W.2d 54 (1994).

## ANALYSIS

In his appellate brief, Campbell argues that the restitution hearing in the case at bar was untimely because it did not conform to the sentence pronounced in the district court's journal entry filed December 8, 1992. In that journal entry, the district court stated that the amount of restitution would be determined pursuant to a hearing prior to Campbell's release from incarceration. It is uncontested that the restitution hearing in the case at bar took place several months after Campbell's release from the state penal complex.

Though Campbell argued in his appellate brief that the hearing was untimely, he did not assign the untimeliness of the hearing as an error in his assignments of error. An appellate court does not consider errors which are argued but not assigned. *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994). Furthermore, as noted by the State, Campbell did not object to the delay in the restitution hearing at the time of sentencing. Rather, he waited until the hearing took place. Thus, the State argues that Campbell has waived this issue on appeal and contends we should not consider Campbell's argument regarding the untimeliness of the restitution hearing.

We find, however, that the untimeliness of the restitution hearing constituted plain error. An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal. *State v. Secret, supra*; *State v. Martin, supra*; *State v. Ladig*, 246 Neb. 542, 519 N.W.2d 561 (1994). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *State v. Wragge, supra*; *State v. Dawn*, 246 Neb. 384, 519 N.W.2d 249 (1994).

Our finding that the untimeliness of the restitution hearing in

the case at bar constituted plain error is mandated by the language of § 29-2281:

> *To determine the amount of restitution, the court may hold a hearing at the time of sentencing.* The amount of restitution shall be based on the actual damages sustained by the victim and shall be supported by evidence which shall become a part of the court record. . . . The court may order that restitution be made immediately, in specified installments, or within a specified period of time, not to exceed five years after the date of judgment or defendant's final release date from imprisonment, whichever is later.

(Emphasis supplied.)

The controlling language in the case at bar is the above emphasized sentence of § 29-2281. In that sentence, we read the discretionary word "may" as applying exclusively to the phrase "hold a hearing." Thus, the statute permits the sentencing court to conduct a discretionary hearing to determine the amount of restitution. However, the discretionary word "may" does not apply beyond the phrase "hold a hearing." In other words, we read § 29-2281 as stating that the sentencing court may hold a restitution hearing, but if does so, the hearing *must* be held at the time of sentencing.

If we were to read the discretionary word "may" as controlling the entire first sentence of § 29-2281, the effect would be to make the phrase "at the time of sentencing" meaningless. If the Legislature wanted the sentencing court to freely choose when the restitution hearing could take place, it could have written § 29-2281 to read, "To determine the amount of restitution, the court may hold a hearing at the time of sentencing or any other time." Alternatively, the Legislature could have left the time limitation out of the statute, so that it would simply read, "To determine the amount of restitution, the court may hold a hearing."

In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of the court to read anything plain, direct,

and unambiguous out of the statute. *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994). The only reading of § 29-2281 which gives meaning to all of its words requires that, if the sentencing court decides that a hearing is necessary to determine the amount of restitution, that hearing must be held at the time of sentencing. Since Campbell's restitution hearing did not take place at the time of sentencing, the hearing was untimely and unauthorized under the statute.

One of the circumstances which renders a sentence void is that the court lacked a legal basis to impose it. *Berumen v. Casady*, 245 Neb. 936, 515 N.W.2d 816 (1994). A void sentence is no sentence. *Id.*; *State v. Wren*, 234 Neb. 291, 450 N.W.2d 684 (1990). The district court in the instant case had no legal basis for holding the February 1994 restitution hearing. Thus, the portion of Campbell's sentence which required him to make restitution to Fashions Plus is a nullity and cannot be enforced.

Our decision vacating that portion of Campbell's sentence requiring restitution is necessary to avoid the complications which can arise when a court delays its determination as to the amount of restitution until after sentencing. In a criminal case, the judgment is the sentence. *State v. Schrein, ante* p. 256, 526 N.W.2d 420 (1995); *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994); *Berumen v. Casady, supra*. Once the district court renders judgment, appeal may be taken to the Nebraska appellate courts. See Neb. Rev. Stat. § 25-1911 (Cum. Supp. 1994). Thus, when the district court announces a sentence which includes an order of restitution, but postpones determining the amount of restitution, the defendant can, before the district court decides the amount of restitution, perfect an appeal. Since 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. Beverlin*, 244 Neb. 615, 508 N.W.2d 271 (1993), the district court would be without jurisdiction to enter an order of restitution. Section 29-2281 forces the district court to avoid this jurisdictional pitfall by requiring the district court to hold its discretionary restitution hearing at the time of sentencing.

## CONCLUSION

At oral argument in the case at bar, the State conceded that the district court did not comply with the requirements of § 29-2281. Since the district court determined the amount of restitution in an untimely manner under this statute, the district court had no legal authority to impose the restitution sentence. The district court's failure to hold the restitution hearing in a timely fashion in the instant case constituted plain error.

SENTENCE OF RESTITUTION VACATED.

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## WBE COMPANY, INC., A NEBRASKA CORPORATION, AND KURT WIEKHORST, APPELLANTS, V. PAPIO-MISSOURI RIVER NATURAL RESOURCES DISTRICT, APPELLEE.

529 N.W.2d 21

Filed March 10, 1995. No. S-93-294.

1. **Records: Appeal and Error.** It is incumbent upon the party appealing to present a record which supports the errors assigned; absent such a record, the decision of the lower court will generally be affirmed.
2. **Courts: Jurisdiction: Appeal and Error.** After an appeal has been perfected to an appellate court, the trial court is without jurisdiction to hear a case involving the same matter between the same parties.
3. **Jurisdiction: Appeal and Error.** Where the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.
4. ____: ____. Whether a question is raised by the parties concerning jurisdiction of a lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether the appellate court has jurisdiction over the matter before it.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed in part, and in part vacated and dismissed.

Dan D. Stoller for appellant WBE Co.

Paul F. Peters and Christopher D. Curzon, of Schmid, Mooney & Frederick, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

WRIGHT, J.

WBE Company, Inc., and Kurt Wiekhorst (collectively referred to as WBE) brought this action in the district court for Sarpy County, seeking an order enjoining the Papio-Missouri River Natural Resources District (District) from awarding a construction contract to the second-lowest bidder. WBE had submitted the lowest bid. The district court voided the contract between the District and the second-lowest bidder, ordered the District to hold a hearing on the award of the contract before its entire board of directors, and ordered that a vote of the board be taken regarding the award of the contract. The District held a hearing, and the board of directors voted to award the contract to the second-lowest bidder. WBE then filed a motion for contempt and a motion for attorney fees. The district court denied the motion for contempt and awarded WBE $200 in attorney fees. WBE appeals from the district court's decisions regarding the motion for contempt and the motion for attorney fees.

## FACTS

In December 1992, the District advertised for bids on a contract for the relocation of sewer siphons under the Big Papio channel at 84th and F Streets and at 93d and Center Streets in Omaha, Nebraska. WBE was the lowest bidder on the project. At a January 14, 1993, meeting, the four members of the District's executive subcommittee were directed to review the bids and to award the contract. On January 28, the executive subcommittee voted 3 to 1 to award the contract to the second-lowest bidder.

On February 3, 1993, WBE filed a petition in the district court for Sarpy County alleging that the District improperly delegated to its executive subcommittee the power to review bids and to award the contract, in violation of Neb. Rev. Stat. § 2-3219 (Reissue 1991). Under § 2-3219, a majority of the voting members of the District's board of directors constitutes a quorum, and the concurrence of a majority of the quorum is sufficient to take action and to make determinations. The

District's board of directors has 15 members. WBE also alleged that the executive subcommittee violated Nebraska's public meetings laws, Neb. Rev. Stat. § 84-1408 et seq. (Reissue 1994), when two of the subcommittee members turned their backs to the public during the January 28 meeting and held a private discussion.

WBE argued to the district court that the District's failure to award the contract to WBE was a violation of state law in that the District failed to award the contract to WBE, as the lowest responsible bidder, without specific legitimate grounds to determine that WBE was not a responsible bidder. On February 11, 1993, the District's board of directors ratified the actions of the executive subcommittee in awarding the contract to the second-lowest bidder. Subsequently, WBE filed an amended petition.

The district court issued an order on February 19, 1993, in which the court found that WBE's bid of $175,000 was the lowest bid and that the second-lowest bid was $175,134.60 by L.G. Roloff Construction Company, Inc. The court determined that the District was subject to the spirit and intent of § 84-1408 et seq. and that the public had a right to know the District's reason for accepting the second-lowest bid. The court stated that the District was not required by law to accept the lowest bid, but that competitive bidding is required to save the public moneys and to avoid cronyism. The court noted that the process could still be protected by requiring the District's entire board of directors to discuss the bids. The court declared void the contract between the District and the second-lowest bidder, and the District was ordered to conduct a hearing before its entire board of directors before awarding the contract.

On February 26, 1993, the District filed a motion for new trial, which was denied on March 5. On March 11, the District's board of directors held a hearing and voted to award the contract to the second-lowest bidder. WBE then filed a motion for contempt, which was denied on March 19. On March 29, WBE filed a motion for attorney fees. On April 5, the District timely appealed from the denial of its motion for new trial. On April 9, the district court awarded WBE $200 in attorney fees. WBE filed a notice of appeal on April 16 from the March 19 and

April 9 orders.

The District's appeal was subsequently dismissed by the Nebraska Court of Appeals on July 6, 1993; however, the Court of Appeals ordered that WBE's appeal remain docketed in that court. Under the authority granted to us by Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1994) to regulate the caseloads of the appellate courts of this state, we removed the appeal to this court.

## ASSIGNMENTS OF ERROR

WBE argues that the district court erred (1) in failing to make a determination that the District failed to hold a hearing in compliance with the public meetings laws and the district court's order of February 19, 1993, and (2) in failing to award attorney fees in a reasonable sum.

## ANALYSIS

WBE appealed from the denial of its motion for contempt. Because the motion is not part of the record, the record on appeal has not been properly preserved. It is incumbent upon the party appealing to present a record which supports the errors assigned; absent such a record, the decision of the lower court will generally be affirmed. *Terry v. Duff*, 246 Neb. 524, 519 N.W.2d 550 (1994). We have reviewed the bill of exceptions with regard to the hearing on the motion for contempt, and we find that WBE's first assignment of error is without merit.

WBE also appealed from the order which awarded WBE $200 in attorney fees. At the time the district court awarded WBE attorney fees, the District's appeal from the denial of the motion for new trial had already been perfected. Although WBE had not yet filed its appeal and attorney fees had not yet been awarded by the district court, the issue of attorney fees was related to the district court's order of February 19 regarding the public meetings laws, from which the District had appealed. The district court had no jurisdiction to enter the order for attorney fees, and the order is hereby vacated.

After an appeal has been perfected to an appellate court, the trial court is without jurisdiction to hear a case involving the same matter between the same parties. *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994); *Tracy Corp. II v. Nebraska*

*Pub. Serv. Comm.*, 218 Neb. 900, 360 N.W.2d 485 (1984). 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). Whether a question is raised by the parties concerning jurisdiction of a lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether the appellate court has jurisdiction over the matter before it. *R-D Investment Co. v. Board of Equal. of Sarpy Cty.*, *ante* p. 162, 525 N.W.2d 221 (1995). Since the district court was without jurisdiction to award WBE attorney fees because of the District's pending appeal, this court lacks jurisdiction to hear WBE's appeal regarding the award of attorney fees.

The judgment of the district court denying the motion for contempt is affirmed. The district court's award of attorney fees is vacated, and this part of the appeal is dismissed.

AFFIRMED IN PART, AND IN PART VACATED AND DISMISSED.

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CURTIS O. GRIESS & SONS, INC., A NEBRASKA CORPORATION, APPELLEE, V. FARM BUREAU INSURANCE COMPANY OF NEBRASKA, A NEBRASKA INSURANCE CORPORATION, APPELLANT.

528 N.W.2d 329

Filed March 10, 1995. No. S-93-342.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate 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 that the moving party is entitled to judgment as a matter of law.

3. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court.
4. **Insurance: Contracts.** In order to recover under an insurance policy of limited liability, the insured must bring himself or herself within its express provisions.
5. ____: ____. When the terms of an insurance policy are clear, they are to be accorded their plain and ordinary meaning.
6. **Words and Phrases.** "Direct" means immediate or proximate as opposed to remote or incidental.
7. **Insurance: Contracts: Proximate Cause.** Under an insurance policy covering physical loss "caused directly" by a specified peril, an insured may recover only for loss which has been proximately caused by a specified peril.
8. **Insurance: Liability: Evidence: Proximate Cause.** In determining the cause of a loss for the purpose of fixing insurance liability, when evidence of concurring causes of the damage appears, the proximate cause to which the loss is to be attributed is the dominant, the efficient one that sets the other causes in operation, and causes which are incidental are not proximate, though they may be nearer in time and place to the loss.
9. **Insurance: Proximate Cause.** When windborne materials occasion a loss, the loss is considered the direct result of a windstorm, because the windstorm is considered the dominant, efficient cause which set the concurring cause in motion.
10. ____: ____. Where a virus has been transmitted by means of a covered peril, the covered peril is the proximate cause of the loss.
11. **Insurance: Damages.** Expenses necessarily incurred in the course of mitigating damages are recoverable by an insured.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN and PAUL D. MERRITT, JR., Judges. Affirmed.

Gary J. Nedved, of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., for appellant.

Donald L. Dunn and Carl J. Sjulin, of Rembolt Ludtke Parker & Berger, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

LANPHIER, J.

Appellee plaintiff's swine were infected with pseudorabies after a tornado carried the virus to its swine-raising operation on March 13, 1990. Plaintiff's swine were insured by defendant insurance company for physical loss caused directly by an applicable peril. Windstorm is a covered peril under the policy. After defendant denied coverage for the loss, plaintiff brought a

declaratory judgment action to declare the rights, status, and legal relations of the parties under their contract of insurance. The district court for Lancaster County granted partial summary judgment for plaintiff on the issue of liability, finding that the windstorm was the direct, proximate, and efficient cause of plaintiff's losses. The issue of damages was submitted to the trial court. After judgment was entered for plaintiff, defendant appealed. Defendant argues that an insurance policy providing coverage for physical loss caused directly by windstorm does not include coverage for the airborne transmission of an infectious disease. We affirm the judgment of the district court.

## BACKGROUND

On January 18, 1990, plaintiff, Curtis O. Griess & Sons, Inc., purchased from defendant, Farm Bureau Insurance Company of Nebraska, for $6,364.40, an insurance policy to cover its livestock from harm caused by certain defined perils, including windstorm. The policy covered "physical loss to the property described in the coverage caused directly by an applicable peril . . . unless the loss is excluded . . . ." Windstorm was a peril insured against. Infectious diseases were not excluded.

On March 13, 1990, a windstorm occurred in Clay County, Nebraska. This tornado traveled from the southwest to the northeast. Southwest of plaintiff's farm, in the path of the tornado, were several herds of pseudorabies-infected swine which had been quarantined by the state Department of Agriculture. Defendant does not dispute that the pseudorabies virus was transmitted to plaintiff's farm by the windstorm. Defendant also does not dispute that plaintiff's swine herd became infected with pseudorabies and that the pseudorabies resulted in either death or damage to plaintiff's swine.

The parties agree that plaintiff incurred $128,732.38 in veterinarian expenses to prevent further damage to the herd related to the testing, treating, and management of the pseudorabies. The parties also stipulated that plaintiff refunded $19,900 to purchasers of breeding gilts sold shortly after the herd became infected, but before the symptoms could be detected.

The affected swine were "Lieske Genetics" maintained for breeding. They therefore command a premium in the breeding stock market. Many pigs died of the infection. Those which did not die could not be used for breeding, but only for slaughter. Because the swine could not be used for breeding, a portion of their value was lost.

## ASSIGNMENTS OF ERROR

Defendant claims the district court erred in the following respects: (1) in granting plaintiff's motion for summary judgment on the issue of liability and overruling defendant's motion for summary judgment, (2) in finding that plaintiff was entitled to recover the sum of $19,990 for refunds made by plaintiff to a third-party purchaser of its hogs, and (3) in awarding plaintiff the sum of $128,732.38 for veterinarian fees incurred by plaintiff in treating the pseudorabies.

## STANDARD OF REVIEW

In reviewing a summary judgment, an appellate 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. *Huntwork v. Voss, ante* p. 184, 525 N.W.2d 632 (1995). 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. *Id.* Regarding questions of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court. *Fiese v. Sitorius, ante* p. 227, 526 N.W.2d 86 (1995).

## ANALYSIS

### Policy Coverage

Defendant first assigns as error the district court's granting of plaintiff's motion for summary judgment on the issue of liability and the overruling of defendant's motion for summary judgment. Defendant does not argue that there is a genuine issue of material fact; rather, defendant submits that under the undisputed facts of the case, plaintiff is not entitled to judgment

as a matter of law. Defendant contends that the immediate, dominant, and proximate cause of plaintiff's loss was pseudorabies and not windstorm. Defendant ends its argument by submitting that since the airborne transmission of an infectious disease is not a covered peril, there is no liability under the policy. Thus, causation is the crux of the parties' dispute. With respect to causation, the parties agree that the pertinent policy language is the phrase "caused directly."

In order to recover under an insurance policy of limited liability, the insured must bring himself or herself within its express provisions. *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991). When the terms of an insurance policy are clear, they are to be accorded their plain and ordinary meaning. *Id.* Since the phrase "caused directly" is clear, it will be accorded its plain and ordinary meaning. "Direct" means immediate or proximate as opposed to remote or incidental. *Id.*; *Clouse v. St. Paul Fire and Marine Ins. Co.*, 152 Neb. 230, 40 N.W.2d 820 (1950). Thus, under the terms of the policy, plaintiff may recover only for loss which has been proximately caused by a specified peril.

> "In determining the cause of a loss for the purpose of fixing insurance liability, when evidence of concurring causes of the damage appears, the proximate cause to which the loss is to be attributed is the dominant, the efficient one that sets the other causes in operation; and causes which are incidental are not proximate, though they may be nearer in time and place to the loss. [Citations omitted.]"

*Brown*, 237 Neb. at 870, 468 N.W.2d at 116.

In support of its argument that the windstorm was not the proximate cause of plaintiff's loss, defendant relies upon *Lydick v. Insurance Co. of North America*, 187 Neb. 97, 187 N.W.2d 602 (1971). The plaintiffs in *Lydick* sued their insurance company to recover the value of cattle allegedly destroyed as a result of a windstorm. The evidence adduced suggested that the plaintiffs' cattle had descended into a sheltered area around an ice-covered pond to escape the cold temperatures and wind. The ice on the pond broke and the cattle drowned. We determined that the insurer was not liable for the loss for two

reasons. First, we determined that the loss was not directly caused by the windstorm. We stated: "The evidence demonstrates that the loss of these cattle was due to a combination of different factors and that the wind was merely one of the prior conditions contributing to the loss." 187 Neb. at 99, 187 N.W.2d at 604. Further, we stated: "The cold wind, by maximum inference, merely created an antecedent and preliminary condition which contributed to their wandering upon the snow-covered ice, and thus can only be considered as an indirect cause." 187 Neb. at 100, 187 N.W.2d at 604. Additionally, we held that the loss was caused by a hazard expressly excluded by the policy.

Defendant submits that, as in *Lydick*, the windstorm in the instant case was merely a prior condition contributing to the loss. However, we disagree.

Physical loss by windstorm is a covered peril. The wind need not pick up and throw the swine to the earth to constitute a direct cause of the loss. We have never defined windstorm so narrowly. When windborne materials occasion a loss, the loss is considered the direct result of a windstorm, because the windstorm is considered the dominant, efficient cause which set the concurring cause in motion. See, *Sun Ins. Office v. Guest Camera Store*, 108 Ga. App. 339, 132 S.E.2d 851 (1963); *Firemen's Insurance Co. of Newark v. Senseney*, 250 F.2d 130 (4th Cir. 1957); *Gerhard v. Travelers Fire Ins. Co.*, 246 Wis. 625, 18 N.W.2d 336 (1945). We can see no reason for treating a windborne virus differently from other windborne objects.

Additionally, where a virus has been transmitted by means of a covered peril, the covered peril has been held to be the proximate cause of the loss. In *Qualls v. Farm Bureau Mutual Insurance Company*, 184 N.W.2d 710 (Iowa 1971), 14 heifers owned by the insured died of pseudorabies transmitted by wild animals which had attacked the heifers. The Iowa Supreme Court held that the attack, a covered peril, was the proximate cause of the loss and declared that under the parties' contract of insurance, the insurer was liable for the loss.

The court in *Qualls* stated:

> We are satisfied the word "attack" as used in the instant insurance agreement clearly extended to those results

> which were proximately caused thereby and, regardless of the seriousness or extent of the attack, any bite which was found to infect the livestock with a serious disease is included in the liability assumed under the contract. There was no provision in the contract which restricted the loss to violence causing the death of the animals.

184 N.W.2d at 712.

*Qualls* is analogous to this case. Like the attack in *Qualls*, the windstorm was the dominant, efficient cause which set the virus in motion. The virus was merely a concurring cause. The windstorm was not, as defendant contends, a prior condition which merely made the cattle susceptible to infection. The windstorm carried the virus to plaintiff's farm, just as the wild animals did in *Qualls*. Absent the windstorm, there would have been no infection of plaintiff's swine. The presence of the virus downwind was the prior condition. The windstorm was the proximate cause, and therefore the direct cause, of plaintiff's loss in the instant case. Infectious diseases were not an exclusion.

The insurance contract provides that the insurer is liable for loss directly caused by a covered peril. Windstorm is a covered peril. Since the March 13, 1990, windstorm directly caused the harm to plaintiff's swine, the district court properly determined that defendant was liable.

## MITIGATION EXPENSES

Defendant's other assignments of error concern whether plaintiff should be reimbursed for those expenses incurred in fulfilling its contractual duty to protect the property from further damage.

With respect to the insured's duties after a loss, the insurance policy provides, in pertinent part, the following:

> 3. WHAT *YOU* MUST DO AFTER A LOSS.
>
> In the event of a loss to which this insurance may apply *you* shall see that the following duties are performed:
>
> . . . .
>
> b. PROTECT THE PROPERTY FROM FURTHER DAMAGE. This includes making reasonable and necessary repairs to protect the property, and keeping

accurate records of repair expenses.

It is clear that under the terms of the insurance contract, plaintiff had a duty to mitigate the damage. Although the language quoted above requiring the insured to keep accurate records of repair expenses suggests the insurer must reimburse the insured for those expenses, the contract does not expressly state whether the insurer is liable for the mitigation expenses. Notwithstanding the lack of an express statement, we have previously held that a trial court properly refused to instruct a jury that mitigation expenses were not recoverable as damages in an action on an insurance policy. *Hoagland & Co. v. Insurance Co.*, 131 Neb. 105, 267 N.W. 239 (1936).

In *Hoagland & Co.*, a windstorm destroyed the insured's lumber shed and part of the lumber stored therein. After the storm, the insured went to the expense of sorting, removing, and repiling the salvageable lumber in another shed. The insurer denied liability for these expenses and contended that the jury should be instructed that these expenses were not recoverable as damages. This court stated:

> It was necessary to assort the lumber to ascertain and separate the damaged from the undamaged portions. It was also essential that the lumber not damaged should be removed and repiled in another shed to preserve it from damage from the elements. This was made necessary as a direct result of the windstorm, and we think it was a recoverable element of damage.

131 Neb. at 111-12, 267 N.W. at 242.

Implicit in our decision rejecting the proposed instruction is the rule that expenses necessarily incurred in the course of mitigating damages are recoverable by an insured. See, also, *Slay Warehousing Co., Inc. v. Reliance Ins. Co.*, 471 F.2d 1364 (8th Cir. 1973); *Travelers Indemnity Co. v. Pollard Friendly Ford Co.*, 512 S.W.2d 375 (Tex. Civ. App. 1974); and *City Coal & Supply Co. v. Ins. Co.*, 99 Ohio App. 368, 133 N.E.2d 415 (1954) (all holding that the insurer must reimburse the insured for expenses necessarily incurred in the course of mitigating damages).

The expenses to which defendant objects are the veterinarian fees expended to prevent the death of the swine and the refunds

made by plaintiff to purchasers of infected swine.

With respect to the veterinarian fees, defendant contends that since the policy provides that losses shall be settled at actual cash value at the time of loss, the veterinarian fees are not recoverable. Defendant's argument merely begs the question of whether the veterinarian fees are a covered loss. As explained above, if the fees were necessarily incurred to mitigate the amount of damages, they are recoverable. The only evidence is that without treatment the animals would have died and the insurer would have been required to cover a greater loss. We therefore conclude that the veterinarian fees were necessarily incurred to mitigate damages. The district court properly included the veterinarian fees when calculating the damages.

Defendant contends the district court erred in including as damages the refunds plaintiff paid to purchasers of plaintiff's infected swine. Defendant submits that plaintiff is attempting to recover under the liability coverage of the insurance contract and that since the policy expressly excludes goods sold from coverage by the insured, there is no coverage. Defendant does not dispute that in losing the breeding value of the swine, plaintiff sustained a physical loss. Defendant does not dispute that the swine which were subsequently sold had been owned by plaintiff on the date of the windstorm. As explained above, defendant is liable under the property coverage of the insurance contract for the physical loss plaintiff sustained due to the windstorm. That plaintiff did not financially realize the loss until a later date does not affect the policy coverage or the nature of the loss. Since defendant stipulated to the amount plaintiff refunded purchasers for the loss in value of the swine sold, and since defendant is liable under the insurance policy for the loss in value, the district court properly included the refunds made to purchasers of the infected swine when computing the damages in this case.

Also before us is plaintiff's motion for attorney fees. Pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1993), plaintiff is awarded attorney fees in the amount of $8,373.

AFFIRMED.

ROBERT W. TWISS ET AL., APPELLANTS, V. DANNIE TRAUTWEIN IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NEBRASKA ACCOUNTABILITY AND DISCLOSURE COMMISSION ET AL., APPELLEES.

529 N.W.2d 24

Filed March 10, 1995. No. S-93-404.

1. **Administrative Law: Judgments: Final Orders: Appeal and Error.** In an appeal under the Administrative Procedure Act, the appeal shall be taken in the manner provided by law for appeals in civil cases, and the judgment rendered or final order entered by the district court may be affirmed, or it may be reversed, vacated, or modified for errors appearing on the record, or the case may be remanded for further proceedings.
2. **Administrative Law: Service of Process: Time: Appeal and Error.** Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1994) provides that in a review of proceedings under the Administrative Procedure Act, summons shall be served within 30 days of the filing of the petition in the manner provided for service of a summons in a civil action.
3. **Administrative Law: Service of Process: Words and Phrases.** Neb. Rev. Stat. § 25-510.02 (Reissue 1989) provides that the plain meaning of the phrase "may be served," when viewed in the context of the service statutes, modifies the method of acceptable service, not the entity to be served.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and CONNOLLY and HANNON, Judges, on appeal thereto from the District Court for Lancaster County, WILLIAM D. BLUE, Judge. Judgment of Court of Appeals affirmed.

Paul D. Kratz, of McGill, Gotsdiner, Workman & Lepp, P.C., and Mark A. Fahleson, of Berens & Tate, P.C., for appellants.

Don Stenberg, Attorney General, and Linda L. Willard for appellees.

WHITE, C.J., CAPORALE, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

WHITE, C.J.

Petitioners, Robert W. Twiss, the Bob Twiss for Legislature Committee (committee), and Alice C. Cummings, the committee's treasurer, appealed from an order of the Lancaster County District Court in which the district court dismissed

petitioners' case on the ground that the Nebraska Attorney General had not properly been served with summons. Petitioners appealed to the Nebraska Court of Appeals, which affirmed by memorandum opinion the district court's decision. We affirm.

In 1992, Twiss was a candidate for the Nebraska Legislature. Pursuant to Neb. Rev. Stat. § 49-1459 (Reissue 1988), his committee was required to file a postprimary campaign statement. However, the committee did not file such a statement until more than 1 month past the deadline. The Nebraska Accountability and Disclosure Commission (NADC) fined the committee $300. Petitioners appealed the NADC's decision to the Lancaster County District Court. Petitioners served summons upon Dannie Trautwein, the NADC's executive director, in her official capacity; the NADC; Allen J. Beermann, the Secretary of State; and several NADC members in their individual capacities.

Petitioners, however, did not serve summons upon the Attorney General. The Attorney General filed a special appearance, alleging that he had not properly been served. The district court agreed and dismissed the appeal. Petitioners appealed to the Court of Appeals.

The Court of Appeals affirmed the district court's decision. Thereafter, petitioners filed a petition for further review in this court. We granted their petition for further review.

On further review, petitioners argue that both the district court and the Court of Appeals erred in ruling that they were *required* to serve summons upon the Attorney General even though they had complied with Neb. Rev. Stat. § 25-505.01(1) (Reissue 1989). In an appeal under the Administrative Procedure Act, the appeal shall be taken in the manner provided by law for appeals in civil cases, and the judgment rendered or final order entered by the district court may be affirmed, or it may be reversed, vacated, or modified for errors appearing on the record, or the case may be remanded for further proceedings. *James v. Harvey*, 246 Neb. 329, 518 N.W.2d 150 (1994); *Davis v. Wright*, 243 Neb. 931, 503 N.W.2d 814 (1993).

Both parties agree that the NADC is a state agency and that this appeal is governed by the Administrative Procedure Act.

Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1994) provides that in a review of proceedings under the Administrative Procedure Act, "[s]ummons shall be served within thirty days of the filing of the petition in the manner provided for service of a summons in a civil action." Therefore, we must look to Neb. Rev. Stat. § 25-501 et seq. (Reissue 1989) to determine the statutory criteria for serving summons in a civil action.

Sections 25-508.01 through 25-514.01 provide the methods of service upon individuals, corporations, the state, political subdivisions, dissolved corporations, partnerships, unincorporated associations, and agents. Specifically, § 25-510.02, captioned "Service on state or political subdivision," provides:

> (1) The State of Nebraska, any state agency as defined in section 81-8,210, and any employee of the state as defined in section 81-8,210 sued in an official capacity may be served by leaving the summons at the office of the Attorney General with the Attorney General, deputy attorney general, or someone designated in writing by the Attorney General, or by certified mail service addressed to the office of the Attorney General.

The petitioners claim that the phrase "may be served" is discretionary, thereby entitling them to serve summons as provided in § 25-505.01. However, the plain meaning of the phrase "may be served," when viewed in the context of the service statutes, modifies the method of acceptable service, not the entity to be served. Cf. *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985). In other words, a claimant's service, to be effective, may be served in one of four ways: (1) by leaving summons at the Attorney General's office with the Attorney General, (2) by leaving summons at the Attorney General's office with a deputy attorney general, (3) by leaving summons at the Attorney General's office with someone designated in writing by the Attorney General to receive summons, or (4) by sending summons by certified mail addressed to the Attorney General's office. All other forms of service in actions against the State of Nebraska or any of its political subdivisions are ineffectual.

AFFIRMED.

FAHRNBRUCH and CONNOLLY, JJ., not participating.

# PRODUCTION CREDIT ASSOCIATION OF THE MIDLANDS, A CORPORATION, APPELLEE, V. ELDIN HAUSSERMANN FARMS, INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS.

529 N.W.2d 26

Filed March 10, 1995. No. S-93-492.

1. **Mortgages: Real Estate: Foreclosure: Equity.** A proceeding to foreclose a real estate mortgage is an equitable action.
2. **Equity: Appeal and Error.** When an equity case is appealed from the district court, the appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court. When the evidence conflicts, however, 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.
3. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
4. **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 clearly erroneous.
5. **Pleadings: Proof.** The burden of proving an affirmative defense rests upon the defendant.
6. **Contracts: Pleadings: Consideration.** Failure of consideration is an affirmative defense.
7. **Contracts.** Accompanying every contract is a common-law duty to perform with care, skill, reasonable expediency, and faithfulness the thing agreed to be done.
8. **Contracts: Debtors and Creditors.** The statutory obligation of good faith in the performance or enforcement of a contract can exist in a debtor-creditor relationship.
9. **Fraud.** In order to sustain the affirmative defense of false representation, a defendant must prove by a preponderance of the evidence that a representation was made; that the representation was false; that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion; that it was made with the intention that the defendant should rely on it; that the defendant did so rely; and that the defendant suffered damages as a result.
10. **Breach of Contract: Pleadings: Proof.** In order to recover in an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant's duty.
11. **Contracts.** The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other.

Appeal from the District Court for Furnas County: JOHN J. BATTERSHELL, Judge. Affirmed.

Robert B. Creager, of Berry, Anderson, Creager & Wittstruck, P.C., for appellants.

Tim W. Thompson, of Kelley, Scritsmier & Byrne, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

CONNOLLY, J.

Production Credit Association (PCA) brought this action against Eldin Haussermann Farms, Inc. (Farms), Wilma Haussermann, and Dale Haussermann to foreclose on real estate mortgages granted to it by Farms. Farms defended against the foreclosure claiming that the mortgages were unenforceable under several theories of law. Farms and Dale also counterclaimed, seeking damages for breach of contract. The trial court dismissed the counterclaims after Farms had presented its case in chief. After all the evidence was submitted, the trial court ruled in favor of PCA and granted the motion for foreclosure. Farms appealed. For the reasons stated below, we affirm.

## FACTUAL BACKGROUND

Eldin Haussermann and his wife, Wilma (the Haussermanns), owned 51 percent of the stock of Farms; the remaining stock was held by their children. Farms was created in 1980 as a real estate holding corporation. The Haussermanns conducted an agricultural business on Farms' land, which included the raising of crops and a cattle feeding operation. Over the course of more than 30 years, PCA granted to the Haussermanns annual operating loans secured by crops and livestock. In 1982 and in the years following, the Haussermanns' operating loans were budget loans. Budget loans differ from line of credit loans in that the lender, in its discretion, has the ability to review the borrower's operation, to allocate loaned funds for specific uses, and to determine whether requested additional loans should be made.

By December 1984, the amount that the Haussermanns owed on the operating loans exceeded $1 million. PCA spoke with Eldin Haussermann, then president of Farms, about selling real estate or collateralizing the loan to cover some of the balance. That same month, Eldin was killed in a farm accident. After

Eldin's death, Wilma and Dale, the Haussermanns' eldest son and the succeeding president of Farms, operated Farms and negotiated with PCA. An interim operating loan was granted to Wilma for operations until Eldin's estate was settled. After submission of cash flow projections, a new operating loan was granted to Wilma for the 1985 operating year. The 1985 operating loan budgeted for the production of crops, pasture rental, family expenses, and similar expenditures, but did not budget for additional cattle purchases. The interim loan and ensuing operating loan were granted pursuant to PCA's understanding that the loans would be secured by Farms' real estate. Wilma purchased livestock in December 1984 with the funds from the interim loan. Wilma did not budget for additional livestock purchases during the operating year, and PCA did not schedule a portion of the operating loan for the purchase of additional livestock. PCA had noted on the Haussermanns' 1984 operating loan application that, in the future, the Haussermanns planned on buying "less feeder cattle."

Wilma and Farms agreed to restructuring of the operating debt, and mortgages were granted on the real estate. The transaction was structured such that Farms agreed to mortgage its property in return for a term note executed by Farms, Wilma, and Dale. The funds procured through the term note were, in turn, loaned by Farms to Wilma so that she could satisfy the existing operating debt. The stated purpose of the loan restructuring was to grant PCA security so that it could grant an operating loan to Wilma for 1985 and continue to grant operating loans to her if the business showed a profit during the 1985 operating year. Farms was aware of PCA's projection that Wilma would lose money during 1985.

In August 1985, Wilma requested an additional operating loan which PCA granted. That same month, Wilma and Dale spoke with PCA and requested an additional loan for the purchase of livestock. PCA did not grant the livestock loan.

In November 1985, 2 weeks prior to the operating loan payment date, PCA determined that Wilma would lose in excess of $150,000 during the 1985 operating year. PCA refused to grant an operating loan for the 1986 year. The payment on

Farms' note was late, and Wilma's operating loan was paid following the sale of capital assets. Efforts to further restructure the debt were unsuccessful, and Farms' default was accelerated. PCA filed a petition for foreclosure on the real estate mortgage.

Farms, Wilma, and Dale filed affirmative defenses to the petition, claiming that PCA was barred from foreclosing under the theories of failure of consideration, fraud in the inducement of the contract, and equitable estoppel. Farms also counterclaimed for profits lost from the forced premature sale of cattle and from the failure to loan money to buy new cattle. Dale also filed a counterclaim. The trial court dismissed the counterclaims at the completion of Farms' case. The trial court directed a verdict in favor of PCA after all the evidence was submitted. Farms has appealed.

## ASSIGNMENTS OF ERROR

Farms assigns as error the district court's granting of PCA's petition for foreclosure, finding that Farms' affirmative defenses were unsupported, and dismissing Farms' counterclaim.

## STANDARD OF REVIEW

> "A proceeding to foreclose a real estate mortgage is an equitable action. [Citations omitted.] When an equity case is appealed from the district court, the appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court. When the evidence conflicts, however, 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. . . ."

*DeMoor v. DeMoor*, 246 Neb. 765, 767, 523 N.W.2d 361, 363 (1994), quoting *McCook Nat. Bank v. Myers*, 243 Neb. 853, 503 N.W.2d 200 (1993).

Farms' counterclaim alleged that PCA had breached its contract. A suit for damages arising from breach of a contract presents an action at law. *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993). 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 clearly erroneous. *Id.* Therefore, an appellate court must review PCA's

foreclosure suit de novo and Farms' counterclaim under the "clearly erroneous" standard.

## ANALYSIS

Although Wilma and Dale appear as appellants, the brief filed on behalf of the appellants focuses on the errors assigned by Farms. We limit our analysis to Farms' assignments of error. Farms asserts that PCA should not be allowed to foreclose on the property because (1) the contract is void for failure of consideration caused by PCA's failure to deal in good faith, (2) the contract is voidable by Farms because of PCA's fraud in inducing Farms to grant the mortgages, and (3) the contract is void due to PCA's breach of contract.

### Failure of Consideration and Good Faith

Matters which seek to avoid a valid contract are affirmative defenses. The burden of proving an affirmative defense rests upon the defendant. Failure of consideration is an affirmative defense. *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992). There is sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. The benefit need not be to the party contracting, but may be to anyone else at the contracting party's procurement or request. *Id.*

Accompanying every contract is a common-law duty to perform with care, skill, reasonable expediency, and faithfulness the thing agreed to be done. *Schuster v. Baumfalk*, 229 Neb. 785, 429 N.W.2d 339 (1988). The statutory obligation of good faith in the performance or enforcement of a contract can exist in a debtor-creditor relationship. See, *Bloomfield v. Nebraska State Bank*, 237 Neb. 89, 465 N.W.2d 144 (1991); Neb. U.C.C. § 1-203 (Reissue 1992).

Farms points to the refusal of PCA to issue the livestock loan as a failure to deal in good faith. Farms states that Wilma's inability to procure livestock contributed to her failure to generate a profit and, subsequently, to the acceleration of Farms' note. Farms claims that it detrimentally relied on PCA's promise to lend to Wilma as it had in the past and that PCA should not be allowed to profit from its failure to keep its promise.

Farms also claims that PCA breached its duty of good faith by unreasonably refusing to issue an operating loan for 1986. Farms suggests that, by reviewing the status of the operation in November when the loan was due in December and by failing to use generally accepted accounting principles, PCA did not deal in good faith with Wilma and Farms.

As authority for its position that PCA should be barred from foreclosing on the mortgages, Farms cites, among other cases, the Nebraska Supreme Court's decision in *Yankton Prod. Credit Assn. v. Larsen*, 219 Neb. 610, 365 N.W.2d 430 (1985). In *Yankton Prod. Credit Assn.*, a borrower appealed a summary judgment in favor of a lender that had refused to disburse projected budget loan allotments. The borrower claimed that a question existed whether the lender had promised to loan sufficient funds to finance the expansion of a farming operation. The borrower also claimed that a question existed whether the lender had breached its duty of good faith. On appeal, the Supreme Court found that the lender created a line of credit in favor of the borrower in the sum of $737,000. The lender later refused to advance a large portion of the sum. The contract between the parties stated that the lender could refuse to advance the funds at its discretion, but the court found that, in practice, PCA was obligated to disburse projected funds if the borrower met certain requirements. The Supreme Court held that questions existed regarding the lender's breach of a promise to lend funds and regarding the possibility of the lender breaching the duty of good faith to the detriment of the borrower.

Farms reliance on *Yankton Prod. Credit Assn.* is misplaced. In *Yankton Prod. Credit Assn.*, the lender refused to disburse budgeted loans. In the present case, PCA loaned the entire amount requested by Wilma. Farms does not allege that PCA failed to disburse budgeted amounts, but, rather, states that PCA, acting beyond the scope of good faith, varied from its course of dealing with Wilma as it had in the past when it refused to loan her money for the purchase of livestock.

Farms' argument fails to properly consider the previous dealings between the parties. Previous budget loan applications submitted by the Haussermanns were entered into evidence.

Each of the applications included a budget for livestock purchases. The only livestock loan money requested by Wilma for 1985 concerned cattle that were purchased early in the operating year. PCA made money available for that purchase. Furthermore, PCA had noted that the Haussermanns had planned on purchasing less livestock after 1984. On our de novo review, we find that the refusal to loan additional money did not violate any reasonable expectation of any of the parties to the contract and did not constitute a breach of good faith. We further find that Farms received the consideration for which it bargained in the restructuring of the operating debt.

FRAUDULENT REPRESENTATION

In order to sustain the affirmative defense of false representation, a defendant must prove by a preponderance of the evidence that a representation was made; that the representation was false; that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion; that it was made with the intention that the defendant should rely on it; that the defendant did so rely; and that the defendant suffered damages as a result. *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994); *Lambelet v. Novak*, 225 Neb. 229, 404 N.W.2d 28 (1987).

Farms claims that, in return for the mortgages, PCA represented that Wilma or Farms was to receive a continuing operating loan "as it had for over 30 years." Farms argues that PCA misrepresented its position regarding the status of the operating loans and Farms detrimentally relied on that misrepresentation. Farms claims that, by refusing to issue an additional loan for livestock, PCA did not grant loans to Wilma as promised. Farms claims that PCA knew it would not issue loans as it had in the past and intended that Farms would rely on its misrepresentation.

Farms notes that had PCA called its note due prior to restructuring, PCA would only have been able to recover against 51 percent of Farms real estate—the 51 percent held by the Haussermanns as stockholders of Farms. Farms reasons that as a corporation it would have benefited from the restructuring

only if the farming operation were allowed to continue.

Farms admits, however, that at the time it granted the mortgages, it knew that PCA would only grant an operating loan for 1986 if Wilma was able to generate a profit in farming operations in 1985. Farms also admits that PCA issued to Wilma all the funds required under the loan agreements.

In *O'Neill Prod. Credit Assn. v. Mellor*, 220 Neb. 555, 371 N.W.2d 265 (1985), a debtor defended against a foreclosure proceeding by claiming that the mortgagee was equitably estopped from foreclosure because it had made false representations in obtaining the mortgage. The debtor failed to state specifically what false representations had been made. The court upheld the trial court award of summary judgment in favor of the mortgagee. The court stated, "The fact that matters did not develop as one or all of the parties might have expected or hoped does not prove that [the mortgagee] misrepresented anything." *Id.* at 559, 371 N.W.2d at 267.

From our de novo review, we find no evidence of a misrepresentation on the part of PCA. PCA apprised Farms of the risks of assuming the Haussermanns' debt, and Farms willingly accepted those risks.

### Breach of Contract

In order to recover in an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant's duty. *Gibb, supra.*

The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other. *Bloomfield v. Nebraska State Bank*, 237 Neb. 89, 465 N.W.2d 144 (1991).

Farms claims that PCA breached its contract by improperly reviewing the profitability of Wilma's 1985 operation and by refusing to issue an operating loan based on that review. In support of this argument, Farms points to the testimony of a PCA official stating that he could not specify the manner in which the operation had lost money. PCA countered this argument at trial by establishing that PCA and the Haussermanns historically determined the profitability of the

operation by comparing the changing total worth of the operation from year to year. PCA claimed that the method in which the parties historically determined profitability prevented PCA from determining the exact source of corporate loss. PCA also established that the 1985 operating loan was paid with funds collected from the sale of capital rather than with operating profits and that the capital sale contributed to the loss of total worth.

From our de novo review, we find that the November accounting was sufficient to determine an operating loss over the course of the operating year. Farms offers no evidence that Wilma generated a profit during 1985. Furthermore, Farms did not contest the amount of the operating loss at trial, but only the manner in which the loss was determined. However, PCA established that the manner in which it determined profitability was the accepted business practice between the parties. PCA also established that Wilma failed to generate a profit in 1985 according to the accepted accounting procedure. The evidence presented by PCA was sufficient to prove that it was justified in rejecting a request for an operating loan for 1986 in accord with the 1985 agreement. We find that PCA did not breach its agreement with Wilma.

We conclude from our de novo review that each of the affirmative defenses raised by Farms is without merit. Because of these findings, and specifically the finding that PCA did not breach its contract, we also find that the counterclaim filed by Farms is meritless.

AFFIRMED.

# WIEKHORST BROTHERS EXCAVATING & EQUIPMENT COMPANY, A GENERAL PARTNERSHIP, APPELLANT, V. OTTO LUDEWIG ET AL., APPELLEES.

529 N.W.2d 33

Filed March 10, 1995. No. S-93-545.

1. **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.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate 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.
3. **Rules of Evidence: Hearsay.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. The admission of hearsay is controlled by the Nebraska Evidence Rules.
4. **Conspiracy.** A conspiracy to unlawfully injure another's business is actionable.
5. ____. A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.
6. **Torts: Intent: Proof.** The necessary elements of tortious interference with a business relationship or expectation are (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.
7. **Conspiracy: Corporations: Agents.** A corporation cannot conspire with an agent when the agent is acting within the scope of his or her authority. Corporations act through their agents, and the acts of an agent are the acts of the corporation.
8. **Conspiracy: Damages.** The gist of a civil conspiracy action is not the conspiracy charged, but the damages the plaintiff claims to have suffered due to the wrongful acts of the defendants.
9. **Conspiracy: Damages: Proof.** Failure to prove a conspiracy is of no consequence if the plaintiff is able to establish that one or more defendants committed wrongful acts resulting in damages.
10. **Torts: Intent: Proof.** One of the basic elements of tortious interference with a business relationship requires an intentional act which induces or causes a breach or termination of the relationship. An intentional, but justified, act of interference will not subject the interferer to liability.
11. **Torts: Construction Contracts: Intent.** Design professionals acting within the

scope of their contractual obligations are privileged to give the owner advice which may lead to the termination of a contractor. Absent a showing of bad faith or malice, a design professional's intentional, but justified, act of interference will not subject it to liability for tortious interference with business.

12. **Rules of Evidence: Hearsay.** Out-of-court statements, if not offered for the purpose of proving the truth of the facts asserted, are not hearsay. Neb. Rev. Stat. § 27-801 (Reissue 1989).

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

Dan D. Stoller for appellant.

Thomas J. Guilfoyle, of Frost, Meyers, Guilfoyle & Govier, for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

LANPHIER, J.

Appellant, Wiekhorst Brothers Excavating & Equipment Company, brought this civil conspiracy action in the district court for Douglas County, Nebraska, against five individuals employed by the engineering firm of Lamp, Rynearson & Associates, Inc. Appellant claims that the five individuals, for their own personal motives, conspired to intentionally interfere with and destroy appellant's business by wrongfully recommending its termination from two sanitary and improvement district storm sewer projects. The district court granted appellees' motion for summary judgment. We affirm because there is no genuine issue of material fact. Appellees acted at all material times within the scope of their employment. As a matter of law, they therefore cannot be liable individually for conspiracy. We further hold that the district court did not err in admitting certain affidavits over appellant's hearsay objections.

## FACTS

This case involves a dispute between a contractor and five employees of an engineering firm. Appellant, Wiekhorst Brothers Excavating & Equipment Company, brought this action against appellees, Otto Ludewig, Michael McMeekin, Brett Wawers, Jeff Ray, and Loren Steenson, in their individual

capacities. The appellees are all employees of the engineering firm Lamp, Rynearson & Associates, Inc. (LRA).

LRA was employed as a design engineer on two unrelated projects by two sanitary and improvement districts (SID's) located in Douglas County. SID No. 337 employed LRA to design and assist in the construction of a public improvement, Storm Sewer Section I, within the Nelson Creek Subdivision in 1986. That same year, SID No. 291 employed LRA to design and assist in the construction of public improvements in the Pacific Meadows Subdivision.

LRA's duties required it to prepare the plans and specifications for the projects to be constructed by the two SID's. LRA's duties also included the preparation of contract documents and handling of the public bid-letting. In addition, LRA was required to ensure that the construction of the public improvements complied with the plans and specifications and the contract documents.

Appellee Ludewig was vice president and director of LRA and was the head of its construction administration division. Appellee McMeekin was the head of LRA's civil engineering department. Steenson was a civil engineer and was the project engineer for SID No. 337. Wawers was an engineer and was Ludewig's chief assistant in the construction administration division. Ray was an engineer and was LRA's construction observer on the SID No. 337 project.

Appellant was the low bidder for Storm Sewer Section I of SID No. 337. Storm Sewer Section I involved the construction of a storm sewer following the alignment of a tree-lined intermittent creek. Preserving the greatest number of trees possible was considered essential to the project, which centered around maintaining the natural beauty of the subdivision.

Appellees allege that the quality of appellant's work suffered from the beginning of the project. Some of these allegations are recounted below with appellant's responses.

Appellee Steenson avers that he observed several problems. The pipes were not properly aligned either vertically or horizontally, dirt was being removed from adjacent building lots, and trees marked for preservation were being damaged or destroyed. Appellant admits that it damaged and removed trees

which were marked to be saved, but claims that it was going to compensate the developer by paying liquidated damages. Appellant admits that it removed substantial amounts of dirt from adjacent building lots, but states that it was going to replace the dirt at a later time.

Part of the project called for 72-inch equivalent horizontal elliptical reinforced concrete pipe. The 72-inch pipe was difficult to lay. It is elliptical and therefore relatively flat on both the top and the bottom. One end of the pipe has a male coupler and the other end of the pipe has a female coupler. Those sections must be pushed together to make a tight fit. A number of the sections had unacceptable gaps, in excess of 1 inch. Appellant was repeatedly asked to fix the gaps by pouring concrete collars around the joints. Prior to fixing the gaps and pouring concrete collars, appellant covered the pipe with dirt, including most of the defective pipe. Appellant admits that many of the joints between the pipes were faulty, but states that it was going to go back and fix the joints at a later time.

The contract required the pipe to be laid on a crushed rock bed, and the pipe and the rock bed to be encased in a geotechnical cloth material to provide stability to the pipe sections. Ludewig called Michael Siedschlag from Geotechnical Services, Inc., and Scott Wiekhorst to the jobsite on October 17, 1986. Siedschlag determined that appellant was not laying the rock bed correctly and that water was not being pumped from the trench. Siedschlag suggested several corrective measures, none of which were taken by appellant.

On or about November 3, 1986, vandals damaged most of the pipe remaining to be laid. Ludewig; the concrete supplier, Hydro Concrete; and Scott Wiekhorst met. Ludewig concluded that the problem could be corrected by turning over the pipe and repairing the top part. When Ludewig returned to the jobsite later in the day, he discovered that appellant was merely throwing the pipe into the trench and was not repairing the broken portion of the pipe.

A survey of the site was performed on or about November 3, 1986, and it was determined that the storm sewers were off line horizontally and vertically. Appellant admits that the storm sewer pipe was out of vertical and horizontal alignment but

blames LRA for specifying the wrong amount of rock base and improper staking.

Ludewig and LRA's president and a member of its board of directors, Gary Kathol, discussed the problems and determined to contact the representatives of SID No. 337. A meeting was held at LRA on November 4, 1986. The meeting included Kathol and appellees Ludewig, McMeekin, Steenson, and Wawers. In attendance were Pat Jacobs, chairman of SID No. 337, Steve Jacobs, clerk of the SID, and John Rickerson, attorney for the SID.

The various problems were discussed. According to appellees' affidavits, Ludewig suggested that appellant be given an opportunity to cure the defects, but also stated that it was his opinion that appellant did not have the capability and/or willingness to make the necessary corrections. All of LRA's employees agreed that some action had to be taken and that termination was justified from an engineering standpoint. Rickerson, the SID's attorney, stated that he believed that immediate termination was justified under the circumstances. Some discussion was had as to whether the contract required notification of the defects and time to cure prior to termination. Based upon LRA's opinion that permissible grounds for termination existed, and with the legal advice of its attorney, SID No. 337 terminated appellant from the job.

LRA encountered difficulties with appellant a second time in 1986 on another SID project. LRA was the engineer for a storm sewer project to be constructed by SID No. 291, and appellant was the successful bidder. The third and most difficult phase of the project involved a crossing under the Union Pacific Railroad main line and a merger with a storm sewer system in the Papio Creek. The feared risks, if the work was done improperly, included collapse of the railroad track. LRA was concerned about appellant's capability to successfully tunnel under the railroad's main line. However, appellant informed LRA that it was going to engage an experienced subcontractor to do the tunneling work during Phase III.

The contract documents required that appellant provide special public liability insurance to protect against the risk to the railroad's main line. On November 26, 1986, Ludewig, on

behalf of LRA, wrote to appellant setting forth the insurance requirements. Appellant needed to provide liability insurance in an amount not less than $2,000,000 per person and $6,000,000 per accident and property damage in an amount not less than $6,000,000. Ludewig demanded that appellant produce proof of insurance within 10 days. Appellant claims that there was some confusion regarding the required amount of insurance prior to November 26 and that this confusion delayed the procurement of insurance. Appellant never produced a certificate of insurance. Appellant responds that it did obtain a quote from an insurance company on January 6, 1987.

As the time approached to begin the tunneling under the railroad's main line, appellant informed Ludewig that it had decided not to bring in an experienced subcontractor and that it was going to perform the tunneling work itself. LRA was convinced that appellant could not properly and safely tunnel under the Union Pacific main line and was concerned about its duty to its client and the public. The board of directors of LRA met with its corporate attorney, John Ford, and decided that LRA should advise SID No. 291 that if appellant was permitted to do the tunneling, LRA could not act as engineer for the SID. Kathol, as president of LRA, was instructed by the board of directors to attend the next SID meeting. At the SID board meeting on December 12, 1986, Kathol notified the SID that LRA would withdraw as engineer for Phase III of the project if appellant was permitted to act as the contractor responsible for the tunneling work. SID No. 291 terminated appellant and finished the job with another contractor.

Appellant filed a petition in the district court for Douglas County on August 10, 1987. Appellees' demurrers to this petition, and three subsequent petitions, were sustained. On September 5, 1990, appellant filed a fourth amended petition. In so doing, appellant attempted to add a new defendant, Kathol.

The fourth amended petition alleged two causes of action. For its first cause of action, appellant alleged that "the Defendants, having entered into a mutual agreement and acting with a common purpose, have engaged in actions that constitute a conspiracy to intentionally harm and injure the Plaintiff by

disrupting the business operations of the Plaintiff and damaging the business reputation of the Plaintiff." Appellant further alleged that "as a direct and proximate cause of the actions of the Defendants, and each of them, the Plaintiff has suffered a pecuniary loss of profits from and after November 4, 1986 and a pecuniary loss for damage to its business reputation."

Appellant's second cause of action alleged that each of the defendants, by virtue of their employment by LRA, had a contractual duty to appellant to accurately design and survey the storm sewer projects. Appellant alleged that the defendants failed to perform their duties with reasonable care and diligence and that such failure constituted negligence.

Appellees again demurred. Kathol, the newly named defendant, demurred on the basis that all of the allegations contained in the fourth amended petition were barred against him pursuant to the statute of limitations for professional negligence, Neb. Rev. Stat. § 25-222 (Reissue 1989). The other defendants, appellees in this action, demurred to appellant's second cause of action for the reason that it was also barred by § 25-222.

The trial court sustained both demurrers, from which no appeal is taken. Appellees then answered the allegations of the first cause of action of appellant's fourth amended petition on March 12, 1992. Appellees admitted that they were employees of LRA, but denied all other material facts. Appellees asserted an affirmative defense that as employees of LRA, they acted at all times within the scope of their employment and for the benefit of and on behalf of their employer and thus were incapable of conspiring with each other. Appellees further asserted that they were protected by a quasi-judicial privilege afforded design professionals.

On November 19, 1992, appellees filed a motion for summary judgment. On February 26, 1993, proceedings were had before the district court, and depositions and affidavits were submitted by both parties. Appellant objected to the introduction of various affidavits offered by appellees on the basis of hearsay and foundation. The court reserved ruling on appellant's objections. On May 28, the district court, without explanation, overruled appellant's hearsay objections and granted appellees'

motion for summary judgment. From that order, appellant has appealed.

## ASSIGNMENTS OF ERROR

Appellant contends that the district court erred by granting summary judgment in favor of appellees when there remained a genuine issue of fact as to the following: (1) whether appellees acted outside the scope of their employment, (2) whether appellees' actions in recommending that appellant be terminated from the SID No. 337 contract without written notice of the right to cure exceeded their qualified privilege to give advice to SID No. 337, and (3) whether appellees' recommendations to their corporate employer that LRA threaten to resign from the SID No. 291 project unless appellant was terminated exceeded their qualified privilege to give advice to SID No. 291.

Appellant further assigns as error the trial court's admission, over appellant's objections, of affidavits offered by appellees for the reason that those affidavits contained inadmissible hearsay statements.

## STANDARD OF REVIEW

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. *Heath Consultants v. Precision Instruments, ante* p. 267, 527 N.W.2d 596 (1995); *Huntwork v. Voss, ante* p. 184, 525 N.W.2d 632 (1995). In reviewing a summary judgment, an appellate 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. *Huntwork v. Voss, supra*; *New Light Co. v. Wells Fargo Alarm Servs., ante* p. 57, 525 N.W.2d 25 (1994).

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. *Kroeger v. Ford Motor*

*Co., ante* p. 323, 527 N.W.2d 178 (1995); *Terry v. Duff*, 246 Neb. 524, 519 N.W.2d 550 (1994). The admission of hearsay is controlled by the Nebraska Evidence Rules. See *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993).

## ANALYSIS

### Conspiracy to Interfere With Business

In its fourth amended petition, appellant alleged that appellees entered into a mutual agreement and engaged in actions that constitute a conspiracy to intentionally harm and injure appellant by disrupting its business operations. Only the six employees were named as defendants, and the corporation itself was not charged with conspiracy.

Appellees asserted two affirmative defenses. First, they state that at all times material to appellant's allegations, they were employees of LRA and acted within the scope of their employment. Further, appellees asserted that all of their actions within the scope of their employment were justified actions protected by a privilege afforded design engineers.

A conspiracy to unlawfully injure another's business is actionable. *Diesel Service, Inc. v. Accessory Sales, Inc.*, 210 Neb. 797, 317 N.W.2d 719 (1982). A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means. *Treptow Co. v. Duncan Aviation, Inc.*, 210 Neb. 72, 313 N.W.2d 224 (1981); *Dixon v. Reconciliation, Inc.*, 206 Neb. 45, 291 N.W.2d 230 (1980); *Peters v. Woodman Accident & Life Co.*, 170 Neb. 861, 104 N.W.2d 490 (1960).

The necessary elements of tortious interference with a business relationship or expectation are (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted. *Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991).

As more fully discussed below, appellant's argument that the

LRA employees conspired to interfere with its business relationships fails for two reasons. First, there is absolutely no evidence that the employees acted outside the scope of their employment with LRA, and therefore, there is no showing of conspiracy. Each appellee has submitted an affidavit describing his duties and responsibilities as an employee or officer of LRA. For example, appellee Ludewig stated that his responsibilities entailed representing the owner during the construction phase of the project and advising and consulting with the owner. Appellee Steenson stated he participated in the preparation of the plat for SID No. 337. All appellees aver that their actions were within the scope of their employment.

Despite bare allegations in appellant's pleadings, appellant failed to offer any evidence to indicate that any appellee acted outside the scope of his employment with LRA. Without some evidence that appellees acted outside the scope of their employment for LRA, there can be no conspiracy.

A corporation cannot conspire with an agent when the agent is acting within the scope of his or her authority. Corporations act through their agents, and the acts of an agent are the acts of the corporation. *Renner v. Wurdeman*, 231 Neb. 8, 434 N.W.2d 536 (1989). See, also, *Dixon v. Reconciliation, Inc., supra*. It follows that if all of a corporation's agents are acting within the scope of his or her authority, their acts are acts of the corporation and there is only one actor.

However, the gist of a civil conspiracy action is not the conspiracy charged, but the damages the plaintiff claims to have suffered due to the wrongful acts of the defendants. *Treptow Co. v. Duncan Aviation, Inc., supra*; *Trebelhorn v. Bartlett*, 154 Neb. 113, 47 N.W.2d 374 (1951). Failure to prove a conspiracy is of no consequence if the plaintiff is able to establish that one or more defendants committed wrongful acts resulting in damages. *Treptow Co. v. Duncan Aviation, Inc., supra*; *Trebelhorn v. Bartlett, supra*. As the design engineer, LRA was required to act as a consultant and advisor to the owners, the SID's, with regard to the construction projects. Appellant argues that by recommending its termination from the two projects, LRA exceeded the scope of its privilege to give advice to the owners and committed wrongful acts.

One of the basic elements of tortious interference with a business relationship requires an intentional act which induces or causes a breach or termination of the relationship. *Renner v. Wurdeman, supra*; *Miller Chemical Co., Inc. v. Tams*, 211 Neb. 837, 320 N.W.2d 759 (1982). An intentional, but justified, act of interference will not subject the interferer to liability. *Matheson v. Stork, supra* (citing and clarifying *Miller Chemical Co., Inc., v. Tams, supra*). See, also, Restatement (Second) of Torts § 770 (1979); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 129 at 983 (5th ed. 1984). For example, where a lender gave notice to a debtor's suppliers that it would no longer provide floor-plan financing to the debtor, we held that there was no improper act of interference with the debtor's business. *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 243 N.W.2d 745 (1976).

We have not previously addressed whether there is any privilege afforded design professionals; however, other courts have done so. Those courts have held that design professionals acting within the scope of their contractual obligations to the owner cannot be liable for advising the owner to terminate a relationship with the contractor, unless the design professionals act in bad faith or with malice. *Dehnert v. Arrow Sprinklers, Inc.*, 705 P.2d 846 (Wyo. 1985); *Kecko Piping Co. v. Monroe*, 172 Conn. 197, 374 A.2d 179 (1977); *Ballou v. Basic Construction Company*, 407 F.2d 1137 (4th Cir. 1969).

We hold that design professionals acting within the scope of their contractual obligations are privileged to give the owner advice which may lead to the termination of a contractor. Absent a showing of bad faith or malice, a design professional's intentional, but justified, act of interference will not subject it to liability for tortious interference with business.

Here, appellant argues that by recommending its termination from the two projects, LRA exceeded the scope of its privilege to interfere and to give advice to the owners. LRA is not a defendant. The privilege afforded design engineers inures to LRA, rather than appellees. However, as we stated above, all acts material to this action were within the scope of appellees' employment. If LRA did not exceed the scope of its privilege, neither did appellees.

The contract documents for Storm Sewer Section I for SID No. 337 were offered into evidence by appellees. Article 9 defines the engineer's status during construction and provides that the engineer will be the owner's representative during the construction period. Further, the engineer's efforts were to be

> directed toward providing for OWNER a greater degree of confidence that the completed Work will conform to the Contract Documents. On the basis of . . . visits and on-site observations as an experienced and qualified design professional, ENGINEER will keep OWNER informed of the progress of the Work and will endeavor to guard OWNER against defects and deficiencies in the Work.

Again, LRA is not a party. Yet while appellant pleads that appellees acted outside the scope of their employment with LRA, appellant argues on the other hand that LRA, through its agents, exceeded its privilege to give advice to SID No. 337 by failing to insist that SID No. 337 follow the requirements of the contract and give appellant notice of the defects and an opportunity to cure. However, at the November 4 meeting, the engineers were asked to determine, from an engineering standpoint, whether the contractor deserved to be terminated. The engineers determined that appellant was not performing, that its work would have to be redone, and that grounds for termination existed. Once that recommendation was made, it was up to the attorney for SID No. 337 to determine the legal and appropriate method of termination. Appellant speculates in its brief regarding possible motives which might show that appellees acted with malice or bad faith and therefore outside the scope of their employment. Assuming, arguendo, that malice and bad faith would be outside the scope of appellees' employment, appellant offers no evidence to support such a finding. LRA, by and through appellees, acted within the scope of its privilege in recommending that SID No. 337 terminate appellant. Since appellees were within the scope of their employment, their actions are also privileged.

Similarly, LRA, by and through appellees, acted within its privilege and with justification when it informed SID No. 291 that it would not act as design engineer if appellant was

permitted to tunnel under the Union Pacific main line. Appellant had failed to procure required insurance and had indicated that it would do the tunneling itself, rather than use an experienced subcontractor as earlier promised. It appears that LRA was justifiably concerned for its own exposure to liability. LRA's board of directors determined that the company would refuse to act as design engineer, only after consulting with its corporate counsel. LRA communicated its decision to SID No. 291's board of trustees, through its president. Again, appellant offers no evidence that any of LRA's employees or agents acted outside the scope of their employment with LRA.

The evidence indicates that appellees acted at all times within the scope of their employment and that LRA acted at all times within the scope of its privilege to give advice to SID No. 337 and SID No. 291. Accordingly, appellees were entitled to summary judgment in their favor as a matter of law.

## HEARSAY

Appellant further assigns as error the trial court's admission, over appellant's objections, of affidavits offered by appellees for the reason that those affidavits contained inadmissible hearsay statements.

At the hearing on the motion for summary judgment, appellant objected to the admissibility of portions of appellees' affidavits for the reason that the affidavits contained hearsay. For example, appellant argued that Ludewig's statements in his affidavit regarding the fact that appellant had been told not to remove dirt and regarding a conversation between Ludewig and appellee Jeff Ray were hearsay and lacking in foundation. Appellees argued that the affidavits were not hearsay, but were offered in support of appellees' defense that they were protected by a quasi-judicial privilege afforded design engineers or because they were based on firsthand knowledge. The trial court admitted the affidavits over appellant's objections.

Out-of-court statements, if not offered for the purpose of proving the truth of the facts asserted, are not hearsay. Neb. Rev. Stat. § 27-801 (Reissue 1989). Here, the out-of-court statements were offered to show the state of mind on the part of appellees, rather than the truth of the matter asserted.

Therefore, the district court properly admitted the affidavits of appellees.

## CONCLUSION

For the foregoing reasons, we affirm the order of the district court granting summary judgment in favor of appellees.

AFFIRMED.

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## LABEL CONCEPTS, APPELLANT AND CROSS-APPELLEE, V. WESTENDORF PLASTICS, INC., DOING BUSINESS AS ASC WHIRLPOOL, APPELLEE AND CROSS-APPELLANT.

528 N.W.2d 335

Filed March 10, 1995. No. S-93-594.

1. **Judgments.** In the absence of an ambiguity, the effect of a judgment must be declared in light of the literal meaning of the language used.
2. ____. If the language of a judgment is ambiguous, there is room for construction.
3. ____. In ascertaining the meaning of an ambiguous judgment, resort may be had to the entire record.
4. ____. Silence in a judgment with respect to any demand which was an issue in the case under the pleadings constitutes an absolute rejection of the demand.
5. **Appeal and Error.** A trial court's factual determinations in a bench trial in an action at law have the same effect as a jury verdict and will not be set aside unless clearly wrong.
6. **Uniform Commercial Code: Sales: Vendor and Vendee: Breach of Warranty: Proof.** After goods are accepted, the buyer has the burden of establishing a breach of merchantability with respect to the goods. Neb. U.C.C. § 2-607(4) (Reissue 1992).
7. **Judgments: Appeal and Error.** In reviewing a trial court's factual determinations in a bench trial in an action at law, an appellate court does not reweigh the evidence, but considers it in the light most favorable to the successful party and resolves evidentiary conflicts in favor of that party, who is entitled to every reasonable inference deducible from the evidence.
8. **Appeal and Error.** In the absence of plain error, an appellate court will not address issues that are not both assigned and analyzed in the brief of the party asserting the error.
9. **Prejudgment Interest: Time.** Compliance with the provisions of Neb. Rev. Stat. § 45-103.02 (Reissue 1993) is a condition precedent to the recovery of

prejudgment interest in actions accruing after January 1, 1987.

10. **Contracts: Intent.** A contract written in clear and unambiguous language is not subject to interpretation or construction; rather, the intent of the parties must be determined from the contents of the contract, and the contract must be enforced according to its terms.
11. **Contracts: Parol Evidence.** A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions or where the language employed is vague or ambiguous.

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

Patricia McCormack and Robert E. O'Connor, Jr., of O'Connor & Associates, for appellant.

Dennis E. Martin and Thomas R. Ostdiek, of Martin & Martin, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

CAPORALE, J.

## I. STATEMENT OF CASE

In this action at law brought under the provisions of the sales article of the Uniform Commercial Code, Neb. U.C.C. §§ 2-101 through 2-616 (Reissue 1992), the plaintiff-appellant, Label Concepts, seeks to recover $11,550.42 plus prejudgment interest for goods sold under oral orders to the defendant-appellee, Westendorf Plastics, Inc., doing business as ASC Whirlpool. Westendorf asserts that because the goods were "unfit," it is not indebted to Label Concepts, and further pleads a setoff and separate counterclaim. Following a bench trial, the district court entered "judgment for [Label Concepts] in the sum of $3680.32." Label Concepts appeals, averring that the district court erred in (1) determining the damages due it and (2) refusing to award prejudgment interest. Westendorf cross-appeals, declaring that the district court erred in (1) admitting certain evidence and (2) failing "to further set-off" a $2,500 credit it had negotiated. We affirm.

## II. NATURE OF DISTRICT COURT'S RULING

Because the judgment entered in this case is silent as to the adjudication of Westendorf's setoff and counterclaim, our first

task is to determine what exactly the district court ruled. While in the absence of an ambiguity the effect of a judgment must be declared in light of the literal meaning of the language used, see *Metropolitan Life Ins. Co. v. Beaty*, 242 Neb. 169, 493 N.W.2d 627 (1993), if the language is ambiguous, there is room for construction, *Bokelman v. Bokelman*, 202 Neb. 17, 272 N.W.2d 916 (1979). In ascertaining the meaning of an ambiguous judgment, resort may be had to the entire record. See, *Whaley v. Matthews*, 136 Neb. 767, 287 N.W. 205 (1939); *Burke v. Unique Printing Co.*, 63 Neb. 264, 88 N.W. 488 (1901). Moreover, there is authority, which we adopt, for the proposition that silence in a judgment with respect to any demand which was an issue in the case under the pleadings constitutes an absolute rejection of the demand. *Sun Finance Co., Inc. v. Jackson*, 525 So. 2d 532 (La. 1988).

Given the foregoing rules and the record with which we are presented, as summarized in part IV below, the effect of the district court's judgment is the same as if the court had carefully detailed that it found for Label Concepts on its petition, entered judgment thereon in the sum of $3,680.32, further found for Label Concepts on Westendorf's setoff and counterclaim, and dismissed said setoff and counterclaim.

## III. SCOPE OF REVIEW

Having deciphered the district court's judgment, we proceed to determine whether it is legally correct. In conducting that inquiry, we are controlled by the rule that a trial court's factual determinations in a bench trial in an action at law have the same effect as a jury verdict and will not be set aside unless clearly wrong. *Imperial Empire Trading Co. v. City of Omaha*, 246 Neb. 919, 524 N.W.2d 314 (1994).

## IV. FACTS

Label Concepts is a manufacturer's representative and distributor which acquires custom-printed labels and in turn sells them to its customers. In 1991, Westendorf placed with Label Concepts a number of oral orders for a variety of labels, some of which were to be affixed to small refrigerators with rounded fronts, such as to make the refrigerators resemble beverage containers.

Initially, a total of eight invoices were at issue; however, Westendorf did not dispute that it owes an unpaid balance of $3,680.32 to Label Concepts on five of these invoices.

The first of the three disputed invoices concerns labels resembling the "Labatt's Lite" container, which order is also in part covered by some of the five undisputed invoices mentioned earlier. In any event, the first time the Labatt's Lite labels were printed by Label Concepts' producer, the colors overlapped, so the labels were reprinted. The reprinted labels turned out to be too short in length. Although Label Concepts claimed its inspection of the reprinted labels proved them to have been in compliance with the specifications supplied by Westendorf, Label Concepts nonetheless had strips produced to Westendorf's specifications, which extended the length of the reprinted labels. This action proved to be a satisfactory solution.

The remaining two disputed invoices concern labels resembling the "Blue Light" container. There was testimony that the first time these labels were printed the colors overlapped. As a result, they were printed a second time, but the second batch of labels stuck together because they had not had time to cure before being stacked. They were then printed a third time. The third batch of labels was ultimately delivered to Westendorf and applied to the refrigerators which were then shipped to Westendorf's Canadian purchaser. The purchaser, however, noticed the colors were wrong and objected to the labels.

Label Concepts claims that the color used was Westendorf's mistake because the labels had been produced in compliance with the colors shown on an artboard submitted by Westendorf to Label Concepts and further that the colors on the labels were identical to those shown on the artboard. Westendorf claims that Label Concepts wrongly referred to the Labatt's Lite artboard and that therefore the colors for the Blue Light order were wrong. The Blue Light artboard was not in evidence.

Westendorf testified that Label Concepts agreed to reprint the labels once again without extra charge and to give Westendorf a credit of $2,500 to compensate Westendorf for having to deal with remedying the problem.

On the other hand, Label Concepts testified it agreed to again

reprint the labels and give Westendorf a credit of $2,500 on this fourth reprint, meaning that Westendorf still owed the money for the third batch, but that if they were redone a fourth time, Westendorf would get the credit.

When, after about 2 weeks, Westendorf had not received any new Blue Light labels, it canceled its order with Label Concepts and ordered replacements from another supplier and applied these to the refrigerators.

## V. ANALYSIS OF LABEL CONCEPTS' APPEAL

With that background, we turn our attention to Label Concepts' assignments of error, the district court's determination as to the amount due and its failure to award prejudgment interest.

### 1. Amount Due

Westendorf argues that the evidence shows that the labels were not merchantable within the meaning of § 2-314 in that they did not "pass without objection in the trade under the contract description." Section 2-314 reads in relevant part:

> (1) Unless excluded or modified (section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .
>
> (2) Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description . . . .

In the instant case, there is no question that Label Concepts was a merchant and no evidence that Label Concepts disclaimed any warranties pursuant to § 2-316; thus, the question is whether the labels which were the subject of the disputed invoices were merchantable. See *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983), *overruled on other grounds, Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987). For the purpose of this analysis, we assume, without deciding, that the labels were accepted by Westendorf, as the term "acceptance" is defined in § 2-606. Thus, the burden of proof was on Westendorf as the buyer to establish the breach of warranty. See, *Laird v. Scribner Coop*, 237 Neb. 532, 466 N.W.2d 798 (1991); § 2-607(4).

Whatever else might be said about the Labatt's Lite labels, there is no question that the labels were too short and that the first of the three disputed invoices covers the extension strips produced to make the Labatt's Lite labels usable. While there was testimony from Label Concepts that the Labatt's Lite labels as reprinted met the specifications Westendorf provided, the district court was free to accept the countervailing testimony. The controlling rule is that in reviewing a trial court's factual determinations in a bench trial in an action at law, an appellate court does not reweigh the evidence, but considers it in the light most favorable to the successful party and resolves evidentiary conflicts in favor of that party, who is entitled to every reasonable inference deducible from the evidence. *Lone Cedar Ranches v. Jandebeur*, 246 Neb. 769, 523 N.W.2d 364 (1994).

That brings us to the subject of the remaining two disputed invoices, which cover the Blue Light labels. In that regard, Westendorf points to testimony that its Canadian purchaser declared the labels to be defective and unacceptable.

Citing *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 363 N.W.2d 155 (1985), for the proposition that there must be proof of a deviation from the standard of merchantability causing the injury, Label Concepts responds that the fact that the labels obviously passed through Westendorf's operation without objection indicates they were not defective.

However, the fact that Westendorf did not notice the defect does not counter the proof that Westendorf's Canadian purchaser refused to accept the refrigerators on which those labels had been affixed.

The district court could well have found that the colors Label Concepts matched were those meant for the Labatt's Lite label, thus making the colors wrong for the Blue Light label.

Accordingly, there is no merit to Label Concepts' first assignment of error.

### 2. Prejudgment Interest

The short answer to Label Concepts' claim that the district court erred by not awarding prejudgment interest is that although it assigns the failure as error, the matter is not argued

in its brief. The applicable rule is that in the absence of plain error, an appellate court will not address issues that are not both assigned and analyzed in the brief of the party asserting the error. See, *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994); *Ashby v. First Data Resources*, 242 Neb. 529, 497 N.W.2d 330 (1993); Neb. Ct. R. of Prac. 9D(1)d (rev. 1992).

Moreover, there is no showing of record that Label Concepts complied with the provisions of Neb. Rev. Stat. § 45-103.02 (Reissue 1993), a condition precedent to the recovery of prejudgment interest in actions accruing after January 1, 1987. *Schlake v. Jacobsen*, 246 Neb. 921, 524 N.W.2d 316 (1994).

Consequently, neither is there any merit to Label Concepts' second assignment of error.

## VI. ANALYSIS OF WESTENDORF'S CROSS-APPEAL

We thus reach the cross-appeal, in which Westendorf asserts the district court erroneously admitted certain evidence and denied Westendorf the $2,500 credit it had negotiated.

### 1. Evidence

Claiming that the matter of the credit had been reduced to a written agreement, Westendorf asserts the district court erred in overruling its parol evidence objection to testimony concerning Label Concepts' understanding of the agreement in that regard. It is true that a contract written in clear and unambiguous language is not subject to interpretation or construction; rather, the intent of the parties must be determined from the contents of the contract, and the contract must be enforced according to its terms. *Rains v. Becton, Dickinson & Co.*, 246 Neb. 746, 523 N.W.2d 506 (1994). Thus, a written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions or where the language employed is vague or ambiguous. *Coppi v. West Am. Ins. Co.*, *ante* p. 1, 524 N.W.2d 804 (1994).

Here the written instrument on which Westendorf relies as the contract controlling the credit is far from being clear and unambiguous; indeed, it can best be described as a model of ambiguity. It is a purchase order directed to Label Concepts which, among other things, lists the quantity, description, and prices of a variety of labels and shows a total from which is

subtracted the sum of $2,500. However, not only is the $2,500 figure crossed out, but there is a line drawn from the figure to the word "error." Such a document means nothing with respect to the claimed credit.

Westendorf's first assignment of error thus fails.

### 2. Denial of Credit

The foregoing resolution of Westendorf's first assignment of error dooms as well its claim that the district court erroneously denied it the credit sought in its setoff and counterclaim. As detailed in part IV, there was evidence from which the district court could reasonably conclude that the credit was to be given only if Label Concepts again produced the Blue Light labels. The evidence that it did not do so is uncontradicted.

## VII. JUDGMENT

Being correct, the judgment of the district court, as noted in part I, is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. KENNETH G. SORENSON, APPELLANT.

529 N.W.2d 42

Filed March 10, 1995. No. S-93-755.

1. **Statutes.** When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning. In the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
2. **Criminal Law: Statutes.** It is a fundamental principle of statutory construction that penal statutes are to be strictly construed.
3. **Sentences.** Unless specifically stated otherwise when pronounced, multiple sentences imposed at the same time run concurrently with each other.
4. ____. Although it is within the trial court's discretion to direct that sentences imposed for separate crimes be served consecutively, Neb. Rev. Stat. § 28-1205 (Reissue 1989) does not permit such discretion in sentencing.

5. **Sentences: Weapons: Words and Phrases.** Neb. Rev. Stat. § 28-1205(3) (Reissue 1989) mandates that the sentencing court require a sentence for the use of a firearm in the commission of a felony be served consecutively to any other sentence imposed. The use of the word "shall" in § 28-1205(3) mandates consecutive sentencing.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and CONNOLLY and IRWIN, Judges, on appeal thereto from the District Court for Douglas County, JOSEPH S. TROIA, Judge. Judgment of Court of Appeals affirmed as modified.

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

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

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

WRIGHT, J.

We granted the petition for further review of the appellant, Kenneth G. Sorenson. The Nebraska Court of Appeals affirmed the sentences imposed by the Douglas County District Court, finding that the oral pronouncement of sentence was ambiguous, but that the oral pronouncement was clarified by the written journal entry which set forth the sentences.

## SCOPE OF REVIEW

When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning. In the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning. *State v. Salyers*, 239 Neb. 1002, 480 N.W.2d 173 (1992).

It is a fundamental principle of statutory construction that penal statutes are to be strictly construed. *Id.*

## FACTS

Sorenson pled guilty to six felonies, including one count of burglary, two counts of first degree sexual assault, one count of attempted first degree sexual assault, one count of use of a knife to commit a felony, and one count of use of a firearm to commit

a felony. Because Sorenson was found to be a habitual criminal, the mandatory minimum prison term for each conviction was 10 years and the maximum possible prison term for each conviction was 60 years. See Neb. Rev. Stat. § 29-2221 (Reissue 1989).

On direct appeal, Sorenson asserted that the trial court erred in rendering upon the court journal a different sentence than that pronounced by the judge in open court. His claim was based in part on the following colloquy which took place at the sentencing hearing:

> [The court:] So it will be the sentence of the Court on the four charges: the burglary, the first degree sexual assaults and the attempted sexual assaults [sic], you do 35 years at the Department of Corrections. On each of the two uses, 15 years, consecutive to the four charges, be a total of 50 (sic) years. Credit for 334 days.
>
> [State]: Do you have to give a top number at all then?
>
> THE COURT: No, just 35 plus 15.
>
> [Defense]: Thank you.
>
> (Off-the-record discussion held between the Court, Counsel and the Probation Office[r].)
>
> [Probation officer]: It would be 35, plus 15, plus 15, be 65.
>
> THE COURT: Yeah. He has to serve the four 35's before he can serve the 15's.

The written journal entry of the trial court states in part:

> Thereupon, it was the judgment and sentence of the court that defendant be imprisoned in an institution under the jurisdiction of the DEPARTMENT OF CORRECTIONAL SERVICES for a period of Thirty[-]five (35) Years on Burglary, Count I; Thirty[-]five (35) Years as to each Count, Sexual Assault-First Offense, Count III and First Degree Forcible Sexual Assault-First Offense, Count VII; Thirty[-]five (35) Years on Attempted First Degree Sexual Assault, Count IX.
>
> Counts I, III, VII and IX to be served concurrent.
>
> Credit for time served of Three hundred thirty[-]four (334) days shall be given against sentences imposed on

Count I, Count III, Count VII, Count IX.

Thereupon, it was the judgment and sentence of the court that defendant be imprisoned in an institution under the jurisdiction of the DEPARTMENT OF CORRECTIONAL SERVICES for a period of Fifteen (15) Years on Use of Firearm to Commit Felony, Count XI. Served consecutive to Counts I, III, VII and IX. Fifteen (15) Years on Use of Knife to Commit Felony, Count V, served consecutive to Count XI, at hard labor, no part of which shall be in solitary confinement, and judgment rendered against the defendant for the costs of prosecution.

## ASSIGNMENTS OF ERROR

In his petition for further review, Sorenson assigns as error the Court of Appeals' finding that the oral pronouncement of sentence was ambiguous and the Court of Appeals' affirmance of sentences which were never pronounced in open court.

## ANALYSIS

The Court of Appeals found that the trial court's oral pronouncement of the sentences on July 29, 1993, was ambiguous, but that no remand for resentencing was necessary because the written notation of the judgment clarified the oral pronouncement. The Court of Appeals stated: "There is no doubt that Sorenson must first serve the concurrent 35-year prison terms and that the 15-year terms for use of weapons are to be served consecutively to the 35-year terms for the underlying felonies." *State v. Sorenson*, 2 Neb. App. 998, 1001, 520 N.W.2d 28, 29 (1994).

Because the written notation clearly shows that the trial judge intended the sentences for the weapons charges to be served consecutively to each other, the Court of Appeals concluded that the sentences need not be set aside or remanded for resentencing. The Court of Appeals held that a subsequent written notation may be relied upon to clarify an ambiguity in the oral pronouncement of a sentence. The Court of Appeals stated that

> this framework is used only when the oral pronouncement is ambiguous. It is not applicable when an unambiguous oral pronouncement conflicts with the written judgment,

> when an oral pronouncement is inadvertent yet unambiguous, or when the oral pronouncement is silent as to whether multiple sentences are to run consecutively or concurrently.

*Id.* at 1004, 520 N.W.2d at 31.

Generally, the rule in Nebraska is that unless specifically stated otherwise when pronounced, multiple sentences imposed at the same time run concurrently with each other. *State v. McNerny*, 239 Neb. 887, 479 N.W.2d 454 (1992). Here, the bill of exceptions does not clearly indicate whether the sentences for use of a knife to commit a felony and use of a firearm to commit a felony were to be served consecutively or concurrently. We agree with the Court of Appeals' finding that the oral pronouncement of sentence was ambiguous. However, this is not decisive of the case before us.

Although it is within the trial court's discretion to direct that sentences imposed for separate crimes be served consecutively, *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991), Neb. Rev. Stat. § 28-1205 (Reissue 1989) does not permit such discretion in sentencing. Section 28-1205 provides:

> (1) Any person who uses a firearm, knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state, or any person who unlawfully possesses a firearm, knife, brass or iron knuckles, or any other deadly weapon during the commission of any felony which may be prosecuted in a court of this state commits the offense of using firearms to commit a felony.
>
> (2) Use of firearms to commit a felony is a Class III felony.
>
> (3) The crime defined in this section shall be treated as a separate and distinct offense from the felony being committed, and sentences imposed under the provisions of this section shall be consecutive to any other sentence imposed.

When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning. In the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning. *State v.*

*Salyers*, 239 Neb. 1002, 480 N.W.2d 173 (1992). It is a fundamental principle of statutory construction that penal statutes are to be strictly construed. *Id.*

In *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985), we held that § 28-1205(3) mandates that the sentencing court require a sentence for the use of a firearm in the commission of a felony be served consecutively to any other sentence imposed. "[T]he use of the word 'shall' in § 28-1205(3) mandates consecutive sentencing." *Stratton*, 220 Neb. at 857, 374 N.W.2d at 34.

Subsequently, in *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988), the defendant was convicted of second degree murder, attempted second degree murder, first degree assault, and three counts of use of a firearm to commit a felony. For the crime of use of a firearm in the murder, the district court sentenced Trevino to 3 years' imprisonment, which was to be served consecutively to his sentences for murder, attempted murder, and assault. For the crime of use of a firearm in the attempted murder, the district court sentenced Trevino to 3 years' imprisonment to be served consecutively to all the above sentences. For the crime of use of a firearm in the assault, Trevino received an additional 3-year sentence to be served consecutively to all the above sentences.

Trevino was given consecutive sentences for use of a firearm in the commission of two separate felonies committed upon one victim. In *Trevino*, we held that § 28-1205 mandates a separate sentencing for each instance of use of a firearm to commit a felony. "The jury having found Trevino guilty of both of the distinct predicate offenses of attempted second degree murder and first degree assault, the consecutive sentences imposed by the district court are supported by the law and the evidence, and mandated by the language of § 28-1205." *Trevino*, 230 Neb. at 521, 432 N.W.2d at 522.

In this case, § 28-1205 applies to two separate convictions: use of a knife to commit a felony and use of a firearm to commit a felony. Each charge for use of a weapon to commit a felony is treated as a separate and distinct offense for which the sentence shall be served consecutively to any other sentence. Therefore, Sorenson's sentence of 15 years for count XI, use of

a firearm to commit a felony, must be served consecutively to his sentences for counts I, III, VII, and IX. His sentence of 15 years for count V, use of a knife to commit a felony, must be served consecutively to the sentence for count XI, use of a firearm to commit a felony.

To the extent that it did not impose consecutive sentences for use of a firearm to commit a felony and use of a knife to commit a felony, the oral pronouncement was invalid. The written notation upon the journal of the court correctly sets forth the sentences which must be imposed in order to comply with § 28-1205. The judgment of the Court of Appeals is affirmed as modified.

AFFIRMED AS MODIFIED.

CONNOLLY, J., not participating.

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## STATE OF NEBRASKA EX REL. PERKINS COUNTY SCHOOL DISTRICT 65, ALSO KNOWN AS VENANGO PUBLIC SCHOOL DISTRICT, ET AL., APPELLANTS, V. THE COUNTY SUPERINTENDENT OF SCHOOLS OF PERKINS COUNTY, NEBRASKA, ET AL., APPELLEES.

528 N.W.2d 340

Filed March 10, 1995. No. S-93-1032.

1. **Statutes: Appeal and Error.** The meaning of a statute is a question of law, in connection with which a reviewing court has an obligation to reach a conclusion independent of that of the inferior court.
2. **Statutes: Legislature: Intent.** In construing 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.
3. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
4. ____. Effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.

5. **Statutes: Schools and School Districts.** A school district conversion under subsection (3) of Neb. Rev. Stat. § 79-516.08 (Reissue 1994) is subject to the condition in subsection (2)(a) thereof that there be in existence another high school within 15 miles on a reasonably improved highway.

Appeal from the District Court for Perkins County: DONALD E. ROWLANDS II, Judge. Reversed.

Robert S. Harvoy and R.K. O'Donnell, of McGinley, Lane, Mueller, O'Donnell & Reynolds, P.C., for appellants.

Lori Zeilinger, Perkins County Attorney, and, on brief, Patrick R. McDermott for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and BOSLAUGH, J., Retired.

CAPORALE, J.

Purporting to act under the provisions of Neb. Rev. Stat. § 79-516.08(3) (Reissue 1994), the respondent-appellee county superintendent of schools of Perkins County, Nebraska, entered an order converting the relator-appellant Perkins County School District 65, also known as the Venango Public School District, from a Class II school district to a Class I school district. Venango and certain of its residents and taxpayers thereafter filed an action in the district court seeking, among other things, a declaration that the superintendent's order was unlawful and thus void. The district court determined otherwise and entered judgment declaring said order to be valid and proper in all respects. Asserting that the district court's judgment is erroneous, the relators thereafter successfully petitioned this court for leave to bypass the Nebraska Court of Appeals. We now reverse the judgment of the district court.

This action inquires into the meaning of § 79-516.08(3); more specifically, the question is whether, under the facts presented, the statute authorizes the superintendent's order. The meaning of a statute is a question of law, in connection with which a reviewing court has an obligation to reach a conclusion independent of that of the inferior court. *In re Application of City of Grand Island, ante* p. 446, 527 N.W.2d 864 (1995).

In order to understand § 79-516.08, we must first look to Neb. Rev. Stat. § 79-102 (Reissue 1994), which defines school

districts as being Class I through VI either on the basis of the grades maintained by the school district or on the basis of the grades maintained and the population within the territory encompassed by the school district. Grades are delineated in Neb. Rev. Stat. § 79-101 (Reissue 1994) as elementary, being grades kindergarten through eighth; and as high school, being all grades above eighth. A Class I school district maintains only elementary grades under the direction of a single school board, § 79-102(1); a Class II school district has a population of 1,000 or less and maintains both elementary and high school grades under the direction of a single board, § 79-102(2).

The relevant portions of § 79-516.08 read:

> (1) Commencing with the 1992-93 school year, if the fall school district membership or the average daily membership of an existing Class II . . . school district shows less than thirty-five students in grades nine through twelve, the district shall submit a plan for developing cooperative programs with other high schools, including the sharing of curriculum and certificated and noncertificated staff, to the county committee for the reorganization of school districts of the county in which the school district is located. The cooperative program plan shall be submitted by the school district by September 1 of the year following such fall school district membership or average daily membership report. A cooperative program plan shall not be required if there is no high school within fifteen miles from such district on a reasonably improved highway. The county committee shall review the plan and provide advice and communication to such school district and other high schools.
>
> (2)(a) If for two consecutive years the fall school district membership, or for two consecutive years the average daily membership, of an existing Class II . . . school district is less than twenty-five pupils in grades nine through twelve or if for one year an existing Class II . . . school district contracts with a neighboring school district or districts to provide educational services for all of its pupils in grades nine through twelve, such school district shall, except as provided in subsection (3) of this section,

become a Class I school district through the order of the county superintendent if the high school is within fifteen miles on a reasonably improved highway of another high school.

(b) During the second consecutive year an existing Class II . . . school district has less than twenty-five pupils in grades nine through twelve pursuant to subdivision (a) of this subsection and if the high school is within fifteen miles on a reasonably improved highway of another high school, any freeholder or freeholders, person in possession or constructive possession as vendee pursuant to a contract of sale of the fee, holder of a school land lease . . . or entrant upon government land who has not yet received a patent therefor may file a petition with a board consisting of the county superintendent, county clerk, and county treasurer, asking to have any tract or tracts of land described in the petition set off from a Class II . . . school district as described in such subdivision in which it is situated and attached to an accredited district in the same county or an adjoining county thereto. . . .

. . . .

(3) Any Class II . . . school district maintaining a four-year high school which has a fall school district membership or an average daily membership of less than twenty-five students in grades nine through twelve may contract with another school district to provide educational services for its pupils in grades nine through twelve. Such contract may continue for a period, not to exceed one year. At the end of such one-year period, the school district may resume educational services for grades nine through twelve if the average daily membership in grades nine through twelve for such school district has reached at least fifty students. If the school district has not achieved such fall school district membership or average daily membership, it shall become a Class I school district as prescribed in subsection (2) of this section.

The superintendent based her order on her findings that Venango, a Class II school district, had contracted all of its high school students to neighboring school districts for the 1992-93

academic year and that the expected student population for those high school grades would be less than 50 students for the 1993-94 academic year. The superintendent admitted, however, that Venango "is not within fifteen (15) miles of another high school on a reasonably improved highway."

The issue is whether § 79-516.08(3) stands alone or whether it must be read in conjunction with § 79-516.08(2)(a). If subsection (3) stands alone, the superintendent was correct in issuing her order; if subsection (3) does not stand alone, she was wrong, because Venango is not within the specified proximity to another high school on a reasonably improved highway.

In construing 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. *In re Application of City of Grand Island, ante* p. 446, 527 N.W.2d 864 (1995); *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994). It is not within the province of a court to read a meaning into a statute that is not warranted by legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985). Effect must be given, if possible, to all the several parts of a statute; 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).

Subsection (2)(a) of the statute under consideration provides two situations under which an existing Class II school district shall become, through the order of the county superintendent, a Class I school district. The first is when for 2 consecutive years the membership for the high school grades is less than 25 pupils. The second is when, unless subsection (3) applies, an existing Class II school district contracts with a neighboring school district or districts to provide educational services for all its high school students for a year. However, in either situation, the conversion is conditioned on there being another high school on a reasonably improved highway which is within 15 miles of the Class II school district's existing high school.

In contrast, subsection (3) enumerates the criteria under which a Class II school district may contract with another school district and under what circumstances a school district that has chosen to so do may resume providing high school educational services. More specifically, subsection (3) provides an exception to the language of subsection (2)(a) which requires that a Class II school district which contracts for the education of its high school students for a year shall be thereafter converted to a Class I school district. The exception is if within the year the contracting school district's high school membership reaches at least 50. However, the language of subsection (3), providing that if the high school membership does not reach at least 50 the contracting Class II school district shall become a Class I school district "as prescribed in subsection (2)," makes subsection (3) conversions subject to the same condition as are subsection (2)(a) conversions, namely, that there be in existence another high school within 15 miles on a reasonably improved highway. Such reading of subsection (3) is consistent with the condition imposed in subsections (1) and (2)(b) and is thus in conformance with the legislative intent expressed by the entire language of § 79-516.08, considered in its plain, ordinary, and popular sense.

That condition not having been satisfied, the superintendent's order is unlawful, void, and of no force and effect.

Accordingly, as presaged in the first paragraph of this opinion, the judgment of the district court is reversed.

REVERSED.

# STATE OF NEBRASKA, APPELLEE, V. MARTIN J. DAKE, APPELLANT.

529 N.W.2d 46

Filed March 10, 1995. No. S-93-1101.

1. **Trial: Appeal and Error.** Whether a trial court is required to make separate findings of fact and conclusions of law is a question of law.
2. **Judgments: Appeal and Error.** In regard to a question of law, an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
3. **Criminal Law: Trial: Evidence.** Neb. Rev. Stat. § 25-1127 (Reissue 1989), requiring that upon request a court state in writing the conclusions of fact found separately from the conclusions of law, does not apply to criminal cases.
4. **Motions to Suppress: Appeal and Error.** Unless clearly wrong, the findings of fact made by a trial court on a motion to suppress will not be overturned on appeal.
5. **Drunk Driving: Blood, Breath, and Urine Tests: Police Officers and Sheriffs.** While under Neb. Rev. Stat. § 39-669.09 (Cum. Supp. 1992) the police cannot hamper a motorist's efforts to obtain independent testing, they are under no duty to assist in obtaining such testing beyond allowing telephone calls to secure the test.
6. **Drunk Driving: Proof.** A violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1992) is but one offense, which can be proved in different ways.

Petition for further review from the Nebraska Court of Appeals, IRWIN, MILLER-LERMAN, and MUES, Judges, on appeal thereto from the District Court for Dodge County, MARK J. FUHRMAN, Judge, on appeal thereto from the County Court for Dodge County, DANIEL J. BECKWITH, Judge. Judgment of Court of Appeals affirmed.

James M. Dake, of Grant, Rogers, Maul & Grant, and Kenneth J. Vampola for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and BOSLAUGH, J., Retired.

CAPORALE, J.

## I. STATEMENT OF CASE

Defendant-appellant, Martin J. Dake, was charged with violating then Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1992) by driving while under the influence of alcoholic liquor or while

having an excessive concentration of alcohol in his blood, breath, or urine. He was thereafter convicted by the county court of "driving while under the influence of alcohol." That adjudication was affirmed by the district court and the Nebraska Court of Appeals. *State v. Dake*, 94 NCA No. 35, case No. A-93-1101 (not designated for permanent publication). Dake thereafter successfully sought further review by this court. He asserts, in summary, that the Court of Appeals erred in affirming the district court's failure to rule that the county court erred by (1) failing to make specific findings of fact and conclusions of law, (2) failing to sustain Dake's motion to suppress certain evidence, (3) admitting certain evidence, and (4) finding the evidence sufficient to support the charge. We now affirm the judgment of the Court of Appeals.

## II. FACTS

On March 7, 1993, Fremont police officer Dwight P. Murphy was on routine patrol when, at about 1 a.m., he noticed the automobile ahead of him momentarily cross the marked yellow broken centerline. Murphy followed the automobile and stopped it at about 1:10 a.m.

In the course of events surrounding the stop, Murphy noticed that Dake's eyes were bloodshot and watery, that his speech was slurred, and that there was an odor of alcohol coming from the interior of the automobile. After Murphy confirmed that the odor was coming from Dake's person, he determined that Dake swayed when walking, slurred words when speaking, and had difficulty with finger dexterity. Dake admitted he had consumed two beers and an Amaretto and sour mixed drink.

As a result of all he had seen, heard, and smelled, Murphy, who had 14 years' experience as a police officer, concluded that Dake was under the influence of alcohol and had him take a preliminary breath test, which Dake failed. Murphy then placed Dake under arrest and took him to the police station for further testing.

At about 1:40 a.m., Murphy videotaped the events at the station. The tape shows Dake swaying and losing his balance momentarily and holding himself upright against a wall. An Intoxilyzer test of his breath, concluded at 1:48 a.m., read that

Dake's blood contained more than ten-hundredths of 1 gram by weight of alcohol per 100 milliliters of blood. See *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987) (explains determination of blood alcohol content through Intoxilyzer test of breath). Shortly thereafter, Murphy took Dake to the Dodge County Judicial Center for holding. Murphy left the center at about 2 a.m. At 3:15 a.m., Dake's mother and attorney arrived to post bond and obtain Dake's release from the center.

While Dennis Jacobson, a corrections officer, was going over the bond procedures with the mother, she asked if Dake had been taken for an independent blood test. After he finished the bonding procedure, Jacobson called the booking officer. Jacobson and the booking officer then asked Dake if he was requesting a blood test, and Dake responded affirmatively. Jacobson thereupon told the mother that he would contact Murphy and get back with her.

Murphy testified that he talked to Jacobson at approximately 3:30 a.m. and was then on duty at the hospital. Jacobson told Murphy that Dake wanted to be taken for a blood test. Murphy refused to return to the center to take Dake for a blood test, since it would be well after 4 a.m. before he could be there.

Although there was some delay in the bonding process, Dake left the center at 4:15 a.m. No blood test was ever taken.

Dake filed a motion to suppress the results of any evidence relating to his drinking, which was overruled. Both the videotape of the events at the police station and the results of the Intoxilyzer test were later admitted in evidence over Dake's objections.

## III. ANALYSIS

The relevant statute at the time, § 39-669.07, provided in part:

> (1) It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle:
>
> (a) While under the influence of alcoholic liquor or of any drug;
>
> (b) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood; or

> (c) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath.

1. Findings of Fact and Conclusions of Law

With that statute before us, we move to a consideration of Dake's first assignment of error, the failure of the county court to make separate findings of fact and conclusions of law, as it was requested to do.

Whether the county court was required to do as requested in that connection is necessarily a question of law. In regard to such a question, an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *Ruch v. Conrad, ante* p. 318, 526 N.W.2d 653 (1995). A violation of § 39-669.07(1) is a misdemeanor and is thus considered criminal in nature. See *State v. Karel*, 204 Neb. 573, 284 N.W.2d 12 (1979).

It is to be noted that the county court found generally that Dake was "guilty as charged under [§] 39-669.07 . . . driving while under the influence of alcohol." Thus, contrary to Dake's contention, the county court did make a specific finding as to which subdivision of § 39-669.07 Dake violated, i.e., subdivision (1)(a). More importantly, however, as we have held that Neb. Rev. Stat. § 25-1127 (Reissue 1989), requiring that upon request a court "state in writing the conclusions of fact found separately from the conclusions of law," does not apply to criminal cases, the trial court was not required to comply with Dake's request. See, *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992); *State v. Lozano*, 209 Neb. 772, 311 N.W.2d 529 (1981).

Thus, there is no merit to the first assignment of error.

2. Nonsuppression of Evidence

Dake's second assignment of error claims the county court erred in failing to suppress the Intoxilyzer test result. This claim is premised on the portion of then Neb. Rev. Stat. § 39-669.09 (Cum. Supp. 1992) which read:

> The person tested shall be permitted to have a physician of his or her choice evaluate his or her condition and perform or have performed whatever laboratory tests he or she

> deems appropriate in addition to and following the test or tests administered at the direction of the law enforcement officer. If the officer refuses to permit such additional test to be taken, then the original test or tests shall not be competent as evidence.

The county court found that Dake's request for an independent blood test had not been denied.

While it is true that unless clearly wrong, the findings of fact made by a trial court on a motion to suppress will not be overturned on appeal, see *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994), this review of the county court's ruling turns not on its factual findings, but on its reading of the relevant statutory language. Consequently, we are dealing with a question of law.

With that in mind, we recall our analysis in *State v. Hamilton*, 217 Neb. 734, 351 N.W.2d 63 (1984). The motorist therein had been arrested for driving under the influence of alcohol. While at the hospital receiving treatment for injuries sustained in a motor vehicle accident, he was told that he would have to go to the sheriff's office for a breath test. The motorist thereupon asked, " 'I can't just take a blood test here and get it over with?' " The deputy responded, " 'No, you'll have to come to the sheriff's office for a breath test.' " *Id.* at 736, 351 N.W.2d at 65. The deputy stated that the motorist had made no further request, but the motorist testified that he then asked the sheriff if they would have to return for the blood test and the deputy had responded that would not be necessary. The motorist also stated that after the breath test at the sheriff's office, he asked, " ' "Now do we go back up to the hospital?" ' " and the deputy responded, " ' "No." ' " *Id.* at 737, 351 N.W.2d at 66. The motorist did not go to the hospital on his own for a blood test, explaining that he had already asked about it twice and that he did not think it would be legal without an officer's presence. We held that permitting a requested independent chemical test is foundational to the admission in evidence of the result of the State's breath test and, citing *State v. West*, 217 Neb. 389, 350 N.W.2d 512 (1984), reiterated that when the foundational requirements are met, the jury is only allowed to judge the weight and credibility of the test results. We then concluded that

the trial court had not clearly erred in finding that the sheriff had not denied the request for a second test, upheld the trial court's overruling of the motorist's motion to suppress the result of the State's breath test, and affirmed the motorist's conviction.

While authority can be found to the contrary, e.g., *State v. Karmen*, 150 Vt. 547, 554 A.2d 670 (1988), many states hold that while under statutes similar to § 39-669.09 the police cannot hamper a motorist's efforts to obtain independent testing, they are under no duty to assist in obtaining such testing beyond allowing telephone calls to secure the test. See, *Commonwealth v. Alano*, 388 Mass. 871, 448 N.E.2d 1122 (1983); Annot., 45 A.L.R.4th 11, § 23 (1986). This is generally true in constitutional due process cases where a right to a reasonable opportunity to collect exculpatory evidence of sobriety has been recognized. See, *Provo City v. Werner*, 810 P.2d 469 (Utah App. 1991); *Alano, supra*; *State v. Snipes*, 478 S.W.2d 299 (Mo. 1972), *cert. denied* 409 U.S. 979, 93 S. Ct. 332, 34 L. Ed. 2d 242; *In re Koehne*, 54 Cal. 2d 757, 356 P.2d 179, 8 Cal. Rptr. 435 (1960). See, also, *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984) (14th Amendment does not impose duty on police to preserve breath sample in order to introduce results at trial). In cases analyzing the statutory rights of various jurisdictions, see, *Provo City, supra* (police officer does not have statutory duty to assist in obtaining independent test); *State v. Hatlestad*, 347 N.W.2d 843, 845 (Minn. App. 1984) (under statute providing that failure to obtain independent test does not prevent admission of state's test unless additional test was " 'prevented or denied' " by peace officer, officer has no duty to furnish supplies or transportation, and test is neither prevented nor denied by refusal to assist); and *Alano, supra* (police may not hamper reasonable opportunity to secure test, but need not assist beyond allowing telephone calls to secure physician).

We agree with the latter group of states and hold that Murphy had no statutory duty to transport Dake anywhere in order that Dake might be independently tested.

Thus, there is no merit to the second assignment of error; the county court correctly overruled Dake's motion to suppress the

Intoxilyzer test result.

### 3. Admission of Evidence

In the third assignment of error, Dake complains of the receipt into evidence of the Intoxilyzer test result and the police station videotape.

His argument with respect to the Intoxilyzer test is the same as he presented in connection with his motion to suppress. There is therefore nothing more to analyze in that regard, so we proceed to the matter of the videotape.

In that connection, Dake first argues that since the tape was made more than 30 minutes after he had last driven, it is not probative on the issue of whether he was impaired when he was driving. He urges that a number of factors come into play which constantly vary the amount of alcohol in one's bloodstream.

Although it appears we have heretofore not ruled on that precise question, we have held that a breath test given within a reasonable time after the motorist was stopped (in that case, less than 1 hour) was probative of a violation of § 39-669.07, the time lapse being a matter going to the weight of the test, rather than to its admissibility. *State v. Kubik*, 235 Neb. 612, 456 N.W.2d 487 (1990). The same reasoning applies to the matters depicted on the videotape. If an hour's delay is not unreasonable, it necessarily follows that a half-hour's delay cannot be unreasonable.

Consequently, the third assignment of error is also meritless.

### 4. Sufficiency of Evidence

The failure of the preceding three assignments of error presage the doom of the fourth and last assignment of error, the assertion that the evidence is insufficient to support the charge.

A violation of § 39-669.07 is but one offense, which can be proved in different ways. *Kubik, supra*. Dake's driving, appearance, and impaired ability to walk, stand, and maneuver his fingers, coupled with Murphy's opinion, establish that he was driving while under the influence of alcoholic liquor, contrary to the provisions of § 39-669.07(1)(a), and the Intoxilyzer test result establishes that he was doing so while he had in his blood a greater concentration of alcohol than permitted by § 39-669.07(1)(b).

Thus, the State proved its charge; the fourth assignment of error is as meritless as were the preceding three.

## IV. JUDGMENT

Being correct, the judgment of the Court of Appeals is affirmed.

AFFIRMED.

WHITE, C.J., concurs.

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STATE OF NEBRASKA, APPELLEE, V. DOUGLAS G. GROFF, APPELLANT.

529 N.W.2d 50

Filed March 10, 1995. No. S-94-228.

1. **Sentences: Appeal and Error.** 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.
2. **Sentences.** Where the imposed sentence of imprisonment is the statutory maximum for the offense, the sentencing court must give the defendant credit for jail time.
3. ____. A judge in sentencing is required to separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled under Neb. Rev. Stat. § 83-1,106(1) (Reissue 1994).
4. **Criminal Law: Constitutional Law: Statutes: Sentences: Time.** Generally, when an offense is committed prior to a statutory change, the amendment or new statute is not applicable to the defendant. A change which imposes a more burdensome punishment than existed at the time a crime was committed runs afoul of ex post facto principles.
5. **Statutes: Time.** While procedural statutes do apply to pending litigation, it is a general proposition of law that they have no retroactive effect upon any steps that may have been taken in an action before such statutes were effective. All things performed and completed under the old law must stand.
6. **Criminal Law: Statutes: Sentences.** When examining changes in statutory criminal sentencing procedures, the enactment, amendment, or repeal of a statute shall be treated as a substantive change in the law if the statute allows for a more burdensome potential punishment of the defendant than that allowed under the superseded or repealed statute.

7. **Statutes: Time.** Statutes covering substantive matters in effect at the time of the transaction govern, not later enacted statutes.
8. **Criminal Law: Statutes: Sentences.** Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.

Petition for further review from the Nebraska Court of Appeals, IRWIN, MILLER-LERMAN, and MUES, Judges, on appeal thereto from the District Court for Hall County, JOSEPH D. MARTIN, Judge. Judgment of Court of Appeals affirmed in part, and cause in part remanded with directions.

Thomas J. Gaul, Deputy Hall County Public Defender, for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

WRIGHT, J.

We granted the State of Nebraska's petition for further review of the decision of the Nebraska Court of Appeals which modified the sentences imposed on Douglas G. Groff. The State asserts that the Court of Appeals erred (1) in concluding that the repeal of Neb. Rev. Stat. § 83-1,105 (Reissue 1987) by 1993 Neb. Laws, L.B. 529, § 2, was inapplicable to this case and (2) in reducing Groff's sentences.

## SCOPE OF REVIEW

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. *State v. Riley*, 242 Neb. 887, 497 N.W.2d 23 (1993).

Where the imposed sentence of imprisonment is the statutory maximum for the offense, the sentencing court must give the defendant credit for jail time. *State v. Heckman*, 239 Neb. 25, 473 N.W.2d 416 (1991).

A judge in sentencing is required to separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled under Neb. Rev. Stat.

§ 83-1,106(1) (Reissue 1994). *State v. Esquivel*, 244 Neb. 308, 505 N.W.2d 736 (1993).

## FACTS

The factual basis for Groff's convictions is not in dispute. Groff pled no contest to three counts of first degree sexual assault on a child and one count of child pornography. Regarding each of the sexual assault counts, Groff faced a potential penalty of 1 to 50 years' imprisonment. See Neb. Rev. Stat. §§ 28-105 and 28-319 (Reissue 1989). Regarding the child pornography, Groff faced a potential penalty of 1 to 20 years' imprisonment, a $25,000 fine, or both. See § 28-105 and Neb. Rev. Stat. § 28-1463.04 (Reissue 1989). At the time of sentencing, the district court sentenced Groff to three terms of 20 to 50 years' imprisonment for the sexual assaults and to one term of 10 to 20 years' imprisonment for the child pornography. All of the sentences were ordered to be served consecutively.

On appeal to the Court of Appeals, Groff argued that the sentences imposed were excessive because they were not within the statutory limits applicable at the time he committed the crimes. The Court of Appeals modified the sentences to reflect the law in effect at that time, § 83-1,105, which required that the minimum sentence imposed by a trial court could not be more than one-third of the maximum term provided by law. The Court of Appeals found that Groff's minimum sentences should be $16^2/_3$ years for each of the sexual assault charges and $6^2/_3$ years for the child pornography charge.

## ASSIGNMENTS OF ERROR

In its petition for further review, the State argues that the Court of Appeals erred in concluding that the repeal of § 83-1,105 was inapplicable to this case and in reducing Groff's minimum sentences.

## ANALYSIS

*Modification of Sentences.*

"Generally, when an offense is committed prior to a statutory change, the amendment or new statute is not applicable to the defendant. . . . A change which imposes a more burdensome punishment than existed at the time a crime was committed runs

afoul of ex post facto principles." *State v. Martin*, 246 Neb. 896, 900, 524 N.W.2d 58, 60 (1994). According to the amended information, the crimes took place in May 1993. Section 83-1,105 was repealed by 1993 Neb. Laws, L.B. 529, § 2, which became effective on September 9, 1993. See Neb. Const. art. III, § 27.

We have held: "While procedural statutes do apply to pending litigation, it is a general proposition of law that they have no retroactive effect upon any steps that may have been taken in an action before such statutes were effective. All things performed and completed under the old law must stand." *State v. Russell*, 194 Neb. 64, 73, 230 N.W.2d 196, 203 (1975). The removal of the minimum limit on indeterminate sentences affected Groff's sentences.

When examining changes in statutory criminal sentencing procedures, the enactment, amendment, or repeal of a statute shall be treated as a substantive change in the law if the statute allows for a more burdensome potential punishment of the defendant than that allowed under the superseded or repealed statute. Prior to the repeal of § 83-1,105, judicial discretion regarding the minimum sentence that could be imposed for indeterminate sentences was limited by law. Section 83-1,105 provided that the minimum sentence could not exceed one-third of the maximum sentence. Statutes covering substantive matters in effect at the time of the transaction govern, not later enacted statutes. *Schall v. Anderson's Implement*, 240 Neb. 658, 484 N.W.2d 86 (1992). Thus, at the time that Groff committed the crimes, the minimum sentence imposed by the district court could not be more than one-third of the maximum term provided by law.

In *State v. Randolph*, 186 Neb. 297, 301-02, 183 N.W.2d 225, 228 (1971), we held: "[W]here a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise." Here, the repeal of § 83-1,105 does not mitigate the punishment, but has the opposite effect. Therefore, the repeal of the statute does not apply to crimes committed prior to the repeal. The Court of Appeals correctly

determined that the minimum sentences imposed exceeded the maximum allowed minimum penalty and correctly ordered that the sentences imposed by the district court be modified accordingly.

*Credit for Time Served.*

At the conclusion of the sentencing hearing, the court stated: "I'm to give you credit for time served." However, the court's notes, the original commitment order, and the revised commitment order all fail to calculate the amount of credit Groff is to be given for time served. We note plain error in the failure of the district court to calculate the amount of credit to be given for time served. See *State v. Clausen, ante* p. 309, 527 N.W.2d 609 (1995). Where the imposed sentence of imprisonment is the statutory maximum for the offense, the sentencing court must give the defendant credit for jail time. *State v. Heckman*, 239 Neb. 25, 473 N.W.2d 416 (1991). A judge in sentencing is required to separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled under § 83-1,106(1). *State v. Esquivel*, 244 Neb. 308, 505 N.W.2d 736 (1993). The record here does not indicate that the district court ever determined the amount of credit for time served to which Groff is entitled, and the Court of Appeals failed to order that the district court do so.

## CONCLUSION

We affirm the judgment of the Court of Appeals in part, but we remand the cause to that court with directions. The Court of Appeals is directed to remand the cause to the district court for a determination of the amount of credit for time served to which Groff is entitled.

AFFIRMED IN PART, AND IN PART REMANDED WITH DIRECTIONS.

# STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JAMES MICHAEL TYLER, RESPONDENT.

528 N.W.2d 344

Filed March 10, 1995. No. S-95-111.

Original action. Judgment of disbarment.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, and CONNOLLY, JJ.

PER CURIAM.

James Michael Tyler was admitted to the practice of law in Nebraska on June 24, 1975.

On December 18, 1992, Tyler was indicted for a pattern of racketeering activity under the Colorado Organized Crime Control Act involving the distribution of marihuana and other controlled substances in Summit County, Colorado. On December 6, 1993, Tyler pled guilty to distribution of marihuana, a Class 4 felony, and was sentenced to 8 years in a Colorado community corrections facility and was fined $1,250.

On October 17, 1994, Tyler was disbarred by order of the Supreme Court, State of Colorado, and his name was stricken from the list of attorneys authorized to practice law in the State of Colorado.

On February 28, 1995, Tyler voluntarily surrendered his license to practice law in the State of Nebraska. In doing so, Tyler specifically admitted that his conduct as hereinbefore set forth violated Canon 1, DR 1-102(A)(1), (3), and (6) of the Code of Professional Responsibility, as adopted by the Nebraska Supreme Court.

Tyler waived his right to notice, appearance, and hearing prior to entry of this order.

We accept Tyler's surrender of his license to practice law in Nebraska and order him disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

FAHRNBRUCH, J., not participating.

# HENRY MISLE, COTRUSTEE OF THE BEN MISLE TRUST, APPELLEE AND CROSS-APPELLANT, V. JULIUS MISLE AND ABRAM MISLE, COTRUSTEES OF THE BEN MISLE TRUST, APPELLANTS AND CROSS-APPELLEES.

529 N.W.2d 54

Filed March 17, 1995. No. S-93-673.

1. **Rules of Evidence: Hearsay.** Business records are hearsay and therefore are inadmissible in court unless they meet the requirements of one of the exceptions to the hearsay rule.
2. ____: ____. Neb. Rev. Stat. § 27-803(5) (Reissue 1989), commonly known as the business records exception to the hearsay rule, provides that the following are not excluded by the hearsay rule: A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, other than opinions or diagnoses, made at or near the time of such acts, events or conditions, in the course of a regularly conducted activity, if it was the regular course of such activity to make such memorandum, report, record, or data compilation at the time of such act, event, or condition, or within a reasonable time thereafter, as shown by the testimony of the custodian or other qualified witness unless the source of information or method or circumstances of preparation indicate lack of trustworthiness. The circumstances of the making of such memorandum, report, record, or data compilation, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight.
3. **Rules of Evidence: Hearsay: Proof.** The party seeking to admit a business record under the business records exception to the hearsay rule, Neb. Rev. Stat. § 27-803(5) (Reissue 1989), bears the burden of establishing the following three-part test. First, the proponent must establish that the activity recorded is of a type that regularly occurs in the course of the business' day-to-day activities. Second, the proponent must establish that the record was made as a part of a regular business practice at or near the time of the event recorded. Third, the proponent must authenticate the record by a custodian or other qualified witness.
4. **Actions: Parties.** Neb. Rev. Stat. § 25-301 (Reissue 1989) provides that every action must be prosecuted in the name of the real party in interest.
5. **Actions: Parties: Standing.** To determine whether a party is a real party in interest, the focus of the inquiry is whether that party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.
6. ____: ____: ____. The purpose of the inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
7. **Attorney Fees: Trusts.** Attorney fees are allowable in trust cases, despite a lack of statutory authorization, where many persons have a common interest in a trust fund or property, and one of them, for the benefit of all, at his own cost and expense, takes legal action for its preservation or administration.

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

Hyman Polsky, of Bailey, Polsky, Cope, Wood & Knapp, for appellants.

David A. Domina and, on brief, Thomas E. Stine, of Domina & Copple, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

WHITE, C.J.

Defendants, Julius and Abram Misle, two of three cotrustees of the Ben Misle Trust, appeal from the decision of the Lancaster County District Court requiring them to make a final distribution from the trust to Sidney Misle, a beneficiary, in the amount of $30,745.59. Plaintiff, Henry Misle, also a cotrustee, cross-appeals, seeking attorney fees. We affirm.

In 1973, Ben Misle created a trust for his 12 grandchildren, 1 of whom is Sidney. In so doing, Ben Misle appointed his three sons, Julius, Abram, and Henry, as cotrustees. Pursuant to the terms of the trust, each beneficiary is entitled to receive a final distribution of principal and income upon reaching age 35; additionally, final trust distribution payments must be signed by two of the three cotrustees. Since the trust's inception in 1973, the trust has loaned all of its assets to Misle Chevrolet & Imports, Inc. (Misle Chevrolet), which Henry has operated since 1986.

Sidney, the son of cotrustee Henry, was born July 29, 1956. On June 6, 1986, Sidney was improperly issued a trust distribution check by Henry for $25,256.88, more than 5 years before Sidney turned 35, and without the requisite signature of a second trustee. However, Henry did not send that check to Sidney immediately as the trust account lacked sufficient funds; Henry sent the June 1986 check to Sidney in September 1986, after the trust account had received a $25,256.88 check from Misle Chevrolet. Because Henry had made this improper distribution, he instructed Sidney to return the money. Sidney informed Henry that he did not have the money, and as a result, Henry sent Sidney a check drawn on Misle Chevrolet's account for $25,256.88 on February 3, 1987. On February 5, Sidney used this money to repay the trust.

In December 1991, after Sidney had turned 35, he requested his final distribution from the trust, $30,745.59. However, cotrustees Julius and Abram refused to make the final trust distribution to Sidney, contending that the trust corpus was still deficient $25,256.88 plus interest due to the improper distribution made in 1986. Therefore, Henry brought this action to compel Julius and Abram to make the final trust distribution to Sidney; Julius and Abram, as cotrustees, filed a counterclaim for reimbursement to be made to the trust due to an alleged double distribution made to Sidney.

At trial, the district court refused to admit the business records of Misle Chevrolet's successor corporation and the testimony of the successor corporation's records custodian, Sheryl Pierson, which would have allegedly shown that the trust corpus was deficient due to an alleged double distribution to Sidney. The district court thereafter ordered Julius and Abram to make the final trust distribution to Sidney. Additionally, the district court dismissed Julius and Abram's counterclaim. This appeal followed.

Julius and Abram assign as error the district court's refusal to admit two business records of Misle Chevrolet and to allow the testimony of Pierson. Henry, in his cross-appeal, assigns as error the district court's denial of his motion for attorney fees.

Julius and Abram's first assignment of error is that the district court erred in excluding exhibit 26, which is an internal accounting document of Misle Chevrolet. Business records are hearsay and therefore are inadmissible in court unless they meet the requirements of one of the exceptions to the hearsay rule. Neb. Rev. Stat. §§ 27-801 and 27-802 (Reissue 1989). Neb. Rev. Stat. § 27-803(5) (Reissue 1989), commonly known as the business records exception to the hearsay rule, provides that the following are not excluded by the hearsay rule:

> A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, other than opinions or diagnoses, made at or near the time of such acts, events or conditions, in the course of a regularly conducted activity, if it was the regular course of such activity to make such memorandum, report, record, or data compilation at the time of such act, event, or

> condition, or within a reasonable time thereafter, as shown by the testimony of the custodian or other qualified witness unless the source of information or method or circumstances of preparation indicate lack of trustworthiness. The circumstances of the making of such memorandum, report, record, or data compilation, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight.

The party seeking to admit a business record under this exception to the hearsay rule bears the burden of establishing the following three-part test. *Crowder v. Aurora Co-op Elev. Co.*, 223 Neb. 704, 393 N.W.2d 250 (1986); *Chalupa v. Hartford Fire Ins. Co.*, 217 Neb. 662, 350 N.W.2d 541 (1984). First, the proponent must establish that the activity recorded is of a type that regularly occurs in the course of the business' day-to-day activities. *Chalupa, supra*. Second, the proponent must establish that the record was made as a part of a regular business practice at or near the time of the event recorded. *Id.* Third, the proponent must authenticate the record by a custodian or other qualified witness. *Id.*; *Bobbie Brooks, Inc. v. Hyatt*, 195 Neb. 596, 239 N.W.2d 782 (1976); *Transport Indemnity Co. v. Seib*, 178 Neb. 253, 132 N.W.2d 871 (1965).

In the case at bar, the proponents, Julius and Abram, failed to satisfy this three-part test. Although Julius and Abram's counsel attempted to authenticate exhibit 26, which would have satisfied the third requirement for admission of a business record, the record contains no evidence that they attempted to establish that exhibit 26 recorded an activity of the type that regularly occurred in the course of either Misle Chevrolet's or its successor corporation's day-to-day activities. Furthermore, the record contains no evidence that exhibit 26 was made as a part of either Misle Chevrolet's or its successor corporation's regular business practice at or near the time of the event recorded. In fact, the record is to the contrary. The district court *permitted* Julius and Abram's counsel to lay the foundation for admitting exhibit 26 under the business records exception: "THE COURT: You can ask the questions you have to ask to get that in as a business record. You [sic] looking whether there was any record that shows Mr. Sidney Misle owed them some

money; is that what we are searching for at this point?"

However, their counsel failed to ask any further questions with respect to the hearsay rule; instead, counsel moved on to exhibit 27. Therefore, because Julius and Abram's counsel failed to lay any foundation for the admissibility of exhibit 26 as a business record, their argument that the district court committed reversible error is without merit.

Julius and Abram's second assignment of error is that the district court erred in excluding exhibit 27, which is a summary of Misle Chevrolet's accounts receivable. Julius and Abram also attempted to introduce exhibit 27 through the testimony of Pierson. However, the record reveals that Julius and Abram's counsel failed to ask any foundational questions necessary to admit exhibit 27 under the business records exception. Therefore, the district court did not err by refusing to admit exhibit 27.

Julius and Abram's third assignment of error is that the district court abused its discretion by dismissing their counterclaim for reimbursement. Neb. Rev. Stat. § 25-301 (Reissue 1989) provides in relevant part that "[e]very action must be prosecuted in the name of the real party in interest." To determine whether a party is a real party in interest, the focus of the inquiry is whether that party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. *Nebraska Depository Inst. Guar. Corp. v. Stastny*, 243 Neb. 36, 497 N.W.2d 657 (1993); *Stahmer v. Marsh*, 202 Neb. 281, 275 N.W.2d 64 (1979). The purpose of the inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Stastny, supra*; *Stahmer, supra*. Misle Chevrolet may have a claim for reimbursement against Sidney, but Julius and Abram, as cotrustees, would not benefit for such an action; they clearly are not the real parties in interest. Therefore, the district court did not abuse its discretion in dismissing Julius and Abram's counterclaim.

In his cross-appeal, Henry assigns as error the district court's denial of his motion for attorney fees. In so doing, Henry relies on our decision in *In re Estate of Linch*, 139 Neb.

761, 764, 298 N.W. 697, 699 (1941), in which we held that attorney fees are allowable in trust cases, despite a lack of statutory authorization, " '[w]here many persons have a common interest in a trust fund or property, and one of them, for the benefit of all, at his own cost and expense, takes legal action for its preservation or administration . . . .' " Quoting *Blacker v. Kitchen Bros. Hotel Co.*, 133 Neb. 66, 273 N.W. 836 (1937). In the case at bar, Henry, a cotrustee and not a beneficiary, brought this action to compel the two other cotrustees to make the final trust distribution to Sidney. If Sidney had commenced this action, which he was entitled to do, he may have been entitled to attorney fees provided he had taken such action at his own cost and expense. However, Henry, who does not have a common interest in the trust with any other persons and who prosecuted this action, does not satisfy *In re Estate of Linch*'s requirements for attorney fees.

We therefore affirm the district court's decision, ordering Julius and Abram to make the final trust distribution of $30,745.59 to Sidney and denying Henry's motion for attorney fees.

AFFIRMED.

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EDWARD E. AND KATHRYN A. JINDRA, HUSBAND AND WIFE, APPELLANTS, V. ELIZABETH CLAYTON AND CINDY CLAYTON, APPELLEES.

529 N.W.2d 523

Filed March 24, 1995. No. S-93-449.

1. **Evidence: Stipulations: Appeal and Error.** In a case in which the facts are stipulated, an appellate court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment.
2. **Appeal and Error.** An appellate court has an obligation to reach conclusions on questions of law independent of the trial court's ruling.
3. **Subrogation: Words and Phrases.** Generally, subrogation is the substitution of one person in the place of another with reference to a lawful claim so that the one who is substituted succeeds to the rights of the other in relation to the debt or claim.

4. **Insurance: Subrogation: Tort-feasors.** In the context of insurance, the right of subrogation is based on two premises: (1) an insured should not be allowed to recover twice for the same loss, which would be the result if the insured recovers both from the insured's insurer and the tort-feasor, and (2) a wrongdoer should reimburse an insurer for payments that the insurer has made to its insured.
5. **Insurance: Subrogation.** Although an insurance company has the right to recover against a wrongdoer whose negligence has subjected the insurance company to liability, no right of subrogation can arise in favor of an insurer against its own insured.
6. **Joint Tenancy.** Each joint tenant is seized of the whole estate and has an undivided share of the whole estate. The shares of interests of joint tenants are presumed equal.
7. **Insurable Interest: Words and Phrases.** An insurable interest is an 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. Neb. Rev. Stat. § 44-103(12) (Reissue 1993).
8. **Contracts: Subrogation: Equity.** Unless a contract specifically provides otherwise, equitable principles apply even when a subrogation right is based on contract. The facts and circumstances of each case determine whether the doctrine of subrogation is applicable.
9. **Evidence: Proof.** The finder of fact may draw reasonable inferences from the facts and circumstances proved.
10. **Insurance: Contracts: Joint Tenancy: Intent.** An insurance company does not have the right to recover against a joint tenant of its insureds where the facts and circumstances of the case indicate that a close family relationship existed between the joint tenants and it is reasonable to infer that the named insureds intended the policy to cover all of the joint tenants.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Thomas A. Grennan and Francie C. Riedmann, of Gross & Welch, P.C., for appellants.

Terry K. Gutierrez and Christopher D. Curzon, of Schmid, Mooney & Frederick, P.C., for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

LANPHIER, J.

Plaintiffs, Edward E. and Kathryn A. Jindra, appeal a judgment of the district court for Douglas County. The Jindras held property in joint tenancy with their adult daughter, Elizabeth Clayton. Clayton and her daughter, Cindy Clayton, resided at the property. The dwelling policy which insured the

property listed the Jindras as the named insureds. The parties have stipulated that the property was damaged by a fire negligently caused by Cindy, then 13 years of age. The Jindras' insurer brought a subrogation action in the name of the Jindras against the Claytons. After a bench trial based entirely on stipulated facts, the district court dismissed the subrogation action. In its memorandum dismissing the action, the district court stated that insurers cannot subrogate against their own insureds and that due to the close familial relationship between the parties and because the insured property was held in joint tenancy, the insurer was, in effect, seeking to subrogate against its own insured. The insurer, in the name of the Jindras, timely perfected an appeal. We hold that the relationship between the Jindras and the Claytons is such that if the insurer were permitted to maintain a subrogation action it would be, in effect, suing its own insured. Therefore, we affirm the holding of the district court.

## STATEMENT OF FACTS

The parties waived jury trial and submitted their case on the basis of stipulated facts. All of the facts stated below are derived from that stipulation, exhibit 1, and the attachments incorporated into it.

Edward E. and Kathryn A. Jindra are husband and wife. Elizabeth Clayton is their daughter and Cindy Clayton their granddaughter.

Prior to and including July 24, 1987, the Jindras were joint owners with Elizabeth Clayton of a house located at 1615 South 60th in Omaha, Nebraska. The Claytons were the permanent and only residents of the house. At no time did the Jindras reside in the house.

On or about July 24, 1987, a fire occurred at the house, resulting in extensive property damage. The fire was proximately caused by the negligence of Cindy Clayton when she carelessly disposed of a lighter or match. At time of the fire, Cindy Clayton, a 13-year-old minor, was home alone. Elizabeth Clayton has stipulated that she failed to keep the lighter or matches in a safe and secure place, out of the reach, possession, and control of Cindy Clayton.

The house was insured under a policy issued by Companion Insurance Company (Companion) for a face amount of $21,000. The Companion policy provided insurance for various perils, including fire, and such insurance policy was in full force and effect on the date of the fire. The Jindras are identified as the named insureds and Commercial Federal Savings & Loan is listed as the mortgagee.

The Claytons were the named insureds under a homeowners insurance policy issued by Farmers Union Co-operative Insurance Company (Farmers). The Farmers policy was in full force and effect on the date of the fire and provided personal property and personal liability coverage.

On August 17, 1987, the Jindras signed a "Sworn Statement in Proof of Loss." The statement indicates that the actual cash value of the property was $21,000 and that damages as a result of the fire totaled $21,000. The Jindras stated that the "fire started from tenant's child using matches." Finally, the Jindras described their interest in the property as "titleholder[s]" and stated that no other person had any interest in the property other than the mortgagee, Commercial Federal Savings & Loan.

On August 17, 1987, Companion paid the Jindras $21,000 pursuant to the policy for the damages sustained in the fire. In receipt for such payment, the Jindras executed a "Subrogation Receipt" in favor of Companion.

Companion brought a subrogation action in the name of its insureds, the Jindras, naming Elizabeth Clayton and Cindy Clayton as defendants. The Jindras alleged three theories of recovery against the Claytons. First, the Jindras alleged that the fire was proximately caused by the negligence of Elizabeth Clayton in failing to properly and adequately supervise the minor, Cindy Clayton. Secondly, the Jindras alleged that Elizabeth Clayton, as a joint tenant, was liable to the Jindras for waste committed to the house. Finally, the Jindras alleged that Cindy Clayton's negligence was the cause of the fire and ensuing damages. The Claytons generally denied the Jindras' allegations.

The case was tried on these stipulated facts on April 1, 1993. On April 27, the district court held that the joint tenancy relationship between the parties precluded a subrogation action

by the Jindras against the Claytons and entered judgment in favor of the Claytons. On May 21, the Jindras timely filed a notice of appeal to the Nebraska Court of Appeals. On September 14, 1994, by order of this court, the case was moved to our docket.

## ASSIGNMENTS OF ERROR

The gist of the Jindras' five assignments of error is that the district court erred by determining that the parties' joint tenancy relationship prohibited subrogation by the Jindras' insurer and by assuming facts not supported by the evidence when sitting as the trier of fact.

## STANDARD OF REVIEW

In a case in which the facts are stipulated, this court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment. *Douglas Cty. Bank & Trust v. Stamper*, 244 Neb. 226, 505 N.W.2d 693 (1993); *Dobias v. Service Life Ins. Co.*, 238 Neb. 87, 469 N.W.2d 143 (1991). An appellate court has an obligation to reach conclusions on questions of law independent of the trial court's ruling. *Dolan v. Svitak, ante* p. 410, 527 N.W.2d 621 (1995); *Hausse v. Kimmey, ante* p. 23, 524 N.W.2d 567 (1994).

## ANALYSIS

The Jindras argue that as joint tenants, they and Elizabeth Clayton each had an insurable interest in the property. However, only the Jindras are identified as the named insureds on the Companion dwelling policy. The Jindras assert that the mere fact that they are joint tenants with Elizabeth Clayton does not automatically make her a coinsured for the purpose of subrogation. The Jindras contend that the Companion policy cannot be construed to inure to the benefit of the Claytons, absent an express agreement evidencing such was the parties' intent. The Jindras argue that no evidence of such an express agreement between them and the Claytons is in the record. They further assert that an express agreement cannot be reasonably assumed from the stipulated facts. Finally, they assert that they have a "valid [cause] of action against the Claytons for both negligence and waste and [that] Companion, having paid the

amount of the loss, is now subrogated to these causes of action[s]." Brief for appellants at 15.

The Claytons admit that Elizabeth Clayton, as a joint tenant, had an insurable interest in the property. For that reason, they argue that the subrogation action is the same as if Companion was suing its own insured. They assert that under the case law of this state, an insurance company has no subrogation rights against its own insured and therefore, the trial court's decision in their favor should be affirmed.

In reaching its decision to deny subrogation, the trial court relied primarily on *Reeder v. Reeder*, 217 Neb. 120, 348 N.W.2d 832 (1984). The trial court noted the close family relationship between the Jindras and the Claytons and the fact that the property was held in joint tenancy. The court stated that even though Elizabeth Clayton's name does not appear on the Companion policy, she is a joint tenant and as such is entitled to coverage under the policy. Therefore, the court held that Companion had no subrogation rights against her, whom the court deemed to be Companion's own insured.

Generally, subrogation is the substitution of one person in the place of another with reference to a lawful claim so that the one who is substituted succeeds to the rights of the other in relation to the debt or claim. *Shelter Ins. Cos. v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74 (1993); *Ehlers v. Perry*, 242 Neb. 208, 494 N.W.2d 325 (1993). In *Shelter Ins. Cos.*, we discussed the general principles of subrogation in some detail. We stated:

> In the context of insurance, the right of subrogation is based on two premises: (1) an insured should not be allowed to recover twice for the same loss, which would be the result if the insured recovers both from the insured's insurer and the tort-feasor, and (2) a wrongdoer should reimburse an insurer for payments that the insurer has made to its insured.

243 Neb. at 118, 498 N.W.2d at 79.

The Jindras' claim is based on the second premise. They essentially allege that the Claytons are wrongdoers and that they should reimburse Companion for payments it made. Although an insurance company has the right to recover against a wrongdoer whose negligence has subjected the insurance

company to liability, no right of subrogation can arise in favor of an insurer against its own insured. *Control Specialists v. State Farm Mut. Auto. Ins. Co.*, 228 Neb. 642, 423 N.W.2d 775 (1988); *Reeder, supra*; *Stetina v. State Farm Mut. Auto Ins. Co.*, 196 Neb. 441, 243 N.W.2d 341 (1976). " ' "[S]ubrogation exists only with respect to rights of the insurer against third persons *to whom the insurer owes no duty*. . . ." ' " *Reeder*, 217 Neb. at 127, 348 N.W.2d at 836 (quoting *Stetina, supra*).

In *Reeder*, we were presented with the question of whether a guest who negligently caused damage to his host's home may be sued by the owner's insurance carrier under a right of subrogation. In that case, Theodore Reeder had permitted his brother, Bernard Reeder, and Bernard Reeder's family to occupy his home. The Theodore Reeders had moved to Texas while still owning a home in Omaha, and the Bernard Reeders needed a place to stay while awaiting the completion of their new home. The parties testified that they had not entered into a lease agreement and that no rent was being paid. However, Theodore Reeder testified that he told his brother that

> "I would leave my insurance policy that I had on it on it while he was in there, and I didn't really discuss any part of his homeowner's or anything else. I just assumed he would take care of that. But we did discuss that I would leave my policy on it."

*Id.* at 122, 348 N.W.2d at 833.

Bernard Reeder's daughter started a fire when she attempted to ignite a gas fireplace but allegedly failed to open the damper. Theodore Reeder's insurer covered the loss and, in turn, obtained a subrogation receipt from its insured. The insurer filed suit against Bernard Reeder, his wife, and their daughter. We affirmed the order of the trial court sustaining the motion for summary judgment in favor of the Bernard Reeders for the reason that, as a matter of law, the insurer was not entitled to maintain the right of subrogation. *Reeder, supra.*

In so holding, we compared the host-guest relationship present in *Reeder* to a landlord-tenant relationship. We noted that other courts have held that, absent an express provision in the lease, the tenant stands in the shoes of an insured landlord for the limited purpose of defeating a subrogation claim. *Id.*

The modern trend is that a lessor's insurer cannot maintain a subrogation action against a lessee in the absence of an express agreement or lease provision. 6A John A. & Jean Appleman, Insurance Law and Practice § 4055 (1972 & Supp. 1994). See, also, *Safeco Ins. Companies v. Weisgerber*, 115 Idaho 428, 767 P.2d 271 (1989); *Fashion Place Inv. v. Salt Lake County*, 776 P.2d 941 (Utah App. 1989); *Cascade Trailer Court v. Beeson*, 50 Wash. App. 678, 749 P.2d 761 (1988); *New Hampshire Ins v Labombard*, 155 Mich. App. 369, 399 N.W.2d 527 (1986); *Safeco Ins. Co. v. Capri*, 101 Nev. 429, 705 P.2d 659 (1985); *Alaska Ins. Co. v. RCA Alaska Commun.*, 623 P.2d 1216 (Alaska 1981); *Liberty Mut. Fire Ins. Co. v. Auto Spring Supply Co.*, 59 Cal. App. 3d 860, 131 Cal. Rptr. 211 (1976); *Monterey Corporation v. Hart, Ex'r*, 216 Va. 843, 224 S.E.2d 142 (1976); *Sutton v. Jondahl*, 532 P.2d 478 (Okla. App. 1975). Landlord-tenants are coinsureds for subrogation purposes

> because of the reasonable expectations they derive from their privity under the lease, their insurable interests in the property, and the commercial realities under which lessors insure leased premises and pass on the premium cost in rent and under which insurers make reimbursement for fires negligently caused by their insureds' negligence.

6A Appleman, *supra*, at 77-78 (Supp. 1994). But see, *Neubauer v. Hostetter*, 485 N.W.2d 87 (Iowa 1992); *Page v. Scott*, 263 Ark. 684, 567 S.W.2d 101 (1978); *Fire Insurance Exchange v. Geekie*, 179 Ill. App. 3d 679, 534 N.E.2d 1061 (1989) (rejecting the premise that landlord-tenants are coinsureds for subrogation purposes).

In *Reeder v. Reeder*, 217 Neb. 120, 348 N.W.2d 832 (1984), we stated that the reasoning underlying the denial of a subrogation claim in a landlord-tenant situation was even more compelling when the relationship was that of host and guest. We also noted that the host had expressly told the guest that he had procured insurance coverage on the premises. Under those circumstances, we held, as a matter of law, that the host's insurer was not entitled to the right of subrogation against the guest.

Here, we are not presented with a landlord-tenant relationship or a guest-host relationship. The Jindras and

Elizabeth Clayton are joint tenants. As joint tenants, each is seized of the whole estate and has an undivided share of the whole estate. *Hein v. W. T. Rawleigh Co.*, 167 Neb. 176, 92 N.W.2d 185 (1958). The shares of interests of joint tenants are presumed equal. *Kinkenon v. Hue*, 207 Neb. 698, 301 N.W.2d 77 (1981). As a joint tenant, Elizabeth Clayton had an insurable interest in the property. A person has an insurable interest in property when he or she has a reasonable expectation, based upon a legal or a real right, of a benefit to be derived from the property and of loss or liability from its destruction. *Ben-Hur Mfg. Co. v. Firemen's Ins. Co.*, 18 Wis. 2d 259, 118 N.W.2d 159 (1962). An insurable interest is an "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." Neb. Rev. Stat. § 44-103(12) (Reissue 1993).

Although Elizabeth Clayton had an insurable interest in the property, only the Jindras were the named insureds on the Companion policy. Insurance contracts are personal and do not run with the property. *Terra Western Corp. v. Berry and Co.*, 207 Neb. 28, 295 N.W.2d 693 (1980). However, "unless a contract specifically provides otherwise, equitable principles apply even when a subrogation right is based on contract." *Shelter Ins. Cos. v. Frohlich*, 243 Neb. 111, 118, 498 N.W.2d 74, 79 (1993). In terms of the exercise of the right of subrogation, " 'no general rule can be laid down which will afford a test for its application in all cases. The facts and circumstances of each case determine whether the doctrine is applicable.' " *Id.*

Here, the parties comprise a closely related family group. Although the parties own a property in joint tenancy, the record does not reveal the financial arrangement between the parties. Therefore we do not know who was paying the mortgage, if there were any rent payments made, et cetera. We do know that the parties procured two insurance policies within 4 days of each other and such policies fully covered their combined real and personal property.

From these facts, the district court inferred that the Jindras entered into the joint tenancy with their daughter as an estate-planning tool. The court further inferred that the

insurance policies appeared to be parts of an integrated transaction to protect all of the joint tenants. The Jindras assert the district court in so doing erred by assuming facts not supported by the evidence when sitting as the trier of fact. However, the finder of fact may draw reasonable inferences from the facts and circumstances proved. *Doyle v. Union Ins. Co.*, 202 Neb. 599, 277 N.W.2d 36 (1979).

The absence of any evidence of an express agreement between the parties regarding whether the Jindras intended their fire insurance to protect their daughter's interest in the property is not as problematic as Companion asserts. In *Reeder*, we found evidence of an express agreement to be important when presented with a host-guest relationship. Here, the family relationship between the parties is even closer than the relationship in *Reeder*, and the parties hold the property in joint tenancy.

For the purposes of subrogation only, the relationship between the Jindras and the Claytons is such that if Companion were permitted to maintain this subrogation action it would be, in effect, suing its own insured.

## CONCLUSION

Given the facts and circumstances of this case, Companion should not be permitted to maintain this subrogation action against the daughter, who is a joint tenant of its insured, and the granddaughter. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

RICHARD H. SLOSBURG, TRUSTEE, APPELLANT, V. BOARD OF EQUALIZATION OF SARPY COUNTY, NEBRASKA, APPELLEE.
R-D INVESTMENT CO., APPELLANT, V. BOARD OF EQUALIZATION OF SARPY COUNTY, NEBRASKA, APPELLEE.
529 N.W.2d 70

Filed March 24, 1995. No. S-93-537.

**Taxation: Valuation.** A county board of equalization cannot consider the valuations of centrally assessed property in valuing the taxpayers' locally assessed property in a protest to the board.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Appeal dismissed, and causes remanded with directions.

Jeffrey A. Silver for appellants.

Michael D. Wellman, Sarpy County Attorney, Mark P. Reynolds, and, on brief, Henry L. Wendt for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

WHITE, C.J.

Richard H. Slosburg and R-D Investment Co. (the taxpayers) appeal from the judgments of the district court which affirmed the denials of relief by the Board of Equalization of Sarpy County, Nebraska, from the assessment and taxation of real property owned by the taxpayers. The cases were consolidated for trial and appeal.

The facts and arguments asserted in these cases are identical to the facts and arguments reported by this court in *R-D Investment Co. v. Board of Equal. of Sarpy Cty., ante* p. 162, 525 N.W.2d 221 (1995), and shall not be repeated here. We held in that case that pursuant to the law set forth in *John Day Co. v. Douglas Cty. Bd. of Equal.*, 243 Neb. 24, 497 N.W.2d 65 (1993), the board lacked subject matter jurisdiction to consider the equalization of R-D's property because a county board of equalization cannot consider the valuations of centrally assessed property in valuing the taxpayers' locally assessed property in a protest to the board. *R-D Investment Co., supra*, is dispositive of the issues presented in the cases now before us.

We lack jurisdiction to hear this appeal, since the district court did not have jurisdiction to hear the taxpayers' appeals from the board. See *R-D Investment Co., supra*. See, also, *Glup v. City of Omaha*, 222 Neb. 355, 383 N.W.2d 773 (1986).

The appeal is dismissed, and the causes are remanded to the district court with directions that the matters be dismissed.

APPEAL DISMISSED, AND CAUSES REMANDED WITH DIRECTIONS.

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STATE OF NEBRASKA, APPELLEE, V. JOSEPH B. REYNOLDS, APPELLANT.

529 N.W.2d 64

Filed March 24, 1995. No. S-93-666.

1. **Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** An appeal from the denial of a transfer to juvenile court is reviewed for an abuse of discretion.
2. **Criminal Law: Courts: Juvenile Courts: Jurisdiction.** In deciding whether to transfer adult criminal proceedings to juvenile court, the court having jurisdiction over a pending criminal prosecution must carefully consider the criteria set forth in Neb. Rev. Stat. § 43-276 (Reissue 1993).

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

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

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

FAHRNBRUCH, J.

In response to this court's remand on the direct appeal of *State v. Reynolds*, 246 Neb. 802, 523 N.W.2d 377 (1994), the district court entered a certified order setting forth the grounds

upon which it denied a juvenile defendant's motion to transfer to juvenile court.

We now hold that the district court for Douglas County did not abuse its discretion in refusing to transfer Reynolds' criminal case to the juvenile court and, thus, affirm its judgment.

An appeal from the denial of a transfer to juvenile court is reviewed for an abuse of discretion. *State v. Phinney*, 236 Neb. 76, 459 N.W.2d 200 (1990).

Joseph B. Reynolds, while on parole from the Youth Development Center-Kearney on burglary charges, attempted to steal an automobile in Omaha with the aid of a 15-year-old juvenile. At the time of the incident, Reynolds was 16 years old. In the case under consideration, Reynolds was charged with two counts of attempted theft by unlawful taking. Following a bench trial, the district court found Reynolds guilty of one count of attempted theft by unlawful taking, a Class IV felony carrying a penalty of up to 5 years' imprisonment, up to a $10,000 fine, or both. Reynolds was sentenced to 2 years of adult probation and ordered to spend the first 180 days of probation in the Douglas County Department of Corrections and to pay the costs of prosecution. He was given credit for 3 days spent in jail awaiting disposition of his case. Reynolds did not assign error concerning his sentence.

Reynolds appealed his conviction claiming (1) that the State failed to prove the existence of any compelling reason why his case should not have been transferred to the juvenile court and (2) that the district court erred by failing to set forth specific findings to support the court's refusal to transfer the case to juvenile court. In *State v. Reynolds, supra*, we remanded the action to the district court and instructed that court to set forth its findings supporting its denial of Reynolds' motion to transfer his case to the juvenile court.

On February 21, 1995, the district court submitted a certified order to this court detailing its reasons for refusing to transfer Reynolds' case to the juvenile court. The district court took into consideration that Reynolds was on parole from the Youth Development Center when the crimes with which he was charged were committed, that the juvenile court had already

exhausted the treatment and rehabilitation to which he would be amenable as a juvenile, the aggressive and premeditated manner of the offense, his age, his previous history, and his maturity and previous contacts with law enforcement.

In deciding whether to transfer adult criminal proceedings to juvenile court, the court having jurisdiction over a pending criminal prosecution must carefully consider the criteria set forth in Neb. Rev. Stat. § 43-276 (Reissue 1993). *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994).

Pursuant to § 43-276, the trial court must consider

> (1) [t]he type of treatment such juvenile would most likely be amenable to; (2) whether there is evidence that the alleged offense included violence or was committed in an aggressive and premeditated manner; (3) the motivation for the commission of the offense; (4) the age of the juvenile and the ages and circumstances of any others involved in the offense; (5) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court, and, if so, whether such offenses were crimes against the person or relating to property, and other previous history of antisocial behavior, if any, including any patterns of physical violence; (6) the sophistication and maturity of the juvenile as determined by consideration of his or her home, school activities, emotional attitude and desire to be treated as an adult, pattern of living, and whether he or she has had previous contact with law enforcement agencies and courts and the nature thereof; (7) whether there are facilities particularly available to the juvenile court for treatment and rehabilitation of the juvenile; (8) whether the best interests of the juvenile and the security of the public may require that the juvenile continue in custody or under supervision for a period extending beyond his or her minority and, if so, the available alternatives best suited to this purpose; and (9) such other matters as [are deemed] relevant . . . .

The district court based its denial to transfer Reynolds' case to juvenile court upon the foregoing statutory criteria. Reynolds had previously served in a juvenile detention facility, and his

history indicated that he did not respond to the rehabilitation efforts offered him. In the present case, Reynolds attempted to steal the automobile in a premeditated manner. When Reynolds was caught in the criminal act by the automobile's owner, he attempted to escape by threatening the owner with a screwdriver. See *State v. Reynolds*, 246 Neb. 802, 523 N.W.2d 377 (1994).

When a court's basis for retaining jurisdiction over a juvenile is supported by appropriate evidence, it cannot be said that the court abused its discretion in refusing to transfer the case to the juvenile court. *State v. Phinney*, 236 Neb. 76, 459 N.W.2d 200 (1990).

## CONCLUSION

Both of Reynolds' assigned errors are without merit, and the district court's judgment is affirmed.

AFFIRMED.

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RONALD G. MEDLEY, APPELLANT, V. JAMES A. DAVIS, M.D., APPELLEE.

529 N.W.2d 58

Filed March 24, 1995. No. S-93-682.

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. **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. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

4. **Summary Judgment: Evidence.** A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion.
5. **Malpractice: Physicians and Surgeons: Expert Witnesses: Proof.** Whether a specific manner of treatment or exercise of skill by a physician, surgeon, or other professional demonstrates a lack of skill or knowledge or failure to exercise reasonable care is a matter that, usually, must be proved by expert testimony.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Reversed and remanded for further proceedings.

Timothy K. Kelso and James E. Harris, of Harris, Feldman, Stumpf Law Offices, for appellant.

William M. Lamson, Jr., and David J. Schmitt, of Kennedy, Holland, DeLacy & Svoboda, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and GRANT, J., Retired.

WRIGHT, J.

Ronald G. Medley brought this medical malpractice action against James A. Davis, M.D. The district court overruled Medley's motion for partial summary judgment, sustained Davis' motion for summary judgment, and dismissed the action. Medley appeals.

## SCOPE OF REVIEW

In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Maloley v. Shearson Lehman Hutton, Inc.*, 246 Neb. 701, 523 N.W.2d 27 (1994); *Young v. First United Bank of Bellevue*, 246 Neb. 43, 516 N.W.2d 256 (1994).

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. *Gravel v. Schmidt, ante* p. 404, 527 N.W.2d

199 (1995); *Heath Consultants v. Precision Instruments, ante* p. 267, 527 N.W.2d 596 (1995).

## FACTS

Medley's amended petition alleged that between October 17, 1986, and August 1990, Medley placed himself under the medical care and treatment of Davis, relying upon Davis' apparent professional advice, care, treatment, and diagnosis for the treatment of certain psychological disorders and physical symptoms. Medley alleged that Davis diagnosed him as having a psychotic or paranoid condition and prescribed certain psychotropic or neuroleptic drugs and medications in such amounts and combinations as to effectively diminish Medley's mental capacities to such an extent that he was incompetent and unable to carry on the normal functions of an adult male.

Medley claimed that Davis was negligent in the following particulars: failing to properly diagnose Medley's condition; failing to obtain a complete patient history; misdiagnosing Medley as psychotic or paranoid; failing to properly care for and treat Medley's psychiatric condition; prescribing excessive amounts of psychotropic drugs over an extended period of time, which Davis knew or should have known would cause severe, debilitating, and permanent side effects; and failing to monitor Medley's drug consumption. Davis denied the allegations and asserted that he exercised that degree of care and skill expected of a physician practicing his profession in Omaha, Nebraska, or similar communities.

Both parties eventually requested summary judgment. Among Medley's exhibits was the affidavit of John Y. Donaldson, M.D. Medley sought treatment from Donaldson in February 1991 after leaving Davis' care. Medley also offered the purported affidavit of William Logan, M.D., which was unsigned, to which Davis objected. The district court ruled that Medley had failed to show good cause for not having secured Logan's signed affidavit prior to the hearing on the summary judgment motions. Davis offered his own affidavit in support of his motion for summary judgment.

The district court concluded that Medley had failed to establish that Davis' care was below the standard required in

psychiatry in the community. The court found that Davis' affidavit established that he had met the required standard of care. The court overruled Medley's motion for partial summary judgment, sustained Davis' motion for summary judgment, and dismissed the action.

## ASSIGNMENTS OF ERROR

Medley claims the district court erred in sustaining Davis' motion for summary judgment, in overruling Medley's motion for partial summary judgment, in sustaining Davis' objection to the purported affidavit of Logan, and in overruling Medley's motion for new trial.

## ANALYSIS

We must determine whether there is a genuine issue of material fact as to whether Davis met the required standard of care in his treatment of Medley during the periods alleged in Medley's amended petition. See *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994). 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. *Maloley v. Shearson Lehman Hutton, Inc.*, 246 Neb. 701, 523 N.W.2d 27 (1994). 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. *Gravel v. Schmidt, ante* p. 404, 527 N.W.2d 199 (1995).

Medley's amended petition was filed in March 1992, and his motion for partial summary judgment was filed on February 18, 1993. Davis' motion for summary judgment was then filed on March 15. The hearing regarding the motions was held on May 25. Medley did not attempt to offer the purported affidavit of Logan until the day of the hearing. Under Neb. Rev. Stat. § 25-1332 (Reissue 1989), the adverse party must serve opposing affidavits prior to the date of the hearing. See *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992). In addition, the unsigned document did not meet the requirements

of Neb. Rev. Stat. § 25-1241 (Reissue 1989), which provides: "An affidavit is a written declaration under oath, made without notice to the adverse party." Therefore, the unsigned document was not admissible. Since Medley failed to comply with either § 25-1332 or § 25-1241 and did not show good cause for his failure to secure Logan's signed affidavit prior to the hearing, the district court properly excluded the affidavit.

Neb. Rev. Stat. § 25-1335 (Reissue 1989) provides an additional safeguard against a premature grant of summary judgment. *Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d 56 (1988). The party opposing the summary judgment may by affidavit show a reasonable excuse or good cause why the party is presently unable to offer evidence essential to justify opposition to the motion for summary judgment. *Id.* Medley failed to request a continuance of the hearing in order to obtain Logan's signature. Under such circumstances, we cannot say that the district court abused its discretion.

Next, we review the evidence offered at the hearing in a light most favorable to Medley and give Medley the benefit of all reasonable inferences deducible from the evidence. See *Maloley v. Shearson Lehman Hutton, Inc., supra*. Because the affidavit from Logan was properly excluded, we consider only the evidence which was properly admitted. This includes affidavits from Donaldson and from Davis.

In his affidavit, Donaldson states that he has professional knowledge of the facts and circumstances surrounding Medley's condition because Medley was his patient. Attached to the affidavit are copies of Donaldson's office records and a February 7, 1992, medical report. The affidavit notes that the statements and/or opinions contained in the attachments are based upon Donaldson's training, education, and experience as a physician engaged in the medical specialty of psychiatry and are based upon a reasonable medical certainty.

Donaldson stated that when he began treating Medley in February 1991, Medley exhibited symptoms of depression and serious side effects to Stelazine, including restlessness, tremors, sedation, and localized stiffness in various parts of the body. Because Davis had prescribed as much as 50 milligrams of Stelazine per day for Medley, Donaldson believed that Davis

assumed Medley was suffering from paranoid schizophrenia. The usual dosage of Stelazine for treating anxiety is 4 to 6 milligrams per day. Stelazine is normally given in doses of 30 to 50 milligrams per day only for treatment of severe schizophrenia.

Donaldson, however, believed that Medley was suffering from a major depressive disorder, possibly with psychosis, rather than schizophrenia. During his twenties and thirties, Medley had obtained a master's degree and had taught at the high school and college levels. Donaldson said it was atypical for a person with schizophrenia to function at such a high level at that age. Donaldson stated that he gradually increased antidepressant medication and gradually withdrew Stelazine. By May 1991, Donaldson was certain that Medley was depressed and was not suffering from paranoid schizophrenia. Donaldson stated in a February 1992 medical report to Medley's attorney that Medley's disability resulted from a combination of Stelazine side effects and untreated depression.

Medley told Donaldson that Medley had been too disabled to work regularly since 1986, when Davis began prescribing medication for Medley. Yet the record shows that in 1986, Davis wrote a letter of recommendation for Medley which indicated essentially no psychiatric illness. In 1989, Davis wrote a letter indicating that Medley had some anxiety and depression, with a diagnosis of adjustment disorder of adult life.

The records offered by Davis show that he never billed Medley for his treatment. Donaldson stated that this might indicate that Davis prescribed medication for Medley while treating Medley's wife, who was a patient of Davis'. Donaldson indicated that Davis may not have had Medley complete the process of becoming an identified patient. Medley told Donaldson that Medley accompanied his wife to her appointments with Davis and that Medley's wife frequently reported his medical complaints to Davis. According to Donaldson, this was an "unusual approach" in providing medication for any patient, and if that was indeed the case, it would not meet the usual medical standard of care.

In Donaldson's opinion, before a psychiatrist prescribes Stelazine, the usual standard of care requires that a thorough

medical history be taken and recorded, that a mental status exam be conducted, and that the psychiatrist reach a diagnosis of intractable generalized anxiety disorder or schizophrenia. Once on the medication, the patient should be seen for regular followups to monitor for any neurologic side effects and other potential problems such as impaired immunity or hepatic dysfunction. Davis offered no prescription records or documentation of medications for Medley.

In his affidavit, Davis stated that he was a physician licensed to practice medicine in the State of Nebraska with a specialization in psychiatry. Davis stated that he was familiar with Medley's care and treatment. Davis indicated that he initially saw and evaluated Medley in November 1986 as a collateral patient with his wife. Based on his examination and observations, Davis began treating Medley with Stelazine in 1987 due to Medley's physical and mental condition. Davis noted that Medley developed extrapyramidal syndrome, which Davis treated with Cogentin. Attached to Davis' affidavit are progress notes for Medley's wife, beginning on February 3, 1987. The notes, which continue through January 2, 1990, relate strictly to Medley's wife. Medley is mentioned only in regard to his relationship with his wife.

Davis stated in his affidavit that he was familiar with the standard of care for psychiatrists in Omaha and similar communities as it existed from 1986 through 1990 and to the time of the affidavit. Based upon a review of his records; his experience, education, and training; his knowledge of the circumstances of Medley's care and treatment; and the allegations of negligence contained in Medley's amended petition, Davis was of the opinion to a reasonable degree of medical certainty that he was not negligent in the care and treatment rendered to Medley, that he met the standard of care for psychiatrists in his treatment of Medley, and that any alleged injury that occurred between 1986 and 1990 was not the result of negligence.

The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Healy v.*

*Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994). A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion. *Universal Assurors Life Ins. Co. v. Hohnstein*, 243 Neb. 359, 500 N.W.2d 811 (1993).

Although Davis' affidavit in support of his motion for summary judgment contained conclusions as to negligence, which we disregard, Medley conceded that Davis' affidavit made a prima facie showing that if Davis' evidence were uncontroverted at trial, he would be entitled to summary judgment. Davis' affidavit stated that he met the standard of care in his treatment of Medley. Therefore, Davis' affidavit shifted the burden to Medley to produce evidence of a factual issue regarding whether or not Davis met this standard of care.

Whether a specific manner of treatment or exercise of skill by a physician, surgeon, or other professional demonstrates a lack of skill or knowledge or failure to exercise reasonable care is a matter that, usually, must be proved by expert testimony. *Reifschneider v. Nebraska Methodist Hosp.*, 222 Neb. 782, 387 N.W.2d 486 (1986). We therefore consider Donaldson's affidavit, since Logan's purported affidavit was properly excluded. The district court found that Donaldson's affidavit was insufficient to refute Davis' prima facie showing that his treatment met the standard of care required. We disagree. Reviewing the medical report prepared by Donaldson and giving all reasonable inferences to Medley, as we are required to do, the report states that the care provided by Davis did not meet the usual medical standard.

Donaldson, a graduate of the University of Nebraska College of Medicine (UNMC), was a clinical associate professor at UNMC. He was a member of the American Board of Psychiatry and Neurology. He had served as a director of psychiatric programs at the Nebraska Psychiatric Institute and the Lincoln Regional Center and had maintained a private practice in Omaha. Therefore, we can reasonably infer that Donaldson was familiar with the standard of care required in the practice of psychiatry in Omaha.

Donaldson reported that the usual standard of care before prescribing Stelazine requires that the psychiatrist obtain a thorough medical history, conduct a mental status exam, and make a diagnosis of intractable generalized anxiety disorder or schizophrenia. Donaldson stated:

> I really don't know what unfolded in Dr. Davis's office but if there were no billings for Mr. Medley he may well have prescribed for Mr. Medley while caring for Mrs. Medley. In that case he may not have had Mr. Medley go through the process of becoming an identified patient with full history, mental status exam, etc. This would be an unusual approach in providing medication for any patient. If that were indeed the case, it would not meet the usual medical standard. You may want to request Mrs. Medley's records to see if mention is made in those of care for Mr. Medley.

A reasonable inference from the facts presented is that this "unusual approach" was indeed the case. Davis acknowledged that he had no documents, office notes, or reports which pertained to Medley other than the progress notes concerning Medley's wife. Davis had no prescription records or other documentation of medications prescribed to Medley. Thus, it is reasonable to infer that Davis' failure to obtain a full history and conduct a mental status exam did not meet the usual standard of care, and there exists a material question of fact as to whether Davis' treatment failed to meet the standard of care required.

Summary judgment should not be used to deprive a litigant of a formal trial if there is a genuine issue of fact. *Metro. Tech. Community College v. South Omaha Industrial Park*, 207 Neb. 472, 299 N.W.2d 535 (1980). We therefore reverse the judgment of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

NATIONAL ACCOUNT SYSTEMS OF LINCOLN, INC., A NEBRASKA CORPORATION, APPELLEE, V. PAMELA J. GLASSCOCK, APPELLANT.
529 N.W.2d 529

Filed March 24, 1995. No. S-93-806.

1. **Health Care Providers: Liens: Liability: Costs.** Hospitals are liable for their pro rata portion of the legal expenses and costs where they seek payment out of a judgment or settlement for the amount of a lien filed pursuant to Neb. Rev. Stat. § 52-401 (Reissue 1993).
2. **Health Care Providers: Liens: Judgments: Attorney Fees: Costs.** By recovering the full amount the hospital lienholder was due under the lien, less its proportionate share for attorney fees and litigation expenses, the hospital lienholder's debt has been fully satisfied, and it may not pursue other remedies against the patient merely because it did not receive 100 cents on the dollar for the lien.

Appeal from the District Court for Lancaster County, JEFFRE CHEUVRONT, Judge, on appeal thereto from the County Court for Lancaster County, GALE POKORNY, Judge. Judgment of District Court reversed, and cause remanded.

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

James A. Cada for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

WHITE, C.J.

On July 29, 1988, Pamela J. Glasscock was injured in a two-automobile accident. As a result, Glasscock incurred $20,253.65 in medical services rendered by several health care providers. Glasscock eventually filed suit against the driver of the other vehicle and negotiated a settlement of $150,000. In the process, Glasscock incurred $5,611.60 in litigation expenses and $42,816.29 in attorney fees. To ensure payment of their debts, the health care providers asserted hospital or physician's liens pursuant to Neb. Rev. Stat. § 52-401 (Reissue 1993).

The health care providers subsequently assigned their interests of $709.48 to National Account Systems of Lincoln, Inc. From the settlement award, Glasscock's attorney, Kenneth Cobb, sent National Account Systems a check for $290.81, the

amount it was due less one-third for attorney fees and for its pro rata share of the litigation expenses. National Account Systems returned the check, demanding payment in full and contending that it was not required to pay proportionate shares of either Cobb's fees or the litigation expenses.

When Cobb and Glasscock refused, National Account Systems sued Glasscock, contending that it was entitled to recover the full amount of $709.48 plus attorney fees and costs. The county court for Lancaster County entered judgment for National Account Systems, requiring Glasscock to pay National Account Systems $709.48 plus $75 in attorney fees. The Lancaster County District Court affirmed. Glasscock appealed to the Nebraska Court of Appeals, and we removed this case pursuant to our authority to regulate the caseloads of the appellate courts.

On appeal, Glasscock argues that both the county court and the district court erred in holding that the holders of hospital liens are not subject to pro rata reduction for reasonable attorney fees and litigation expenses. After the parties filed their briefs in this case, we decided *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994), which is controlling. In *Bloomquist*, we addressed for the first time the issue of whether § 52-401 requires a hospital lienholder to pay proportionate shares of attorney fees and litigation expenses incurred in litigating or settling a personal injury claim.

Section 52-401 provides:

> Whenever any person shall employ a physician, nurse, or hospital to perform professional service or services of any nature, in the treatment of or in connection with an injury, and such injured person shall claim damages from the party causing the injury, such physician, nurse, or hospital, as the case may be, shall have a lien upon any sum awarded the injured person in judgment or obtained by settlement or compromise on the amount due for the reasonable value of services necessarily performed, except that no such lien shall be valid against anyone coming under the Nebraska Workers' Compensation Act. In order to prosecute such lien, it shall be necessary for such

> physician, nurse, or hospital to serve a written notice upon the person or corporation from whom damages are claimed that such physician, nurse, or hospital claims a lien for such services and stating therein the amount due and the nature of such services, except that whenever an action is pending in court for the recovery of such damages, it shall be sufficient to file the notice of such lien in the pending action.

In *Bloomquist*, we held that "hospitals are liable for their pro rata portion of the legal expenses and costs where they seek payment out of a judgment or settlement for the amount of a lien filed pursuant to § 52-401." 246 Neb. at 726, 523 N.W.2d at 361. In so doing, we reasoned:

> But for the efforts of the patients' attorneys and the incurring of costs by the patients, it is unlikely that the hospitals would receive any payment. The lien statute grants hospitals a method of obtaining a full or partial recovery for the value of services that the hospitals would probably have "written off" as uncollectible; and while not a windfall to the hospitals, the recovery should not come without costs. In some circumstances, an injured party may lack any incentive to pursue litigation because his medical expenses equal or exceed the limits of insurance or other assets available to satisfy a judgment from a third party. Any recovery such a party would receive would be exhausted by attorney fees and medical expenses.
>
> Medical providers who rely on the hospital lien statute to recover their costs only receive payment if the injured person incurs the cost of hiring an attorney to effectuate a recovery. If the injured person elects not to prosecute a claim, then the lien itself is worthless. The hospital may not stand in the patient's shoes, but the hospital is entirely dependent upon the patient's attorney.

246 Neb. at 725-26, 523 N.W.2d at 360.

Glasscock also argues that, because National Account Systems, as the health care providers' assignee, elected to pursue its remedy as a lienholder under § 52-401, it is precluded from pursuing other remedies. We agree. By recovering the full amount National Account Systems was due

under the lien, less its proportionate share for attorney fees and litigation expenses, National Account Systems' debt has been fully satisfied, and it may not pursue other remedies against Glasscock merely because it did not receive 100 cents on the dollar for the lien. To hold otherwise would vitiate the core holding in *Bloomquist* and would encourage § 52-401 lienholders to refrain from action until the patient has recovered a judgment and then pursue the patient for any proportionate reduction in the lienholders' foreclosure action.

Because our decision in *Bloomquist* is dispositive and because we see no reason to depart from that decision, we reverse and remand the decision of the district court.

REVERSED AND REMANDED.

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CHARLES A. REIKOFSKI AND KATHY REIKOFSKI, HUSBAND AND WIFE, APPELLEES, V. JAMES K. BODWELL AND RETA M. BODWELL, HUSBAND AND WIFE, APPELLANTS.

529 N.W.2d 531

Filed March 24, 1995. No. S-93-808.

1. **Quiet Title: Equity.** An action to quiet title is equitable in nature.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Conveyances: Property: Intent.** An otherwise effective conveyance of property transfers the entire interest which the conveyor has, and has the power to convey, unless an intent to transfer a less interest is effectively manifested. Neb. Rev. Stat. § 76-104 (Reissue 1990).

Appeal from the District Court for Stanton County: ROBERT B. ENSZ, Judge. Affirmed.

Charles L. Caskey for appellants.

Charles W. Balsiger, P.C., for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

CONNOLLY, J.

James K. and Reta M. Bodwell, husband and wife, appeal the decision by the district court for Stanton County wherein the district court quieted title in a certain tract of land in Stanton County in the names of Charles A. and Kathy Reikofski, husband and wife. We affirm the district court's decision because the Reikofskis obtained title in fee from their predecessors, while the Bodwells' predecessor in title conveyed only an easement to the Bodwells.

## I. FACTUAL BACKGROUND

Prior to November 17, 1879, Sidney and Rachel Holman owned the fee simple title to a tract of land identified as "Block Seventy-six (76)" in the original town of Stanton located in Stanton County, Nebraska. On November 17, 1879, the Holmans conveyed by warranty deed a portion in the north half of Block 76 to the Fremont-Elkhorn and Missouri Valley Railroad Company (Fremont Railroad Company). The relevant portions of the 1879 deed read:

> [W]hereas the said Fremont-Elkhorn and Missouri Valley Rail Road Company [grantee] is now constructing a Railroad from Wisner in the County of Cumming [sic] and State of Nebraska northerly up the Elkhorn Valley in the direction of the Missouri River, which said Rail road is to pass through the County of Stanton in said State of Nebraska and the said Sidney L. Holman and Rachel S. Holman being desirous for the construction of said Railroad and to aid the cause by the grant herein made. . . . And by these presents do give grant bargain sell convey and confirm to the said [grantee] and to its successors and assigns forever, for the purpose of constructing a Rail Road there on and for all uses and purposes connected with the construction and use of of [sic] said Railroad, a strip of land fifty feet in width on each side of the center line of said Railroad when the same has been definitely located

> over and across the following described Real Estate to wit: [description of land]. . . . To Have Hold and Enjoy the lands above conveyed with the appurtenances and privileges thereto pertaining. And the right to use the said land and material of whatever kind, within the limits of the said one hundred feet above conveyed when it shall become necessary for cuts slopes repairs and embankments, unto the said [grantee] and to its successors and assigns forever for any and all uses and purposes connected with the construction preservation occupation and enjoyment of said Railroad. Provided that if said Railroad shall not be located and graded within ten years from date hereof, or if at any time after said Railroad shall have been constructed, the said grantee, its successors or assigns shall abandon said road or the route thereof shall be changed so as to be continued over said premises, the land hereby conveyed and all rights in and to the same, shall revert to the said grantor their heirs and assigns.

The record reflects that, at some point, the Holmans conveyed the title to Block 76. Though the record is unclear as to how it happened, Charles Reikofski's parents, George and Edith Reikofski, came to own Block 76 in fee simple. In separate warranty deeds dated November 21, 1968, George and Edith conveyed the south half of Block 76 to Charles in fee simple and the north half of Block 76 to Charles' brother Ronald Reikofski, in fee simple, subject to the railroad's right-of-way.

On March 24, 1971, Ronald and his wife, Janie, conveyed their fee simple interest in the north half of Block 76 to Charles by quitclaim deed, subject to the railroad's right-of-way. Charles also received quitclaim deeds for the north half of Block 76 from his sisters, Mary Ellen Lorenzen and Dixie Curry, and from his other brother, Donald Reikofski. On June 16, 1986, Charles and Kathy conveyed all of Block 76 to themselves in joint tenancy by warranty deed. Another warranty deed, dated January 13, 1989, conveyed a more limited portion of Block 76 to Charles and Kathy in joint tenancy.

At some point after Charles and Kathy Reikofski received all the deeds discussed above, the Fremont Railroad Company's

successor, Chicago Northwestern, ceased using the tract of land conveyed by the 1879 deed for railroad purposes. On January 11, 1990, Chicago Northwestern conveyed its interest in that land, as well as other land not involved in the instant proceedings, by quitclaim deed to James and Reta Bodwell.

The Reikofskis filed the petition in the instant case on October 19, 1992, asking the district court to quiet title to the land identified in the 1879 deed, which Chicago Northwestern purportedly conveyed to the Bodwells, in the Reikofskis' names and requesting an injunction to prevent the Bodwells from performing any work on the land. The Bodwells filed an answer and counterclaim wherein they asked the court to quiet title in their names and requested damages for the "improvement and additional expense to said real estate." The district court determined that the Reikofskis owned the contested land in fee simple and quieted title in their names.

## II. ASSIGNMENTS OF ERROR

The Bodwells contend that the district court erred in (1) determining that the 1879 deed conveyed only an easement to the Fremont Railroad Company, their predecessor in title; (2) quieting title in the contested land in the Reikofskis' names; and (3) not finding the reversionary interest conveyed in the 1879 deed void and unenforceable under Neb. Rev. Stat. § 76-107 (Reissue 1990).

## III. STANDARD OF REVIEW

An action to quiet title is equitable in nature. *Saunders v. Rebuck*, 242 Neb. 610, 496 N.W.2d 472 (1993); *Nennemann v. Rebuck*, 242 Neb. 604, 496 N.W.2d 467 (1993). See, also, *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994). In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Synacek v. Omaha Cold Storage, ante* p. 244, 526 N.W.2d 91 (1995); *Nebraska Irrigation, Inc. v. Koch*, 246 Neb.

856, 523 N.W.2d 676 (1994); *Upah v. Ancona Bros. Co.*, 246 Neb. 585, 521 N.W.2d 895 (1994).

## IV. ANALYSIS

### 1. Applicable Propositions of Law

In the instant case, the primary issue we need to decide in order to determine whether the district court's ruling is correct is whether the 1879 deed from the Holmans to the Fremont Railroad Company gave the railroad a defeasible fee or an easement. If the 1879 deed conveyed a defeasible fee, then the Reikofskis' claim of reverter in the deed is void as being an unreasonable restraint on alienation. See, *State v. Union Pacific RR. Co.*, 242 Neb. 97, 490 N.W.2d 461 (1992); *Cast v. National Bank of Commerce T. & S. Assn.*, 186 Neb. 385, 183 N.W.2d 485 (1971). See, also, *Falls City v. Missouri Pacific Railroad Company*, 453 F.2d 771 (8th Cir. 1971). However, if the 1879 deed merely conveyed an easement, as the Reikofskis contend, title to the land contained in the easement would revert to the Holmans' successors and assignees: the Reikofskis. See, *State v. Union Pacific RR. Co.*, 241 Neb. 675, 490 N.W.2d 461 (1992) (*Union Pacific RR. Co. I*), *modified on other grounds* 242 Neb. 97, 490 N.W.2d 461; *Bode v. Flobert Industries, Inc.*, 197 Neb. 488, 249 N.W.2d 750 (1977), *overruled in part on other grounds, Lillich v. Lowery*, 211 Neb. 757, 320 N.W.2d 463 (1982); *George v. Pracheil*, 92 Neb. 81, 137 N.W. 880 (1912), *overruled in part on other grounds, Commercial Fed. Sav. & Loan v. ABA Corp.*, 230 Neb. 317, 431 N.W.2d 613 (1988), and *Union Pacific RR. Co. I, supra*.

### 2. The Conveyance in the Case at Bar

The Holmans owned the real estate identified as Block 76 in fee simple when they executed the 1879 deed to the Fremont Railroad Company. It is well settled in Nebraska law that an otherwise effective conveyance of property transfers the entire interest which the conveyor has, and has the power to convey, unless an intent to transfer a less interest is effectively manifested. Neb. Rev. Stat. § 76-104 (Reissue 1990); *Union Pacific RR. Co. I, supra*; *Sun Oil Co. v. Emery*, 183 Neb. 793, 164 N.W.2d 644 (1969).

In *Bode v. Flobert Industries, Inc., supra*, this court analyzed a deed which granted a railroad a right-of-way through a certain tract of land, using language virtually identical to language used in the 1879 deed in the instant case. In *Bode*, we held that the deed transferred only an easement to the railroad to use the specified land for railroad purposes. We reach the same conclusion in the case at bar. The language of the 1879 deed demonstrated an intent to limit the grant of land to the Fremont Railroad Company. Like the deed in *Bode*, the 1879 deed in the instant case contained language in both the granting and habendum clauses indicating that the railroad company received a "right to use" the land conveyed.

The Bodwells cite *Union Pacific RR. Co. I* as authority for their contention that the 1879 deed transferred a defeasible fee in the specified land to the Fremont Railroad Company. However, *Union Pacific RR. Co. I* is distinguishable from the instant case because the granting clause in the deed in *Union Pacific RR. Co. I* made no exceptions, reservations, or specifications for the use of the land conveyed. For application, see *Elton Schmidt & Sons Farm Co. v. Kneib*, 2 Neb. App. 12, 507 N.W.2d 305 (1993). The granting clause in the 1879 deed in the case at bar, however, contained an express specification limiting the use of the land conveyed "for the purpose of constructing a Rail Road there on and for all uses and purposes connected with the construction and use of of [sic] said Railroad." Under *Bode*, that language in the granting clause, combined with similar limiting language in the habendum, conveyed only an easement for use of the land to the Fremont Railroad Company.

## V. CONCLUSION

The 1879 deed from the Holmans to the Fremont Railroad Company conveyed an easement over the land described therein for the railroad company's benefit. When Chicago Northwestern ceased using that land for railroad purposes, the easement was extinguished, and the land reverted back to the Holmans' successors and/or assignees, Charles and Kathy Reikofski. The Reikofskis own the contested land in fee simple.

AFFIRMED.

# IN RE INTEREST OF CONSTANCE G., A CHILD UNDER 18 YEARS OF AGE.
# STATE OF NEBRASKA, APPELLEE, V. BETH S., APPELLEE, AND LARRY G., APPELLANT.

529 N.W.2d 534

Filed March 24, 1995. No. S-93-1034.

1. **Judgments: Jurisdiction: Appeal and Error.** Where a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the inferior court.
2. ____: ____: ____. Where a jurisdictional question rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly wrong.
3. **Parental Rights.** The dual purpose of proceedings brought under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) on the ground that a juvenile is homeless, destitute, or without proper support through no fault of the parents, guardian, or custodian is to protect the welfare of the minor and to safeguard the parents' right to properly raise their own child; a petition thereunder is brought on behalf of the child, not to punish the parents.
4. **Juvenile Courts: Final Orders: Appeal and Error.** In reviewing any final order of a juvenile court, an appellate court is to try the factual questions de novo on the record, reaching a conclusion independent of the findings of the juvenile court; provided, however, that when the evidence is in conflict, the appellate court considers and may give weight to the fact that the juvenile court observed the witnesses and accepted one version of the facts rather than another.
5. **Parental Rights: Juvenile Courts.** A juvenile court has the discretionary power to prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code.
6. **Parental Rights: Juvenile Courts: Proof.** While Neb. Rev. Stat. § 43-285 (Cum. Supp. 1990) grants the juvenile court discretionary power over a plan proposed by the Department of Social Services, it also grants a preference in favor of such a plan; in order for the court to disapprove the department's plan, a party must prove by a preponderance of the evidence that the department's plan is not in the child's best interests.
7. **Parental Rights: Juvenile Courts.** After an adjudication under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) 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 and thereafter 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.

Petition for further review from the Nebraska Court of Appeals, IRWIN, MILLER-LERMAN, and MUES, Judges, on appeal

thereto from the District Court for Howard County, RONALD D. OLBERDING, Judge, on appeal thereto from the County Court for Howard County, DAVID A. BUSH and PHILIP M. MARTIN, JR., Judges. Judgment of Court of Appeals reversed, and cause remanded with direction.

Michael J. Shaughnessy, of Shaughnessy & Shaughnessy, for appellant.

Daniel J. Thayer, of Lauritsen, Brownell, Brostrom, Stehlik & Thayer, for appellee Beth S.

Patrick L. Neid, guardian ad litem.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

CAPORALE, J.

## I. STATEMENT OF CASE

Following the appellee mother's admission of the allegations in the appellee State's petition and the appellant father's no contest plea, the county court, sitting as a juvenile court, adjudicated Constance G., the subject girl infant, to be "homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian" and asserted jurisdiction over her under the provisions of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993).

At a later dispositional hearing, the county court adopted the rehabilitation plan proposed by the Nebraska Department of Social Services and placed temporary custody of the infant in and with the department, which continued placement of the infant in the foster care arrangement the department had made pursuant to an earlier order of the county court. Although the mother did not appeal the dispositional order, the father first unsuccessfully appealed to the district court and thence to the Nebraska Court of Appeals, where he assigned and argued as errors in his brief the failure of the district court to have determined that the county court wrongly failed to place custody of the infant with the father and mother, or in the father's care alone, or in foster care closer to the parents' home. Ruling that the county court had not acquired jurisdiction over

the infant because there was insufficient evidence with regard to the father, the Court of Appeals dismissed the appeal. *In re Interest of Constance G.*, 3 Neb. App. 1, 520 N.W.2d 784 (1994).

Claiming that the Court of Appeals was wrong in its jurisdictional ruling, the guardian ad litem for the infant petitioned this court for further review. We granted such review and now reverse the judgment of the Court of Appeals and remand the cause with the direction that it affirm the judgment of the district court.

## II. FACTS

The supplemental bill of exceptions filed in this court after the Court of Appeals issued its opinion reveals that at the time of the adjudication hearing the county court, without objection, received in evidence an affidavit in which a department social worker recited that the infant's biological mother, Beth S., resided at Dannebrog with her parents, and the infant's biological father, Larry G., resided at Lincoln; that the mother had removed herself from Lincoln as the result of an altercation between herself and the father, who was then on probation for "DWI and Drugs"; and that the mother had been diagnosed while a teenager as being a paranoid schizophrenic and was currently hearing voices telling her to "physically and sexually abuse" the infant and had been hearing such voices since the infant's birth.

The affidavit further relates that the mother had an extremely hard time touching the then approximately 10-week-old infant for fear of hurting her and that the mother described her child as "a failure to thrive infant [who] lost weight rapidly after coming home from the Hospital." According to the affidavit, the social worker was of the opinion that leaving the infant with the maternal grandparents, where the mother intended to live, would create a substantial risk of harm to the infant, as both grandparents worked and would not be able to supervise the mother and the infant. The social worker's affidavit represents as well that the infant's mother wished to give up the infant but did not want the infant's father to have her. However, unsworn statements made at the adjudication hearing suggest that by the

time of that hearing, which is shown by the transcript to have been held on one date and by the supplemental bill of exceptions on another, both the mother and the father were living at Lincoln. In any event, the county court left the child in the foster care placement in the Grand Island or St. Paul area that the department had made; the exact location is not made clear by the record.

At the dispositional hearing, evidence was finally developed that the mother and father were not married, but that the father had admitted paternity on the occasion of the infant's birth. On this occasion the county court, without objection, received in evidence the department's plan for attempting to reunite the infant with her parents. The plan, among other things, calls for efforts to teach parenting skills to the parents and provides for supervised visitation among them. The record reveals, however, that the infant is not comfortable when in the presence of her parents, in that she cries very hard, vomits, and becomes rigid and that her eyes glaze over. The plan provides for continuing the foster care placement the department made at the inception of its involvement.

The father proposed his own plan, the essence of which is that the infant be placed in the parents' home at Lincoln, but that the mother never be left alone with the infant.

## III. ANALYSIS OF JURISDICTIONAL ISSUE

We begin our analysis of the jurisdictional issue by recalling that where a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the inferior court, *Wagner v. Unicord Corp., ante* p. 217, 526 N.W.2d 74 (1995); however, where such a question rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly wrong, *State ex rel. Grape v. Zach, ante* p. 29, 524 N.W.2d 788 (1994).

With that in mind, we direct our attention to the relevant statute, § 43-247, which provides: "The juvenile court in each county as herein provided shall have jurisdiction of . . . (3) Any juvenile (a) who is homeless or destitute, or without proper

support through no fault of his or her parent, guardian, or custodian . . . ." The statutes do not define "homeless," "destitute," or "without proper support" as used in § 43-247(3)(a), nor have we heretofore specifically articulated what type of evidence is necessary to establish that one is a juvenile coming within the ambit of § 43-247(3)(a) because the juvenile is, through no fault of the parent, guardian, or custodian, homeless, destitute, or without proper support.

However, other courts have dealt with similar questions. The Pennsylvania Superior Court has interpreted language defining a "dependent child" as one who is " 'without proper parental care or control . . .' " to encompass two discrete questions: Is the child at this moment without proper parental care or control, and if so, is such care and control immediately available? *In re Interest of Justin S.*, 375 Pa. Super. 88, 96, 543 A.2d 1192, 1196 (1988).

The Arizona Supreme Court has held that the dependency provisions of its state's statutes do not proscribe any parental conduct or omission, but, rather, are concerned only with the welfare of children and whether their essential needs are being met. In a dependency action, the only inquiry is whether a child is in need of care which for any reason is not being provided. *Matter of Depend. Nos. JD-89-006 & JD-89-007*, 167 Ariz. 98, 804 P.2d 827 (Ariz. App. 1990); *Matter of Daniel, Deborah and Leslie H.*, 591 P.2d 1175 (Okla. 1979). See *In re Appeal in Maricopa Cty., Juv. Action No. J-75482*, 111 Ariz. 588, 536 P.2d 197 (1975).

The only issue before the court in *In re Bishop*, 36 Ohio App. 3d 123, 521 N.E.2d 838 (1987), was whether the trial court erred as a matter of law in adjudicating the minor child to be a dependent. The court noted that the focus of a charge that a child is dependent is on the child and his conditions and not on the fault of the parents. The court stated that a finding of dependency must be rooted in the question of whether the child is receiving proper care. See, also, *In re Campbell*, 13 Ohio App. 3d 34, 468 N.E.2d 93 (1983); *In re Bibb*, 70 Ohio App. 2d 117, 435 N.E.2d 96 (1980). Cf. *In re East*, 32 Ohio Misc. 65, 67, 288 N.E.2d 343, 345 (1972) ("[c]ertainly, the faults and failures of parents may be contributing factors creating a

condition or environment such as to warrant the state to intercede in the child's behalf").

In determining that the county court failed to acquire jurisdiction, the Court of Appeals relied upon *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992). Therein, the State alleged that the juvenile court had jurisdiction over the minor because she lacked proper parental care by reason of the fault or habits of her mother in that the mother had sexually abused the minor. Later, the State amended its petition by removing the sexual abuse claim and asserting instead that the mother had been involved with the juvenile court for 2 years in an effort to resolve her poor parenting skills with reference to the minor's three siblings, with the result that the mother's rights in and to the siblings had been terminated. Notwithstanding the lack of any allegation that the mother's poor parenting of the siblings had any effect upon the minor then at issue or that the mother's poor parenting of the siblings placed the minor then in question at risk, the juvenile court, unbothered by the fact that the minor had not even been born when it took jurisdiction over the siblings, concluded it needed no factual basis to assume jurisdiction over the minor because it was well aware of its previous dealings with the mother concerning the other siblings. Under those circumstances, we ruled that the juvenile court had acquired no jurisdiction over the minor.

But the situation in *In re Interest of D.M.B.* is hardly the situation here. Not only did jurisdiction in *In re Interest of D.M.B.* depend upon establishing lack of parental care by reason of the fault or habits of the mother, there were no allegations, let alone proof, that the mother's fault or habits in any way injured or put the minor at risk of harm.

In contrast, we are not here concerned with anyone's faults or habits; we are concerned only with the conditions in which the infant found herself. While the Court of Appeals correctly noted that the affidavit providing the only evidence at the adjudication hearing recited little about the father, it does reveal that the infant failed to gain weight while she was in the joint physical care of both her mother and father. That is not an insignificant fact.

The dual purpose of proceedings brought under § 43-247(3)(a) on the ground that a juvenile is homeless, destitute, or without proper support through no fault of the parents, guardian, or custodian is to protect the welfare of the minor and to safeguard the parents' right to properly raise their own child; a petition thereunder is brought on behalf of the child, not to punish the parents. See, *Matter of La Shonda B.*, 95 Cal. App. 3d 593, 157 Cal. Rptr. 280 (1979); *Collins v. Superior Court in and for County of Los Angeles*, 74 Cal. App. 3d 47, 141 Cal. Rptr. 273 (1977).

The father, after having been afforded his due process rights, including the appointment of counsel, chose not to contest the State's allegations, and the record made at the adjudication hearing supports the county court's finding that, at the very least, the infant, through no fault of the parents, was destitute and without proper support.

Accordingly, the Court of Appeals erred in ruling that the county court had not acquired the requisite jurisdiction. The county court had acquired jurisdiction over the infant and thereby had jurisdiction to make orders in the infant's best interests, consistent with the father's rights.

## IV. ANALYSIS OF FATHER'S ASSIGNMENTS OF ERROR

Given the foregoing determination, we exercise our option of considering the father's assignment of error which the Court of Appeals did not reach. See *Coppi v. West Am. Ins. Co.*, *ante* p. 1, 524 N.W.2d 804 (1994). As first noted in part I, the father complains that custody of the infant was not placed in his and the mother's care, or his care alone, or in foster care nearer to them. Before proceeding to an analysis of these issues, it is important to remind ourselves that in reviewing any final order of a juvenile court, an appellate court is to try the factual questions de novo on the record, reaching a conclusion independent of the findings of the juvenile court; provided, however, that when the evidence is in conflict, the appellate court considers and may give weight to the fact that the juvenile court observed the witnesses and accepted one version of the facts rather than another. *In re Interest of D.M.B.*, 240 Neb.

349, 481 N.W.2d 905 (1992). See, also, *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994); *In re Interest of D.D.P.*, 235 Neb. 864, 458 N.W.2d 193 (1990) (adjudication under § 43-247(3)(a)).

Resolution of the father's complaints is controlled by Neb. Rev. Stat. § 43-285 (Cum. Supp. 1990), which provides:

> (1) When the court awards a juvenile to the care of the Department of Social Services . . . the juvenile shall, unless otherwise ordered, become a ward and be subject to the guardianship of the department . . . . [T]he Department of Social Services shall have authority, by and with the assent of the court, to determine the care, placement, medical services, psychiatric services, training, and expenditures on behalf of each juvenile committed to it. . . .
>
> (2) Following an adjudication hearing at which a juvenile is adjudged to be under subdivision (3) of section 43-247, the court may order the department to prepare and file with the court a proposed plan for the care, placement, and services which are to be provided to such juvenile and his or her family. If any other party, including, but not limited to, the guardian ad litem, parents, county attorney, or custodian, proves by a preponderance of the evidence that the department's plan is not in the juvenile's best interests, the court shall disapprove the department's plan. The court may modify the plan, order that an alternative plan be developed, or implement another plan that is in the juvenile's best interests.

We have held that a juvenile court has the discretionary power to prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code. *In re Interest of L.O. and B.O.*, 229 Neb. 889, 429 N.W.2d 388 (1988); *In re Interest of L.H.*, 227 Neb. 857, 420 N.W.2d 318 (1988). While § 43-285 grants the juvenile court discretionary power over a plan proposed by the department, it also grants a preference in favor of such a plan. In order for the court to disapprove the department's plan, a party must prove by a

preponderance of the evidence that the department's plan is not in the child's best interests.

However, *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 272–73, 417 N.W.2d 147, 161 (1987), announced a procedural rule requiring a juvenile court to hold a hearing before entering an order containing a rehabilitative plan for a parent:

> [A]fter 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 and thereafter 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, §§ 27-101 to 27-1103, 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 facts supporting the provisions contained in the parental rehabilitative plan shall be stated in the record.

In the present case, the county court complied with those requirements. At the adjudication hearing, the county court explained that if it were to find that the infant was a juvenile falling within the provisions of § 43-247(3)(a), the proceedings would progress to the dispositional stage, during which the court has a "wide variety of options." The county court also explained to the parents that the department would be preparing a plan and a report to help the court determine the infant's placement, and instructed the parents that the court would need information about their living arrangements and their respective homes to determine the best placement for the infant.

Although the infant was only 5 months old at the time of the dispositional hearing, she had been living in the third placement during her short life (the parents' home, the maternal

grandparents' home, and the foster home). The infant had shown continued improvement while in foster care and continued to become hysterical when in the presence of her natural parents. Thus, the record supports the continuation of the infant's placement in the stable environment provided by her foster parents.

Moreover, the department's plan focuses on attempting to correct the situations and conditions on which the adjudication was based. It provided for continued therapy for the mother's mental health problems and recommended treatment for the father's problems with anger. These were the conditions which in part led to the separation of the natural parents and the unstable environment in which the infant had been forced to live and had failed to thrive.

We conclude, independent of the findings of the county court, that continued placement of the infant in the present foster home is in the infant's best interests and that adoption of the department's plan was reasonable under the circumstances.

## V. JUDGMENT

As stated in part I, we reverse the judgment of the Court of Appeals and remand the cause with the direction that it affirm the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTION.

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## STATE OF NEBRASKA, APPELLEE, V. GARY A. KEITHLEY, APPELLANT.

529 N.W.2d 541

Filed March 24, 1995. No. S-94-189.

1. **Postconviction: Appeal and Error.** An appellate court will not ordinarily entertain a successive motion for postconviction relief unless the motion shows on its face that the basis for relief was not available at the time movant filed the prior motion.

2. ____: ____. A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.

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

Gary A. Keithley, pro se.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

WHITE, C.J.

Gary A. Keithley was convicted in 1986 of second degree murder in the 1959 stabbing death of William Weiner. Keithley was sentenced to 20 years' imprisonment. We affirmed the judgment in *State v. Keithley*, 227 Neb. 402, 418 N.W.2d 212 (1988). In 1990, we affirmed the district court's denial of Keithley's motion for postconviction relief. *State v. Keithley*, 236 Neb. 631, 463 N.W.2d 329 (1990). Keithley filed a second motion for postconviction relief in December 1993, which was summarily dismissed by the district court.

In his second motion for postconviction relief, Keithley alleges he was denied due process under the U.S. Constitution and the Nebraska Constitution in that (1) newly discovered evidence warrants granting him a new trial, (2) he was denied effective assistance of trial counsel, and (3) inadmissible evidence was introduced at the trial. The district court summarily dismissed the motion on the basis that Keithley did or could have raised all of these issues on direct appeal or in Keithley's first motion for postconviction relief. Keithley appeals the district court's dismissal of his second motion for postconviction relief.

Keithley claims that trial counsel and appellate counsel failed to reveal to him a 1959 police report allegedly containing exculpatory evidence. Keithley argues that the police report is newly discovered evidence entitling him to a new trial. However, in his second motion for postconviction relief, Keithley states that he was given the police report after his

direct appeal. Keithley thus had the opportunity to present the alleged newly discovered evidence on his first motion for postconviction relief and failed to do so.

An appellate court will not ordinarily entertain a successive motion for postconviction relief unless the motion shows on its face that the basis for relief was not available at the time the movant filed the prior motion. See, *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994); *State v. Luna*, 230 Neb. 966, 434 N.W.2d 526 (1989). A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal. *State v. Jones*, 246 Neb. 673, 522 N.W.2d 414 (1994). See, *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991); *State v. Blankenfeld*, 228 Neb. 611, 423 N.W.2d 479 (1988).

Keithley also argues that his trial counsel was ineffective because he failed to reveal the police report to Keithley and failed to object to allegedly inadmissible evidence. Keithley raised the issue of ineffective assistance of trial counsel on his first motion for postconviction relief. We note that Keithley had different counsel on appeal than at trial. As stated above, Keithley cannot now secure review of an issue that could have been reviewed on his first motion for postconviction relief. Since we have already determined that Keithley knew about the police report after direct appeal and before the first motion for postconviction relief, Keithley is barred from now raising this issue. Keithley also raised the issue of inadmissibility of evidence on direct appeal and cannot now again raise the same issue.

Having found that none of Keithley's assignments of error have merit, we affirm the district court's denial of postconviction relief.

AFFIRMED.

# FIRST WESTSIDE BANK, A STATE BANKING CORPORATION, APPELLEE, V. FOR-MED, INC., A NEBRASKA CORPORATION, AND DAVID R. ANDERSON, INDIVIDUALLY, APPELLANTS.

529 N.W.2d 66

Filed March 24, 1995. No. S-94-247.

1. **Uniform Commercial Code: Sales.** Whether a sale of collateral was commercially reasonable within the meaning of Neb. U.C.C. § 9-504(3) (Reissue 1980) is a question of fact.
2. **Judgments: Appeal and Error.** 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 wrong.
3. **Secured Transactions: Sales: Proof.** Where a secured party seeks a deficiency judgment, it is that party's burden to show the reasonableness of the sale of collateral.
4. **Rules of the Supreme Court: Records: Appeal and Error.** Neb. Ct. R. of Prac. 9D(1)f and g (rev. 1992) requires that factual recitations be annotated to the record, whether they appear in the statement of facts or argument section of a brief; the failure to do so may result in an appellate court's overlooking a fact or otherwise treating the matter under review as if the represented fact does not exist.
5. **Uniform Commercial Code: Secured Transactions: Debtors and Creditors: Sales.** With regard to security transactions, the purpose of the Uniform Commercial Code is to protect both the creditor and the debtor; on the sale of collateral, it is the secured party's duty to the debtor to use all fair and reasonable means to obtain the best price under the circumstances, but the creditor need not use extraordinary means.
6. **Uniform Commercial Code: Sales.** The determination of whether a particular sale was commercially reasonable turns on the particular facts of each case, and under particular circumstances, a sale may be commercially reasonable notwithstanding the lack of advertising.
7. ____: ____. Among the other factors to be considered in determining whether a sale of collateral was commercially reasonable is the adequacy or insufficiency of the price at which it was sold.

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

Gary L. Dolan, of Wolfe, Anderson, Hurd, Luers & Ahl, for appellants.

James M. Kelley for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

CAPORALE, J.

This is the second appearance in this court of the within action at law for a deficiency judgment under the Uniform Commercial Code. While in the first appearance there was no question concerning the notice of the sale of the collateral given the corporate debtor-appellant therein and herein, For-Med, Inc., and while we held that the individual debtor-appellant therein and herein, David R. Anderson, had received constructive notice of said sale, we nonetheless further held that the district court had erred in entering summary judgment in favor of the creditor-appellee therein and herein, First Westside Bank. This was so because no evidence had been presented from which the district court could have found that the sale was commercially reasonable. As a consequence, we reversed the judgment in favor of First Westside and remanded the cause for further proceedings. *First Westside Bank v. For-Med, Inc.*, 240 Neb. 219, 481 N.W.2d 193 (1992) (*First Westside I*). The proceedings giving rise to this second appearance then took place, which again resulted in the district court entering judgment in favor of First Westside in the sum of $18,735.04 plus interest and costs. While For-Med and Anderson concede that the price First Westside obtained for the collateral was not "wholly unreasonable," they nonetheless appealed to the Nebraska Court of Appeals, urging that the district court erred in finding the sale to have been commercially reasonable. However, because this court had decided *First Westside I*, the appeal was docketed in this court. We now affirm the judgment of the district court.

The dispute is controlled by Neb. U.C.C. § 9-504 (Reissue 1980), which read in pertinent part:

> (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. . . .
>
> (2) If the security interest secured an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. . . .
>
> (3) Disposition of the collateral may be by public or

> private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable.

Whether a sale of collateral was commercially reasonable within the meaning of § 9-504(3) is a question of fact. *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990). Thus, in reviewing this matter, we are bound by the rule that 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 wrong. *Label Concepts v. Westendorf Plastics, ante* p. 560, 528 N.W.2d 335 (1995); *Gibb v. Strickland*, 245 Neb. 325, 513 N.W.2d 274 (1994); *Diefenbaugh v. Rachow*, 244 Neb. 631, 508 N.W.2d 575 (1993); *Mix v. City of Lincoln*, 244 Neb. 561, 508 N.W.2d 549 (1993).

With that scope of review in mind, and recalling that where a secured party seeks a deficiency judgment, it is that party's burden to show the reasonableness of the sale of collateral, *First Westside I* and *Adams State Bank v. Navistar Financial Corp.*, 229 Neb. 334, 426 N.W.2d 525 (1988), we turn our attention to the facts as revealed by the record. In doing so, we note that the parties recite many of the facts in the argument portions of their briefs without annotating them to the record. Neb. Ct. R. of Prac. 9D(1)f and g (rev. 1992) clearly requires that factual recitations be annotated to the record, whether they appear in the statement of facts or argument section of a brief. The failure to do so may result in an appellate court's overlooking a fact, *State v. Hernandez*, 242 Neb. 78, 493 N.W.2d 181 (1992), or otherwise treating the matter under review as if the represented fact does not exist, *Alder v. First Nat. Bank & Trust Co.*, 241 Neb. 873, 491 N.W.2d 686 (1992). Because in this instance the factual record is relatively short, we have undertaken our own search through it to verify the unannotated facts. We caution, however, that this should not be understood to mean that we shall undertake such a task in any future case.

That having been clarified, we move on. On June 24, 1983,

the parties executed a loan and security agreement in the amount of $79,924.89 plus interest, using Anderson's 1978 Blue Bird motor home as collateral. Anderson and For-Med defaulted on the loan, and First Westside elected to accelerate payment and put Anderson and For-Med in default.

After repossession of the collateral, First Westside sold it at private sale for $60,000 and applied the proceeds to Anderson's and For-Med's obligation.

All of the evidence in regard to the manner in which the collateral was sold came from First Westside. There was no normal bank procedure for selling motor homes, and although most motor vehicles it sold were advertised in a local newspaper, First Westside elected not to advertise the collateral. It explained that the motor home was very large and could not be left on its parking lot; thus, it was not available to show to just anyone who might be interested in a motor home. Instead, First Westside solicited sealed bids by word of mouth from other financial institutions, dealers, and certain of its customers.

According to the record, there existed no local Blue Bird motor home dealer; the nearest one was in Michigan. Conventions of Blue Bird motor home owners are held a few times a year, at which one can get an idea as to what is available. In addition, magazines exist in which Blue Bird and other motor homes are advertised. These magazines have national circulation, with a 2½-month timelag between the placing of an advertisement and its publication.

First Westside received three bids, and the collateral was purchased by a First Westside customer. The purchaser described himself as "more of a user than a dealer" of recreational vehicles, but deemed himself "very familiar" with the Blue Bird line of motor homes, having owned two in the past. He described such motor homes as top of the line, saying, "[T]hey are considered one of the premium of all motor homes, very expensive, but very durable and very safe. I think most people would love to have a Blue Bird." There is a limited supply of Blue Bird motor homes, as the Blue Bird company tries not to saturate the market. According to the purchaser, these motor homes are unique, and there are not a lot of ways to sell them, a fact he communicated to First Westside.

The purchaser claimed that before submitting his bid, he researched the situation. There were only about 10 Blue Bird dealers, and their names were not easily found unless one was familiar with them. The purchaser estimated that in 1983, a brandnew Blue Bird motor home would have cost $120,000 to $130,000, depending on equipment. Further, Blue Bird motor homes depreciate at the rate of about 8 percent per year for the first 7 or 8 years, with a greater amount the first year, like an automobile. Depreciation slows after that.

The purchaser's firm maintained its own fleet of vehicles, and after the purchaser got a cursory look at the motor home in question, he had it taken to the firm's shop in order for its chief mechanic to inspect it in more depth. After the inspection, the purchaser made a $57,500 bid. First Westside declined that bid, and the purchaser then bid $60,000. That bid was also refused initially, but was accepted several days later. This amount is what the purchaser thought the motor home was worth at the time.

Repairs were necessary to get the unit in proper operating condition. The coach was in "fairly dirty condition," and the carpet had to be removed. The drapes were cleaned and the refrigerator was replaced. All in all, there were 34 items of repair costing $22,000, including the replacement of the engine; ruptured plumbing; the rear, central, and bath furnaces; and the generator exhaust system.

Two and one-half years later, it took the purchaser 6 months to sell the unit through word of mouth for $58,000.

The primary thesis advanced by For-Med and Anderson is that the sale of the collateral was not commercially reasonable because its availability was not advertised sufficiently. It has been written that with regard to security transactions, the purpose of the Uniform Commercial Code is to protect both the creditor and the debtor; on the sale of collateral, it is the secured party's duty to the debtor to use all fair and reasonable means to obtain the best price under the circumstances, but the creditor need not use extraordinary means. See *Vic Hansen & Sons, Inc. v. Crowley*, 57 Wis. 2d 106, 203 N.W.2d 728 (1973).

In *Chrysler Dodge Country v. Curley*, 782 P.2d 536 (Utah App. 1989), the truck repossessed was in rough condition.

After it was repaired and cleaned, it was placed on the creditor's regular lot for sale. As it generated little interest, three private bids were solicited and the truck was sold. In rejecting the debtor's complaint that the bid solicitation and advertising had been inadequate, the Utah court, under a rule considering the question of commercial reasonableness to be a fact-sensitive question of law, concluded that while the notification of potential buyers is of great importance, public advertising is not mandatory. It thus ruled that advertising the truck on the lot for 2½ months and then soliciting bids and accepting the highest bid, which was higher than the book value of the vehicle, made the sale commercially reasonable.

As noted in *Security Federal S. & L. v. Prendergast*, 108 N.M. 572, 775 P.2d 1289 (1989), the determination of whether a particular sale was commercially reasonable turns on the particular facts of each case, and under particular circumstances, a sale may be commercially reasonable notwithstanding the lack of advertising. See, also, *Hall v. Owen Co. State Bank et al.*, 175 Ind. App. 150, 370 N.E.2d 918 (1977).

Among the other factors to be considered in determining whether a sale of collateral was commercially reasonable is the adequacy or insufficiency of the price at which it was sold. *First Nat. Bank of Omaha v. Kizzier*, 202 Neb. 369, 275 N.W.2d 600 (1979). Here, the collateral was resold 2½ years after the purchaser acquired it, for an amount far less than he had invested in its purchase and repair. In light of that circumstance and the admission of For-Med and Anderson that the price at which the collateral was sold was not "wholly unreasonable," it cannot be said that the district court's finding that the sale was commercially reasonable is clearly wrong.

Accordingly, the judgment of the district court is, as noted in the first paragraph hereof, affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. CLAY BENJAMIN STATMORE, RESPONDENT.

529 N.W.2d 71

Filed March 24, 1995. No. S-94-277.

Original action. Judgment of disbarment.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, and CONNOLLY, JJ.

PER CURIAM.

Clay Benjamin Statmore was admitted to the practice of law in Nebraska on September 12, 1979.

On March 22, 1994, formal charges involving three counts of lawyer misconduct were filed in this court against Statmore. On March 23, three additional charges of misconduct were filed against Statmore in this court.

On November 3, 1994, Statmore voluntarily surrendered his license to practice law in the State of Nebraska, the surrender to be effective January 31, 1995. In so doing, Statmore specifically admitted counts I, III, and VI of the formal charges.

Counts I and III charged Statmore with violating his oath of office as an attorney licensed to practice law in the State of Nebraska as provided by Neb. Rev. Stat. § 7-104 (Reissue 1991); violating Neb. Ct. R. of Discipline 3(B) (rev. 1992); and violating the Code of Professional Responsibility, Canon 1, DR 1-102(A)(1), which provides that a lawyer shall not violate a disciplinary rule, and DR 1-102(A)(5), which provides that a lawyer shall not engage in conduct that is prejudicial to the administration of justice.

In substance, count VI charged that Statmore had pled guilty to a single count of attempted issuance of a bad check, a misdemeanor, and that the records of the county attorney of Lancaster County revealed that between January 1, 1990, and November 25, 1993, Statmore had issued at least 21 checks that had been returned for insufficient funds on deposit. Count VI further charged that by the conduct alleged, Statmore violated his oath of office as an attorney licensed to practice law in the State of Nebraska as provided by § 7-104 and was in violation

of DR 1-102(A)(1), which provides that a lawyer shall not violate a disciplinary rule; DR 1-102(A)(3), which provides that a lawyer shall not engage in illegal conduct involving moral turpitude; and DR 1-102(A)(6), which provides that a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law. In regard to count VI, Statmore, in the voluntary surrender of his license to practice law, admitted that he was convicted of attempting to issue a bad check, a Class III misdemeanor.

Statmore waived his right to notice, appearance, and hearing prior to entry of this order.

We accept Statmore's surrender of his license to practice law in Nebraska and order him disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

FAHRNBRUCH, J., not participating.

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RUTH M. EGGERS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ARNOLD M. EGGERS, DECEASED, APPELLANT, V. DAVID RITTSCHER, PERSONAL REPRESENTATIVE OF THE ESTATE OF ISABELLE L. BARKDOLL, DECEASED, ET AL., APPELLEES.

529 N.W.2d 741

Filed March 31, 1995. No. S-92-951.

1. **Equity: Contracts: Specific Performance: Decedents' Estates: Appeal and Error.** An action to compel specific performance of an oral contract to devise real property by will is equitable in nature and is reviewed by an appellate court de novo on the record.
2. **Appeal and Error.** In a de novo review, an appellate court reaches a conclusion independent of the trial court; however, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
3. ____. When reviewing a question of law, an appellate court reaches a conclusion

independent of the lower court's ruling.

4. **Real Estate: Title: Vendor and Vendee.** Under an executory contract for the sale of real estate, equitable title to the premises is conveyed to the vendee.
5. **Decedents' Estates: Claims: Words and Phrases.** Neb. Rev. Stat. § 30-2209(4) (Reissue 1989) exempts from the definition of the term "claims" disputes regarding equitable title.
6. **Contracts: Decedents' Estates.** Nebraska courts regard with grave suspicion any claim of an oral contract to convey property at death.
7. **Contracts: Specific Performance: Decedents' Estates: Proof.** One trying to enforce an oral contract to convey property at death must prove by clear and convincing evidence (1) an oral contract the terms of which are clear, satisfactory, and unequivocal and (2) that the thing done constituting performance is such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and CONNOLLY and IRWIN, Judges, on appeal thereto from the District Court for Antelope County, RICHARD P. GARDEN, Judge. Judgment of Court of Appeals affirmed.

Jeffrey L. Stoehr, of Stoehr & Searson, and C.J. Gatz, of Jewell, Gatz, Collins, Fitzgerald & Delay, for appellant.

Douglas J. Stratton, of Gerrard, Stratton & Mapes, P.C.; Richard E. Mueting, of Mueting & Stoffer; Donn K. Bieber, of Otradovsky, Bieber & Westadt; and William G. Dittrick, Carol C. Knoepfler, and Cynthia A. Rismiller, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellees.

HASTINGS, C.J., WHITE, LANPHIER, and WRIGHT, JJ.

LANPHIER, J.

Ruth M. Eggers, appellant, sought an injunction and specific performance of an oral contract in the district court for Antelope County. Eggers alleged an oral contract whereby Roy and Isabelle Barkdoll promised to convey a parcel of land to Eggers upon their death. After the Barkdolls died, Eggers initiated this action naming as defendants the personal representative of the estate of Isabelle Barkdoll and certain charitable organizations named in Barkdoll's will as residuary beneficiaries. Eggers sought (1) to enjoin the personal representative from leasing or selling the property, (2) to enjoin the residuary beneficiaries from taking possession of the

property, and (3) to have the defendants deed the parcel to her and have the title quieted in her name. Following a bench trial, the district court denied Eggers the relief she sought. Eggers then appealed to the Nebraska Court of Appeals, which affirmed the judgment of the district court on other grounds. The Court of Appeals affirmed the lower court's judgment for the reason that Eggers' action was a "claim" under the probate code which had not been filed and was now time barred by Neb. Rev. Stat. § 30-2485 (Reissue 1989). *Eggers v. Rittscher*, 94 NCA No. 20, case No. A-92-951 (not designated for permanent publication). Eggers' motion for rehearing was denied, and she petitioned for further review. Contrary to the holding of the Court of Appeals, Eggers' action did not constitute a claim under the probate code and was consequently not time barred. However, because Eggers failed to adduce clear and convincing evidence of the underlying oral contract, the judgment of the Court of Appeals is affirmed.

## BACKGROUND

Eggers alleged an oral contract made in 1952 which provided that in exchange for personal services rendered to Roy and Isabelle Barkdoll during their lifetime, the Barkdolls would transfer ownership of 160 acres of farm ground to the Eggerses at death. Roy Barkdoll died before Isabelle, and the land passed to Isabelle by right of survivorship. Upon Isabelle Barkdoll's death, the land, barring the success of Eggers' claim/cause of action, would transfer by the residuary clause of her will. The residuary beneficiaries in Barkdoll's will are the Masonic Children's Home, the Masonic Home for the Elderly, and Tilden Community Hospital.

Evidence of the terms of the oral contract was provided by the testimony of Eggers and her son. Other independent parties testified about conversations with the Barkdolls in which these parties were led to believe that after the Barkdolls' deaths, title to the land would pass to the Eggerses.

Also in support of her claim/cause of action, Eggers adduced evidence that she and her husband constructed terraces on the property, seeded two sections of the property, built two earthen dams on the property, removed some fences and maintained

others, and kept all proceeds from the government idle acres program in which they enrolled the property. The Eggerses also branded, dehorned, castrated, weaned, and fattened the Barkdolls' calves on the property along with their own.

There was evidence that the Eggerses paid the Barkdolls, on the average, $1,200 to $1,500 each year after the Barkdolls quit raising cattle on the property. The Barkdolls claimed this money as farm or rental income on their tax returns.

## ASSIGNMENT OF ERROR

As summarized, Eggers claims that the Court of Appeals erred in ruling that her cause of action seeking specific performance of an oral contract to convey title to real estate was in fact a "claim" against a decedent's estate and barred by the provisions of § 30-2485.

## STANDARD OF REVIEW

An action to compel specific performance of an oral contract to devise real property by will is equitable in nature and is reviewed by an appellate court de novo on the record. *Matthews v. Matthews*, 215 Neb. 744, 341 N.W.2d 584 (1983); *In re Estate of Layton*, 212 Neb. 518, 323 N.W.2d 817 (1982). In a de novo review, an appellate court reaches a conclusion independent of the trial court; however, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Blue Tee Corp. v. CDI Contractors, Inc., ante* p. 397, 529 N.W.2d 16 (1995).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Dolan v. Svitak, ante* p. 410, 527 N.W.2d 621 (1995).

## "NONCLAIM" STATUTE

The Court of Appeals held that Eggers failed to show that title was in dispute and that therefore, the action was a "claim" against Isabelle Barkdoll's estate as that term is defined in the probate code at Neb. Rev. Stat. § 30-2209(4) (Reissue 1989). The Court of Appeals also determined that as a claim based on a contract, Eggers had 4 months from the date she received

notice that the will was being offered for probate to file her claim pursuant to § 30-2485. The Court of Appeals dismissed the action as time barred, having determined that Eggers did not file a claim within 4 months of the date she received notice that the will was being offered for probate.

Eggers contends that the Court of Appeals initially erred in determining that her action was a claim. Eggers argues that contrary to the Court of Appeals' holding, her action was not a claim because it involved a dispute over title. Underlying Eggers' assertion is the notion that if title to property alleged to be a decedent's is in dispute, then such action raising the dispute is not a claim. The probate code's definition of the term "claims" supports this contention. Section 30-2209(4) of the probate code defines the term "claims" as follows:

> Claims, in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. *The term does not include* estate or inheritance taxes, *demands or disputes regarding title of a decedent* or protected person to specific assets alleged to be included in the estate.

(Emphasis supplied.)

With respect to this issue, the Court of Appeals stated: "Ruth [Eggers] does not claim that Isabelle did not have title at the time of her death. Rather, the dispute before the court, and as pled, involves whether the Barkdolls breached an oral agreement to transfer this land at Isabelle's death, by will, to the Eggers." *Eggers v. Rittscher*, 94 NCA No. 20 at 5, case No. A-92-951 (not designated for permanent publication).

These statements of the Court of Appeals are not correct. Eggers, in bringing the action for specific performance, has implicitly admitted that Isabelle Barkdoll had legal title at the time of her death. However, by alleging an executory oral contract, Eggers has raised a dispute as to the decedent's title. Under an executory contract for the sale of real estate, equitable title to the premises is conveyed to the vendee. *Kleven v.*

*Brunner*, 229 Neb. 883, 429 N.W.2d 384 (1988). By asserting that an oral contract to convey upon death existed, Eggers has effectively alleged that by the time of Isabelle Barkdoll's death, Eggers had equitable title to the property. One who holds equitable title may bring an action to quiet title. *Sofio v. Glissman*, 156 Neb. 610, 57 N.W.2d 176 (1953). Since equitable title is sufficient for one to bring a quiet title action, it is obviously a sufficient basis to raise a dispute as to title for the purposes of § 30-2209(4). Additionally, in defining the term "claims," § 30-2209(4) does not distinguish between legal and equitable title. We will not read such a distinction into the statute. Absent a clear legislative expression to the contrary, we read § 30-2209(4) to exempt from the definition of "claims" disputes regarding equitable title. The determination of the Court of Appeals that Eggers did not dispute title was therefore incorrect. This error led to the erroneous holding that Eggers' action was a claim. Having determined that Eggers has raised a dispute as to the decedent's title, we hold that Eggers' action is not a "claim" as that term is defined by § 30-2209(4). Because Eggers' action is not a claim, it is not barred by the nonclaim statute. Furthermore, since this action is not a claim, we hold that the district court's exercise of jurisdiction in this equitable action was proper.

## EXISTENCE OF ORAL CONTRACT

Having concluded that the Court of Appeals erroneously determined that Eggers' action was time barred, we must now consider the issue raised by Eggers in her initial appeal: whether the district court properly determined that Eggers failed to prove her claim.

We regard with grave suspicion any claim of an oral contract to convey property at death. *Matthews v. Matthews*, 215 Neb. 744, 341 N.W.2d 584 (1983); *In re Estate of Layton*, 212 Neb. 518, 323 N.W.2d 817 (1982). Such a contract is normally void on its face as violative of the statute of frauds. *Id.* For those reasons, we require one trying to enforce such a contract to prove by clear and convincing evidence the existence of the contract and its terms and that because of partial performance, the agreement is outside the effect of the statute of frauds.

Specifically, a plaintiff must prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal and (2) that the thing done constituting performance is such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract. *Id.*

With regard to the proof of the contract and its terms, both Ruth Eggers and her son, Duane Eggers, related the details of a conversation which allegedly took place in the fall of 1952 in the Eggers home. Their respective versions of this conversation were consistent. After Arnold Eggers mentioned his intent to buy the land in question, Roy Barkdoll responded that he would like to buy the land. Both Ruth and Duane Eggers testified that during that conversation, Arnold Eggers and Roy Barkdoll agreed that if Arnold would maintain the land and allow Roy to put some cattle on the land, then after the Barkdolls died, they would transfer it to the Eggerses.

A neighbor of the Barkdolls, Pluma Kee, testified that the Barkdolls told her that Arnold Eggers was caring for the Barkdolls' cattle and that they would one day transfer the land to the Eggerses. Further corroboration was provided by Neil Werkmeister, who rented the land from the Eggerses, and Dean Gaylen, a neighbor of the Eggerses.

In light of this uncontroverted evidence, we find that as Ruth Eggers has alleged, the Barkdolls and the Eggerses did enter into an oral contract to convey the property in question pursuant to the terms alleged. However, with regard to the Eggerses' performance of those terms, we cannot conclude that the performance was referable solely to the contract in question.

There was abundant evidence of maintenance of the land and of the Barkdolls' cattle. The Eggerses seeded many areas to control erosion. The Eggerses terraced part of the land. A fence which divided property owned by the Eggerses and the land in question was removed. Other fences were maintained by the Eggerses. The Eggerses erected two dams on the property to prevent erosion and hold water for cattle. Finally, uncontroverted evidence established that the Eggerses cared for the Barkdolls' cattle. However, there was evidence that the Eggerses made rent payments to the Barkdolls and that the Barkdolls treated the payments as rent. Notwithstanding the

quantity of the evidence, all the above activities could be referable to a rental agreement between the two parties. Eggers has failed to prove by clear and convincing evidence that the maintenance activities undertaken were referable solely to the oral contract to convey and not referable to another contract.

## CONCLUSION

Although the Court of Appeals erred in concluding that this action was a claim and therefore time barred, it did properly affirm the judgment of the district court. As the district court held, Eggers failed to prove the performance undertaken was referable solely to the oral contract to convey. We therefore affirm the judgment of the Court of Appeals affirming the judgment of the district court.

AFFIRMED.

FAHRNBRUCH, J., participating on briefs.
CAPORALE and CONNOLLY, JJ., not participating.

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DOUGLAS J. LEWIS, APPELLANT, V. BOARD OF COMMISSIONERS OF LOUP COUNTY, NEBRASKA, AND TOM MCNEIL ET AL., CONSTITUTING THE MEMBERS OF SAID BOARD, APPELLEES.
529 N.W.2d 745

Filed March 31, 1995. No. S-93-377.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate 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 proper 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.

Appeal from the District Court for Loup County: RONALD D. OLBERDING, Judge. Reversed and remanded.

John A. Wolf and, on brief, Donald R. Janousek for appellant.

Gregory G. Jensen for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

FAHRNBRUCH, J.

Douglas J. Lewis filed a writ of mandamus in the district court for Loup County to compel the board of commissioners of Loup County and its members (Board) to provide public access to real estate Lewis owns and claims is isolated. Lewis appeals the district court's decision granting summary judgment in favor of the Board.

We reverse the action of the district court in entering summary judgment in favor of the Board.

## STANDARD OF REVIEW

In reviewing a summary judgment, an appellate 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. *Huntwork v. Voss, ante* p. 184, 525 N.W.2d 632 (1995); *New Light Co. v. Wells Fargo Alarm Servs., ante* p. 57, 525 N.W.2d 25 (1994). Summary judgment is proper 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. *Huntwork, supra*; *New Light Co., supra*.

## FACTS

When we view the evidence in the light most favorable to Lewis and give Lewis the benefit of all reasonable inferences deducible from the evidence, the undisputed facts of the case are as follows:

In September 1948, Lewis and his wife purchased real estate in the northeast quarter of Section 21, Township 22 North, Range 17 West of the 6th P.M., in Loup County, Nebraska, together with other real estate.

In June 1986, the couple subdivided some of their land into 15 numbered lots and an outlot. The Lewises filed for record a plat and dedication of the lots in a subdivision called Beverly Hills.

At all times relevant herein, a diagonal county road traversed the northeast corner of the northeast quarter of Section 21. The legal description of the plat and dedication of the Beverly Hills Subdivision reveals that the northeast corner of the subdivision abuts the county road right-of-way line for a distance of 314.4 feet. The plat and dedication further reveals that a 60-foot stretch of the 314.4 feet abutting the county road right-of-way provides access to Beverly Hills via the subdivision's Sunset Drive.

Lewis and his wife sold and conveyed various lots in the subdivision to others, but retained ownership of several lots. Some of the lots still owned by Lewis and his wife abut the adjoining land which he claims is isolated from public access.

On August 12, 1992, Lewis filed a petition and affidavit with the Board claiming that his land was isolated and requesting that the Board provide public access to the property. After a hearing on September 9, the Board apparently denied this request.

On November 16, 1992, Lewis filed a petition for a writ of mandamus in the district court. In the prayer of his petition, Lewis asked the district court to order the Board to lay out a public road and proceed to provide public access to the land he claimed was isolated. After substantial discovery, the Board moved for a summary judgment which was denied by the district court. However, the district court granted a supplemental motion for summary judgment filed by the Board.

In entering summary judgment in favor of the Board, the district court found that (1) article 8 of the subdivision's declaration of covenants expressly provided Lewis the right to use Sunset Drive to access the property he claimed was isolated from an existing public road; (2) the outlot (Sunset Drive) was 60 feet wide and could be used by Lewis to access an existing public road; (3) Lewis failed to satisfy the requirements of Neb. Rev. Stat. § 39-1713(2) and (3) (Reissue 1978); and (4) no genuine issue concerning any material fact existed. Lewis appeals this decision.

Pursuant to our authority to regulate the caseloads of the appellate courts, this appeal was removed from the Nebraska Court of Appeals' docket to this court's docket.

## ASSIGNMENTS OF ERROR

Summarized and restated, Lewis claims that the district court erred in: (1) finding that article 8 of the declaration provides access to his property; (2) granting summary judgment based upon the terms of a written contract, the terms of which are ambiguous; (3) finding that Lewis failed to satisfy the requirements of § 39-1713(2) and (3); and (4) granting summary judgment in favor of the Board.

## ANALYSIS

We turn immediately to Lewis' fourth assignment of error, as it is dispositive of the appeal. Lewis claims that the district court erred in granting summary judgment in favor of the Board. We must determine if there exists any material issue of fact.

Lewis' right to obtain access in the form of a public road for his allegedly isolated real estate is governed by Neb. Rev. Stat. §§ 39-1713, 39-1714, and 39-1716 (Reissue 1993), the law existing when Lewis and his wife created and recorded the Beverly Hills Subdivision.

Section 39-1713 provides that

> [w]hen any person shall present to the county board an affidavit satisfying it (1) that he or she is the owner of the real estate described therein located within the county, (2) that such real estate is shut out from all public access, other than a waterway, by being surrounded on all sides by real estate belonging to other persons, or by such real estate and by water, (3) that he or she is unable to purchase from any of such persons the right-of-way over or through the same to a public road or that it cannot be purchased except at an exorbitant price, stating the lowest price for which the same can be purchased by him or her, and (4) asking that a public access be provided in accordance with section 39-1716, the county board shall appoint a time and place for hearing the matter . . . .

Section 39-1714 provides that whenever the county board

finds that such conditions set forth in § 39-1713 are present and, instead of being entirely shut off from all public roads, that the owner has access to any public road only by an established private road less than 2 rods in width, the county board is required, upon the filing of an affidavit or affidavit and petition, to hold a hearing on the matter.

Section 39-1716 requires the board to proceed to provide public access when it finds

> (1) that the conditions set forth in section 39-1713 or 39-1714 exist, (2) that the isolated land was not isolated at the time it was purchased by the owner, (3) that the isolation of the land was not caused by the owner or by any other person with the knowledge and consent of the owner, and (4) that access is necessary for existing utilization of the isolated land . . . .

Section 39-1716 also provides that the county board may lay out a public road of not more than 4 nor less than 2 rods in width to the isolated real estate, if it finds that the amount of use and the number of persons served warrants such action.

Lewis stated in his petition and affidavit and his responses to the Board's request for admissions and interrogatories that he does not have public access to his real estate and that his real estate is surrounded on all sides by real estate belonging to other persons. Lewis also denied that his property adjoins a county road for a distance of 314.4 feet. Lewis further stated in his affidavit in opposition of the Board's motion for summary judgment that his real estate is isolated and in the alternative that the only access to the county road available to him is by an established private road less than 2 rods in width.

The Board submitted an affidavit of Richard C. Johnson, a certified engineer licensed in the State of Nebraska, in support of its supplemental motion for summary judgment. Johnson stated that based on his inspection of the property and research of the public records of Loup County, there is public access to Lewis' real estate. Johnson stated that a county road abuts 314 feet of Lewis' property and that he observed a driveway from the county road into the premises.

The affidavits of Lewis and Johnson create a genuine issue as to whether Lewis' real estate is isolated. Accordingly, the Board

is not entitled to a judgment as a matter of law. This being dispositive of the appeal, Lewis' remaining assignments of error will not be discussed.

## CONCLUSION

For the reasons stated herein, we reverse the district court's order of summary judgment and remand the cause for further proceedings.

REVERSED AND REMANDED.

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MICHAEL D. BARKS, APPELLEE AND CROSS-APPELLANT, V. COSGRIFF COMPANY, A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE.

529 N.W.2d 749

Filed March 31, 1995. No. S-93-397.

1. **Verdicts: Appeal and Error.** A jury verdict will not be disturbed on appeal as excessive unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded the evidence or rules of law.
2. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
3. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
4. **Trial: Evidence: Waiver.** If, when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction, or fails to object or to insist upon ruling on the objection to introduction of such evidence, and otherwise fails to raise the question as to its admissibility, that party is considered to have waived whatever objection he or she may have had thereto, and the evidence is in the record for consideration the same as other evidence.
5. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
6. **Termination of Employment: Employment Contracts: Good Cause: Proof.** In an action for wrongful termination, the employee must initially prove the existence of the employment contract, its terms and his or her compliance with

those terms until termination, the employer's breach, and damages. After the employee has done so, the burden then shifts to the employer to come forward with evidence that good cause existed for discharging the employee. If the employer produces sufficient evidence, the employee may rebut, and if in controversy, the issue goes to the trier of fact; however, the ultimate burden of proving wrongful termination remains with the employee.

7. **Jury Instructions: Proof: Appeal and Error.** A jury instruction that misstates the burden of proof has a tendency to mislead the jury and is erroneous.
8. **Motions for New Trial: Appeal and Error.** A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.
9. **Pleadings: Motions to Strike.** The proper manner in which to challenge the appropriateness of a counterclaim is by a motion to strike rather than by a demurrer.
10. **Demurrer: Final Orders: Appeal and Error.** The sustaining of a general demurrer, not followed by a judgment of dismissal terminating the litigation, does not constitute a reviewable final order.
11. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
12. ____: ____: ____. In the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Appeal dismissed in part, and in part reversed and remanded for a new trial.

Michael L. Lazer and Lisa A. Sarver, of Dwyer, Pohren, Wood, Heavey, Grimm, Goodall & Lazer, for appellant.

Robert R. Otte, of Morrow, Poppe, Otte, Watermeier & Phillips, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

CONNOLLY, J.

Michael D. Barks sued Cosgriff Company (Cosgriff) for wrongful termination. Cosgriff filed a counterclaim for breach of contract. Prior to trial, the Douglas County District Court sustained Barks' demurrer to Cosgriff's counterclaim. A jury rendered a verdict in Barks' favor on the wrongful termination claim. Cosgriff appeals the jury's verdict and the district court's order sustaining Barks' demurrer. On cross-appeal, Barks

requests an award of attorney fees. We reverse the jury's verdict on Barks' wrongful termination claim because the district court improperly instructed the jury with regard to that claim. We dismiss for lack of jurisdiction that part of Cosgriff's appeal which is related to the district court's decision to sustain Barks' demurrer to Cosgriff's counterclaim.

## I. FACTUAL BACKGROUND

Cosgriff is a Nebraska corporation which specializes in organizing and supervising charitable fundraising campaigns throughout the country. Pursuant to an oral agreement, Cosgriff hired Barks on September 5, 1990. Barks received a letter dated September 6 from Cosgriff setting forth certain terms and conditions of his employment. The letter read:

> Dear Mike:
>
> We are pleased to welcome you as an Associate of the Cosgriff Company.
>
> The beginning date of your employment will be September 5, 1990.
>
> We ask that you provide the firm with your exclusive full-time services, adhere to company policies and promptly report to and give your best efforts to duties assigned by the president.
>
> Your beginning salary will be at the guaranteed rate of $40,000 per year. Our schedule of payment is base pay, plus assignment pay. The base pay will be $200 per week, plus $670 per week assignment pay — for a total of $870 per week when you are on assignment. We project assignment pay for 45 weeks during the year. Again, you are guaranteed $40,000 for the first year.
>
> . . . .
>
> We are indeed pleased that you and your family have joined our firm, and fully expect this will be a rewarding and enjoyable career for you and the family.
>
> Cordially yours,
> /s/ Bob
> Robert P. Cosgriff
> President

In his deposition and at trial during cross-examination, Barks

testified that the above-referenced letter accurately and completely set forth the terms of his employment agreement with Cosgriff. However, on redirect examination conducted the day after his cross-examination, Barks recanted that testimony and stated that Robert Cosgriff, the president of Cosgriff, told Barks that his employment contract would be for a 1-year term.

After approximately a week of training at Cosgriff's Omaha office, Barks was assigned work as an onsite resident staff director for Cosgriff in Norfolk, where Cosgriff was organizing a two-phase capital fundraising campaign for the TEACH/Sacred Heart Church project. Though Barks had approximately 7 years' experience in fundraising through the United Way and various educational institutions, he had never conducted the type of capital fundraising campaign required by the TEACH project.

Upon completion of phase I of the TEACH campaign, Barks returned to the main office in Omaha. The record reflects that members of the TEACH campaign staff had been dissatisfied with Barks' performance. As indicated by the record, the problems with Barks' performance seemed to stem from two sources: Barks' own inability to handle the TEACH campaign assignment and the inadequate training provided by Cosgriff.

After the disappointing performance in Norfolk, Robert Cosgriff informed Barks that he was being considered for a less challenging feasibility study taking place in Minnesota. Robert Cosgriff testified that Barks seemed reluctant to take the Minnesota assignment because he did not want to be that far away from his family. Barks testified that he showed no such hesitation and that he began immediate preparation for the Minnesota assignment. During this time period, the TEACH campaign in Norfolk canceled the remainder of its contract with Cosgriff because of its dissatisfaction with the success of phase I of the campaign.

On approximately November 23, 1990, Cosgriff terminated Barks' employment. Barks filed the instant lawsuit on January 10, 1991, alleging wrongful termination. Cosgriff counterclaimed, alleging that Barks had breached his employment contract, and requested as damages the wages and expenses paid to Barks, as well as lost fees stemming from the

cancellation of the balance of the TEACH campaign contract. The district court sustained Barks' demurrer to Cosgriff's counterclaim. A jury returned a verdict in Barks' favor on the wrongful termination claim and awarded Barks $20,000 in damages. This appeal followed.

## II. ASSIGNMENTS OF ERROR

Cosgriff contends that the trial court erred in (1) admitting Barks' testimony of alleged oral representations regarding his employment contract, (2) failing to grant Cosgriff's motions for directed verdict, (3) improperly instructing the jury regarding the parties' respective burdens of proof, (4) failing to grant Cosgriff's motion for judgment notwithstanding the verdict, (5) failing to grant Cosgriff's motion for new trial, (6) sustaining Barks' demurrer to Cosgriff's counterclaim, (7) dismissing the counterclaim without affording Cosgriff an opportunity to amend its pleadings, and (8) granting Barks' motion in limine to exclude evidence regarding Cosgriff's lost fees and wages and expenses paid to Barks.

On cross-appeal, Barks alleges that the trial court erred in not awarding Barks attorney fees.

## III. STANDARD OF REVIEW

A jury verdict will not be disturbed on appeal as excessive unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded the evidence or rules of law. *McDonald v. Miller*, 246 Neb. 144, 518 N.W.2d 80 (1994); *Vacanti v. Master Electronics Corp.*, 245 Neb. 586, 514 N.W.2d 319 (1994); *Sanwick v. Jenson*, 244 Neb. 607, 508 N.W.2d 267 (1993).

In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994); *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994); *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994).

## IV. ANALYSIS

### 1. BARKS' WRONGFUL TERMINATION ACTION

#### (a) Evidence of Oral Contract

Cosgriff argues that the trial court erred when it allowed Barks to testify regarding alleged oral statements made by Robert Cosgriff which indicated that Barks' employment contract with Cosgriff was for the definite term of 1 year. Cosgriff contends that the alleged oral representations should have been excluded pursuant to the parol evidence rule. Furthermore, Cosgriff argues that since Barks testified both in his deposition and on cross-examination at trial that the September 6 letter from Robert Cosgriff completely and accurately reflected the entire agreement between the parties, Barks should not have been allowed to change his testimony on redirect examination the day after his cross-examination.

We refuse to reach the merits of Cosgriff's first assignment of error. Cosgriff failed to object when Barks testified that Robert Cosgriff told Barks that his contract was for 1 year. Failure to make a timely objection waives the right to assert prejudicial error on appeal. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). If, when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction, or fails to object or to insist upon ruling on the objection to introduction of such evidence, and otherwise fails to raise the question as to its admissibility, that party is considered to have waived whatever objection he or she may have had thereto, and the evidence is in the record for consideration the same as other evidence. *Lincoln Branch, Inc. v. City of Lincoln*, 245 Neb. 272, 512 N.W.2d 379 (1994); *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994). Since Cosgriff failed to object to Barks' testimony regarding the alleged representations made by Robert Cosgriff, the testimony was properly before the jury for consideration.

#### (b) Jury Instruction

Cosgriff contends that the trial court improperly instructed the jury regarding Barks' cause of action for wrongful termination. Specifically, Cosgriff argues that the trial court's

jury instructions failed to inform the jury that if they found Barks to be an at-will employee, Cosgriff did not need a justification to terminate him. Cosgriff also alleges that the challenged jury instruction improperly shifted the burden of proof onto Cosgriff if Barks proved his prima facie case for wrongful termination.

Cosgriff failed to object to any of the jury instructions prior to their submission to the jury. Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994); *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993); *Paro v. Farm & Ranch Fertilizer*, 243 Neb. 390, 499 N.W.2d 535 (1993). However, we find that the trial court's decision to administer the jury instruction in question constituted plain error. Therefore, we will reach the merits of this assignment of error.

In *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 500 N.W.2d 529 (1993), this court set forth the rules regarding burden of proof in wrongful termination and breach of employment contract cases. In *Schuessler*, we stated that the employee must initially prove the existence of the employment contract, its terms and his or her compliance with those terms until termination, the employer's breach, and damages. After the employee has done so, the burden then shifts to the employer to come forward with evidence that good cause existed for discharging the employee. If the employer produces sufficient evidence, the employee may rebut, and if in controversy, the issue goes to the trier of fact; however, the ultimate burden of proving wrongful termination remains with the employee.

The *Schuessler* decision clarified, but did not overrule, the opinion in *Stiles v. Skylark Meats, Inc.*, 231 Neb. 863, 865, 438 N.W.2d 494, 496 (1989), wherein this court stated:

> In an action for breach of a contract of employment, the burden of proving the existence of a contract and all the facts essential to the cause of action is upon the person who asserts the contract. . . . The burden then shift[s] to [the employer] to prove good cause indeed existed for [the

> employee's] discharge. . . . [A]n employee may attack an employer's offered explanation as pretextual.

The *Schuessler* decision was released 2 months after the trial in the case at bar. Thus, the trial court in the instant case had only the *Stiles* decision to look to as authority for drafting the challenged jury instruction. The *Schuessler* court was concerned that the language used in *Stiles* might be perceived as improvidently assigning too great a burden to both parties in an employment contract action. The trial court in the instant case appears to have fallen victim to that misperception. Jury instruction No. 2, as administered by the trial court, misstated the law.

*(i) Elements of Barks' Claim*

First, in part I.B of the instruction, the trial court omitted one of the elements of the employee's prima facie claim. The trial court instructed the jury that before Barks could succeed on his wrongful termination claim, Barks had to prove (1) that Barks and Cosgriff entered into a contract of employment for a term of 1 year, (2) the terms of the contract, (3) that Cosgriff wrongfully breached the contract by terminating Barks' employment, (4) that Cosgriff's breach proximately caused Barks' damages, and (5) the nature and extent of the damages. *Schuessler*, however, dictates that an additional element must be satisfied: Barks must prove that he complied with the terms of his contract until his discharge.

*(ii) Effect of Finding Barks Was an At-Will Employee*

Part II.A of jury instruction No. 2 also requires clarification. Part II.A read:

> Defendant claims that the contract was not for a definite term and that the Defendant employed the Plaintiff at-will and could terminate the Plaintiff without liability.
>
> The Defendant claims that if you find that the Defendant employed the Plaintiff for a specific term the Plaintiff wholly failed to perform his services for Cosgriff Company in a professional manner . . . and was terminated for good cause.
>
> The Defendant also states that the Defendant performed all of its obligations toward Plaintiff as an employer, but

> that the Plaintiff fully failed and refused to perform his employment obligations in a professional, prompt and satisfactory manner and the Plaintiff is therefore estopped from making claim on the employment contract.

The problem with the quoted language from the trial court's jury instruction is that the trial court failed to advise the jury that if they found Barks to be an at-will employee, Barks' wrongful termination claim must fail because Cosgriff would not have needed a reason to terminate Barks. In essence, the trial court's jury instructions ignored the effect of the jury's potential determination that Barks was an at-will employee. The jury could not be expected to know the legal ramifications of a determination that Barks was an at-will employee without some legal instruction from the trial court on that point. Thus, the jury instructions failed to completely and accurately state the law regarding at-will employment..

*(iii) Burden of Proof*

The final defect in the trial court's jury instructions is found in part II.B of jury instruction No. 2, which read: "In order for the Defendant to justify the termination of the Plaintiff, the Defendant must prove by the greater weight of the evidence that the Plaintiff was terminated for good cause."

Part II.B of jury instruction No. 2 improperly shifted the burden of proof to Cosgriff. Read in the context of the entire jury instruction, part II.B told the jury that if Barks established a prima facie case for breach of employment contract, then the burden of proof shifted to Cosgriff to prove good cause for termination by a preponderance of the evidence. The instruction misstated the law. Under *Schuessler*, the burden of proof does not shift to the employer. Rather, the burden of *production* is shifted to the employer. In other words, the employer need merely produce credible evidence of good cause for termination after the employee establishes his or her prima facie case. The burden of proof remains with the plaintiff employee throughout. Once the employer meets its burden of production, the employee may offer evidence to rebut the employer's factual contentions. If, at the close of all the evidence, there is a factual dispute, the question goes to the jury. Thus, the plaintiff always has the

burden of proof as to all the elements in a wrongful termination action. The employer does not have the burden of proof as to any factual issue.

Consistent with the foregoing analysis, we hold that the trial court in the instant case improperly instructed the jury regarding the burdens of proof for the respective parties. A jury instruction that misstates the burden of proof has a tendency to mislead the jury and is erroneous. See *Kaspar v. Schack*, 195 Neb. 215, 237 N.W.2d 414 (1976). Since jury instruction No. 2 misstated the law to the prejudice of Cosgriff, we must reverse the decision and remand the cause to the district court for a new trial.

*(iv) Effect of Erroneous Jury Instruction*

Cosgriff contends that the trial court improperly denied its motion for new trial. A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993). We have determined that the trial court improperly instructed the jury regarding Barks' wrongful termination claim, and that error prejudiced Cosgriff. Thus, the trial court erred in not granting Cosgriff's motion for new trial.

(c) Other Assignments of Error

We have reviewed Cosgriff's other assignments of error regarding the district court's decision to overrule Cosgriff's motions for directed verdict and for judgment notwithstanding the verdict and find no merit in those assignments of error. Additionally, our decision reversing the jury's verdict and remanding the cause for new trial makes it unnecessary for us to address Barks' cross-appeal for attorney fees and the trial court's decision with regard to Barks' motion in limine.

2. Cosgriff's Counterclaim

In its answer to Barks' petition in the instant case, Cosgriff included a counterclaim wherein Cosgriff alleged that Barks breached his employment contract by failing to provide his best professional efforts to the duties assigned to him, failing to adhere to company policies, failing to attend scheduled meetings, poorly evaluating prospects, misrepresenting his work

experience, causing cancellation of phase II of the TEACH campaign, refusing to work during his last week with the company, and refusing to take a subsequent assignment after completion of phase I of the TEACH campaign. Cosgriff sought as damages the wages and expenses it paid to Barks, as well as the fees lost when the TEACH campaign canceled the second phase of its contract with Cosgriff.

Barks filed an answer to Cosgriff's counterclaim. Subsequently, on the morning of the trial, Barks filed a demurrer alleging that Cosgriff's counterclaim failed to state facts sufficient to support a cause of action. The trial court sustained Barks' demurrer to Cosgriff's counterclaim. However, the only evidence in the record regarding the trial court's decision to sustain the demurrer is a brief oral exchange which appears in the bill of exceptions just prior to the trial. The record does not contain any written affirmation of the trial court's decision regarding the demurrer. Furthermore, nothing in the record, written or oral, indicates that the trial court ever dismissed Cosgriff's counterclaim after sustaining the demurrer.

As a preliminary matter, we note that Barks improperly attacked Cosgriff's counterclaim by filing a demurrer. It is established law in Nebraska that the proper manner in which to challenge the appropriateness of a counterclaim is by a motion to strike rather than by a demurrer. *The Tilden Bank v. Retzlaff*, 188 Neb. 834, 199 N.W.2d 734 (1972); *Weller v. Putnam*, 184 Neb. 692, 171 N.W.2d 767 (1969). Standing alone, a counterclaim might well state facts sufficient to constitute a cause of action but at the same time not be proper as a counterclaim under Neb. Rev. Stat. §§ 25-812 and 25-813 (Reissue 1989). *Weller v. Putnam, supra*. However, since the parties and the district court treated Barks' demurrer as a demurrer rather than as a motion to strike, we will also treat it a demurrer for the purposes of this appeal.

As we noted above, the district court failed to enter an order of dismissal after sustaining Barks' demurrer to Cosgriff's counterclaim. The sustaining of a general demurrer, not followed by a judgment of dismissal terminating the litigation, does not constitute a reviewable final order. *Cornhusker Agrl. Assn. v. Equitable Gen. Ins. Co.*, 223 Neb. 618, 392 N.W.2d

366 (1986); *Koll v. Stanton-Pilger Drainage Dist.*, 207 Neb. 425, 299 N.W.2d 435 (1980). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994). In the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction. *Id.* Since the district court in the case at bar failed to enter an order dismissing Cosgriff's counterclaim, this court is without jurisdiction to hear Cosgriff's arguments with regard to Barks' demurrer. Thus, that part of Cosgriff's appeal which is related to Barks' demurrer is dismissed for lack of jurisdiction.

## V. CONCLUSION

The jury's verdict on the wrongful discharge claim is reversed, and the cause is remanded to the district court for a new trial because the district court erroneously instructed the jury as to the elements of Barks' wrongful discharge claim, the effect of a finding that Barks was an at-will employee, and the parties' respective burdens of proof. We dismiss for lack of jurisdiction that part of Cosgriff's appeal which is related to the district court's decision to sustain Barks' demurrer to Cosgriff's counterclaim.

APPEAL DISMISSED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

WHITE, C.J., dissenting.

I agree with the majority's discussion of *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 500 N.W.2d 529 (1993). However, in this circumstance I believe *Schuessler* should not be applied because, in my judgment, the errors complained of were in fact caused by the defendant's counsel in his pleading in which he characterized the asserted matters as affirmative defenses and then failed to object to the instructions. He created error of which he now seeks to take advantage. This should not be permitted.

LANPHIER, J., dissenting.

The majority opinion holds that the jury instructions failed to

completely and accurately state the law regarding a wrongful termination claim. I respectfully dissent. The jury instructions fully advised the jury regarding the law. The instructions also correctly placed the burden of proof on the defendant for what the defendant denominated in his pleadings as affirmative defenses. The majority opinion would put this burden on the plaintiff.

## ELEMENTS OF A WRONGFUL TERMINATION ACTION

I depart from the majority's conclusion in section IV(1)(b)(i) that the jury instructions omitted one of the elements of the plaintiff's cause of action for a breach of contract of employment as set out in *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 500 N.W.2d 529 (1993). In *Schuessler*, we attempted to clarify an earlier opinion, *Stiles v. Skylark Meats, Inc.*, 231 Neb. 863, 438 N.W.2d 494 (1989). In *Schuessler*, we focused on the burden of proof placed on both parties, and we restated the elements of a cause of action for a breach of contract of employment claim. We said, "The employee must initially prove the existence of the contract, its terms and his compliance with them until his discharge, the employer's breach, and damages." 243 Neb. at 436, 500 N.W.2d at 538.

Since an employer may lawfully discharge an at-will employee without cause, a plaintiff in an action for breach of a contract of employment has the burden of proving the existence of a contract and proving its terms. *Smith v. City of Omaha*, 220 Neb. 217, 369 N.W.2d 67 (1985). In *Stiles, supra*, we said that a plaintiff was required to prove the existence of a contract and that the employer breached that contract by firing him or her for other than good cause. See, also, *Overmier v. Parks*, 242 Neb. 458, 495 N.W.2d 620 (1993).

*Schuessler* apparently adds an element to the plaintiff's burden of proof by requiring the plaintiff to prove that he or she complied with the terms of the employment contract as part of the plaintiff's prima facie case. Plaintiffs in other types of breach of contract actions are not required to prove they complied with the terms of the contract in order to prove a prima facie case. Generally, 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. *Krzycki v. Genoa Nat. Bank*, 242 Neb. 819, 496 N.W.2d 916 (1993); *K.M.H. v. Lutheran Gen. Hosp.*, 230 Neb. 269, 431 N.W.2d 606 (1988).

In this matter, Cosgriff asserted that if the jury found that an employment contract existed, then Barks was terminated for good cause because he allegedly failed to perform his services for the company in a professional manner, did not give his full efforts to the fundraising campaign, and did not use his best efforts to perform assigned duties. In applying *Schuessler* to Barks, the majority would require him to prove as part of his prima facie case that he complied with the terms of his alleged contract of employment. Therefore, the majority effectively places the initial burden of proving the absence of good cause on Barks. This violates the majority's holding which places the burden of production on the employer to come forward with evidence that good cause existed for discharging the employee.

Our statement of the elements of a cause of action for breach of an employment contract in *Stiles* more accurately states the plaintiff's prima facie case. By requiring the plaintiff to prove the existence of a contract and that the employer breached that contract by firing him or her for other than good cause, we recognize that an employee could be terminated for reasons other than failure to perform the terms of the employment contract. For example, an employee could be terminated for misconduct or because the employer no longer has an economic need for anyone to do the employee's job. See, *Ballard v. Giltner Pub. Sch.*, 241 Neb. 970, 492 N.W.2d 855 (1992); *Cleasby v. Leo A. Daly Co.*, 221 Neb. 254, 376 N.W.2d 312 (1985). In both cases, the reasons constitute just cause for breach of the employment contract.

Finally, *Schuessler* was released some 2 months after this matter went to trial. A trial court is required to render a decision which reflects any change in the applicable law which occurred in the interval between the time the judge made rulings of law and the time judgment is pronounced. *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994). Although we stated in *Schuessler* that we were attempting to clarify the burden of

proof in breach of employment contract actions, we added an element to the cause of action. I believe the trial court correctly relied on *Stiles* in stating the law in effect at the time it pronounced judgment. It was not error for the trial court not to anticipate a change in the law. Therefore, no error should be predicated on a ruling of this court subsequent to that judgment.

## EFFECT OF FINDING BARKS WAS AN AT-WILL EMPLOYEE

In section IV(1)(b)(ii), the majority concludes that the jury instructions ignored the effect of the jury's potential determination that Barks was an at-will employee. Jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *Hamernick v. Essex Dodge Ltd., ante* p. 392, 527 N.W.2d 196 (1995); *Sindelar v. Canada Transport, Inc.*, 246 Neb. 559, 520 N.W.2d 203 (1994).

In this case, when the jury instructions are read as a whole, they correctly advised the jury.

Part I.B of jury instruction No. 2 delineated the elements of an employee's prima facie claim for wrongful termination. Part I.B reads:

> Before the Plaintiff can recover against the Defendant, the Plaintiff must prove, by the greater weight of the evidence, each and all of the following:
>
> 1. That the Plaintiff and Defendant entered into a contract of employment for a term of one year;
>
> 2. The terms of the contract;
>
> 3. That the Defendant wrongfully breached the contract by terminating Plaintiff;
>
> 4. That the breach of contract was the proximate cause of the damage to the Plaintiff; and
>
> 5. The nature and extent of that damage.

Part I.B of the jury instruction clearly placed the burden of proof on Barks to prove by the greater weight of the evidence that he and Cosgriff entered into a contract of employment for a term of 1 year. Part I.C advised the jury that if Barks had "not

met this burden of proof, then your verdict must be for the Defendant. On the other hand, if the Plaintiff has met this burden of proof, then you must consider the Defendant's defense that Plaintiff was terminated for cause." Therefore, if the jury determined that Barks failed to prove that there was a contract of employment, the jury was required to hold that Barks' wrongful termination claim failed. The jury would not have reached the language the majority objects to in part II.A of the instruction.

BURDEN OF PROOF WAS ON THE DEFENDANT

Finally, in section IV(1)(b)(iii) the majority holds that the burden of proof remains with the employee at all times, although the burden of production shifts to the employer to produce credible evidence of good cause for termination after the employee establishes a prima facie case. However, we have previously held that the burden of proof is on the employer when the breach of contract is asserted as an affirmative defense. *Ballard v. Giltner Pub. Sch.*, 241 Neb. 970, 492 N.W.2d 855 (1992). In its answer, Cosgriff asserted as an affirmative defense that Barks had breached his employment contract.

In *Ballard*, a school district terminated the plaintiff from her position as assistant cook due to alleged work-related misconduct. The parties had entered into a written employment contract which stated that the plaintiff's employment would continue as long as she rendered satisfactory service. The plaintiff's employment was terminated after she called the school principal a "dumb bastard" at the conclusion of a discussion concerning a discipline matter involving her son, a student at the school. The school district asserted that the plaintiff's termination was justified. We said:

> Breach of contract is a contractual party's failure, without legal excuse, to perform a promissory obligation which forms the whole or part of a contract. . . . As an affirmative defense, breach of contract must be pleaded and proved by the party having the burden of proof for the defense.

(Citations omitted.) 241 Neb. at 976, 492 N.W.2d at 858. See,

also, *Nebraska Pub. Emp. v. City of Omaha*, 244 Neb. 328, 506 N.W.2d 686 (1993).

Under Ballard's contract with the school district, her employment could validly be terminated if she failed to render satisfactory service as a cook. The school district failed to adduce any evidence indicating that Ballard had not provided satisfactory service as a cook; rather, the evidence indicated her termination was based solely on a comment she made during a parent–principal conference. Accordingly, the school district's affirmative defense failed.

In *Cleasby v. Leo A. Daly Co.*, 221 Neb. 254, 376 N.W.2d 312 (1985), the plaintiff brought suit for a breach of a contract for personal services. The defendant asserted business necessity as an affirmative defense justifying its breach of the contract. In *Cleasby*, the burden of proof was upon the defendant employer.

In this matter, Cosgriff asserted as an affirmative defense Barks' alleged failure to perform under the employment contract. As it was an affirmative defense, the burden of proof was properly on the defendant. Ordinarily, this court disposes of a case on appeal on the theory on which it was presented in the trial court. *Peterson v. Don Peterson & Assoc. Ins. Agency*, 234 Neb. 651, 452 N.W.2d 517 (1990); *First West Side Bank v. Hiddleston*, 225 Neb. 563, 407 N.W.2d 170 (1987). Accordingly, I would affirm the trial court's jury instructions placing the burden of proof on Cosgriff.

## CONCLUSION

Cosgriff failed to object to the jury instructions at trial. Cosgriff's defenses were presented to the trial court as affirmative defenses. Although the jury instructions could have been more artfully drafted, Cosgriff's failure to timely object and his characterization of his defenses as affirmative defenses waived his right to assert prejudicial error on appeal. The trial court's use of such jury instructions should not constitute plain error, and I would affirm the district court's holding.

# PAMELA CLOONAN, APPELLANT AND CROSS-APPELLEE, V. FOOD-4-LESS OF 30TH AND WEBER, INC., APPELLEE AND CROSS-APPELLANT.

529 N.W.2d 759

Filed March 31, 1995. No. S-93-444.

1. **Judgments: Directed Verdict: Appeal and Error.** On appeal from an order of a trial court dismissing an action at the close of the plaintiff's evidence, an appellate court must accept the plaintiff's evidence as true, together with reasonable conclusions deducible from that evidence.
2. **Directed Verdict.** A directed verdict is proper only where an issue should be decided as a matter of law.
3. **Negligence: Liability: Invitor-Invitee: Proximate Cause.** A possessor of land is subject to liability for injury caused to a business invitee by a condition of the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff either (a) would not discover or realize the danger, or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the plaintiff invitee against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.
4. **Negligence: Liability: Invitor-Invitee: Proof: Notice.** A plaintiff must show either actual or constructive notice on the part of the defendant of the condition which caused the plaintiff to fall.
5. **Negligence: Liability: Invitor-Invitee: Notice.** In order for a defendant to have constructive notice of a condition, the condition must be visible and apparent and it must exist for a sufficient length of time prior to an accident to permit a defendant or the defendant's employees to discover and remedy it.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Affirmed.

Josephine Walsh Wandel and Bernard L. McNary, of Wandel Law Offices, P.C., for appellant.

Susan E. Norris, of Gross & Welch, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

FAHRNBRUCH, J.

In this appeal, Pamela Cloonan claims that the district court erred when, at the close of her case in chief, it directed a

verdict against her and dismissed her slip and fall lawsuit against an Omaha grocery store, Food-4-Less of 30th and Weber, Inc. (Food-4-Less).

We affirm the actions of the district court for Douglas County.

## STANDARD OF REVIEW

On appeal from an order of a trial court dismissing an action at the close of the plaintiff's evidence, this court must accept the plaintiff's evidence as true, together with reasonable conclusions deducible from that evidence. *Jones v. Goeden*, 232 Neb. 177, 440 N.W.2d 199 (1989); *Henderson v. Forman*, 231 Neb. 440, 436 N.W.2d 526 (1989). A directed verdict is proper only where an issue should be decided as a matter of law. *Jones, supra*.

## FACTS

Accepting Cloonan's evidence as true and giving Cloonan the benefit of all reasonable conclusions deducible from the evidence, the record reflects the following:

On November 27, 1990, Cloonan became aware from news reports that a freezing drizzle had fallen, but that it had stopped by approximately 11:30 a.m. The news reports indicated, however, that the weather conditions were expected to be worse later in the day. Between 1 and 1:30 p.m., Cloonan's husband drove her to the Food-4-Less store located on North 30th Street in Omaha. Cloonan noticed that the ground was moist and the temperature was chilly but that there was no moisture in the form of falling snow or drizzle.

The Food-4-Less store has a sidewalk in front of the building. Ramps at various locations slope down from the sidewalk to the store's parking lot. The store front has two doors, one near the south end and the other near the north end of the building. Cloonan exited her husband's vehicle near the curb of the sidewalk by the south door. She needed to take only one step from the door of the automobile to the curb where a rubber mat had been placed in front of the south door. Cloonan did not notice the condition of the sidewalk in front of the store at the time she entered the store to purchase groceries.

Upon completing her shopping, Cloonan exited the store

through the north door, pushing a cart containing the groceries she had purchased.

Because the ramp directly in front of the north door looked "glassy and slippery," Cloonan decided to go along the sidewalk to the second ramp which was located farther north. She noticed that there was salt on the sidewalk in front of the north door and that the condition of the sidewalk was "okay."

As Cloonan walked toward the second ramp, she noticed that the sidewalk in front of the store was wet but was not slippery. She looked to her right into the parking lot to find where her husband had parked their car. Cloonan noticed that there was ice at the corner of the building and that the second ramp also appeared slippery. However, the record reflects that Cloonan never walked near the corner of the building nor did she ever reach the second ramp.

Two or three feet before the second ramp, Cloonan slipped and fell *on the sidewalk*. Evidence indicated that Cloonan sustained an injury to her right knee. Cloonan sued Food-4-Less seeking recovery for her injuries. In an amended petition filed on October 3, 1991, Cloonan alleged that she slipped and fell on ice on the sidewalk at the Food-4-Less store and that this ice created a dangerous condition for the store's customers, that Food-4-Less failed to exercise reasonable care to prevent a dangerous condition, that Food-4-Less failed to salt the area upon which Cloonan fell, and that Food-4-Less knew or should have known that there was ice on the sidewalk.

On July 8, 1992, Food-4-Less filed a motion for summary judgment. The district court overruled that motion, and the case proceeded to trial.

At trial, Cloonan testified that on the day she fell, the Food-4-Less sidewalk upon which she was walking was wet, but she stated at least three times that the sidewalk was "okay." Cloonan further testified she was not aware of any ice beneath her before she fell. At no time during her in-court testimony did Cloonan testify that there was ice on the sidewalk where she fell. Although Cloonan testified that "a split second before I fell I could tell I was on something slippery," she did not identify the "something slippery" as ice.

Hazel Henderson, a Salvation Army bellringer, testified that

she saw Cloonan fall and went to her assistance. From where Henderson had been standing, between the building and the ramp in front of the north door, she had a clear view of the sidewalk. She testified that there was ice in the parking lot and on the ramps but that the area where she had been standing on the sidewalk had been either salted or cleared off.

Cloonan testified that after she fell, her husband assisted her to their car and called the Food-4-Less store from a phone booth on the way home to tell the employees that "somebody should check the sidewalk, the sidewalk is icy and that his wife had just fallen." Cloonan's husband did not testify to this phone call when he was on the witness stand.

Thomas Wise, an assistant manager of Food-4-Less, testified that he was not on duty on the day Cloonan fell, but that he received a phone call from Cloonan's husband the day after the accident. An accident report made pursuant to Cloonan's husband's telephone call to Wise reflects that Cloonan's husband reported that his wife had "slipped on some ice." Upon receiving the report from Cloonan's husband, Wise interviewed Food-4-Less employees and found that none of the employees at the store knew of Cloonan's fall.

Wise testified that during icy weather it was his normal procedure as an assistant manager, as was the procedure of the floor runner, to watch the condition of the sidewalk. The floor runner's duties include shoveling and salting the sidewalk.

Charles Johnson, another assistant manager who was acting manager on the day Cloonan fell, also testified as to the store's normal procedure for observing and clearing the sidewalk during icy weather conditions. Johnson testified that he normally arrives at the Food-4-Less store by 6 a.m. and that on days with icy weather he immediately spreads ice melt on the surface of the sidewalk outside the doors. The floor runner arrives at 8 a.m. and is responsible for putting ice melt on the sidewalk. Johnson testified that the floor runner is outside the store approximately every half hour to bring grocery carts into the store and is responsible for evaluating the conditions outside the store and applying ice melt as needed.

Cloonan's doctor, Lynn A. Crosby, M.D., testified by video deposition that on December 12, 1990, he examined Cloonan,

who was complaining of pain in her right knee. Crosby testified that Cloonan told him she fell or slipped on some ice coming out of a store. Crosby further testified that Cloonan's injuries were consistent with a slip on ice.

At the conclusion of Cloonan's case in chief, Food-4-Less moved for a directed verdict. In granting the motion, the district court found, in substance, (1) that there was an absence of proof of negligence on the part of Food-4-Less and (2) that Cloonan was contributorily negligent as a matter of law. The court then dismissed Cloonan's case.

Cloonan filed a motion for a new trial. It was overruled. Cloonan timely appealed to the Nebraska Court of Appeals. We removed the case to this court pursuant to our authority to regulate the caseloads of the appellate courts.

## ASSIGNMENTS OF ERROR

Cloonan contends that the district court erred in (1) failing to find that she had established, as a matter of law, a prima facie case of negligent failure of Food-4-Less to maintain its sidewalk and the right of Cloonan to recover damages as a consequence of her slip and fall on the sidewalk in front of the Food-4-Less store; (2) finding that Cloonan had committed contributory negligence sufficient to bar her from recovering judgment against Food-4-Less as a matter of law; (3) granting Food-4-Less' motion for a directed verdict; and (4) overruling Cloonan's motion for a new trial.

Food-4-Less, on cross-appeal, claims that the district court erred in denying its motion for summary judgment.

## ANALYSIS

We first turn to the issue of whether Cloonan established a prima facie case against Food-4-Less for allegedly failing to use reasonable care to protect Cloonan, its business invitee, from falling on ice on Food-4-Less' sidewalk.

> [A] possessor of land is subject to liability for injury caused to a business invitee by a condition of the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an

> unreasonable risk of harm to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff either (a) would not discover or realize the danger, or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the plaintiff invitee against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.

*Richardson v. Ames Avenue Corp., ante* p. 128, 131-32, 525 N.W.2d 212, 215-16 (1995); *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 438 N.W.2d 485 (1989). See, also, *Hamernick v. Essex Dodge Ltd., ante* p. 392, 527 N.W.2d 196 (1995); *Carnes v. Weesner*, 229 Neb. 641, 428 N.W.2d 493 (1988); *Corbin v. Mann's Int'l Meat Specialties*, 214 Neb. 222, 333 N.W.2d 668 (1983); *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982); *Syas v. Nebraska Methodist Hospital Foundation*, 209 Neb. 201, 307 N.W.2d 112 (1981).

Cloonan does not allege that Food-4-Less created an unsafe condition on its sidewalk. Thus, we turn our attention to Cloonan's allegation in her amended petition that Food-4-Less knew or should have known that there was ice on the sidewalk.

A plaintiff must show either actual or constructive notice on the part of the defendant of the condition which caused the plaintiff to fall. See *Richardson, supra*. Cloonan failed to adduce any evidence at trial that Food-4-Less had actual notice of ice or of any other condition of the sidewalk which caused her fall. Therefore, to hold Food-4-Less liable for her fall, Cloonan was required to prove that Food-4-Less had constructive notice of the condition of the sidewalk.

In order for a defendant to have constructive notice of a condition, the condition must be visible and apparent and it must exist for a sufficient length of time prior to an accident to permit a defendant or the defendant's employees to discover and remedy it. See *id.*

The facts in this case are uncontroverted that there was no visible and apparent dangerous condition of the sidewalk. Henderson, an independent witness presented by Cloonan in her case in chief, testified that she had a clear view of the sidewalk in front of the store and that it had been either salted or cleared

off. Cloonan herself testified that the sidewalk was wet, but "okay." Although Henderson and Cloonan testified that the ramps were icy or slippery, the uncontroverted testimony was that Cloonan fell not on a ramp, but on the sidewalk.

Cloonan failed to adduce any evidence that any alleged dangerous condition of Food-4-Less' sidewalk, whether caused by ice or some other slippery substance, was visible or apparent to either Henderson or to Cloonan. Food-4-Less, through its employees, is not required to see what cannot be seen by other human beings. Because Cloonan failed to present any evidence that the alleged dangerous condition of the sidewalk was visible and apparent, Cloonan has failed to prove that Food-4-Less had constructive notice that the sidewalk in front of the store was in a dangerous condition.

There being no evidence that Food-4-Less had actual or constructive knowledge or notice of a dangerous condition of its sidewalk, Cloonan failed in her burden to prove her allegation that Food-4-Less either knew or should have known of the dangerous condition of the sidewalk. Since the record reflects that Food-4-Less had no actual or constructive knowledge or notice of the dangerous condition of its sidewalk, it follows that Food-4-Less cannot, as a matter of law, be held liable to Cloonan for her injuries. Therefore, the district court properly granted Food-4-Less' motion for a directed verdict in its favor at the close of Cloonan's case.

Having determined that the district court properly found that Food-4-Less was entitled to a directed verdict upon the completion of Cloonan's evidence, it is unnecessary for this court to address Cloonan's remaining assignments of error or Food-4-Less' assignment of error on cross-appeal.

## CONCLUSION

The directed verdict in favor of Food-4-Less and the dismissal of the case at the close of Cloonan's evidence entered by the district court is affirmed.

AFFIRMED.

WHITE, C.J., dissenting.

Once again, in a landowner's premises liability case a majority of this court has changed the burden of proof that a

plaintiff must satisfy before he or she is entitled to recover. Before our recent decision in *Richardson v. Ames Avenue Corp., ante* p. 128, 525 N.W.2d 212 (1995), the following standard defined a plaintiff's prima facie case:

> A possessor of land is subject to liability for injury caused to a business invitee by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff, either (a) would not discover or realize the danger, or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the plaintiff invitee against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.

*Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 856, 438 N.W.2d 485, 493 (1989). See *Scharmann v. Dayton Hudson Corp., ante* p. 304, 526 N.W.2d 436 (1995). Subsequently, in *Richardson* a majority of this court expanded a plaintiff's burden to include a duty to offer how the hazardous condition occurred and its duration. As Justice Lanphier and I pointed out in the dissent, this was not the law in this state prior to *Richardson*.

LANPHIER and CONNOLLY, JJ., join in this dissent.

# SCHREMPP AND SALERNO, FORMERLY KNOWN AS SCHREMPP, GROSS & SALERNO, A NEBRASKA GENERAL PARTNERSHIP, APPELLEE, V. JOSEPH F. GROSS, JR., APPELLANT, AND BYAM & BYAM, A NEBRASKA GENERAL PARTNERSHIP, INTERVENOR-APPELLEE.

529 N.W.2d 764

Filed March 31, 1995. No. S-93-446.

1. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, the appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
2. **Contracts: Intent.** A contract which is written in clear and unambiguous language is not subject to interpretation or construction; rather, the intent of the parties must be determined from the contents of the contract, and the contract must be enforced according to its terms.
3. **Contracts: Intent: Evidence.** In the interpretation of a writing which is intended to state the entire agreement, preliminary negotiations between the parties may be considered in order to determine their meaning and intention, but not to vary or contradict the plain terms of the instrument. Extrinsic facts are allowed only when factual disputes and ambiguities exist regarding the meaning of material terms in a contract.
4. **Partnerships.** Absent a contrary agreement, any income generated through the winding up of unfinished business of a partnership is allocated to the former partners according to their respective interests in the partnership.
5. **Attorney Fees.** When several attorneys engage in the prosecution of litigation for a contingent fee, in the absence of any other agreement, they will be held, upon the successful result of the suit, to share equally in the distribution of the fee.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Affirmed.

Edward D. Hotz and Patrick M. Flood, of Betterman, Katelman & Hotz, P.C., for appellant.

John P. Miller and Terrence J. Salerno for appellee.

Joseph C. Byam, of Byam & Byam, for intervenor-appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and GRANT, J., Retired.

FAHRNBRUCH, J.

In this case, the trial court ordered that a fee for legal services (Kopp fee) should be divided pursuant to the formula contained in a partnership agreement of three attorneys, Warren

Schrempp, Joseph F. Gross, Jr., and Terrence Salerno.

The court also ordered that one-half of a second fee for legal services (Jones fee) should be distributed by the same formula to the former partners of Schrempp, Gross & Salerno and that the other one-half should be paid to the law firm of Byam & Byam.

The court also held that the Schrempp, Gross & Salerno partnership was dissolved when Gross left it and took the two cases with him. Gross continued to handle the two cases in question, and a settlement in each case resulted in attorney fees of $40,000 in the Kopp case and $85,705.76 in the Jones case.

Attorney Gross appealed the court's rulings.

We affirm the rulings of the district court for Douglas County.

## ASSIGNMENTS OF ERROR

Gross claims that the trial court erred in (1) denying his request for a jury trial; (2) concluding that legal files Gross continued to handle after he withdrew from the Schrempp, Gross & Salerno partnership were "work in process" pursuant to the partnership agreement; (3) concluding that the Schrempp, Gross & Salerno partnership dissolved upon the withdrawal of Gross; (4) not dissolving the partnership in accordance with the partnership agreement; (5) refusing to admit into evidence prior drafts of the partnership agreement; (6) determining that Byam & Byam was entitled to one-half of the second fee; and (7) determining that there was not a misjoinder of causes of action.

## FACTS

Omaha attorneys Schrempp, Gross, and Salerno formed a law partnership on July 8, 1986, but did not sign a partnership agreement until November 11, 1987. The partnership agreement allocated one-half of the profits and losses to Schrempp and one-fourth each to Gross and Salerno.

Sections 14 and 15 of the partnership agreement detailed the terms of dissolution and partnership withdrawal. As relevant here, Section 14 states:

> The witdrawal [sic], retirement, disability, death, expulsion or bankruptcy of any Partner where more than two Partners remain in the Partnership shall not require a

> winding up of the Partnership (unless the remaining Partners vote to dissolve) and shall have no effect upon the contiuance [sic] of the Partnership's business.

Section 15.01, as relevant here, states:

> Upon withdrawal from the Partnership, the withdrawing Partner shall be paid by the Partnership an amount equal to the balance as of the date of withdrawal of the withdrawing Partner's cash operating account (adjusted for Partnership profits and losses to the date of withdrawal) plus an amount equal to the unvested portion of the withdrawing Partner's share of any Partnership Pension, Profit Sharing or Keogh Plan.
>
> The foregoing amounts shall be in full payment for all sums due and owing to the withdrawing Partner and his interest in all work in process, clients of the partnership, client files, and papers, books, and records relating to Partnership clients shall terminate.

On July 29, 1991, Schrempp and Salerno filed a declaratory judgment action asking the trial court to determine how the Jones and Kopp fees should be divided among the partners. The Kopp and Jones cases were in the Schrempp, Gross & Salerno firm when Gross left the partnership. When he left, Gross took the two files with him. He finalized the cases after he withdrew from the partnership and refused to share the fees with his two former partners or anyone else involved in the cases.

In regard to the Jones fee, Schrempp and Salerno alleged that the law firms of Byam & Byam and Schrempp, Gross & Salerno were hired by Jones to prosecute his personal injury claim on a contingency fee basis. The Byam and Schrempp firms together were to receive attorney fees amounting to one-third of all amounts recovered for Jones. The two firms agreed to split the Jones fee evenly. On July 6, 1988, Gross withdrew from the Schrempp, Gross & Salerno partnership. The two law firms representing Jones agreed that Gross should continue to work on the Jones case. On January 26, 1989, the parties in the Jones case settled. Gross, however, refused to share the resulting attorney fee of $85,705.76 with his former partners and with Byam & Byam.

In regard to the Kopp fee, Schrempp and Salerno alleged that

when Gross was a partner with them, he was assigned the Kopp file, a personal injury case which was being handled by the firm before Gross became a partner in it. Schrempp and Salerno alleged in their petition that Gross took the Kopp file with him when he left the partnership. They also alleged that by letter, Gross told them that he intended to represent the Kopp family but would distribute any attorney fees resulting from the case in accordance with the partnership agreement. In April 1990, the parties in Kopp settled, and Gross refused to share the attorney fees, amounting to $40,000, with his former partners.

Gross filed a demurrer to Schrempp and Salerno's petition, alleging that the petition was defective because it did not include Byam & Byam as a party to the action. Gross claimed, inter alia, that under Neb. Rev. Stat. § 25-323 (Reissue 1989) Byam & Byam was a "necessary party" to the determination of the controversies alleged in the Jones cause of action.

Shortly thereafter, Byam & Byam successfully petitioned to intervene in the matter due to its interest in one-half of the Jones fees.

In his answer, Gross requested a jury trial and affirmatively alleged that the Jones and Kopp files were not "work in process" under Section 15 of the partnership agreement. Gross further claimed that Byam & Byam was only entitled to a quantum meruit recovery at most. The trial court denied Gross' request for a jury trial.

The evidence adduced at the bench trial established that Jones originally retained Byam & Byam to represent him in his personal injury claim against the city of Omaha. Byam & Byam solicited the help of Schrempp, Gross & Salerno, resulting in an agreement that the two firms would evenly split the attorney fees. Gross was assigned to work on the Jones case in conjunction with attorney Joseph Byam of Byam & Byam.

In June 1988, Gross informed Byam that he planned to leave Schrempp, Gross & Salerno. Gross asked Byam what should be done about the Jones case, and Byam said, "I don't see any reason why you shouldn't continue to work on this case," to which Gross responded, "[T]hat's fine."

The following month, Gross voluntarily left Schrempp, Gross & Salerno. Gross took five or six files from the office,

including Jones and Kopp. The evidence reflects that Schrempp and Salerno disapproved of Gross' taking the Jones and Kopp files and disputed his claim to the files.

In August 1988, Gross agreed to distribute attorney fees arising from Jones and Kopp in accordance with the partnership agreement. Gross specifically stated in an August 11, 1988, letter to Schrempp and Salerno in reference to the Kopp case: "It is my intention to divide any fee 2-1-1. That is not to say that you have a 'claim' to any fee in that case." Schrempp and Salerno agreed to waive any interest in the other cases that Gross took from the office, and Gross agreed to waive any interest in cases that remained with Schrempp and Salerno.

During the trial, Gross offered early drafts of the partnership agreement to prove the intent of the parties in using the term "work in process" in Section 15 of the agreement. The trial court sustained an objection to the exhibits on the ground that Section 15 of the partnership agreement is not vague or indefinite but clearly states that the partnership has a claim for in-process cases being worked on by a withdrawing partner.

In its order, the trial court held that the Jones and Kopp cases were work in process under Section 15 of the partnership agreement. The court further held that Gross had a fiduciary obligation to complete Jones and Kopp for the partnership. Because the partnership agreement was silent as to distribution of fees when the withdrawing partner removed work in process, the trial court relied upon the Uniform Partnership Act. It ruled that the change in relationship of the partners caused a dissolution of the partnership, necessitating a winding up of the partnership affairs. The court then awarded one-half of the attorney fees in Jones to Byam & Byam and ordered that the remaining one-half of the fees be distributed according to the Schrempp, Gross & Salerno partnership agreement. The court ordered that the attorney fees in Kopp be distributed in accordance with the Schrempp, Gross & Salerno partnership agreement.

Gross filed a motion for a new trial, which was overruled. Gross appealed.

## STANDARD OF REVIEW

In an appeal from a declaratory judgment, the appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court. *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994).

## ANALYSIS

### Request for Jury Trial

Gross claims the trial court erred in refusing to grant his request for a jury trial. Gross contends that he was entitled to a jury trial because the parties disputed material facts. The case at bar, however, does not present any factual disputes.

It is undisputed that Schrempp, Gross & Salerno practiced law under a partnership agreement. Gross voluntarily withdrew from the partnership on July 6, 1988, and removed the Jones and Kopp files from the office. It is undisputed that Jones retained the law firms of Byam & Byam and Schrempp, Gross & Salerno to litigate his claim on a contingency fee basis and that all three parties signed the agreement to represent Jones.

Gross did contest the interpretations of the partnership agreement. Such an issue, as analyzed below, is a question of law because the partnership agreement is unambiguous. See *Young v. Tate*, 232 Neb. 915, 442 N.W.2d 865 (1989). There are no material facts for a jury or judge to decide. Therefore, the court did not err in denying Gross' request for a jury trial.

### Partnership Agreement

Gross claims that the trial court erred in concluding that under the partnership agreement the Jones and Kopp files were "work in process." Gross argues that "work in process" as used in Section 15 was not meant to apply to files which a withdrawing partner continued to handle. Gross also claims that the trial court erred in not admitting into evidence early drafts of the partnership agreement. Gross argues that had the court admitted the drafts, he could prove his assertion regarding the intent of "work in process." Because the two assignments of error are related, we will consider Gross' second and fifth assignments of error together.

A contract which is written in clear and unambiguous

language is not subject to interpretation or construction; rather, the intent of the parties must be determined from the contents of the contract, and the contract must be enforced according to its terms. *Rains v. Becton, Dickinson & Co.*, 246 Neb. 746, 523 N.W.2d 506 (1994). Section 15 of the partnership agreement states that the withdrawing partner terminates all interest "in all work in process, clients of the partnership, client files, and papers, books, and records relating to Partnership clients." The term "work in process" clearly speaks for itself and does not need the aid of extrinsic facts.

Prior negotiations and drafts of the partnership agreement, offered to interpret Section 15, are not admissible because the plain meaning of the agreement speaks for itself. Gross relies on the well-established principle in *Wilderman v. Watters*, 149 Neb. 102, 30 N.W.2d 301 (1948), that in the interpretation of a writing which is intended to state the entire agreement, preliminary negotiations between the parties may be considered in order to determine their meaning and intention, but not to vary or contradict the plain terms of the instrument. However, such extrinsic facts are allowed only when factual disputes and ambiguities exist regarding the meaning of material terms in a contract. See, *Nebraska Depository Inst. Guar. Corp. v. Stastny*, 243 Neb. 36, 497 N.W.2d 657 (1993) (prior negotiations are admissible when meaning of contract is in doubt); *Hansen v. Circle Lake Development Corp.*, 199 Neb. 678, 260 N.W.2d 609 (1977) (preliminary negotiations of the parties considered when trying to determine the meaning of ambiguous terms). Here, the terms of the partnership agreement are plain and unambiguous. The trial court correctly sustained objections to the admission of the drafts of the partnership agreement because Section 15 of the agreement unambiguously stated that a withdrawing partner terminates any interest in work in process.

Upon Gross's withdrawal, Section 15 required the partnership to pay Gross the balance of his cash operating account plus his share of any pension, profit sharing, or Keogh plan. In return, Section 15 also required that Gross terminate his interest in partnership clients and work in process. Gross, pursuant to Section 15, should have waived his interest in the

Jones and Kopp cases and allowed Schrempp and Salerno to continue representing the law firm's clients.

DISSOLUTION OF THE PARTNERSHIP

Gross contends that the court erred in concluding that Schrempp, Gross & Salerno dissolved upon Gross' withdrawal. Section 5 of the partnership agreement states, "The term of the partnership shall be treated as commencing on July 8, 1986, and shall continue until dissolved by an act or event specified *in this Agreement or by law* as one effecting dissolution." (Emphasis supplied.) Thus, the partnership agreement provided for dissolution due to an act effecting dissolution as mandated by statute.

As already stated, Gross violated Section 15 of the agreement by taking work in process with him and by continuing to represent the clients of the partnership after his withdrawal. Section 15 of the agreement, however, is silent as to a withdrawing partner's refusing to terminate his interest in work in process. Section 14 of the partnership agreement, which provides the terms for dissolution, is also silent as to a withdrawing partner's acting in contravention of the terms for withdrawal.

Gross' violation of the partnership agreement causes a dissolution under the Uniform Partnership Act. Neb. Rev. Stat. § 67-331(2) (Reissue 1990) states that dissolution is caused "[i]n contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time."

Because Gross acted in direct contravention of Section 15 of the partnership agreement, he caused a dissolution of the partnership. The action of Gross meets the statutory definition of dissolution because he changed the relation of the partners by ceasing to be associated in the carrying on of the business. See Neb. Rev. Stat. § 67-329 (Reissue 1990). The trial court did not err in holding that the partnership dissolved upon Gross' withdrawal.

PARTNERSHIP DISSOLUTION

Gross claims that the trial court erred by not dissolving the

partnership in accordance with the partnership agreement. Schrempp and Salerno respond to Gross' claim by relying upon *Frates v. Nichols*, 167 So. 2d 77 (Fla. App. 1964). In *Frates*, a partner voluntarily left a law firm and took with him 10 negligence cases. Eight of these cases resulted in fees. Similar to Schrempp, Gross & Salerno's agreement, the partnership agreement in *Frates* stated that a withdrawing partner receives the balance of his individual capital account, but waives any interest in " 'the partnership, its accounts, its cases then in process, or any business or fees thereafter received.' " *Id.* at 81 n.11.

The Florida appellate court applied common-law principles because the partnership agreement was silent as to a withdrawing partner's taking work in process. In addressing whether the fees generated from files taken by Frates should be distributed to the partnership, the court held that "a law partner in dissolution owes a duty to his old firm to wind up the old firm's pending business, and that he is not entitled to any extra compensation therefor." *Id.* at 80. We agree with the analysis of the Florida court. The agreement between Schrempp, Gross, and Salerno did not expressly contemplate the present dispute. Thus, we look to the Uniform Partnership Act and common-law principles to determine if the partnership should wind up its affairs in light of Gross' violation of the agreement.

In *Smith v. Daub*, 219 Neb. 698, 365 N.W.2d 816 (1985), the law partnership of Daub, Stehlik & Smith dissolved. On appeal, we addressed whether Smith was entitled to compensation at some rate other than that which existed during the term of the partnership for work he performed following the dissolution. We held:

> Both under the provisions of the Uniform Partnership Act and the Code of Professional Responsibility, the partnership of Daub, Stehlik, and Smith was obligated to complete the work for the clients or afford the clients an opportunity to seek other counsel. Until the work was either completed or the partnership discharged from any further responsibility in connection with the work, the partnership could not be terminated. A partnership only terminates when the business of the partnership has been

> wound up. [Citation omitted.] Therefore, whatever rules apply with regard to distribution before the partnership is dissolved apply after it is dissolved but before it is terminated by winding up the affairs of the partnership.

*Smith v. Daub*, 219 Neb. at 704, 365 N.W.2d at 820–21. Similarly, the obligation to represent Jones and Kopp remained with Schrempp, Gross & Salerno.

We adopt the reasoning in *Rosenfeld, Meyer & Susman v. Cohen*, 146 Cal. App. 3d 200, 194 Cal. Rptr. 180 (1983), that as a partner, Gross had a continuing fiduciary duty to Schrempp, Gross & Salerno that prohibits a partner of a dissolved partnership from entering into contracts for personal gain in connection with unfinished business of the partnership. Absent a contrary agreement, any income generated through the winding up of unfinished business of a partnership is allocated to the former partners according to their respective interests in the partnership. See, *Kirsch v. Leventhal*, 181 A.D.2d 222, 586 N.Y.S.2d 330 (1992); *Sullivan, Bodney & Hammond, P.C. v. Bodney*, 16 Kan. App. 2d 208, 820 P.2d 1248 (1991); *Jewel v. Boxer*, 156 Cal. App. 3d 171, 203 Cal. Rptr. 13 (1984); *Resnick v. Kaplan*, 49 Md. App. 499, 434 A.2d 582 (1981).

The California Court of Appeals in *Jewel v. Boxer* articulated the policy concerns behind distributing the fees in accordance with the terms of the partnership agreement:

> There are sound policy reasons for applying the rule against extra compensation to law partnerships. The rule prevents partners from competing for the most remunerative cases during the life of the partnership in anticipation that they might retain those cases should the partnership dissolve. It also discourages former partners from scrambling to take physical possession of files and seeking personal gain by soliciting a firm's existing clients upon dissolution.

*Jewel v. Boxer*, 156 Cal. App. 3d at 179, 203 Cal. Rptr. at 18.

Jones and Kopp retained the firm of Schrempp, Gross & Salerno to represent their interests. Gross, as a member of the firm, handled the Jones and Kopp files. Gross' fiduciary duty to the firm remained when he withdrew from the firm but continued to handle the Jones and Kopp cases. Gross' actions

dissolved the firm, and the fees from Jones and Kopp are part of the winding up of firm assets. It appears that except for Byam & Byam's claim for its share of the Jones fee, the parties have raised no other issues than those discussed. Therefore, to finally wind up the Schrempp, Gross & Salerno partnership all that is necessary is the distribution of fees earned from the Jones and Kopp cases in accordance with the partnership agreement.

### Intervenor's Interest

Gross contends that Byam & Byam is not entitled to one-half of the Jones fee. It is undisputed that Jones retained both Byam & Byam and Schrempp, Gross & Salerno to represent him and that the two law firms orally agreed to split fees in the Jones case. Even absent an agreement to split fees, as asserted by Gross, the court was correct in awarding one-half of the fees to Byam & Byam. When several attorneys engage in the prosecution of litigation for a contingent fee, in the absence of any other agreement, they will be held, upon the successful result of the suit, to share equally in the distribution of the fee. See *Langdon v. Kennedy, Holland, DeLacy & McLaughlin*, 118 Neb. 290, 224 N.W. 292 (1929).

### Joinder of Parties

Lastly, Gross assigns that the court erred in concluding that there was no misjoinder of causes of action. This argument is without merit. On August 29, 1991, Gross filed a demurrer in the district court claiming the petition was defective because Byam & Byam, "a necessary party," was not a party to the Jones cause of action. On September 10, Byam & Byam filed a motion to intervene because of its interest in the Jones cause of action.

Gross cannot claim prior to trial that Byam & Byam must be a party to the Jones cause of action and after the trial appeal on the ground that Byam & Byam was granted the right to intervene in the Jones cause of action. A party cannot complain of error which he has invited the court to commit. *Norwest Bank Neb. v. Bowers*, 246 Neb. 83, 516 N.W.2d 623 (1994).

In any event, Byam & Byam had a direct and immediate interest, in that it would either lose or gain by the direct application of the judgment. See *Bowman v. City of York*, 240

Neb. 201, 482 N.W.2d 537 (1992). Thus, Byam & Byam could intervene as a matter of right. See *Geer-Melkus Constr. Co., Inc. v. Hall County Museum Board*, 186 Neb. 615, 185 N.W.2d 671 (1971).

## CONCLUSION

The trial court correctly held that Gross dissolved the partnership when, upon withdrawal, he took files which were "work in process." As part of the winding up of the Schrempp, Gross & Salerno partnership, the former partners should distribute attorney fees from Jones and Kopp in accordance with the partnership percentages in the partnership agreement. The trial court correctly held that Byam & Byam has an interest in one-half of the attorney fees from the Jones settlement.

AFFIRMED.

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## UNION INSURANCE COMPANY, APPELLEE, V. LAND AND SKY, INC., ET AL., APPELLANTS, AND CHARLES PRIOR HALL AND WBX PARTNERS, A CALIFORNIA PARTNERSHIP, APPELLEES.

529 N.W.2d 773

Filed March 31, 1995. No. S-93-518.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in the 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. **Insurance: Contracts: Liability.** An insurer has a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy.
3. **Insurance: Contracts.** When an insurance contract can fairly be interpreted in more than one way, there is ambiguity to be resolved by the court as a matter of law.
4. ____: ____. While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.
5. **Contracts: Appeal and Error.** Whether a document is ambiguous is a question

of law, and an appellate court considering such a question is obligated to reach a conclusion independent of the trial court's decision.

6. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
7. **Declaratory Judgments: Justiciable Issues.** Declaratory judgment cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain. There must, at the time that declaration is sought, be an actual justiciable issue.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded for further proceedings.

David A. Gauntlett and David A. Stall, of Callahan & Gauntlett, and Tyler J. Sutton and Victor E. Covalt III, of Woods & Aitken, for appellants.

Danene J. Tushar, of DeMars, Gordon, Olson, Recknor & Shively, for appellee Union Insurance Co.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

CONNOLLY, J.

Union Insurance Company (Union) brought this declaratory judgment action seeking a declaration that it was not obligated under the terms of an insurance policy to defend or indemnify Land and Sky, Inc., against a suit for patent infringement. Both parties filed motions for summary judgment. The district court for Lancaster County granted Union's motion for summary judgment and held that Union was not obligated to defend or indemnify. Land and Sky, Inc., and Lynn and Ronald Larson, principals of the corporation (all hereinafter collectively Land and Sky), have appealed. We find that the trial court was in error, and its order must be reversed and the cause remanded for further proceedings.

## I. FACTUAL BACKGROUND

### 1. UNDERLYING ACTION

Charles Prior Hall holds U.S. patent No. 3,585,356, which claims a waterbed, including the waterbed mattress and a suitable frame and heater. Land and Sky is a corporation which

manufactures flexible liquid storage containers that are used as waterbed mattresses. Land and Sky advertises its products to wholesale and retail markets and distributes pamphlets that describe the manner in which its products could be incorporated into a waterbed mattress frame.

In 1991, Hall filed a lawsuit (the Hall action) against Land and Sky for patent infringement under 35 U.S.C. § 271 (1988), which states in pertinent part:

> (a) . . . Whoever without authority makes, uses or sells any patented invention . . . infringes the patent.
>
> (b) Whoever actively induces infringement of a patent shall be liable as an infringer.
>
> (c) Whoever sells a component of a patented machine . . . constituting a material part of the invention, knowing the same to be especially made . . . for use in an infringement of such patent, and not a staple article . . . of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

After Hall filed his lawsuit, Land and Sky requested its insurer, Union, to defend and indemnify the Hall action. Union claimed that it had no obligation to defend or indemnify.

### 2. The Policies

Union insured Land and Sky from January 12, 1985, through March 31, 1988, under two policies of liability insurance: a "Comprehensive General Liability Insurance" policy (primary policy) and a "Blanket Commercial Catastrophe Liability Policy" (excess policy). The issue in the case at bar is whether the primary policy's coverage for "advertising injury" affords coverage for inducing or contributing to a patent infringement. If the primary policy does afford such coverage, and if Land and Sky is potentially liable to Hall for patent infringement due to Land and Sky's advertising activities, then Union must defend Land and Sky in the Hall action.

The primary policy defines "advertising injury" as an "injury arising out of an offense committed during the policy period occurring in the course of the named insured's advertising activities, if such injury arises out of . . . piracy, unfair competition, or infringement of copyright, title or slogan." The

excess policy defines "advertising policy" in essentially the same terms, with the exception that it expressly excludes coverage for patent infringement.

### 3. The Case at Bar

Union filed the instant action for declaratory judgment seeking a declaration that it was not obligated to defend or indemnify Land and Sky. Union filed a motion for summary judgment, and Land and Sky filed a motion for partial summary judgment seeking a declaration that Union had a duty to defend the Hall action. The trial court granted Union's motion for summary judgment, holding that neither the primary nor the excess policy bound Union to defend a lawsuit for patent infringement. This appeal followed.

## II. ASSIGNMENTS OF ERROR

Land and Sky claims that the trial court erred in (1) failing to find that the primary and excess policies required Union to defend the Hall action, (2) failing to find that the primary and excess policies required Union to indemnify Land and Sky's potential liability in the Hall action, and (3) failing to award Land and Sky attorney fees.

## III. STANDARD OF REVIEW

In appellate review of a summary judgment, the court views the evidence in the 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. *New Light Co. v. Wells Fargo Alarm Servs.*, *ante* p. 57, 525 N.W.2d 25 (1994); *Maloley v. Shearson Lehman Hutton, Inc.*, 246 Neb. 701, 523 N.W.2d 27 (1994).

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. *New Light Co. v. Wells Fargo Alarm Servs.*, *supra*; *Double K, Inc. v. Scottsdale Ins. Co.*, 245 Neb. 712, 515 N.W.2d 416 (1994).

The construction of an insurance contract is purely a question

of law. See *Central Waste Sys. v. Granite State Ins. Co.*, 231 Neb. 640, 437 N.W.2d 496 (1989). Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *New Light Co. v. Wells Fargo Alarm Servs., supra*; *Murphy v. City of Lincoln*, 245 Neb. 707, 515 N.W.2d 413 (1994).

## IV. ANALYSIS

### 1. Duty to Defend

Although an insurance policy may impose an obligation to defend and thereby impose a duty greater than the obligation to indemnify, the nature of the duty to defend is defined by the insurance policy as a contract. *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 243 Neb. 779, 502 N.W.2d 484 (1993). An insurer has a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy. *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981).

Land and Sky's argument that Union is obligated to defend the Hall action has two elements. The first element is Land and Sky's claim that the language in the primary policy is ambiguous and should be read in favor of Land and Sky as the insured. The second element is the claim that Land and Sky's potential liability arose out of insured advertising activities. We will address the elements individually.

#### (a) Ambiguity

The initial question we must address is whether the terms "piracy" and "unfair competition," as used in the primary and excess policies, encompass patent infringement. These terms are not defined in either policy.

We have stated that when an insurance contract can fairly be interpreted in more than one way, there is ambiguity to be resolved by the court as a matter of law. *Economy Preferred Ins. Co. v. Mass*, 242 Neb. 842, 497 N.W.2d 6 (1993). While an ambiguous insurance policy will be construed in favor of the insured, 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.*

Whether a document is ambiguous is a question of law, and an appellate court considering such a question is obligated to reach a conclusion independent of the trial court's decision. *Gables CVF v. Bahr, Vermeer & Haecker Architect*, 244 Neb. 346, 506 N.W.2d 706 (1993). A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Kropp v. Grand Island Pub. Sch. Dist. No. 2.*, 246 Neb. 138, 517 N.W.2d 113 (1994); *Plambeck v. Union Pacific RR. Co.*, 244 Neb. 780, 509 N.W.2d 17 (1993).

Land and Sky claims that two terms in the advertising injury portion of the policies—"piracy" and "unfair competition"—could be understood to cover patent infringement. Land and Sky provides sparse evidence in support of its claim that "unfair competition" includes patent infringement. However, Land and Sky cites several dictionary definitions which support the claim of ambiguity regarding the term "piracy." For example, Black's Law Dictionary 1148 (6th ed. 1990) defines piracy as the "unlawful reproduction or distribution of property protected by patent and trademark laws"; Webster's Encyclopedic Unabridged Dictionary of the English Language 1096 (1989) defines piracy as "the unauthorized appropriation or use of a . . . patented work"; and The Oxford English Dictionary 897 (2d ed. 1989) defines piracy as "infringement of the rights conferred by a patent or copyright."

In *National Union Fire Ins. Co. v. Siliconix Inc.*, 729 F. Supp. 77 (N.D. Cal. 1989), the court stated that "piracy" was susceptible of two interpretations and that patent infringement was included in one of those interpretations. See, also, *Aqua Queen Mfg., Inc. v. Charter Oak Fire Ins.*, 830 F. Supp. 536 (C.D. Cal. 1993), *rev'd* 33 U.S.P.Q.2d 1681 (9th Cir. 1995) (unpublished opinion). In *Aqua Queen Mfg., Inc.*, the Ninth Circuit Court of Appeals overruled this position, but based its ruling, in part, on a California statute not germane to this action. See, also, *Intex Plastics Sales Co. v. United Nat. Ins. Co.*, 23 F.3d 254 (9th Cir. 1994).

Land and Sky also cites the language employed by Union in the excess policy as evidence of ambiguity in the primary policy.

Union parenthetically states in the excess policy that patent infringement is specifically excluded from coverage. Land and Sky argues that the exclusion of patent coverage in the excess policy creates an ambiguity regarding whether patent infringement is included in the primary policy.

Union's position is that common-law definitions should apply, not dictionary definitions. Union claims that the scope of advertising injury clearly does not include patent infringement when read in the context of the list of other, covered, torts. This rationale was employed by a federal district court in *Atlantic Mut. Ins. Co. v. Brotech Corp.*, 857 F. Supp. 423 (E.D. Pa. 1994). In *Atlantic Mut. Ins. Co.*, the court stated:

> The issue is not what the isolated term "piracy" could mean, but what "piracy" occurring in the course of advertising activity reasonably could mean. Placed in context, the intended meaning of the language is clear. "In the context of policies written to protect against claims of advertising injury, 'piracy' means misappropriation or plagiarism found in the elements of the advertisement itself—in its text form, logo, or pictures—rather than in the product being advertised."

857 F. Supp. at 428.

However, we note that the court in *Atlantic Mut. Ins. Co.* did not have to consider the additional evidence of an ambiguity present in this case—the express exclusion of patent infringement coverage in the excess policy. The fact that Union determined it necessary to exclude patent infringement in the excess policy would indicate a belief on Union's part that patent infringement was included in the primary policy. We find that this inconsistency in the two policies creates an ambiguity regarding the meaning of the term "piracy." Thus, we find that the term "piracy" is ambiguous and is capable of at least two definitions. Because the term is susceptible of two reasonable interpretations, one encompassing patent infringement and one not, we construe the term "piracy" in favor of the insured as encompassing patent infringement.

(b) Advertising Activity

Having determined that "piracy" encompasses patent

infringement, we must now determine whether Land and Sky's potential liability arose out of its advertising activities. The complaint in the Hall action alleges that Land and Sky infringed the Hall patent under § 271. The complaint is not specific about which subsection of that statute Land and Sky has allegedly violated. Section 271 contains three subsections that are relevant to this proceeding: subsection (a) concerning direct infringement, subsection (b) concerning the inducement to infringe, and subsection (c) concerning contributory infringement. Union has a duty to defend the Hall action if Land and Sky's advertising activities give rise to the potential of liability under any one of these subsections.

Federal courts that have addressed the issue have held that advertising cannot be a cause of patent infringement under § 271(a). See, *Intex Plastics Sales Co. v. United Nat. Ins. Co., supra*; *New Hampshire Ins. v. R.L. Chaides Const.*, 847 F. Supp. 1452 (N.D. Cal. 1994). Likewise, advertising is not an element of contributory patent infringement under § 271(c). A violation of § 271(c) occurs when an unlicensed party sells an article that has no substantial noninfringing use.

Liability can arise, however, out of an insured's advertising activities under § 271(b). "Liability under 35 U.S.C §271(b) can be established where a party takes active steps to induce infringement through advertising or by providing instructions." *Rexnord Inc. v. Laitram Corp.*, 6 U.S.P.Q.2d 1817, 1842 (E.D. Wis. 1988). See, also, *Fromberg, Inc. v. Thornhill*, 315 F.2d 407 (5th Cir. 1963). Land and Sky specifically markets and advertises its products as particularly suitable for use as waterbed mattresses. Land and Sky uses extensive print advertising to direct its product to the waterbed industry, as well as to consumers of waterbed products. In addition to advertising that its flexible liquid containers are particularly suitable for use as waterbed mattresses, Land and Sky provides an instruction sheet demonstrating the preferred method for incorporating its waterbed mattress into a waterbed frame. Its instruction sheet also depicts the installation and placement of the temperature control and heating unit commonly known as the waterbed heater. At the retail level, Land and Sky furnishes its retailers with a choice of point-of-purchase display materials that

include sample container bags, literature displays, and banners.

Union cites a number of cases in which courts have held that there is no causal connection between advertising which forms the basis of a patent infringement claim and "advertising injury" clauses in insurance contracts similar to those employed by Union. However, the cases cited by Union evaluated only the insured's potential liability created by a *direct* patent infringement. See, *New Hampshire Ins. v. R.L. Chaides Const.*, *supra*; *National Union Fire Ins. Co. v. Siliconix Inc.*, 729 F. Supp. 77 (N.D. Cal. 1989); *Aetna Cas. & Sur. v. Superior Court*, 19 Cal. App. 4th 320, 23 Cal. Rptr. 2d 442 (1993). In the instant case, it is uncontested that Land and Sky did not directly infringe upon the Hall patent. However, Land and Sky may be potentially liable for inducing or contributing to a patent infringement under § 271(b) due to its advertising activities. Thus, consistent with our analysis above, Union is under a duty to defend Land and Sky in the Hall action.

### 2. Duty to Indemnify

Land and Sky also appeals the failure of the trial court to find that Union has a duty to indemnify Land and Sky for the potential injuries presented by the Hall action. In order to maintain an action for declaratory judgment under the provisions of Neb. Rev. Stat. § 25-21,149 (Cum. Supp. 1994), there must be an actual controversy. It cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain. There must, at the time that declaration is sought, be an actual justiciable issue. *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981). In the Hall patent infringement case, no judgment has been rendered against Land and Sky. Until Land and Sky is obligated to pay, the question of Union's obligation is uncertain and contingent. Therefore, we need not decide the issue of indemnification.

### 3. Attorney Fees

Land and Sky assigns as its final error the failure of the trial court to award Land and Sky attorney fees in the declaratory judgment proceeding. In support of its claim, Land and Sky cites Neb. Rev. Stat. § 44-359 (Reissue 1993), which states:

> In all cases when the beneficiary . . . brings an action

> upon any type of insurance policy . . . against any company . . . doing business in this state, the court, upon rendering judgment against such company . . . shall allow the plaintiff a reasonable sum as an attorney's fee . . . to be taxed as part of the costs.

The statute also allows for additional attorney fees to be awarded for services rendered in an appellate proceeding.

We find that § 44-359 applies to this case. The order of the trial court is reversed and the cause remanded on the issue of attorney fees.

## V. CONCLUSION

The order of the district court declaring that Union has no duty to defend the Hall action is reversed, and the matter is remanded for a determination of the amount to be awarded to Land and Sky for attorney fees.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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

I concur in the judgment only; from the majority's holding, I respectfully dissent.

It seems to me that the unstated premise on which the majority opinion rests is the general rule of contract law that absent anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction are, in the eyes of the law, one instrument and will be read and construed together as if they were as much one in form as they are in substance. *Properties Inv. Group v. Applied Communications*, 242 Neb. 464, 495 N.W.2d 483 (1993).

I certainly agree that policies of insurance are contracts to be interpreted as are any other contracts. *Design Data Corp. v. Maryland Cas. Co.*, 243 Neb. 945, 503 N.W.2d 552 (1993). Indeed, 2 George J. Couch, Cyclopedia of Insurance Law § 15:37 at 242 (rev. 2d ed. 1984) states:

> Where two contracts, though separate in form, are both applied for and agreed upon at the same time as one transaction, they must be considered together for the purpose of determining the character of the transaction and

> the intention of the parties, and both instruments should be given effect where reasonably possible.

See, also, *Balderama v. Western Cas. Life Ins. Co.*, 825 S.W.2d 432 (Tex. 1991) (separate insuring clauses, definitions, and provisions in separate policies not referring to each other construed together as one of them, being unnumbered and lacking schedule to which it referred, could not stand on own); *Schreiber v. German-American Hail Ins. Co.*, 43 Minn. 367, 45 N.W. 708 (1890) (inconsistent descriptions of number of crop acres insured read out of each policy). But the rule does not apply when invoked by the drafter who was in a superior bargaining position, nor when there is no clear evidence that the parties intended the agreements to be read together. *Berger v. U.S. Fidelity & Guar. Co.*, 834 F.2d 1154 (3d Cir. 1987).

The ambiguity in question here, whether there is coverage for inducing or contributing to the infringement of a patent, stems not from any indication that there might be confusion in Union Insurance Co.'s mind, as seemingly suggested by the majority, but from the fact that if there is a single contract consisting of both the primary, or "Comprehensive General Liability Insurance," policy and the excess, or "Blanket Commercial Catastrophe Liability," policy, then the contract defines "advertising injury" differently in different places, one way in the primary policy and another way in the excess policy. The determination of whether there is an ambiguity in a contract is a question of law, the resolution of which depends not on what the insurer intended the words to mean, as the majority seemingly suggests, but on what a reasonable person in the position of the insured would have understood them to mean. *Decker v. Combined Ins. Co. of Am.*, 244 Neb. 281, 505 N.W.2d 719 (1993); *Mahoney v. Union Pacific RR. Emp. Hosp. Assn.*, 238 Neb. 531, 471 N.W.2d 438 (1991).

The difficulty here is that while the record demonstrates that the two policies were issued at the same time, there is nothing from which I can infer that they were both applied for and agreed upon at the same time as part of one transaction and for the same purpose, nor that the parties intended them to be read together. These unresolved questions present genuine and material issues of fact, *Properties Inv. Group, supra*, making the

grant of summary judgment to any party inappropriate, *New Light Co. v. Wells Fargo Alarm Servs., ante* p. 57, 525 N.W.2d 25 (1994).

Thus, I too would reverse and remand, but would do so not under a ruling that Union has a duty to defend, leaving for determination only the amount of the attorney fees due Land and Sky, Inc., but, rather, for trial on the issue of whether Union has a duty to defend.

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DONALD M. VERVAECKE, ASSIGNEE OF LUCILLE A. VERVAECKE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MAURICE M. VERVAECKE, DECEASED, APPELLANT, V. STATE OF NEBRASKA AND M. BERRI BALKA, NEBRASKA STATE TAX COMMISSIONER, APPELLEES.

529 N.W.2d 779

Filed March 31, 1995. No. S-93-735.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate 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 proper 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. **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 court below.
4. **Decedents' Estates: Taxation.** Nebraska's estate tax is computed as a percentage of the federal estate tax liability. If the amount of federal estate tax liability increases or decreases, the Nebraska estate tax shall be adjusted accordingly.
5. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
6. **Statutes: Appeal and Error.** An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

7. **Taxation: Interest.** When any amount of transfer tax in excess of that legally due has been paid to the State Treasurer, the party making such overpayment or his or her successors or assigns shall be entitled to refund of such overpayment plus interest.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded with direction.

Michael McCormack, of McCormack, Cooney, Hillman & Elder, for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and BOSLAUGH, J., Retired.

FAHRNBURCH, J.

Donald M. Vervaecke appeals a summary judgment that held the State of Nebraska, when it refunded an unintentional overpayment of an estate tax, was not required to pay interest from the date of the overpayment.

This appeal involves the interpretation of a statute, which is a question of law. As a result of our interpretation of Neb. Rev. Stat. § 77-2106.01 (Cum. Supp. 1992), we reverse the judgment of the district court for Lancaster County and hold that Vervaecke is entitled to the additional interest he claims is due him as assignee of the personal representative of his father's estate and as assignee of his mother's interest in the refund.

Originally filed in the Nebraska Court of Appeals, this appeal was removed to this court pursuant to our authority to regulate the caseloads of the appellate courts.

## STANDARD OF REVIEW

In reviewing a summary judgment, an appellate 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. *Huntwork v. Voss, ante* p. 184, 525 N.W.2d 632 (1995); *New Light Co. v. Wells Fargo Alarm Servs., ante* p. 57, 525 N.W.2d 25 (1994). Summary judgment is proper 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. *Huntwork, supra*; *New Light Co., supra*.

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 court below. *Grady v. Visiting Nurse Assn.*, 246 Neb. 1013, 524 N.W.2d 559 (1994); *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994).

## FACTS

When we view the evidence in the light most favorable to Vervaecke and give Vervaecke the benefit of all reasonable inferences deducible from the evidence, the undisputed facts of the case are as follows:

On August 26, 1989, Donald M. Vervaecke's father, Maurice M. Vervaecke, died. On August 30, 1990, the Vervaecke estate filed both a federal estate tax return and a Nebraska estate tax return. The Vervaecke estate paid $122,472 in state estate taxes to the State of Nebraska.

On June 22, 1992, following an audit, the Internal Revenue Service notified the Vervaecke estate that the marital deduction on its federal return should be increased. This adjustment resulted in a federal estate tax refund to the estate of $703,691, together with interest in the amount of $143,332.86.

Nebraska's estate tax is computed as a percentage of the federal estate tax liability. Neb. Rev. Stat. § 77-2101.01 (Cum. Supp. 1994). Neb. Rev. Stat. § 77-2103 (Cum. Supp. 1994) provides that if the amount of federal estate tax liability increases or decreases, the Nebraska estate tax shall be adjusted accordingly. A reduction in the federal estate tax entitled the Vervaecke estate to a reduction in its Nebraska estate tax liability.

The Vervaecke estate filed an amended Nebraska estate tax return claiming a refund in the amount of $117,652. The estate also calculated interest on the refund at 14 percent from August 30, 1990, the date of payment of the estate tax, to December

28, 1992, the date of the refund, in the amount of $34,732.48.

Section 77-2106.01 is silent as to interest on overpayment of taxes. In 1992, L.B. 1004 amended § 77-2106.01 to provide for interest as follows:

> When any amount of transfer tax [state estate tax] in excess of that legally due has been paid to the State Treasurer, the party making such overpayment or his or her successors or assigns shall be entitled to refund of such overpayment *plus interest at the rate specified in section 45-104.01, as such rate may from time to time be adjusted by the Legislature.*

(Emphasis supplied.) The effective date of L.B. 1004 was July 15, 1992.

On October 21, 1992, the State of Nebraska refunded to the Vervaecke estate $117,652 as an overpayment of Nebraska estate tax. On December 28, 1992, the State of Nebraska paid $4,196.76 in interest to the Vervaecke estate. The interest was calculated on the overpayment of $117,652 Nebraska estate tax from July 15, 1992, the effective date of L.B. 1004, which provided for interest, through December 28, 1992, the date of the refund.

The parties stipulated that the accepting and cashing of the State's warrant representing the interest refund would not constitute a waiver or estoppel to Vervaecke asserting his claim for interest from the date of the payment of the estate taxes through the effective date of L.B. 1004.

On July 1, 1993, Vervaecke brought a declaratory judgment action seeking a declaration that he is entitled to additional interest on the Nebraska estate tax refund from the date of payment, August 30, 1990, to July 15, 1992, at the rate of 14 percent per annum.

Both Vervaecke and the State filed motions for summary judgment. The district court sustained the State's motion and denied Vervaecke's motion. The district court determined that "in Nebraska, interest on claims against the state is allowable only when authorized by statute and that unless the [intent] and purpose of a legislative act show that it is to be applied retroactively, it applies prospectively only."

## ASSIGNMENT OF ERROR

Vervaecke claims that the district court erred as a matter of law in granting the State's motion for summary judgment and in denying his motion for summary judgment.

## ANALYSIS

In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994); *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (1994). An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Id.*

Neb. Rev. Stat. § 77-2101 (Cum. Supp. 1994) provides that "[t]ransfer tax shall mean the estate tax and generation-skipping transfer tax." The plain language of § 77-2106.01 declares that "[w]hen any amount of transfer tax in excess of that legally due *has been paid* to the State Treasurer, the party making such overpayment or his or her successors or assigns shall be entitled to refund of such overpayment *plus interest* . . . ." (Emphasis supplied.)

The plain, direct, and unambiguous meaning of the words "has been paid" in § 77-2106.01 does not limit interest on overpayments of estate tax to those overpayments made after the effective date of the statute. Given its plain and ordinary meaning, the term "has been paid" includes overpayments of estate tax made prior to the effective date of L.B. 1004, July 15, 1992.

Section 77-2106.01 places certain limitations upon the State's obligation to pay interest on an overpayment of an estate tax. In this case, the State is not claiming that any of those limitations apply, since Vervaecke timely filed his claim for refund.

Pursuant to § 77-2106.01 as amended in 1992, the Vervaecke estate, as a matter of law, was entitled to interest on its overpayment of Nebraska estate tax from the date of its payment, August 30, 1990.

Therefore, the district court erred when it granted the State's motion for summary judgment and also erred when it denied Vervaecke's motion for summary judgment.

The district court's rulings on each party's motion for summary judgment is reversed, and the cause is remanded to the district court with direction to enter a summary judgment in favor of Vervaecke which judgment shall fix the amount of additional interest due Vervaecke from the State.

REVERSED AND REMANDED WITH DIRECTION.

WRIGHT, J., dissenting.

The majority invokes the rule of construction which states that in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. See *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994). However, the following principle of law has been a part of Nebraska jurisprudence since at least 1897: "[A] law will not be given a retrospective operation, unless that intention has been manifested by the most clear and unequivocal expression." *State v. City of Kearney*, 49 Neb. 337, 339, 70 N.W. 255, 256 (1897). " 'A legislative act operates only prospectively and not retrospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed.' " *Young v. Dodge Cty. Bd. of Supervisors*, 242 Neb. 1, 6, 493 N.W.2d 160, 163 (1992).

The statute at issue states in pertinent part: "When any amount of transfer tax in excess of that legally due has been paid to the State Treasurer, the party making such overpayment . . . shall be entitled to refund of such overpayment plus interest . . . ." Neb. Rev. Stat. § 77-2106.01 (Cum. Supp. 1992). The majority states that the phrase "has been paid" does not limit interest on overpayments of estate tax to those overpayments made after the effective date of 1992 Neb. Laws, L.B. 1004, § 11. I point out that before the enactment of L.B. 1004, the taxpayer had no right to interest on an overpayment. See *Peterson v. State*, 114 Neb. 612, 209 N.W. 221 (1926). Thus, the enactment of L.B. 1004 created a new right for the taxpayer. Had the Legislature desired to make § 77-2106.01 apply retroactively to the date of the overpayment, the phrase "plus interest from the date of the overpayment" could have been used. It was not.

Nothing in § 77-2106.01 or its legislative history clearly and unequivocally indicates that the statute should be given

retroactive effect. I conclude that the calculation of interest was authorized only prospectively from the effective date of L.B. 1004. The district court properly recognized the rule set forth in *State v. City of Kearney, supra*. I would affirm the order of the district court.

CAPORALE, J., joins in this dissent.

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DARRELL D. HULL, APPELLEE AND CROSS-APPELLANT, V. AETNA INSURANCE COMPANY, APPELLEE AND CROSS-APPELLEE, AND CONTINENTAL WESTERN INSURANCE COMPANY, APPELLANT AND CROSS-APPELLEE.

529 N.W.2d 783

Filed March 31, 1995. No. S-93-887.

1. **Workers' Compensation: Appeal and Error.** Findings of fact made by the Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous.
2. **Workers' Compensation: Evidence: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside if the record does not contain sufficient competent evidence to warrant the making of the order, judgment, or award.
3. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Final Orders: Appeal and Error.** The three types of order which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
5. **Actions.** Special proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.
6. **Workers' Compensation.** Workers' compensation actions are special proceedings.
7. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.

8. **Workers' Compensation.** Where a worker has contracted an occupational disease by exposure to a harmful substance over a period of years in the course of successive employers or insurers, the employer who most recently exposed the worker to the harmful substance, or that employer's insurer, is liable to pay the entire award.
9. **Workers' Compensation: Time.** Where an occupational disease results from the continual absorption of small quantities of some deleterious substance from the environment of the employment over a considerable period of time, an afflicted employee can be held to be injured only when the accumulated effects of the substance manifest themselves, which is when the employee becomes disabled and entitled to compensation. Thus, the date that determines liability is the date that the employee becomes disabled from rendering further service.
10. **Workers' Compensation.** The last employment that bears a causal relation to a worker's disability (by providing some potentially causal conditions or contributory exposure) is deemed to have caused the disease, even though the employee has not proved the last employment was the actual cause of the disability.
11. **Workers' Compensation: Wages: Words and Phrases.** Wages are defined in Neb. Rev. Stat. § 48-126 (Reissue 1993) as the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident.
12. **Workers' Compensation: Wages.** A self-employed claimant's average weekly wage under Neb. Rev. Stat. § 48-121(2) (Reissue 1993) shall be based upon the claimant's gross income less business expenses, i.e., net income.

Petition for further review from the Nebraska Court of Appeals, IRWIN, MILLER-LERMAN, and MUES, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals reversed, and cause remanded with direction.

Dallas D. Jones and Thomas B. Wood, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Timothy C. Phillips, of Morrow, Poppe, Otte, Watermeier & Phillips, P.C., for appellee Hull.

Richard R. Endacott and Brett W. Berg, of Knudsen, Berkheimer, Richardson & Endacott, for appellee Aetna Ins. Co.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

FAHRNBRUCH, J.

Darrell D. Hull, a self-employed dentist, seeks workers'

compensation for an occupational illness which could be traced through the coverage periods of two successive insurers.

Both insurance carriers, Continental Western Insurance Company (Continental) and Aetna Insurance Company (Aetna), contend they are not liable. Both insurance carriers base their defenses on the last injurious exposure rule.

The Nebraska Court of Appeals dismissed this appeal on the ground that the Workers' Compensation Court three-judge review panel's remand to the trial judge did not constitute a final, appealable order. *Hull v. Aetna Ins. Co.*, 94 NCA No. 32, case No. A-93-887 (not designated for permanent publication).

We reverse the decision of the Court of Appeals and address (1) the liability of successive insurance carriers to a claimant suffering a lengthy occupational illness or disease and (2) the calculation of a self-employed claimant's average weekly wage.

## ASSIGNMENTS OF ERROR

On a petition for further review, Hull and Continental assign as error that the Court of Appeals failed to find that the Workers' Compensation Court review panel entered a final, appealable order. Hull also claims that the Court of Appeals erred in dismissing the appeal without addressing his errors assigned on appeal.

## STANDARD OF REVIEW

Findings of fact made by the Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous. See, Neb. Rev. Stat. § 48-185 (Reissue 1993); *Aken v. Nebraska Methodist Hosp.*, 245 Neb. 161, 511 N.W.2d 762 (1994). A judgment, order, or award of the compensation court may be modified, reversed, or set aside if the record does not contain sufficient competent evidence to warrant the making of the order, judgment, or award. *McGowan v. Lockwood Corp.*, 245 Neb. 138, 511 N.W.2d 118 (1994).

An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991).

## FACTS

### Medical History

Hull began the practice of dentistry in 1952 in Fairbury. In 1960, Hull experienced an outbreak of contact dermatitis caused by methyl methacrylate, a polymer component utilized in temporary dental reconstruction.

Hull did not experience any further problems with dermatitis until June 1987. He then experienced another episode of contact dermatitis related to methyl methacrylate. In October 1987, Hull also began experiencing pulmonary problems.

In June 1988, Hull suffered a severe episode of contact dermatitis affecting most of his fingers, the palms of both hands, and other parts of his body. The dermatitis caused Hull to miss, in the aggregate, approximately 1 week of work. Hull's condition progressively worsened, and Hull observed a relationship between time spent in the office and his skin and pulmonary problems.

On March 13, 1989, Dr. Rudolf Strnot, a dermatologist, treated Hull for contact dermatitis and autoeczematization on Hull's face, arms, and torso. Dr. Strnot recommended that Hull cease practicing dentistry. That same month, Dr. Anup Chakraborty, a specialist in pulmonology, also recommended to Hull that he quit dentistry. Hull decreased his dental practice to less than 10 hours per week.

In June 1989, Hull was examined by specialists at the University of Nebraska Medical Center. Dr. Suzanne Braddock, a dermatologist, and Dr. Robert Waldman, dean of medicine at the medical center, each determined that the causative agent for Hull's contact dermatitis broadened to include many potential agents in the dental office. In January 1991, Hull terminated his dental practice. Since he left the practice, Hull's dermatitis problems appear completely eliminated and the pulmonary problem has improved. Since September 1990, Hull has worked as a flight instructor.

### Workers' Compensation Coverage

Continental's workers' compensation policy covered Hull from October 15, 1987, to October 15, 1988. Aetna covered Hull from October 15, 1988, to October 15, 1990. Aetna paid

Hull temporary total disability benefits of $245 per week from December 21, 1989, to December 19, 1990. Aetna also paid some medical expenses incurred by Hull.

Aetna referred Hull to Karen L. Stricklett, a vocational rehabilitation consultant. On January 13, 1993, Stricklett determined Hull's loss of earning capacity based upon income tax returns for 1987, 1988, and 1989. Stricklett averaged Hull's 1987 and 1988 business incomes to $12,050 per year and concluded that Hull's loss of earning capacity fell within the 10- to 15-percent range.

## Procedural History

On July 29, 1992, Hull filed an amended petition in the Workers' Compensation Court against Continental and Aetna. Hull alleged personal injury and disability from occupational asthma and contact dermatitis caused by exposure to chemicals and compounds associated with dentistry. Hull alleged that he earned approximately $1,374.57 per week when he sustained the injury on March 13, 1989.

The trial court applied the last injurious exposure rule and found Aetna to be the sole liable defendant. Based upon an average weekly wage of $571.80, the trial court ordered Aetna to pay Hull $245 per week for 98 weeks of temporary total disability and $43.48 per week for 202 weeks, representing a 12.5-percent permanent loss of earning power. The court also ordered Aetna to reimburse certain medical expenses and pay for future treatment.

A three-judge review panel of the Workers' Compensation Court disagreed with the use of the last injurious exposure rule and held that the date of injury determines liability when there is one employer and several insurers. Thus, the review panel vacated the award made by the trial court and remanded the case for a determination of the date of Hull's injury.

Hull and Continental appealed to the Court of Appeals. Both parties assigned as error that the review panel failed to apply the last injurious exposure rule. Hull also claimed that the review panel erred in failing to determine the proper amount of compensation due Hull and in using Hull's income tax returns to determine his net income in order to calculate his average

weekly wage.

The Court of Appeals held that the review panel's order did not affect a substantial right of the parties. As a result, the court dismissed the appeal on the ground that the review panel did not reach a final, appealable order.

## ANALYSIS

### JURISDICTION

The three types of order which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. Neb. Rev. Stat. § 25-1902 (Reissue 1989).

Special proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes. *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993). The Nebraska Revised Statutes provide for workers' compensation under chapter 48. Thus, workers' compensation actions are special proceedings. Therefore, the review panel entered a final order if the order affected a substantial right.

A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing. *Jarrett v. Eichler, supra.*

In *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994), a district court's order reversing a decision and remanding a cause to the county court was appealed to the Nebraska Court of Appeals. The Court of Appeals dismissed the appeal on the grounds that the order was not a final order. We reversed the decision of the Court of Appeals and held that the district court entered a final order because it took away a county court judgment rendered in favor of one of the parties.

In the case at bar, the trial court awarded Hull benefits and found Aetna as the only liable party. The Workers' Compensation Court review panel vacated a judgment in favor of Hull and which dismissed Continental from the lawsuit.

Clearly, the order affected a substantial right of Hull and Continental. By the action of the Workers' Compensation Court panel, Hull was deprived of an award in his favor and Continental was deprived of a finding of no liability on its part.

## CARRIER LIABILITY

All parties agree that the last injurious exposure rule, as analyzed in 4 Arthur Larson, The Law of Workmen's Compensation § 95.20 (1994), applies to the case at bar. We agree. Of issue is whether the last injurious exposure rule focuses upon the date of injury, as argued by Aetna, or upon the last exposure that caused the disability, as argued by Continental.

Where a worker has contracted an occupational disease by exposure to a harmful substance over a period of years in the course of successive employers or insurers, the employer who most recently exposed the worker to the harmful substance, or that employer's insurer, is liable to pay the entire award. See *Osteen v. A. C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981). To assign liability we must address (1) the date that liability is premised upon and (2) the causal relationship between the exposure and disability.

Where an occupational disease results from the continual absorption of small quantities of some deleterious substance from the environment of the employment over a considerable period of time, an afflicted employee can be held to be injured only when the accumulated effects of the substance manifest themselves, which is when the employee becomes disabled and entitled to compensation. *Id.* Thus, the date that determines liability is the date that the employee becomes disabled from rendering further service. See *Lowery v. McCormick Asbestos Co.*, 300 Md. 28, 475 A.2d 1168 (1984).

Hull suffered from contact dermatitis due to substances in the workplace in 1960 and 1987 through 1990. It was not until March 1989, however, that his occupational disease manifested itself to a level of disability. Therefore, Hull became disabled and entitled to the workers' compensation he seeks on March 13, 1989, while covered by Aetna.

The mere date of disability, however, does not end the

inquiry. The second issue is the nexus between the exposure to the injury and the disability.

In the case of occupational disease, liability is most frequently assigned to the carrier who was covering the risk when the disease resulted in disability, if the employment at the time of disability was of a kind contributing to the disease. The employer or insurer at the time of the most recent exposure which bears a causal relation to the disability is generally liable for the entire compensation. *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987); *Osteen v. A. C. and S., Inc., supra*. See, also, *Labor & Industries v. Fankhauser*, 121 Wash. 2d 304, 849 P.2d 1209 (1993). This is comparable to the last injurious exposure rule, except that it places more stress on the moment of disability. *Bracke v. Baza'r*, 293 Or. 239, 646 P.2d 1330 (1982), citing 4 Larson, *supra*, § 95.21. If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second. *Mendoza v. Omaha Meat Processors, supra*. On the other hand, if the insured's condition is not a true recurrence, but is brought about by any intervening or untoward event which could be deemed the proximate cause of the work-connected condition, the liability falls upon that insurer whose policy is in effect at the date of the new illness. *Standard Distributing Co. v. Nally*, 630 A.2d 640 (Del. 1993). This rule relieves the employee from proving specific medical causation as to any particular employer or insurance carrier of those potentially liable for the disability. Thus, the last employment that bears a causal relation to a worker's disability (by providing some potentially causal conditions or contributory exposure) is deemed to have caused the disease, even though the employee has not proved the last employment was the actual cause of the disability. See *Parks v. Flint Steel Corp.*, 755 P.2d 680 (Okla. 1988).

It is undisputed that Hull suffered from contact dermatitis while covered under Continental. Therefore, the determinative issue is whether the March 13, 1989, disability was a mere recurrence of the occupational disease dating back to

Continental's period of coverage or was the result of a new causative agent during Aetna's period of coverage.

In the original trial, the court found that during Aetna's coverage period, Hull was exposed to substances which caused the deterioration of his condition. The court's finding is supported by the conclusions of Drs. Braddock and Waldman that during the period of Aetna's coverage, Hull's dermatitis was caused by an expanding base of allergic agents. The trial judge was not clearly wrong in finding that Hull's disability came as a result of some causative agents during Aetna's coverage.

This may appear as a harsh rule, inasmuch as the contact dermatitis, in its origin, can be traced back to 1960. The law of averages, however, will spread the costs proportionately among insurers over time. *Labor & Industries v. Fankhauser, supra.* Thus, the rule equitably spreads the risk of liability for an occupational disease among the employers who expose workers to the danger of the disease and their respective carriers. *American Ins. Co. v. Indus. Com'n of Arizona*, 144 Ariz. 364, 697 P.2d 1114 (Ariz. App. 1984).

## COMPENSATION

Hull contends that when the compensation due him is calculated, the average weekly wage should be based upon gross income.

According to Neb. Rev. Stat. § 48-121(2) (Reissue 1993), the amount of compensation for permanent partial disability is 66⅔ percent of the difference between the wages received at the time of injury and the earning power of the employee thereafter, but not more than the maximum weekly income benefits specified in Neb. Rev. Stat. § 48-121.01 (Reissue 1993). Wages are defined in Neb. Rev. Stat. § 48-126 (Reissue 1993) as "the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident."

We held in *Solheim v. Hastings Housing Co.*, 151 Neb. 264, 37 N.W.2d 212 (1949), that allowances made to an employee for board, lodging, or similar advantages shall represent a real and reasonably definite economic gain to the employee before they can be considered as wages for the purpose of computing compensation. We held in *Turner v. Beatrice Foods Co.*, 165

Neb. 338, 85 N.W.2d 721 (1957), that where an employee's wages averaged $100 per week, an additional $6 a week the employee received as tax-exempt expense money was not included as wages for purposes of workers' compensation. Nevertheless, we have not addressed whether a self-employed claimant's business expenses are wages for workers' compensation purposes.

Hull relies upon *Filippone v. Indust. Comm'n*, 41 Colo. App. 322, 590 P.2d 977 (1978), to argue that business expenses deductible from a self-employed claimant's gross income are not deducted from the calculation of average weekly wage. More recently, however, Colorado appellate courts have disapproved the holding in *Fillipone* and now hold that business expenses should be deducted in determining a self-employed claimant's wages. See, *Tozer v. Scott Wetzel Services, Inc.*, 883 P.2d 496 (Colo. App. 1994); *Elliott v. El Paso County*, 860 P.2d 1363 (Colo. 1993). Other states also hold that a self-employed claimant's average weekly wage must be offset by the claimant's business expenses. See, *Pioneer Const. v. Conlon*, 780 P.2d 995 (Alaska 1989); *Happle Solar Contractors v. Happle*, 547 So. 2d 1035 (Fla. App. 1989). We find these holdings consistent with our analysis in *Solheim v. Hastings Housing Co., supra*, and *Turner v. Beatrice Foods Co., supra*. Therefore, we hold that a self-employed claimant's average weekly wage under § 48-121(2) shall be based upon the claimant's gross income less business expenses, i.e., net income.

Lastly, Hull asserted in the Court of Appeals that the trial court erred in calculating the amount Aetna must reimburse Hull for prescription drug expenses. The trial court ordered Aetna to pay Hull $1,108.80 for prescription drugs purchased from Stewart Pharmacy, as indicated in exhibit 18. This exhibit indicates that Hull purchased $1,108.80 worth of prescription drugs from Priefert Pharmacy, not Stewart Pharmacy. Exhibit 18 also indicates that Hull purchased prescription drugs from Stewart Pharmacy with two grand totals of $1,214.80 and $741.62. Thus, it appears that the trial court clearly erred in determining Hull's prescription drug expenses.

## CONCLUSION

The Workers' Compensation Court review panel's order

vacating the award entered by the trial court substantially affected the rights of Hull and Continental. Therefore, the review panel's order was a final, appealable order. Moreover, liability between successive insurers for a claimant's occupational illness is premised upon (1) the date that the accumulated effects of the illness manifest to the level of disability entitling the claimant to compensation and (2) the last carrier on risk that bears a causal relation to that disability. We reverse the judgment and remand this cause to the Nebraska Court of Appeals with direction to remand the cause to the Workers' Compensation Court to enter judgment consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTION.

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## COUNTY OF LANCASTER, NEBRASKA, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF PUBLIC INSTITUTIONS, ET AL., APPELLEES.

529 N.W.2d 791

Filed March 31, 1995. No. S-93-925.

1. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
2. **Declaratory Judgments: Immunity: Appeal and Error.** Just as an appellate court must determine the scope of review in an action for declaratory judgment from the nature of the dispute, so does such a court determine whether sovereign immunity lies.
3. **Jurisdiction: Appeal and Error.** When a lower court lacks the power, that is, the subject matter 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 lower court.
4. **Declaratory Judgments: Immunity: Waiver.** The Nebraska Uniform Declaratory Judgments Act is inoperative as a waiver of sovereign immunity; a plaintiff who seeks declaratory relief against the state must find authorization for such remedy outside the confines of the Uniform Declaratory Judgments Act.

5. **Administrative Law.** The Administrative Procedure Act authorizes only a declaration regarding the validity of any rule or regulation and does not confer jurisdiction for declaratory relief concerning a statute.
6. **Actions: Immunity.** For the purposes of applying the doctrine of sovereign immunity, a suit against an agency of the state is the same as a suit against the state.
7. **Actions: Public Officers and Employees: Statutes: Immunity.** Declaratory or other equitable actions against a state officer or agent attacking the constitutionality of the statute or seeking relief from an invalid act or an abuse of authority by an officer or agent is not a suit against the state and is not prohibited by principles governing sovereign immunity.
8. **Declaratory Judgments: Public Officers and Employees: Immunity.** A declaratory judgment action seeking to compel affirmative action on the part of a state official, in which the plaintiff names as defendants the state and a state official and claims that the state official abused his or her authority, is within the rule of immunity; if such a suit simply seeks to restrain the state official from performing affirmative acts, it is not within the rule of immunity.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded with directions.

Gary E. Lacey, Lancaster County Attorney, and Michael E. Thew for appellant.

Don Stenberg, Attorney General, and David T. Bydalek for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

CONNOLLY, J.

The County of Lancaster initiated a declaratory judgment action in the district court for Lancaster County seeking a determination that the Nebraska Department of Public Institutions and two officials of the department were without legal authority to refuse to accept custody of individuals committed to the department by the Lancaster County Mental Health Board (Board). The district court ruled that the department could refuse acceptance of persons committed to it and that the county did not make the proper demand of the department which would have mandated the active participation of the department in placement of such persons. The county appealed. We find that because the state did not waive its sovereign immunity, the district court lacked jurisdiction to hear

the instant case. Therefore, we reverse the order of the district court and remand the cause to the district court with directions to dismiss the county's action.

## FACTUAL BACKGROUND

This matter was submitted on the following stipulated facts: The county operates a crisis center which houses individuals in need of emergency protective custody prior to a formal commitment hearing before the Board. The county claims that the crisis center is not equipped to provide long-term mental health treatment.

Upon a proper finding, the Board issues orders that individuals are to be committed to the department. On numerous occasions, the department has refused to accept immediate custody of those individuals committed to it by the Board because of lack of appropriate space. In those instances, the committed individuals have remained at the crisis center for as long as 13 days.

The county brought an action for a declaratory judgment seeking a ruling that the department was required by the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 83-1001 to 83-1078 (Reissue 1987 & Cum. Supp. 1992) (the Act), to accept individuals immediately upon their commitment by the Board.

On September 8, 1993, the district court ruled that the department could refuse to accept individuals under the Act. The court also ruled that the county failed to make a proper demand on the department as required in § 83-1040. The county appeals.

## ASSIGNMENTS OF ERROR

The county assigns as error the district court's finding that the department could refuse to accept individuals under the Act and the court's finding that the county failed to make a proper demand on the department.

## STANDARD OF REVIEW

In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial

court. *Nebraska Pub. Emp. v. City of Omaha, ante* p. 468, 528 N.W.2d 297 (1995); *Abdullah v. Nebraska Dept. of Corr. Servs.*, 246 Neb. 109, 517 N.W.2d 108 (1994); *Jaksha v. Thomas*, 243 Neb. 794, 502 N.W.2d 826 (1993).

Just as an appellate court must determine the scope of review in an action for declaratory judgment from the nature of the dispute, so does such a court determine whether sovereign immunity lies. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). When a lower court lacks the power, that is, the subject matter 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 lower court. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994); *Richdale Dev. Co. v. McNeil Co.*, 244 Neb. 694, 508 N.W.2d 853 (1993); *Knerr v. Swigerd*, 243 Neb. 591, 500 N.W.2d 839 (1993).

## ANALYSIS

The county seeks a ruling that the department is bound by statutes to accept persons committed to it immediately upon the proper finding of the Board. Subsequent to the September ruling of the district court, this court issued its ruling in *Riley v. State*, 244 Neb. 250, 506 N.W.2d 45 (1993). The department argues that the holding in *Riley* is controlling in this case and that the case should be dismissed. In *Riley*, a correctional officer brought a declaratory judgment action against the state concerning the administrative termination of his employment. The district court dismissed his case for lack of subject matter jurisdiction. On appeal, this court agreed that jurisdiction was lacking because the state had not waived its sovereign immunity in declaratory judgment actions.

In *Riley*, this court made three rulings pertaining to declaratory judgment actions against the state: (1) The Nebraska Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 1989 & Cum. Supp. 1994), is inoperative as a waiver of sovereign immunity; a plaintiff who seeks declaratory relief against the state must find authorization for such remedy outside the confines of the Uniform Declaratory Judgments Act; (2) the Administrative

Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1987 & Cum. Supp. 1992), authorizes only a declaration regarding the validity of any rule or regulation; and (3) the limited waiver of sovereign immunity granted by the Administrative Procedure Act does not confer jurisdiction for declaratory relief concerning a statute. For the purposes of applying the doctrine of sovereign immunity, a suit against an agency of the state is the same as a suit against the state. *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993).

The instant declaratory judgment action seeks only an interpretation of the statutes in question. Under *Riley*, such an action may not be brought against a department of the state. Since the state has not waived its sovereign immunity, the trial court did not have jurisdiction to hear this case as it applied to the department.

The county contends that the instant case differs from *Riley* in that the county has named as defendants two individuals—officers of the department—in addition to the department. We must determine whether the declaratory judgment action against the individual officers is in reality an action against the state and, therefore, barred by sovereign immunity.

Declaratory or other equitable actions against a state officer or agent attacking the constitutionality of the statute or seeking relief from an invalid act or an abuse of authority by an officer or agent is not a suit against the state and is not prohibited by principles governing sovereign immunity. *Concerned Citizens, supra*; *Bartels v. Lutjeharms*, 236 Neb. 862, 464 N.W.2d 321 (1991); *Rein v. Johnson*, 149 Neb. 67, 30 N.W.2d 548 (1947).

In *Concerned Citizens*, this court dismissed a declaratory action against a state agency, but stated that a suit could be maintained against the director of that agency. We stated that an action against a state officer or agent to obtain relief from an invalid act or from an abuse of authority by the officer or agent is not a suit against the state and is not prohibited by the general principles governing the immunity of the state from suit.

The department argues that a closer examination of these cases reveals that the mere inclusion of a state officer as a party does not necessarily confer jurisdiction in a declaratory

judgment action. The department points out that in *Bartels* and *Rein*, the declaratory judgment actions attacked the *constitutionality* of a statute. In *Concerned Citizens*, the plaintiff alleged that the Department of Environmental Control had no *authority* to issue a permit to build a hazardous waste incinerator.

The case at bar differs from previous cases wherein this court found that suits against state officials were not barred by sovereign immunity. The county in the instant case has raised no constitutional challenge to the actions taken by the state officials. Furthermore, the county does not seek to prevent the state officials from acting; rather, the county seeks to compel the state officials to act.

In *Philadelphia Life Insurance Co. v. Commonwealth*, 410 Pa. 571, 576, 190 A.2d 111, 114 (1963), a case involving an action by insurers seeking to restrain certain state officers from enforcing an allegedly invalid statute imposing a tax on gross premiums, the court stated:

> The distinction is clear between suits against the Commonwealth which are within the rule of its immunity and suits to restrain officers of the Commonwealth from enforcing the provisions of a statute claimed to be unconstitutional. Suits which seek to compel affirmative action on the part of state officials . . . are within the rule of immunity; suits which simply seek to restrain state officials from performing affirmative acts are not within the rule of immunity.

(Emphasis omitted.) See, also, *Hudgens v. Dean*, 75 Ill. 2d 353, 388 N.E.2d 1242 (1979) (holding that a suit against state officers, which would, if successful, require an affirmative act of the state, is barred by immunity); *State ex rel. Fleming v. Cohn*, 12 Wash. 2d 415, 121 P.2d 954 (1942); *White Eagle Oil & Refining Co. v. Gunderson*, 48 S.D. 608, 205 N.W. 614 (1925).

The individual defendants in the case at bar have been sued in their official capacity. Although the county has not alleged that the individuals acted unconstitutionally, it does assert that by not accepting immediate custody of the Board's commitments, the individuals acted in contravention of their

duties. The county seeks by declaratory judgment to compel the immediate acceptance by the defendants of those people who are committed by the Board. The relief sought against the individual defendants is affirmative and therefore is within the scope of immunity.

## CONCLUSION

Because the action brought by the county is barred by the doctrine of sovereign immunity, the district court did not have jurisdiction to determine the issue. We reverse the order of the district court and remand the cause to that court with directions to dismiss the county's action.

REVERSED AND REMANDED WITH DIRECTIONS.

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STATE OF NEBRASKA, APPELLEE, V. CALVIN F. COX, APPELLANT.
529 N.W.2d 795

Filed March 31, 1995. No. S-93-1044.

1. **Statutes.** The meaning of a statute is a question of law.
2. **Appeal and Error.** In connection with a question of law, a reviewing court has an obligation to reach a conclusion independent of that of the inferior court.
3. **Constitutional Law: Search and Seizure.** While with respect to searches the principal object of the Fourth Amendment to the U.S. Constitution is the protection of privacy rather than property, seizures nonetheless involve property interests.
4. **Criminal Law: Motions to Suppress: Evidence.** A defendant may in a criminal trial move for suppression of evidence even though under the facts the defendant could not sustain a property-based action of replevin or trespass for the thing suppressed.
5. **Statutes: Legislature: Intent.** In reading 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.
6. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
7. **Search and Seizure: Property: Words and Phrases.** The phrase "seized

property" means property seized in which the defendant or another person has a possessory interest.

Petition for further review from the Nebraska Court of Appeals, IRWIN, MILLER-LERMAN, and MUES, Judges, on appeal thereto from the District Court for Box Butte County, BRIAN SILVERMAN, Judge. Judgment of Court of Appeals affirmed.

David E. Veath for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

CAPORALE, J.

The Nebraska Court of Appeals affirmed the district court's judgment that the defendant-appellant, Calvin F. Cox, was guilty of driving under the influence of alcohol. *State v. Cox*, 3 Neb. App. 80, 523 N.W.2d 52 (1994). Cox then successfully moved this court for further review, asserting, in summary, that the Court of Appeals erred in failing to rule that the district court had wrongly asserted jurisdiction over certain evidence used to convict him and thus improperly received that evidence. We now affirm the judgment of the Court of Appeals.

Cox was initially charged in the county court for Box Butte County with driving while intoxicated. After the county court sustained Cox' motion to suppress certain evidence, the plaintiff-appellee, the State of Nebraska, successfully moved for dismissal. The State thereafter instituted in the district court the proceedings giving rise to this appeal.

Remarkably enough, although several of Cox' assignments of error in the Court of Appeals centered around the county court's order of dismissal, that order was not made a part of the record until it was supplied in response to this court's order to Cox to show cause why his appeal should not be dismissed. As a consequence, the record now reveals that although the State filed its information in the district court on July 30, 1993, the county court did not dismiss the action pending therein until August 5, 1993, with an order reciting that the matter was being "dismissed without prejudice to re-filing the complaint in the

District Court. All property subject to the Motion to Suppress filed herein is transferred to the jurisdiction of the District Court." Although on October 20, 1993, the district court held a hearing on Cox' motion in that court to suppress "any and all evidence obtained from or about his person" at or near the date of his arrest, a copy of the county court's order was not filed in the district court until December 28, 1994, after this court entered its show cause order.

The error Cox has assigned to the Court of Appeals rests on the provisions of Neb. Rev. Stat. § 29-827 (Reissue 1989), which read:

> Where motions to suppress and for the return of seized property are made in courts inferior to the district court in cases involving violations of state laws, the county attorney may give notice to such court that the property in question will be further required as evidence, may then dismiss the action in such court and refile the complaint in the district court. In its order of dismissal the court shall order transfer of the property to the jurisdiction of the district court.

Cox urges that as the State did not make known to the district court that the county court had transferred to the district court the property which had been within the jurisdiction of the county court and which the county court had suppressed, the district court did not acquire jurisdiction over the property and thus could not receive the property in evidence. More specifically, Cox contends that the district court had no jurisdiction to receive in evidence the printed record of the result of the blood alcohol test performed on him after his arrest.

The question is the meaning of § 29-827. The meaning of a statute is a question of law, in connection with which a reviewing court has an obligation to reach a conclusion independent of that of the inferior court. *State v. Wragge*, 246 Neb. 864, 524 N.W.2d 54 (1994).

Cox' argument assumes that by virtue of its being tangible, the written record of the blood alcohol test result is "property" in the sense in which that term is used in § 29-827. He then postulates that since the district court was not supplied with an

order of the county court transferring jurisdiction over that item to the district court, the district court lacked jurisdiction over it and thus could not receive the item into evidence.

The argument suffers from two fatal fallacies. The first is that it equates the suppressing of evidence with the returning of seized property. However, § 29-827 does not equate the two matters, for it addresses "motion*s* to suppress *and* for the return of seized property." (Emphasis supplied.) The statute thereby contemplates separate motions to achieve different results.

Properly so, for while with respect to searches the principal object of the Fourth Amendment to the U.S. Constitution is the protection of privacy rather than property, *Warden v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967), seizures nonetheless involve property interests, *Soldal v. Cook County*, 506 U.S. 56, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992) (Fourth Amendment protects against unreasonable "seizures," thereby protecting property interests), and *United States v. Jacobsen*, 466 U.S. 109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984). As noted in *Soldal*, 506 U.S. at 65-66:

> Suppose . . . that police officers lawfully enter a house, by either complying with the warrant requirement or satisfying one of its recognized exceptions—*e.g.*, through a valid consent or a showing of exigent circumstances. If they come across some item in plain view and seize it, no invasion of personal privacy has occurred. . . . If the boundaries of the Fourth Amendment were defined exclusively by rights of privacy, "plain view" seizures would not implicate that constitutional provision at all.

See, also, *U.S. v. Conley*, 856 F. Supp. 1010 (W.D. Pa. 1994).

As a result of the evolution from early common-law emphasis on property rights to concerns over privacy interests, the U.S. Supreme Court has established that a defendant could move for suppression in a criminal trial even though under the facts the defendant could not sustain a property-based action of replevin or trespass for the thing suppressed. See *Warden, supra*, citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920), *overruled on other grounds, United States v. Havens*, 446 U.S. 620, 100 S. Ct. 1912, 64 L. Ed. 2d 559 (1980).

In *Silverthorne Lumber Co.*, numerous papers were seized in violation of the Fourth Amendment. Photographs and copies were then made and were used as the basis of an indictment. The U.S. Supreme Court rejected the notion that even though the papers were illegally obtained, the government could copy them, return the originals, and then use the knowledge it had thus obtained to file an information against the defendants and compel the defendants to produce the originals through lawful prosecution.

What is important in *Silverthorne Lumber Co.* for our purposes is the clear divergence between property-based remedies such as trespass and replevin for the return of seized property and the privacy-based remedy of suppression of evidence. In the former, one may vindicate one's property interest in the thing unlawfully seized by obtaining its return, but the privacy interest in the information derived from the thing unlawfully seized is vindicated by suppressing the information. See *Warden, supra*. Thus, the suppression of evidence does not necessarily entitle the aggrieved person to its return. *Warden, supra*.

The second fallacy in Cox' argument is that it seeks to isolate the word "property," as used in the last sentence of § 29-827, from the phrases "seized property" and "property in question," as used in the first sentence of the statute. The applicable rules are that in reading 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. Moreover, it is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. *State ex rel. Perkins Cty. v. County Superintendent, ante* p. 573, 528 N.W.2d 340 (1995).

Application of those rules leads to the conclusion that the term "property," as used in the last sentence of § 29-827, refers to the same things as do the phrases "seized property" and "property in question," as used in the first sentence of the statute.

The phrase "seized property" means property seized in

which the defendant or another person has a possessory interest. See *United States v. Jacobsen*, 466 U.S. 109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984). "[The] text [of the Fourth Amendment] protects two types of expectations, one involving 'searches,' the other 'seizures.' " 466 U.S. at 113. "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *Id.*

Thus, while the actual blood taken from Cox may qualify as seized property, an issue not raised, the written report of the test result is no more such property than are the observations made by the officer who seized Cox himself. After all, the report is simply a written record of the observations made during the testing of the blood.

The reason for § 29-827 is perhaps best illustrated by *State v. Allen*, 159 Neb. 314, 66 N.W.2d 830 (1954). Therein, the State seized some pheasants as part of its prosecution of Allen for unlawfully possessing and transporting game birds. After the State presented its evidence, Allen successfully moved for a dismissal. Several months later, Allen made application to the county court for return of the pheasants; the State objected, claiming that the birds were contraband and that the proper procedure was an action in replevin. However, the county court ordered the pheasants pulled out of refrigeration and returned to Allen in 20 days. Before that could take place, the State filed a petition in error in the district court, alleging that the county court erred by ordering the birds returned.

The district court held that by virtue of being admitted into evidence, the birds left the possession of the law enforcement agency and entered into the possession and custody of the county court. As a result, the county court had "sole and exclusive jurisdiction to order disposition of the said property." *Id.* at 319, 66 N.W.2d at 834. On appeal to this court, the State contended that in a criminal case the county court was without authority to order contraband received in evidence returned to the defendant following dismissal of the complaint. Noting that there was no bill of exceptions and thus no record that the birds were contraband, we held that after the birds had been offered into evidence, they were in custodia legis and thus under the control of the county court. Therefore, the district court had

correctly affirmed the county court's order to return the birds to Allen.

Section 29-827 constitutes an exception to the county court's power to otherwise dispose of seized property. When given notice by the county attorney of an intent to dismiss and refile in district court, the county court must relinquish the seized property to the jurisdiction of the district court.

While there may have been other bases upon which the written report of the test result should have been excluded from the evidence, a matter with which we do not concern ourselves, the basis advanced by Cox has no merit.

Accordingly, as noted in the first paragraph of this opinion, we affirm the judgment of the Court of Appeals.

AFFIRMED.

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## STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. RICHARD L. SCHMELING, RESPONDENT.

529 N.W.2d 799

Filed March 31, 1995. No. S-94-485.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof: Appeal and Error.** In its de novo review of the record in a disciplinary proceeding against an attorney, and to sustain a particular complaint against an attorney, the Supreme Court must find that the complaint has been established by clear and convincing evidence.
3. **Disciplinary Proceedings.** In a disciplinary proceeding against an attorney, the basic issues are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
4. **Disciplinary Proceedings: Evidence: Appeal and Error.** A party may not take exception to the admission of evidence in the Supreme Court's consideration of a

disciplinary proceeding where no objection to the evidence was made before the referee, just as a party on appeal may not assign the admission of evidence as error where no objection was made at trial.

5. **Disciplinary Proceedings.** The Supreme Court may consider subsequent disciplinary matters in determining the sanctions to be imposed against an attorney.
6. ____. To determine whether and to what extent discipline should be imposed, it is necessary that the following factors be considered: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
7. ____. A violation of any of the ethical standards relating to the practice of law or any conduct of an attorney which tends to bring reproach upon the courts or the legal profession constitutes grounds for suspension or disbarment.

Original action. Judgment of suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

Dana M. London for respondent.

CAPORALE, LANPHIER, WRIGHT, and CONNOLLY, JJ., and MILLER-LERMAN, Judge, and GRANT, J., Retired.

PER CURIAM.

Formal disciplinary charges against Richard L. Schmeling were filed with the Nebraska Supreme Court on May 17, 1994. A referee was appointed, and findings of fact were entered on September 30. The referee recommended that Schmeling be suspended from the practice of law for 1 year. Schmeling has taken exception to the referee's findings and recommendation. We accept the referee's recommendation and impose discipline.

## FACTS

On March 31, 1993, Geoffrey and Sylvia Huntington filed a complaint against Schmeling with the Nebraska State Bar Association's Counsel for Discipline. Schmeling filed an untimely response to the complaint on May 17, and he did not appear at a March 8, 1994, hearing before the Committee on Inquiry of the First Disciplinary District. Formal charges were subsequently filed with the Supreme Court.

The record shows that Schmeling, who was admitted to the practice of law in 1965, was employed by the Huntingtons in

August 1989 to assist them in a foreclosure action on their home. On or about September 28, 1989, Schmeling was served with a request for admissions by the lender. Schmeling failed to file the Huntingtons' response to the request, and the request for admissions was deemed admitted. The admissions were subsequently used against the Huntingtons in support of the lender's successful motion for summary judgment. However, the referee found that the Huntingtons were not adversely affected by this because the evidence was uncontroverted that the admissions were true.

Schmeling also represented the Huntingtons in a chapter 13 bankruptcy proceeding which was filed in August 1990, just prior to a hearing on the foreclosure action. The automatic stay imposed by the bankruptcy laws stopped the foreclosure. However, Schmeling failed to file a plan within the 15-day time period provided by bankruptcy rule 3015, 11 U.S.C. app. rule 3015 (1988). The chapter 13 bankruptcy petition was filed on August 13, 1990, but the plan was not filed until after September 24. Schmeling testified that he was not familiar with chapter 13 bankruptcy and did not know when the plan had to be filed. Schmeling's failure to file the plan resulted in the issuance of an order of intent to dismiss the bankruptcy petition.

The first plan filed by Schmeling contained numerous items to which the chapter 13 trustee had valid objections. An amended plan prepared by Schmeling also was not satisfactory to the trustee. In May 1990, Schmeling was advised that the bankruptcy petition would be dismissed if a new amended plan was not filed within 30 days. Schmeling admitted that he never told the Huntingtons that he was not filing a second amended plan, nor did he seek or obtain their approval not to file a second amended plan. The bankruptcy petition was dismissed on August 20, 1991, but Schmeling did not advise his clients of the dismissal.

After the dismissal of the bankruptcy petition, the foreclosure proceedings continued. On October 23, 1991, Schmeling appeared on behalf of the Huntingtons to object to confirmation of the foreclosure sale. The Huntingtons were not advised of the sale and confirmation of sale until early November, when they were served with a writ of assistance which required them to

vacate their home within 3 days.

Schmeling was charged with violating the following provisions of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> (5) Engage in conduct that is prejudicial to the administration of justice.
>
> . . . .
>
> DR 6-101 Failing to Act Competently.
>
> (A) A lawyer shall not:
>
> (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.
>
> (2) Handle a legal matter without preparation adequate in the circumstances.
>
> (3) Neglect a legal matter entrusted to him.
>
> . . . .
>
> DR 7-101 Representing a Client Zealously.
>
> (A) A lawyer shall not intentionally:
>
> . . . .
>
> (2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.
>
> (3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).
>
> . . . .
>
> DR 7-106 Trial Conduct.
>
> (A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

The referee concluded that Schmeling violated DR 1-102, DR 6-101, and DR 7-101 in the following respects: failing to file a plan within 15 days of the filing of the bankruptcy petition, failing to obtain his clients' approval in deciding not to file a second amended plan, and failing to notify his clients of the dismissal of the bankruptcy proceedings and of the recommenced foreclosure proceedings. The referee also noted that Schmeling had received three private reprimands: on December 10, 1990, for events that occurred between 1988 and 1990; on September 22, 1992, for events that occurred on July 13, 1992; and on February 5, 1993, for events that occurred on January 3, 1992. The referee recommended that Schmeling be suspended from the practice of law for 1 year.

## ANALYSIS

A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Veith*, 238 Neb. 239, 470 N.W.2d 549 (1991). In its de novo review of the record in a disciplinary proceeding against an attorney, and to sustain a particular complaint against an attorney, the Supreme Court must find that the complaint has been established by clear and convincing evidence. *State ex rel. NSBA v. Thor*, 237 Neb. 734, 467 N.W.2d 666 (1991). In a disciplinary proceeding against an attorney, the basic issues are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989). The court, in determining the imposition of discipline, should bear in mind that cumulative acts of attorney misconduct are distinguishable from isolated incidents of neglect and therefore justify more serious sanctions. *Veith, supra*; *Kirshen, supra*.

Schmeling first takes exception to the referee's conclusion that the failure to file the original plan of reorganization within 15 days of the filing of the bankruptcy petition constitutes a

violation of any disciplinary rule. Schmeling admits that he did not file the original plan within the prescribed time, but he argues that his failure to do so did not violate the code of ethics because it was not prejudicial to the administration of justice and did not constitute neglect of a legal matter.

Neglect is defined as "[a]n omission to do or perform some work, duty, or act." Black's Law Dictionary 1032 (6th ed. 1990). There is no question that Schmeling neglected to file the original reorganization plan within the time allowed by the bankruptcy rules. The failure to file the plan was properly considered by the disciplinary committee and the referee in determining whether to file charges and in recommending discipline. We find no merit to the first exception.

Schmeling takes exception to the finding that he violated DR 7-101(A)(3). He argues that his actions did not prejudice or damage his clients because they were delinquent in their payments to the chapter 13 trustee and would not have been successful in their reorganization efforts.

Schmeling admitted that he never filed a second amended plan, but he stated that he believed the Huntingtons would not have been successful in their efforts to reorganize their debts. Schmeling said he was under the impression that the Huntingtons were behind in their payments to the trustee, although Schmeling had received no official notification to that effect from the trustee. This exception also has no merit. We have stated that an attorney's "excuse that the lawsuit was without merit is unacceptable. An attorney who neglects a matter entrusted to him has failed to act competently." *State ex rel. NSBA v. Rasmussen*, 232 Neb. 53, 56, 439 N.W.2d 481, 483 (1989). Whether the Huntingtons would have been successful in completing the requirements of a chapter 13 bankruptcy is not the issue. The issue is whether Schmeling abided by the disciplinary rules regarding vigorous representation of his clients, which he did not.

Schmeling takes exception to the referee's conclusion that the private reprimands of September 22, 1992, and February 5, 1993, can be considered in determining the sanctions to be imposed against him. He argues that under Neb. Ct. R. of Discipline 9(H)(2) and (H)(3)(g) (rev. 1992), only prior private

reprimands should be considered in any subsequent disciplinary proceeding. Schmeling asserts that to consider the subsequent reprimands violates his right of due process and is fundamentally unfair.

At the hearing before the referee, the relator offered as evidence the three private reprimands issued against Schmeling. Schmeling did not object to the admission of the evidence. In another disciplinary action, we held that a party may not take exception to the admission of evidence in this court's consideration of a disciplinary proceeding where no objection to the evidence was made before the referee, just as a party on appeal may not assign the admission of evidence as error where no objection was made at trial. See *State ex rel. NSBA v. Roubicek*, 225 Neb. 509, 406 N.W.2d 644 (1987). Therefore, Schmeling cannot take exception in this court to the receipt into evidence of the exhibits related to these reprimands when he did not object to their admission at the hearing.

Schmeling also argues that these reprimands cannot be used in determining the sanction imposed upon him because two of them occurred subsequent to the events related to the Huntingtons. In *State ex rel. Nebraska State Bar Assn. v. Michaelis*, 210 Neb. 545, 316 N.W.2d 46 (1982), *cert. denied* 459 U.S. 804, 103 S. Ct. 27, 74 L. Ed. 2d 42, *reh'g denied* 459 U.S. 1059, 103 S. Ct. 479, 74 L. Ed. 2d 625, we stated that while an attorney's actions subsequent to the events underlying a disciplinary case should perhaps not be considered in determining whether the attorney has violated the Code of Professional Responsibility, it is permissible for these subsequent events to be considered in determining what sanctions should be imposed against the attorney in the disciplinary matter. Therefore, Schmeling's exception is not well taken.

Schmeling takes exception to the referee's recommendation of a 1-year suspension from the practice of law. Schmeling argues that this sanction is excessive and disproportionate to disciplinary orders entered in proceedings similar in nature and that a more appropriate sanction would be probation or a public reprimand and/or censure.

We have stated:

> To determine whether and to what extent discipline should be imposed it is necessary that the following factors be considered: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) his present or future fitness to continue in the practice of law.

*State ex rel. NSBA v. Veith*, 238 Neb. 239, 246, 470 N.W.2d 549, 555 (1991).

A violation of any of the ethical standards relating to the practice of law or any conduct of an attorney which tends to bring reproach upon the courts or the legal profession constitutes grounds for suspension or disbarment. *State ex rel. NSBA v. Mehmken*, 246 Neb. 1029, 524 N.W.2d 350 (1994); *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989). Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances to determine an appropriate sanction. *Veith, supra*. Considering the six factors identified in *Veith*, a 1-year suspension from the practice of law is not excessive or disproportionate.

In his brief, Schmeling raises other issues concerning the formal charges. However, we are limited in our review to examining only those items to which he has taken exception. Other issues discussed but not assigned as exceptions will not be considered.

## CONCLUSION

Schmeling violated the Code of Professional Responsibility and misrepresented information to his clients, which is conduct that is prejudicial to the administration of justice. He attempted to handle a chapter 13 bankruptcy, although he admitted, "I don't do a lot of Chapter 13s." He neglected to timely file the first plan, and he completely neglected to file a second amended plan. As a result of these actions, the bankruptcy proceeding was dismissed, the Huntingtons' home was foreclosed upon, and the Huntingtons were given a writ of assistance requiring them to vacate their home within 3 days. Schmeling ignored rules of the bankruptcy court requiring the steps to be taken in pursuing

bankruptcy as a remedy. This is prejudicial conduct.

We find after a de novo review that the complaint has been established by clear and convincing evidence, and the court is satisfied to a reasonable certainty that the charges are true. See *State ex rel. NSBA v. Thor*, 237 Neb. 734, 467 N.W.2d 666 (1991). Schmeling is suspended from the practice of law for 1 year, effective immediately.

JUDGMENT OF SUSPENSION.

WHITE, C.J., and FAHRNBRUCH, J., not participating.

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ROGER BUNNELL, APPELLANT AND CROSS-APPELLEE, V. BURLINGTON NORTHERN RAILROAD COMPANY, A DELAWARE CORPORATION, APPELLEE AND CROSS-APPELLANT.

530 N.W.2d 230

Filed April 7, 1995. No. S-93-462.

1. **Jury Instructions: Appeal and Error.** Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.
2. **Judges: Proof: Appeal and Error.** It is the burden of the complaining party to establish that judicial prejudice has occurred.

Appeal from the District Court for Box Butte County: PAUL D. EMPSON, Judge. Affirmed in part, and in part reversed and remanded with directions.

Robert G. Pahlke, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellant.

Thomas L. Beam, Terry C. Dougherty, and Andrew S. Pollock, of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

WHITE, C.J.

Roger Bunnell brought an action in the district court under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. (1988), against Burlington Northern Railroad Company (Burlington) seeking damages for bilateral carpal tunnel syndrome allegedly suffered as a result of Bunnell's employment at Burlington's Alliance, Nebraska, facility. The jury returned a special verdict in favor of Burlington, and Bunnell appeals. Burlington cross-appeals the court's denial of costs for deposition expenses incurred by Burlington.

Bunnell was employed as a machinist for Burlington for 14 years prior to his injuries. Bunnell performed services on the locomotives in the diesel pit area of Burlington's Alliance facility. Bunnell alleged in his petition that he suffers from bilateral carpal tunnel syndrome as a result of the strain-inducing repetitive tasks he performed during the course of his employment at Burlington. After a 12-day trial, the jury returned a verdict for Burlington. Burlington filed a motion for costs after the verdict was rendered. The trial court allowed costs in the amount of $81.50 for witness fees and for service of subpoenas, but denied deposition costs.

The essence of Bunnell's assignments of error is that the district court erred in giving the jury a contributory negligence instruction because Burlington failed to introduce any evidence that Bunnell was contributorily negligent. Burlington argues that the jury never reached the issue of contributory negligence, since the jury used a special verdict form. The special verdict form required the jury to first decide if Burlington's negligence proximately caused Bunnell's injuries and, if so, then and only then required the jury to determine if Bunnell was contributorily negligent in any manner so as to reduce his recovery proportionately. The jury returned a verdict for Burlington on that issue and thus never reached the issue of whether Bunnell was contributorily negligent. Burlington submits that the error, if any, was harmless.

Bunnell relies on *Wilson v. Burlington Northern, Inc.*, 670 F.2d 780 (8th Cir. 1982), *cert. denied* 457 U.S. 1120, 102 S. Ct. 2934, 73 L. Ed. 2d 1333. The *Wilson* court commented on *Rogers v. Southern Pacific Co.*, 172 Cal. App. 2d 493, 342 P.2d

258 (1959), which held that since the Federal Employers' Liability Act uses a pure comparative negligence scheme and the jury found for the defendant, any error regarding a contributory negligence instruction was harmless. *Wilson, supra*. However, the *Wilson* court stated:

> There is some logic to the rule propounded by the *Rogers* court. This rule, however, ignores the practical realities that accompany the use of juries and *general verdicts*. . . . [T]here is a risk that the jury may fail to understand the statutory comparative negligence scheme. And when, as here, *a general verdict is used*, a court cannot ascertain whether or not the jury correctly applied the applicable law in deciding to award no damages.

(Emphasis supplied.) *Id.* at 784. The *Wilson* court held that the district court committed reversible error by submitting an unjustified contributory negligence instruction to the jury because of the risk of confusing the jury.

*Wilson* is distinguishable from the case now before us because the jury in *Wilson* used a general verdict form, and the jury in Bunnell's case used a special verdict form, which separates the issue of the defendant's negligence from the issue of the plaintiff's contributory negligence. The harm of jury confusion that a general verdict can cause is not present in Bunnell's case because, by virtue of the special verdict form, the jury never reaches the contributory negligence issue. Assuming, without deciding, that the contributory negligence instruction was erroneously given, the error was harmless in this case, since the jury never reached the issue of contributory negligence.

Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. *Plambeck v. Union Pacific RR. Co.*, 232 Neb. 590, 441 N.W.2d 614 (1989).

Bunnell also alleges that the district court erred in making rulings on evidence in a way that showed the judge's prejudgment of the issues. We have reviewed the bill of exceptions and have not found Bunnell's allegations to be supported by the record. It is the burden of the complaining

party to establish that judicial prejudice has occurred. See, *State v. Joubert*, 235 Neb. 230, 455 N.W.2d 117 (1990), *cert. denied* 499 U.S. 931, 111 S. Ct. 1338, 113 L. Ed. 2d 269 (1991); *State v. Ellefson*, 231 Neb. 120, 435 N.W.2d 653 (1989). Having found no evidence that the trial judge acted improperly so as to prejudice Bunnell, we find that Bunnell's assignment of error regarding judicial misconduct is also without merit.

Burlington cross-appeals to recover deposition costs. Neb. Rev. Stat. § 25-1710 (Reissue 1989) provides that costs shall be allowed as a matter of course to a defendant upon judgment in the defendant's favor in actions mentioned in Neb. Rev. Stat. § 25-1708 (Reissue 1989), which are actions for the recovery of money. As no reason appears why the general rule should not be followed, the costs of the deposition will be taxed to the appellant. See *Tobas v. Mutual Building and Loan Association*, 147 Neb. 676, 24 N.W.2d 870 (1946).

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

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TERESA K. ROUBIDEAUX, APPELLANT, V. YVONNE K. DAVENPORT, M.D., APPELLEE.

530 N.W.2d 232

Filed April 7, 1995. No. S-93-625.

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. Moreover, 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.
2. **Summary Judgment: Proof.** A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must furnish sufficient evidence to demonstrate that the moving party is entitled to judgment as

a matter of law if the evidence presented remains uncontroverted. After the moving party has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.

3. ____: ____. In the absence of a prima facie showing by the movant that she is entitled to summary judgment, the opposing party is not required to reveal evidence which she expects to produce at trial to prove the allegations contained in her petition.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded for further proceedings.

Anita K. Gregerson, of Gregerson Law Office, and Teresa K. Roubideaux for appellant.

Mark E. Novotny and William M. Lamson, Jr., of Kennedy, Holland, DeLacy & Svoboda, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and GRANT, J., Retired.

LANPHIER, J.

Teresa K. Roubideaux appeals from an order of the district court for Lancaster County dismissing her medical malpractice action against Yvonne K. Davenport, M.D. The district court granted Davenport summary judgment for the reason that Roubideaux failed to adduce expert medical testimony concerning the appropriate standard of care and Davenport's negligent departure from that standard. Roubideaux contends the district court erred in granting Davenport summary judgment because Davenport's affidavit contains contradictory statements which raise genuine issues of material fact. We agree with this contention, and therefore, we reverse the judgment of the district court and remand the cause for further proceedings.

## BACKGROUND

Roubideaux filed her second amended petition on January 5, 1993. In her petition Roubideaux alleged that she engaged Davenport, an obstetrician and gynecologist, to deliver her baby and then to perform a tubal ligation. The petition alleged that Davenport operated on Roubideaux on July 16, 1991, but cut, instead of fallopian tubes, round ligaments. Roubideaux's

petition also alleged that subsequent to the surgery, Roubideaux underwent an exploratory procedure called a hystero-salpingography, which revealed that both of her fallopian tubes were intact. Roubideaux alleged that in the course of a tubal ligation, the standard procedure is to examine the oviduct all the way to its fimbriated end to ensure that fallopian tubes, not round ligaments, are severed. Finally, Roubideaux alleged that Davenport failed to follow this standard procedure and that Davenport's deviation from this standard was the cause of the damages Roubideaux sustained.

On January 12, 1993, Davenport filed an answer denying that she negligently performed the surgery. On February 22, Davenport moved for summary judgment. On May 6, Davenport submitted her own affidavit in support of her motion. Attached to the affidavit are correspondence between Davenport and Roubideaux, medical records, and an excerpt from a medical treatise.

On May 6, Roubideaux's attorney filed an affidavit which stated that Roubideaux needed additional time to complete and forward from Colorado her affidavit in opposition to the motion for summary judgment. On May 13, the district court ordered that Roubideaux submit her affidavit in opposition to Davenport's motion for summary judgment within 10 days. On May 21, Roubideaux filed affidavits made by her and her husband. On June 18, the district court granted Davenport's motion and dismissed Roubideaux's action.

## ASSIGNMENTS OF ERROR

As summarized and restated, Roubideaux asserts through her assigned errors that the district court erred (1) in sustaining Davenport's motion for summary judgment and (2) in failing to grant Roubideaux a sufficient continuance to conduct necessary discovery.

## STANDARD OF REVIEW

In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Jim's, Inc. v. Willman, ante* p. 430, 527 N.W.2d 626 (1995). Moreover,

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. *Id.*

A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must furnish sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented remains uncontroverted. *Id.* After the moving party has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Id.*

## SUMMARY JUDGMENT

Roubideaux contends the district court's granting of summary judgment was erroneous because Davenport failed to prove that no genuine issue of material fact exists. Roubideaux argues that Davenport's affidavit in support of the motion for summary judgment itself raises genuine issues of material fact. We agree.

In her affidavit, Davenport describes with particularity the procedure she performed on Roubideaux. She states:

> On or about July 16, 1991, affiant performed the minilaparotomy with bilateral tubal ligation for and on behalf of Plaintiff; with the consent of Plaintiff. At that time Plaintiff was taken to the operating room and given general anesthetic. She was placed in the supine position and the abdomen was prepped and draped in the usual manner. An infraumbilical skin incision was made and carried down through the subcutaneous tissue and fascia. The abdominal peritoneum was identified and open. The two retractors were placed within the incision and the uterine fundus was identified. Following inside the left tube was identified, grasped with an Allis clamp in its mid-portion. A rent was made in the mesosalpinx and a suture of 0 chromic was placed through this. The proximal portion of the tube was tied off. A second suture was

> placed through the rent in the mesosalpinx and the distal portion of the tube tied off. An area of approximately one centimeter was excised between these two sutures. The area was inspected for bleeding and there was none. A similar procedure was carried out on the opposite site. The abdominal peritoneum was closed with a running suture of 2-0 chromic. The fascia was closed with 0 Vicryl. Subcutaneous tissue was closed with 4-0 Vicryl and the skin approximated with a subcuticular stitch of Dexon. Blood loss was minimal. The patient was taken to the recovery room in good condition.

This portion of her affidavit suggests that she excised portions of Roubideaux's fallopian tubes.

Later, in the same affidavit, however, Davenport suggests that round ligaments, not fallopian tubes, were excised. Davenport states:

> Subsequent to the above-noted surgery, the tissue from the tubal ligation performed on Teresa Roubideaux by affiant was examined by John H. Casey, M.D. Upon clinical review by Dr. Casey, he discovered that the specimen removed from Teresa Roubideaux by affiant was not in fact representative of fallopian tubes.

Davenport then also states: "On September 5, 1991, affiant informed Teresa Roubideaux that the hysterosalpingogram showed tubal patency and, at that time, affiant discussed with Teresa Roubideaux a repeat bilateral tubal ligation."

Although the outcome of the operation is not necessarily determinative of whether Davenport committed medical malpractice, what happened during the operation is a material fact central to the issue of medical malpractice. There are thus contradictory statements contained in Davenport's affidavit about whether or not the fallopian tubes were severed during the tubal ligation surgery. The fact in issue, however, in and of itself, does not suggest malpractice.

But, in her affidavit Davenport states she identified Roubideaux's fallopian tubes. Although she does not state either how she did this or why—having identified the fallopian tubes—she severed round ligaments, she later makes a conclusory statement that she followed the appropriate standard of care.

Attached to Davenport's affidavit and a part of it is an excerpt taken from Kistner's Gynecology Principles & Practice (1990). In pertinent part, that excerpt states:

> Failure rate of most female sterilization methods is generally quoted as 2 per 1,000 operations performed. Most failures result from recanalization of the oviduct. However, if the procedure is hastily done without identifying the entire length of the oviduct to its fimbriated end, a round ligament could be mistaken for an oviduct.

Again, Davenport's affidavit is internally inconsistent. She concludes that she followed the appropriate standard of care. However, in her detailed explanation of the procedure she performed, she makes no mention of following the procedure set forth in the above-quoted excerpt attached to her affidavit. The excerpt states that failure to identify the entire length of the oviduct to its fimbriated end can lead to mistaking a round ligament for an oviduct. Viewing the evidence in a light most favorable to Roubideaux and giving her the benefit of all reasonable inferences, we find that it appears Davenport failed to properly identify the oviduct. Davenport again failed to meet the burden of a movant for summary judgment of proving that no genuine issues of material fact exist. Davenport's own affidavit raises an issue as to whether she in fact followed what she claims is the appropriate standard of care for tubal ligation surgery.

That Roubideaux has not yet adduced evidence supporting her allegations is of no consequence. In the absence of a prima facie showing by the movant that she is entitled to summary judgment, the opposing party is not required to reveal evidence which she expects to produce at trial to prove the allegations contained in her petition. *Hanzlik v. Paustian*, 211 Neb. 322, 318 N.W.2d 712 (1982), *overruled on other grounds, Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992).

Davenport has not made a prima facie showing that she is entitled to summary judgment. Genuine issues of material fact exist. Davenport has not met her burden as movant, and therefore, Roubideaux was not required to adduce evidence in support of the allegations in her petition.

Our holding on this issue obviates the need to address Roubideaux's other assigned error. For the foregoing reasons, the judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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## MARTIN JULIUS MISCHKE, PERSONAL REPRESENTATIVE OF THE ESTATE OF STANLEY MISCHKE, DECEASED, APPELLEE, V. GORDON MISCHKE ET AL., APPELLANTS.

530 N.W.2d 235

Filed April 7, 1995. No. S-93-649.

1. **Equity: Decedents' Estates: Accounting.** An action for an accounting of estate property is in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
3. **Evidence: Appeal and Error.** When the credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Partnerships: Property: Intent.** The chief criterion for determining whether certain property is or is not that of a partnership is the intent of the partners to devote it to partnership purposes. Obviously, this intent must include the intent of the titleholder of the property involved. Use of the property alone is not sufficient because an owner may intend to contribute only the use, as distinguished from the ownership, to the partnership.
5. **Partnerships: Property: Taxes: Intent.** The payment of taxes on property may be probative of intent but does not by itself establish the property as a partnership asset.
6. **Principal and Agent.** A power of attorney authorizes another to act as one's agent.
7. ____. An agent is prohibited from profiting from the agency relationship to the detriment of the principal or having a personal stake that conflicts with the principal's interest in a transaction in which the agent represents the principal.
8. **Principal and Agent: Gifts: Intent.** No gift may be made by an attorney in fact

to himself or herself unless the power to make such a gift is expressly granted in the instrument itself and there is shown a clear intent on the part of the principal to make such a gift.

9. **Principal and Agent: Intent.** Absent express intention, an agent may not utilize his position for his or a third-party's benefit in a substantially gratuitous transfer.

Appeal from the District Court for Knox County: RICHARD P. GARDEN, Judge. Affirmed as modified, and cause remanded for further proceedings.

Kevin L. Reiner and Steven M. Johnson, of Johnson, Heidepriem, Miner & Marlow, and Patrick J. Birmingham for appellants.

Larry R. Demerath, of Demerath Law Offices, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

FAHRNBRUCH, J.

In this equity action, Martin Julius Mischke, personal representative of the estate of his brother Stanley Mischke, sought an accounting and return to Stanley's estate of personal and real property he alleges was unlawfully transferred to his brothers Jerome, Gordon, and Cyrus Mischke.

Jerome, Gordon, and Cyrus appeal from the district court's order finding that they hold Stanley's interest in three parcels of real estate in a constructive trust and must convey the real and personal property transferred to them to Stanley's estate.

Upon de novo review of the record, we affirm the judgment of the district court for Knox County as modified herein and remand the cause to that court for further proceedings.

## STATEMENT OF FACTS

Stanley, Jerome, Gordon, Cyrus, and Wayne Mischke operated a farm and pastureland that was originally owned by their parents in the Crofton area. The survivors of these brothers claim that they utilized the farm and pastureland as partners under the name "Mischke Hereford Ranch." The record fails to reflect that a written partnership agreement was ever drafted. Wayne died in 1962. Then the land was utilized by Stanley, Jerome, Gordon, and Cyrus.

In some respects, the Mischke Hereford Ranch appears to

have performed as a partnership. Profits went into the Mischke Hereford Ranch account, and expenses were paid out of that account. The brothers shared profits and losses.

In other respects, the brothers' actions did not give the appearance of a partnership. When Wayne left the farm, his brothers did not pay him for any interest he may have had in the operation. The record does not reflect that Jerome, Gordon, and Cyrus made any capital contributions. Stanley acted more as a boss than as an equal partner. In a letter to two of his sisters, Jerome described Stanley as "no easyer [sic] to live with," and opined that Stanley was "certinly [sic] not going to give up being boss and owner."

Historically, upon the death of the boys' father on October 2, 1930, the boys' mother, Louise Mischke, became owner of the land. In 1964, the mother conveyed the south half of Section 27, Township 33 North, Range 2 West of the 6th P.M., in Knox County (the homeplace), to Stanley, Jerome, and Gordon. She also conveyed other real estate to Stanley, Jerome, Gordon, and Cyrus. In 1965, Stanley, Jerome, and Gordon conveyed the homeplace back to their mother to avoid gift taxes. In 1972, the mother died and, in her will, devised the homeplace to Stanley as sole devisee.

Stanley lived alone on the homeplace. Nevertheless, the Mischke Hereford Ranch paid the utilities and property taxes on the homeplace, as well as making some improvements. Profits generated from the homeplace went into the Mischke Hereford Ranch account.

The evidence is in conflict as to what Stanley intended to do with the property. Cyrus testified that Stanley had discussed with him transferring the homeplace to the brothers. Gordon and Jerome testified that an understanding existed that Stanley would convey the homeplace back to the brothers. However, Jerome, in a 1990 letter to two of his sisters, wrote that "[t]he three of us worry about what is going to happen if something would happen to [Stanley] because so far as we know he has done nothing about ownership. He won't even talk about it . . . ." The Mischke family attorney testified that Stanley never discussed with him whom he wanted to have his property. Martin Mischke testified that Stanley, up to the year of his

death, expressed indecision regarding estate planning.

On July 19, 1991, Stanley become ill and was taken to a Yankton, South Dakota, hospital where a CAT scan revealed a blood clot on his brain.

At his own initiative, Jerome contacted Jerry Pollard, a South Dakota attorney, about preparing Stanley's will. Pollard arrived at the hospital, and after a short discussion with Stanley, Pollard became concerned that Jerome and Gordon were pressuring and coaxing Stanley to do something. Pollard wheeled Stanley away from his brothers in order to have a 15- to 30-minute private discussion with him. Stanley directed Pollard to prepare a will dividing the property evenly among all his living brothers. Stanley further stated he was concerned about pressure he was receiving from family members.

Stanley also instructed Pollard to draft a power of attorney appointing Jerome as his attorney in fact. While the power of attorney authorized Jerome to sell and convey Stanley's real estate, it did not authorize him to transfer Stanley's interest in real and personal property to Jerome, Gordon, and Cyrus without compensation or in connection with any estate plan.

Pollard drafted the will and power of attorney in his office. Jerome and Gordon picked up the documents and took them to a Sioux City, Iowa, hospital, where Stanley had been transferred for surgery. Jerome and Gordon presented the will and power of attorney to Stanley, who signed them on the night of July 19 before going into surgery. Both Jerome and Gordon testified that Stanley did not read the will prior to signing it before witnesses and a notary public. There appears to be no evidence in the record as to whether Stanley read the power of attorney before signing it.

After Stanley signed the will, Jerome and Gordon had an opportunity to talk to Stanley before he went into surgery. During this time, Stanley read the will and stated that it was not what he wanted. Jerome testified that Stanley said he did not want his brothers Martin and Myron Mischke to share equally with Jerome, Gordon, and Cyrus. Stanley tore the will in half and threw it away. Thereafter, according to both Jerome and Gordon, Stanley instructed them to go ahead with the power of attorney. Jerome testified that Stanley orally instructed him to

transfer the property if Stanley did not come out of his operation. Jerome further testified that if Stanley were to come out of his operation, the transfer of his property "would be taken care of as it went along."

On July 23, 1991, while Stanley was still alive but in a coma, Jerome, purporting to act as attorney in fact, transferred to himself, Gordon, and Cyrus Stanley's interest in the following described real estate: the southwest quarter of Section 20, the northwest quarter of Section 29, the northeast quarter of the northeast quarter in Section 30, the southeast quarter of the southeast quarter of Section 19, the east half of Section 20, and the west half and the northwest quarter of the northeast quarter of Section 21, all in Township 33 North, Range 2 West of the 6th P.M., in Knox County. Jerome also transferred Stanley's interest in the south half of Section 27, Township 33 North, Range 2 West of the 6th P.M., in Knox County, to himself and Gordon.

On July 24, 1991, Jerome, while Stanley was still in a coma, transferred Stanley's interest in the southwest quarter and the south half of the southeast quarter of Section 15, as well as the south half of the north half of the southwest quarter and the south half of the southwest quarter of Section 14, Township 33 North, Range 2 West of the 6th P.M., in Knox County, to himself, Gordon, and Cyrus.

Jerome transferred Stanley's personal checking account to himself, Gordon, and Cyrus and Stanley's certificates of deposit to himself and Gordon. Jerome also transferred various personal property from Stanley to himself, Gordon, and Cyrus. All transfers were made without Stanley or his estate receiving any consideration.

On July 26, 1991, Stanley died.

After learning of the transfers by Jerome to himself and his two brothers Gordon and Cyrus, Martin filed a petition for adjudication of intestacy and was appointed personal representative of Stanley's estate.

As personal representative, Martin filed a petition against Jerome, Gordon, and Cyrus alleging that Jerome, while acting in a fiduciary capacity, unlawfully transferred, conveyed, and/or converted all of Stanley's real and personal property to himself,

Gordon, and Cyrus. The petition further alleged that such transfers were made contrary to the authority of the durable power of attorney.

In their answer, Jerome, Gordon, and Cyrus generally denied Martin's allegations and in their counterclaim alleged that Martin's petition clouded their title to the real estate and depreciated its market value. The brothers claimed that the partnership of Mischke Hereford Ranch beneficially and equitably owned the real property in question.

The district court held that Jerome, as Stanley's attorney in fact, did not have authority to transfer Stanley's real and personal property to himself and his brothers without full and adequate consideration. The court held that Jerome, Gordon, and Cyrus hold the real and personal property transferred to them in constructive trust for the estate of Stanley and ordered that they convey the property to the personal representative. The court dismissed the brothers' counterclaim.

The brothers' motion for a new trial was overruled, and this appeal followed.

## ASSIGNMENTS OF ERROR

Restated, Jerome, Gordon, and Cyrus claim that the district court erred by (1) failing to find that the property in question was a partnership asset; (2) failing to conclude that Jerome acted within his authority under the durable power of attorney; (3) finding that Jerome transferred the property in question by gift; (4) ordering Jerome, Gordon, and Cyrus to hold in constructive trust Stanley's real and personal property which had been transferred to them by Jerome; and (5) ordering Jerome, Gordon, and Cyrus to transfer the property in question to Stanley's estate.

We need only address the first two assignments of error because they are dispositive of this appeal: the ownership of the property and the authority granted Jerome in the power of attorney.

## STANDARD OF REVIEW

An action for an accounting of estate property is in equity. See *Fletcher v. Mathew*, 233 Neb. 853, 448 N.W.2d 576 (1989). In an appeal of an equity action, an appellate court tries

the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Nebraska Irrigation, Inc. v. Koch*, 246 Neb. 856, 523 N.W.2d 676 (1994). When the credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *Synacek v. Omaha Cold Storage, ante* p. 244, 526 N.W.2d 91 (1995).

## ANALYSIS

In their first assignment of error, Jerome, Gordon, and Cyrus contend that Stanley's real property which was transferred to them by Jerome was, at all times relevant, a partnership asset of the Mischke Hereford Ranch. Their argument assumes that the Mischke Hereford Ranch is a legal partnership. We need not address the merits of this assumption because even if a partnership existed, there is insufficient evidence that Stanley intended his property to be owned by the Mischke Hereford Ranch.

Stanley alone had title to the personal and real property which Jerome transferred to himself, Gordon, and Cyrus. The Mischke Hereford Ranch used and profited from Stanley's property and paid taxes and made improvements to the homeplace. The chief criterion for determining whether certain property is or is not that of a partnership is the intent of the partners to devote it to partnership purposes. See *Bode v. Prettyman*, 149 Neb. 179, 30 N.W.2d 627 (1948). Obviously, this intent must include the intent of the titleholder of the property involved. Use of the property alone is not sufficient because an owner may intend to contribute only the use, as distinguished from the ownership, to the partnership. *Norcross v. Gingery*, 181 Neb. 783, 150 N.W.2d 919 (1967). Similarly, the payment of taxes on the property may be probative of intent but does not by itself establish the property as a partnership asset. See, *Standring v. Standring*, 794 P.2d 1089 (Colo. App. 1990); *Estate of Schreiber*, 68 Wis. 2d 135, 227 N.W.2d 917 (1975).

Jerome, Gordon, and Cyrus testified that an understanding

existed that Stanley would convey the property to the partnership. There is nothing in the record to reflect that his "understanding" was ever reduced to writing. This testimony is not consistent with Martin's testimony that Stanley did not know what to do with the property; with the testimony of the Mischke family attorney, who did estate planning for the family yet was never approached by Stanley regarding any intent to transfer the property to the partnership or to anyone; with Jerome's letter to his two sisters complaining that Stanley would not even talk of his intentions regarding the property and acknowledging that Stanley was the owner of the property; and with the fact that Stanley had the property for nearly 20 years and never attempted to convey it to the partnership, despite receiving pressure from his brothers.

Thus, the record fails to reflect an intent on the part of Stanley for the property in question to be a partnership asset. Stanley owned the homeplace and had an interest in the remainder of the real estate involved here. To the extent that the Mischke Hereford Ranch was a partnership, it merely enjoyed the use of Stanley's land and never had an ownership interest in it. We agree with the trial court that Jerome, Gordon, and Cyrus are not entitled through the transfers by Jerome to the ownership of Stanley's interest in the real estate.

In the second assignment of error, the appellants contend that Jerome acted under the authority of the durable power of attorney when he transferred Stanley's personal and real property to himself, Gordon, and Cyrus.

A power of attorney authorizes another to act as one's agent. *Fletcher v. Mathew*, 233 Neb. 853, 448 N.W.2d 576 (1989). An agent is prohibited from profiting from the agency relationship to the detriment of the principal or having a personal stake that conflicts with the principal's interest in a transaction in which the agent represents the principal. *In re Estate of Lienemann*, 222 Neb. 169, 382 N.W.2d 595 (1986).

Jerome transferred Stanley's property to himself and his two brothers Gordon and Cyrus without consideration, to the detriment of Stanley's interest. The power of attorney executed by Stanley does not specifically, expressly, or even generally provide that Jerome had the authority to transfer any of

Stanley's real or personal property to himself or anyone else without full and complete consideration. No gift may be made by an attorney in fact to himself or herself unless the power to make such a gift is expressly granted in the instrument itself and there is shown a clear intent on the part of the principal to make such a gift. *Vejraska v. Pumphrey*, 241 Neb. 321, 488 N.W.2d 514 (1992). Absent express intention, an agent may not utilize his position for his or a third party's benefit in a substantially gratuitous transfer. *Id.* Clearly, the personal and real property transfers by Jerome as attorney in fact were beyond the scope of the powers granted Jerome by Stanley's durable power of attorney, and each and every such transfer was unlawful and void ab initio.

As a result of our finding on de novo review of the record that all transfers of real and personal property purportedly made under Stanley's durable power of attorney were void ab initio, Jerome, Gordon, and Cyrus are accountable to Stanley's estate not only for all of the property originally transferred to them, but also for any profits that they have made on account of receiving the property or that a reasonably prudent person would have realized from use, or for income from the fair market value of the property, whichever is greater. See *Schepers v. Lautenschlager*, 173 Neb. 107, 112 N.W.2d 767 (1962).

## CONCLUSION

The district court's judgment, as modified by this opinion, is affirmed, and the matter is remanded to that court for further proceedings consistent with this opinion.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

# UNIVERSITY PLACE-LINCOLN ASSOCIATES L.P. ET AL., APPELLANTS, V. RANDALL T. NELSEN, DOING BUSINESS AS CARS R FUN, AND GAYLA D. NELSEN, APPELLEES.

530 N.W.2d 241

Filed April 7, 1995. No. S-93-672.

1. **Injunction: Equity: Appeal and Error.** An injunction is a remedy available through an equity action. In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, however, that where credible evidence is in conflict on a material issue of fact an appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Easements.** In the absence of any evidence to the contrary, an easement's terms must be given their plain and ordinary meaning, as ordinary, average, and reasonable persons would understand those terms.
3. **Motor Vehicles: Time: Words and Phrases.** The word "parking," in its plain and ordinary sense, refers to a short duration measured by hours or at most by a day or two and has in it the element of a vehicle in use, being placed only temporarily until it is put in service again soon.

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

William G. Blake, of Pierson, Fitchett, Hunzeker, Blake & Loftis, for appellants.

Richard L. Spangler, Jr., of Woods & Aitken Law Firm, for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

WHITE, C.J.

Before 1988, Love Development & Investment Company and Love Investment Company (collectively, Love Investment) owned University Place, a shopping center (Lot 2), and its adjoining parking lot (Lot 1), which are located at the intersection of 48th and Leighton Streets in Lincoln, Lancaster County, Nebraska. In 1988, Love Investment divided University Place into two lots and sold Lot 1 to University Place-Lincoln Associates L.P. (Lincoln Associates), a limited partnership; Love Investment retained ownership of Lot 2. At that time, Love Investment declared an easement to govern parking privileges

on both lots. The easement provided in relevant part:

> Parking easements. Owner [Love Investment], as the present owner of Tracts I and II [Lots 1 and 2], hereby declares, and grants and conveys to the from time to time owner of the other Tract for the use and benefit of said from time to time owner and the respective tenants, subtenants, employees, agents, contractors, licensees, permittees and invitees thereof, a perpetual, nonexclusive easement (the "Parking Easement") in and on those portions of the Tracts which are from time to time used for vehicular parking (the "Parking Easement Area") for the purpose of vehicular parking thereon, and a perpetual, nonexclusive easement over and across such portions of both Tracts as may be reasonably necessary for such vehicular and pedestrian ingress to and egress from the Parking Easement Area as may be required to enable the said from time to time owners of both Tracts and their respective tenants, subtenants, employees, agents, contractors, licensees, permittees and invitees to realize the benefits of the Parking Easement. It is understood that each from time to time owner of a Tract shall have the right to develop, build and construct improvements upon any portion of the Parking Easement Area which benefits the other Tract, in which event the Parking Easement shall automatically terminate (without further action by any party) as to that portion of said Tract in which said development, building or construction shall occur. *It is further understood that if a from time to time owner of a Tract discontinues use of a portion of its Tract for vehicular parking, the Parking Easement shall automatically terminate (without further action by any party) as to that portion of said Tract.*

(Second emphasis supplied.) On October 21, 1988, Love Investment recorded the easement with the Lancaster County register of deeds.

Subsequently, in 1992, Love Investment sold Lot 2 to Randall T. Nelsen. Nelsen commenced construction of a building on Lot 2 to serve as a used-car dealership. Lincoln Associates objected, contending that Nelsen's use of Lot 2 would violate the easement.

Lincoln Associates and tenants of the shopping center filed this action in Lancaster County District Court, seeking a restraining order against Nelsen. The district court initially granted the request for a restraining order but later vacated the order. After trial on the merits, the trial court found for Nelsen and dismissed the petition.

An injunction is a remedy available through an equity action. In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, however, that where credible evidence is in conflict on a material issue of fact an appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Richdale Dev. Co. v. McNeil Co.*, 244 Neb. 694, 508 N.W.2d 853 (1993); *K N Energy, Inc. v. City of Broken Bow et al.*, 244 Neb. 113, 505 N.W.2d 102 (1993); *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 472 N.W.2d 391 (1991).

Lincoln Associates and the shopping center tenants allege that the district court erred in determining that Nelsen was "storing" and not "parking" cars, thereby "discontinu[ing] use of a portion of [his] Tract for vehicular parking [and] automatically terminat[ing] [the parking easement] as to that portion of said Tract." We note that the declaration of easements contains neither a provision for cessation of parking nor a definition of "parking." Therefore, in the absence of any evidence to the contrary, the easement's terms must be given their plain and ordinary meaning, as ordinary, average, and reasonable persons would understand those terms. See, *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994); *Prawl Engineering v. Charles Vrana & Son Constr.*, 241 Neb. 49, 486 N.W.2d 24 (1992).

As the district court observed, the word "parking," in its plain and ordinary sense, refers to a short duration "measured by hours or, at most, by a day or two" and which has in it the element of a vehicle in use, being placed only temporarily until it is put in service again soon. See *Inc. Vil. of Great Neck v. Green*, 8 Misc. 2d 356, 166 N.Y.S.2d 219 (1957). Conversely, while "parking" connotes transience, "storing" connotes a

degree of permanency. *Matter of Monument Garage Corp. v. Levy*, 266 N.Y. 339, 194 N.E. 848 (1935); *St. Louis County v. Taggert*, 809 S.W.2d 476 (Mo. App. 1991). See *St. Louis County v. Pfitzner*, 657 S.W.2d 262 (Mo. App. 1983). In the case at bar, because Nelsen was using Lot 2 as a used-car dealership, he was not "parking" cars on Lot 2; rather, he was "storing" cars on Lot 2. Consequently, as contemplated in the declaration of easements, the parking easement has been automatically terminated as to that portion of Lot 2 where Nelsen has been storing used cars because he has discontinued use of that portion of Lot 2 for vehicular parking. We are compelled to conclude that the district court did not err in determining that Nelsen was "storing" and not "parking" cars, thereby "discontinu[ing] use of a portion of [his] Tract for vehicular parking [and] automatically terminat[ing] [the parking easement] as to that portion of said Tract."

Therefore, the easement continues in full force with regard to the areas in which Nelsen is not storing cars, and the shopping center's customers may continue parking in those areas. We affirm.

AFFIRMED.

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JOHN TOMPKINS, JR., APPELLANT, V. LARRY RAINES, ALSO KNOWN AS LARRY HENGGLER, APPELLEE.

530 N.W.2d 244

Filed April 7, 1995. No. S-93-681.

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. **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. **Workers' Compensation.** The Workers' Compensation Act is an employee's exclusive remedy against an employer for an injury arising out of and in the course of employment.
4. ____. Whether an accident arose out of and in the course of employment must be determined from the facts of each case.

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

John B. Ashford and Steven M. Renteria, of Bradford, Coenen & Welsh, for appellant.

Allen J. Potts and, on brief, Lawrence E. Barrett, of Sodoro, Daly & Sodoro, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

WRIGHT, J.

John Tompkins, Jr., first brought an action in the Nebraska Workers' Compensation Court seeking compensation for personal injuries. A three-judge rehearing panel of the compensation court eventually dismissed his case. While that action was pending in the compensation court, Tompkins filed a petition in Douglas County District Court seeking damages for the same injuries. The district court granted summary judgment against Tompkins, and he appeals.

## SCOPE OF REVIEW

In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Jim's, Inc. v. Willman, ante* p. 430, 527 N.W.2d 626 (1995).

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. *Id.*

## FACTS

On January 25, 1990, Tompkins was providing labor for Larry Raines at Raines' body shop in Omaha, Nebraska, in order to repay a loan. That afternoon, Raines was involved in an altercation with a third party, and the third party stabbed Tompkins with a knife.

Tompkins first filed a claim seeking workers' compensation benefits. In February 1991, a single judge of the Workers' Compensation Court entered an order stating that Tompkins had suffered penetrating knife wounds while engaged in the duties of his employment and that, as a result of the accident and injuries, Tompkins had incurred medical and hospital expenses. The single judge found that Tompkins was temporarily totally disabled from January 26 through March 8, 1990, a period of 6 weeks, and that he suffered no permanent disability. Tompkins was awarded workers' compensation benefits of $133.33 per week for 6 weeks for temporary total disability compensation and was awarded $7,199.81 for hospital bills.

On rehearing before a three-judge panel, the parties stipulated to various facts in lieu of an evidentiary hearing. The three-judge panel found that Tompkins had failed to prove the extent of his injury; time lost from work, if any; bills incurred for the stabbing; or other monetary loss. The three-judge panel entered an order dismissing the petition and reversing the award entered by the single judge of the compensation court. Tompkins did not appeal that order.

While the workers' compensation action was pending, Tompkins filed a petition in the Douglas County District Court on October 10, 1991, alleging that Raines was negligent in failing to provide Tompkins with a safe workplace, in allowing the third party to remain on the premises, and in failing to warn Tompkins of the dangerous condition caused by the third party. Tompkins claimed that as a result of the events of January 25, 1990, he suffered personal injuries which resulted in permanent bodily impairment, scarring, loss of earnings, loss of earning capacity, and medical expenses.

Raines' amended answer asserted, inter alia, that Tompkins had previously elected to pursue his remedy under the Nebraska Workers' Compensation Act, that Tompkins' claim was barred

because of his previous election of remedies, and that Tompkins was collaterally estopped from pursuing this tort action due to his earlier position that his injuries occurred within the course and scope of his employment. Raines further asserted that Tompkins was precluded from relitigating the issue of whether Tompkins was an employee because that issue had been decided by the compensation court and the judgment was not appealed.

Raines filed a motion for summary judgment which included a copy of the workers' compensation award and a copy of the order of dismissal by the three-judge panel. On July 14, 1993, the district court entered summary judgment in favor of Raines and ordered that the case be dismissed.

## ASSIGNMENT OF ERROR

Tompkins claims that the district court erred in determining that dismissal of the action brought in the Workers' Compensation Court precluded him from bringing this tort action.

## ANALYSIS

Tompkins argues that the order of the compensation court on rehearing has no preemptive effect because the issue of whether he was an employee at the time of his injury was never decided by the rehearing panel. We must, therefore, determine whether Tompkins' employment status was decided by the panel. If Tompkins was an employee at the time of his injury, his exclusive remedy for relief is under the Workers' Compensation Act. If Tompkins was not an employee at the time of his injury, the compensation court did not have subject matter jurisdiction over the dispute and his tort action was properly filed in district court.

Neb. Rev. Stat. § 48-148 (Reissue 1993) provides:

> If any employee . . . of any employer subject to the Nebraska Workers' Compensation Act files any claim with, or accepts any payment from such employer . . . or submits any question to the Nebraska Workers' Compensation Court under such act, such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury.

We have held that the Workers' Compensation Act is an

employee's exclusive remedy against an employer for an injury arising out of and in the course of employment. *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991). If an accident does not arise out of and in the course of employment, no coverage is available under workers' compensation, and the parties are not subject to the act. *Marlow v. Maple Manor Apartments*, 193 Neb. 654, 228 N.W.2d 303 (1975). Whether the accident arose out of and in the course of employment must be determined from the facts of each case.

In *Marlow*, the defendant argued that the plaintiff, by electing to file a claim for workers' compensation, brought herself within the provisions of § 48-148, barring her from later filing a tort action. We held, however, that workers' compensation law covers only claims arising out of and in the course of employment. The issue is one of coverage, not of election to file a claim for compensation. If coverage exists because the injury arose out of and in the course of employment, then the Workers' Compensation Act is the exclusive remedy. We also pointed out in *Marlow* that "[a]n adjudication that an injury does not arise out of or in the course of the employee's employment is a conclusive determination only of the fact that the Workmen's Compensation Court lacks jurisdiction in the matter. This determination does not bar recourse to the tort remedy, if one exists." 193 Neb. at 659, 228 N.W.2d at 306.

In the present case, Tompkins first filed a claim in the compensation court, where a single judge found that Tompkins' injuries arose out of and in the course of his employment and that there was an implied employment agreement between Tompkins and Raines. The three-judge rehearing panel did not reverse this finding, but found that Tompkins' petition had to be dismissed because he failed to prove the extent of his injuries and his damages. Neither party appealed from the decision of the three-judge panel. An adjudication was made that Tompkins was an employee. Tompkins' exclusive remedy therefore is in the compensation court.

## CONCLUSION

The Workers' Compensation Act is the employee's exclusive remedy against an employer for an injury arising out of and in

the course of employment. *Plock, supra.* Tompkins first sought relief in the Workers' Compensation Court, asserting that he was an employee at the time he was injured. The compensation court determined that Tompkins was an employee, and this determination was binding upon Tompkins. The district court was correct in granting summary judgment to Raines. The judgment of the district court is affirmed.

AFFIRMED.

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KEITH D. HANGMAN, APPELLANT, V. RICHARD J. BRUENING AND RITA J. BRUENING, HUSBAND AND WIFE, ET AL., APPELLEES.
530 N.W.2d 247

Filed April 7, 1995. No. S-93-697.

1. **Res Judicata: Appeal and Error.** An appellate court may raise the issue of res judicata sua sponte.
2. **Res Judicata: Judgments.** The doctrine of res judicata bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in an earlier proceeding, if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
3. ____: ____. Res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action.
4. **Res Judicata.** The doctrine of res judicata rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause.

Appeal from the District Court for Dixon County: ROBERT E. OTTE, Judge. Judgment vacated, and cause remanded with direction to dismiss.

Thomas A. Fitch, of Fitch Law Office, for appellant.

Wayne E. Boyd, of Boyd Law Office, P.C., for appellees Bruening.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

FAHRNBRUCH, J.

Keith D. Hangman's 1992 petition to quiet the title to land over which Richard J. Bruening and Rita J. Bruening have an easement must be dismissed under the doctrine of res judicata, an issue which we raise sua sponte.

We vacate the March 8, 1993, judgment of the district court for Dixon County in favor of the Bruenings and remand the cause to that court with direction to dismiss Hangman's June 2, 1992, petition filed against the Bruenings and against any interest the Bruenings have in the easement over Hangman's land.

## FACTS

On April 16, 1991, Hangman brought an action against the Bruenings to quiet title in him to a strip of land 2 rods wide across the north side of the southeast quarter of the southeast quarter of Section 33, Township 31 North, Range 5 East of the 6th P.M., in Dixon County, Nebraska. In that action, Hangman claimed that the Bruenings had abandoned their easement over the strip of land previously described and that the easement was no longer valid.

On November 27, 1991, after a trial on the merits of the April 16 petition, the district court entered a judgment finding that the Bruenings' easement was valid and that it had not been abandoned by the Bruenings through lack of use. On January 27, 1992, Hangman's motion for a new trial was overruled. We take judicial notice that the records of this court reflect that no appeal was taken by Hangman from the 1991 judgment.

On June 2, 1992, Hangman filed a second quiet title action against the Bruenings "and all other persons having or claiming an interest in" the land here in question. The second law suit, which is the subject of the present appeal, involves the same strip of land and easement that were the subject of the 1991 quiet title action. Hangman's second quiet title action is not based upon the Bruenings' alleged abandonment of their easement, but, rather, upon Hangman's claim that he adversely possessed the strip of land, including Bruenings' easement, for

more than 10 years.

On August 4, 1992, Hangman filed a motion for summary judgment against the Bruenings and a motion for default judgment against all other defendants who did not answer Hangman's petition. The motions were overruled. Subsequently, a summary judgment motion filed by the Bruenings was also overruled, and the case was tried in January 1993.

The district court entered an order, filed March 8, 1993, finding, as it had in the first case, that the Bruenings' easement was still in force and had not been abandoned by them. After his motion for new trial was overruled, Hangman appealed to the Nebraska Court of Appeals. Pursuant to our authority to regulate the caseloads of the appellate courts, this case was removed from the Court of Appeals' docket to this court's docket.

## ANALYSIS

This court need not reach the issues ruled upon by the district court in Hangman's 1992 action. At all times relevant herein, Hangman's 1992 action was barred under the doctrine of res judicata. Res judicata was not raised as an affirmative defense in the Bruenings' amended answer. However, an appellate court may raise the issue of res judicata sua sponte. See, *Eggland v. Eggland*, 240 Neb. 393, 482 N.W.2d 245 (1992); *Dakota Title v. World-Wide Steel Sys.*, 238 Neb. 519, 471 N.W.2d 430 (1991). We have elected to do so.

Both Hangman's 1991 action and his 1992 action were brought against the Bruenings to quiet title to the same strip of land to which Hangman claimed ownership. The easement Hangman asked the district court to void in 1992 is the same easement Hangman asked the court to void in 1991. The same issue, the Bruenings' interest in the easement, was litigated in both actions and, insofar as is relevant here, by the same parties, i.e., Hangman and the Bruenings.

The doctrine of res judicata bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in an earlier proceeding, *Dakota Title, supra*, if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final

judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions, *Wicker v. Vogel*, 246 Neb. 601, 521 N.W.2d 907 (1994), and *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994).

The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. *In re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994); *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 508 N.W.2d 907 (1993). The doctrine of res judicata rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause. *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994).

Here, the 1991 judgment was rendered by a court of competent jurisdiction in Dixon County, the county in which the property at issue and easement thereon is located. The 1991 quiet title action was based upon the theory that the easement had been abandoned by the Bruenings. After the 1991 trial on the merits, the district court entered an order finding that the easement in question was valid and that it had not been abandoned by the Bruenings through lack of use. Thus, the 1991 judgment was based upon the merits of the case brought by Hangman against the Bruenings and became final when there was no appeal of the judgment.

The present quiet title action, although based upon the theory of adverse possession, involved the same rights between the same parties as did the 1991 quiet title action. The theory of adverse possession could have been raised in the earlier quiet title litigation. All matters which could have been litigated in the earlier proceedings are barred by the doctrine of res judicata.

We, therefore, vacate the March 8, 1993, judgment entered by the district court for Dixon County and remand the cause to that court with direction to dismiss Hangman's June 2, 1992, petition filed against the Bruenings and against any interest the Bruenings may have in the easement over Hangman's land.

JUDGMENT VACATED, AND CAUSE REMANDED WITH DIRECTION TO DISMISS.

# CITY OF RALSTON, NEBRASKA, ET AL., APPELLEES, V. BERRI BALKA, TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL., APPELLANTS, AND NEBRASKA HORSEMEN'S BENEVOLENT AND PROTECTED ASSOCIATION ET AL., INTERVENORS-APPELLEES.

530 N.W.2d 594

Filed April 7, 1995. No. S-93-882.

1. **Actions: Parties: Standing.** Before a party is entitled to invoke a court's jurisdiction, that party must have standing to sue, which involves having some real interest in the cause of action; in other words, to have standing to sue, a plaintiff must have some legal or equitable right, title, or interest in the subject matter of the controversy. The purpose of the inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
2. **Equal Protection: Special Legislation: Political Subdivisions.** Neither the special legislation prohibition nor the Equal Protection Clauses have any applicability to acts of a state against its own political subdivisions.
3. **Actions: Equity: Taxation.** A taxpayer may commence and prosecute an equitable action to enforce a right of action that the governing body has refused to enforce.
4. **Constitutional Law: Statutes: Proof.** The party claiming that a statute is unconstitutional bears the burden of so proving, and all reasonable doubts will be resolved in favor of the statute's constitutionality.
5. **Constitutional Law: Statutes: Appeal and Error.** Although parties ordinarily must raise constitutional issues before they will be considered on appeal, where the invalidity of the act is plain, and such a determination is necessary to a reasonable and sensible disposition of the issues presented, an appellate court is required by necessity to notice the plain error in the premise on which the case was tried.
6. **Charities: Words and Phrases.** "Charitable" means having the character or purpose of a charity. It includes every gift for a general public use, to be applied consistent with existing laws, for the benefit of an indefinite number of persons, and designed to benefit them from an educational, religious, moral, physical, or social standpoint.
7. **Words and Phrases.** A "betterment" is an improvement. It is an improvement that does more than restore to a former good condition.
8. **Constitutional Law: Statutes: Special Legislation.** A legislative act constitutes special legislation, violative of Neb. Const. art. III, § 18, if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.
9. **Special Legislation.** The Legislature has properly drawn a classification if the special class has some reasonable distinction from other subjects of like general character and that distinction is reasonably related to the legitimate goals sought to be achieved.
10. **Special Legislation: Words and Phrases.** A "closed class" is one that limits the

application of the law to a present condition and leaves no room or opportunity for an increase in the numbers of the class by future growth or development.

11. **Statutes: Special Legislation.** In deciding whether a statute legitimately classifies, the court must consider the actual probability that others will come under the act's operation. If the prospect is merely theoretical, and not probable, the act is special legislation.
12. **Equal Protection: Political Subdivisions: Municipal Corporations.** Municipal corporations are not afforded protection under the Equal Protection Clauses because those provisions have no application to acts of a state against its own political subdivisions.
13. **Constitutional Law: Statutes: Equal Protection: Taxation.** To challenge a statute's constitutionality under the Equal Protection Clauses, an individual's right must be affected. That individual must demonstrate a direct nexus between the statute's operation and the individual's interest. In other words, an individual must establish an interest greater than that accruing to every other taxpayer with a desire for good government, however commendable that desire may be. An individual taxpayer must show that the alleged unconstitutional feature of the statute injures him and so operates to deprive him of a constitutional right.

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

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

Donald L. Dunn, of Rembolt Ludtke Parker & Berger, for appellees and intervenors-appellees.

Michael A. Kelley and Michael J. Lehan, of Kelley & Lehan, P.C., for Nebraska Horsemen's Benevolent and Protected Association.

HASTINGS, C.J., WHITE, CAPORALE, LANPHIER, and WRIGHT, JJ., and GRANT, J., Retired, and HOWARD, D.J., Retired.

PER CURIAM.

The Nebraska Tax Commissioner, M. Berri Balka, appeals from an order of the Lancaster County District Court which held that 1991 Neb. Laws, L.B. 795, § 6, a lottery regulation provision, is unconstitutional. The district court enjoined the commissioner from enforcing L.B. 795, § 6. We affirm.

In 1991, the Nebraska Legislature enacted L.B. 795, which provided:

> (1) If a racetrack licensed pursuant to Chapter 2, article 12, is located in a county and such county or a city or

village within such county conducts a lottery pursuant to the Nebraska County and City Lottery Act, *two percent of the gross proceeds from such lottery shall be credited to the Thoroughbred Racing Assistance Fund.*

(2) The Thoroughbred Racing Assistance Fund is hereby created. The fund shall be used to supplement purses for live thoroughbred racing in Nebraska. Twenty-five percent of the fund shall be distributed as purse supplements and breeder and stallion awards for Nebraska-bred horses as defined and registered pursuant to section 2-1213 at the racetrack where the funds were generated. The State Racing Commission shall distribute money in the fund to the licensed racetracks based proportionately on the percentage of the live race handle of the immediately preceding year. Any money in the fund available for investment shall be invested by the state investment officer pursuant to sections 72-1237 to 72-1276.

(Emphasis supplied.) 1991 Neb. Laws, L.B. 795, § 6 (codified at Neb. Rev. Stat. § 9-629.02 (Reissue 1991)).

Several municipal corporations and individuals filed this action for declaratory and injunctive relief. The municipal corporations are cities and villages located in counties with licensed horse racetracks and with licensed lotteries; the individuals are taxpayers and property owners residing in two of those counties. They sought a declaration that the "two percent of the gross proceeds" provision should be construed as consisting of the 2-percent tax required to be submitted to the Department of Revenue by counties, cities, and villages conducting lotteries, which is credited to the Charitable Gaming Operations Fund under Neb. Rev. Stat. § 9-648 (Reissue 1991). Additionally, they sought a declaration that L.B. 795, § 6, was unconstitutional on equal protection grounds and requested injunctive relief, thereby preventing the commissioner from implementing L.B. 795, § 6.

The district court found that L.B. 795, § 6, "impose[d] an additional tax in addition to the tax imposed by § 9-648" and therefore violated Neb. Const. art. III, § 18. The district court also held that L.B. 795, § 6, violated U.S. Const. amend. XIV,

§ 1, and Neb. Const. art. I, §§ 1 and 25, abridging the municipal corporations' and individual taxpayers' equal protection rights. The district court therefore enjoined the commissioner from implementing L.B. 795, § 6. The commissioner appealed.

The threshold issue in this appeal is whether the municipal corporations and individual taxpayers have standing to bring this action. Before a party is entitled to invoke a court's jurisdiction, that party must have standing to sue, which involves having some real interest in the cause of action; in other words, to have standing to sue, a plaintiff must have some legal or equitable right, title, or interest in the subject matter of the controversy. *State v. $15,518*, 239 Neb. 100, 474 N.W.2d 659 (1991); *Behrens v. American Stores Packing Co.*, 236 Neb. 279, 460 N.W.2d 671 (1990). The purpose of the inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Nebraska Depository Inst. Guar. Corp. v. Stastny*, 243 Neb. 36, 497 N.W.2d 657 (1993).

Neither the special legislation prohibition nor the Equal Protection Clauses have any applicability to acts of a state against its own political subdivisions. See *Triplett v. Tiemann*, 302 F. Supp. 1239 (D. Neb. 1969). Consequently, the municipal corporations lack standing to challenge the constitutionality of L.B. 795, § 6. However, we have long held that a taxpayer may commence and prosecute an equitable action to enforce a right of action that the governing body has refused to enforce. *Professional Firefighters of Omaha v. City of Omaha*, 243 Neb. 166, 498 N.W.2d 325 (1993); *Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth.*, 220 Neb. 504, 371 N.W.2d 258 (1985). The taxpayers therefore have standing to challenge the constitutionality of L.B. 795, § 6, because they are seeking to enjoin the expenditure of public funds. See *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 327 N.W.2d 595 (1982).

The party claiming that a statute is unconstitutional bears the burden of so proving, and all reasonable doubts will be resolved in favor of the statute's constitutionality. *Henry v. Rockey*, 246 Neb. 398, 518 N.W.2d 658 (1994); *Bamford v. Upper Republican Nat. Resources Dist.*, 245 Neb. 299, 512 N.W.2d

642 (1994), *cert. denied* ____ U.S. ____, 115 S. Ct. 201, 130 L. Ed. 2d 131; *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991); *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990).

We note that the appellee cities raised in their petition the proposition that L.B. 795 violates article III, § 24, of the Nebraska Constitution. However, the trial court did not pass on the proposition, and appellees did not see fit to raise the issue on cross-appeal. Article III, § 24, prohibits all games of chance and lotteries except as otherwise provided by law. Subsection 2 of article III, § 24, provides exceptions to this general gambling ban. Subsection 2 provides, in relevant part, that "[t]he Legislature may authorize and regulate a state lottery . . . and other lotteries, raffles, and gift enterprises . . . the proceeds of which are to be used solely for charitable or community betterment purposes without profit to the promoter of such lotteries, raffles, or gift enterprises."

We have declared that ordinarily or generally, this court will not consider constitutional challenges absent a specification of the provisions claimed to be violated. *State v. Melcher*, 240 Neb. 592, 483 N.W.2d 540 (1992); *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987); *State v. Meints*, 223 Neb. 199, 388 N.W.2d 813 (1986). Indeed, we have on occasion overstated the rule by omitting the observation that such is only ordinarily or generally the case. E.g. *State ex rel. Douglas v. Schroeder*, 222 Neb. 473, 384 N.W.2d 626 (1986).

However, we have long recognized that at times the legal realities are such that a constitutional provision must be considered as plain error notwithstanding that the parties have failed to identify it. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991), *cert. denied* ____ U.S. ____, 113 S. Ct. 2930, 124 L. Ed. 2d 681 (1993); *Linn v. Linn*, 205 Neb. 218, 286 N.W.2d 765 (1980); *State v. Goodseal*, 186 Neb. 359, 183 N.W.2d 258 (1971), *cert. denied* 404 U.S. 845, 92 S. Ct. 146, 30 L. Ed. 2d 82; *State v. Majors*, 85 Neb. 375, 123 N.W. 429 (1909).

In *MAPCO Ammonia Pipeline, supra*, we declared unconstitutional a statute granting certain tax exemptions, notwithstanding that the taxpayers had failed to bring the legality of the exemptions into question. In doing so, we

observed that although the parties ordinarily must raise constitutional issues before they will be considered on appeal, " 'where the invalidity of the act is plain, and such a determination is necessary to a reasonable and sensible disposition of the issues presented, we are required by necessity to notice the plain error in the premise on which the case was tried.' " 238 Neb. at 584, 471 N.W.2d at 746 (quoting *Goodseal, supra*). Although neither party had questioned the constitutionality of the then self-defense statute, this court in *Goodseal* held it to be unconstitutional. In *Linn, supra*, we observed that although the issue had not been properly raised in the trial court, we would nonetheless, because of the importance and uniqueness of the facts, note as plain error the unconstitutional vagueness of a statute dealing with the termination of parental rights. In *Majors, supra*, this court held that a statute was not only infirm under the constitutional provision cited by the litigant, but that it also violated another provision of the Constitution. The *Majors* court explained it did so, even though the additional ground had been presented neither on argument nor in the brief, because the action had been brought on behalf of the State by the Attorney General

> to test and determine the question of the validity of the statute in order to further the educational interests of the state, and, if for any reason we are convinced that the statute is unconstitutional, we ought to so determine; for, if the courts can, under such pretext, nullify the constitution, we will soon find ourselves openly defying the provisions of the fundamental law which we have solemnly sworn to uphold.

85 Neb. at 387, 123 N.W. at 434.

We are here presented with an action in which public entities question the constitutionality of the manner in which monies generated to benefit their communities are being distributed in the face of constitutional language which, although not cited by them, directly controls the answer. To ignore that language would result in an unreasonable and nonsensical disposition of the issue which would, in effect, nullify the Constitution. The law cannot and will not permit that to happen. Thus, we move on to an analysis of L.B. 795, § 6, in light of the language of

article III, § 24(2).

L.B. 795, § 6, is clearly a lottery regulation provision, subject to article III, § 24. It requires certain lotteries to credit portions of their gross proceeds to a state-created fund, which was created "to supplement purses for live thoroughbred racing in Nebraska." 1991 Neb. Laws, L.B. 795, § 6. Such a provision must comply with the general gambling ban's exceptions found in article III, § 24. The gravamen is whether requiring 2 percent of the gross proceeds from certain lotteries to be credited to the horseracing industry is for "charitable or community betterment purposes."

"Charitable" means "[h]aving the character or purpose of a charity." Black's Law Dictionary 233 (6th ed. 1990). It includes "every gift for a general public use, to be applied consistent with existing laws, for benefit of an indefinite number of persons, and designed to benefit them from an educational, religious, moral, physical or social standpoint." *Id.* Clearly, supplementing the purses for live thoroughbred racing in Nebraska is not a charitable activity. Therefore, to withstand constitutional scrutiny, diverting 2 percent of the gross proceeds from certain lotteries to the fund must qualify as a "community betterment" purpose.

Although we were unable to find any definition of "community betterment," we were able to find a definition of "betterment." A "betterment" is an improvement. Webster's Third New International Dictionary, Unabridged 209 (1981). It is "an improvement . . . that does more than restore to a former good condition." *Id.*

In the case at bar, supplementing the purses for live thoroughbred racing in Nebraska clearly does not confer any direct and peculiar benefit to the entire community. To the contrary, only the owners of Nebraska-bred horses stand to benefit from the implementation of L.B. 795, § 6, and any argument that such a lottery regulation will eventually trickle down to the general populace and better the community at large is at best tenuous. Such a "betterment" clearly is not shared by the entire community. As a result, L.B. 795, § 6, does not qualify for the "community betterment" exception to article III, § 24.

We now turn to the commissioner's first assignment of error, in which the commissioner contends that the district court erred in concluding that L.B. 795, § 6, constituted special legislation prohibited by Neb. Const. art. III, § 18. That section provides in relevant part:

> The Legislature shall not pass local or special laws in any of the following cases, that is to say:
>
> . . . .
>
> Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . . In all other cases where a general law can be made applicable, no special law shall be enacted.

A legislative act constitutes special legislation, violative of article III, § 18, if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class. *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991); *City of Scottsbluff v. Tiemann*, 185 Neb. 256, 175 N.W.2d 74 (1970). The district court determined that L.B. 795, § 6, "creat[ed] an unreasonable, arbitrary, discriminatory, and closed classification," violative of article III, § 18.

To determine whether a legislative classification constitutes an unreasonable classification and therefore violates article III, § 18, we must determine whether the classification at issue is " ' "based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to objects to be classified. . . ." ' " *Haman*, 237 Neb. at 711, 467 N.W.2d at 846 (quoting *State ex rel. Douglas v. Marsh*, 207 Neb. 598, 300 N.W.2d 181 (1980)). In other words, the legislative classification must (1) be based on some *substantial* difference of circumstances or situation that would indicate the justice or expediency of diverse legislation with regard to the objects classified and (2) further a public purpose. *Haman, supra*; *Douglas, supra*.

The Legislature has properly drawn a classification " ' "if the special class has some reasonable distinction from other subjects of like general character . . ." ' " and that distinction is reasonably related to the legitimate goals sought to be achieved. *Haman*, 237 Neb. at 711, 467 N.W.2d at 846 (quoting

*Douglas, supra*). This "test of validity under the special legislation prohibition is more stringent than the traditional rational basis test." *Haman*, 237 Neb. at 713, 467 N.W.2d at 847. In the case at bar, the Legislature is seeking to supplement purses for live thoroughbred racing in Nebraska. In other words, the Legislature enacted L.B. 795 essentially to subsidize participants in the horseracing industry.

The individual taxpayers had the burden of proving in the district court that L.B. 795, § 6, violated article III, § 18. The individual taxpayers, however, failed to offer any evidence to indicate that no substantial difference of circumstances or situation existed. Absent any proof to the contrary, we are unable to conclude that the individual taxpayers satisfied their burden of proving that L.B. 795, § 6, constituted an unreasonable classification.

The commissioner also contends that the district court improperly found that L.B. 795, § 6, created a permanently closed class. A "closed class" is one that " 'limits the application of the law to present condition, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development . . . .' " *City of Scottsbluff*, 185 Neb. at 262, 175 N.W.2d at 79 (quoting *State v. Kelso*, 92 Neb. 628, 139 N.W. 226 (1912)). "In deciding whether a statute legitimately classifies, the court must consider the actual probability that others will come under the act's operation. If the prospect is merely theoretical, and not probable, the act is special legislation." *Haman*, 237 Neb. at 717-18, 467 N.W.2d at 849. See, also, Neb. Rev. Stat. §§ 2-1201 to 2-1242 (Reissue 1991 & Cum. Supp. 1992). Indeed, in § 2-1204, the Legislature stated:

> The State Board of Agriculture, or any county society for the improvement of agriculture organized under section 2-201 or 2-221, or any corporation or association of persons organized and carried on for civic purposes, or which conducts a livestock exposition for the promotion of the livestock or horse-breeding industries of the state, and which does not permit its members to derive personal profit from its activities by way of dividends or otherwise, may apply to the State Racing Commission for a license to

conduct horseracing at a designated place within the state. This statutory provision indicates that the Legislature recognizes that the class is not permanently closed, as it anticipated future applications for horseracing licenses.

In Nebraska today, Dakota, Hall, Douglas, Lancaster, and Platte Counties all have thoroughbred racing conducted on a horseracing track, licensed pursuant to Neb. Rev. Stat. chapter 2, article 12, within their boundaries. In addition, during 1992's last quarter, 72 counties, cities, and villages operated lotteries pursuant to the act and were not required to submit any portion of their gross proceeds to the fund. Furthermore, during that same period, 15 counties, cities, and villages operated lotteries pursuant to the act and would have been required to submit 2 percent of their gross proceeds to the fund (if we follow the commissioner's interpretation of the act). Nothing is prohibiting any county, city, or village currently without either a horseracing track, a lottery, or both from operating one. Therefore, we are simply unable to conclude that L.B. 795, § 6, creates a permanently closed class.

The commissioner's second assignment of error is that the district court erred in holding that L.B. 795, § 6, violates the Equal Protection Clauses of the U.S. Constitution, U.S. Const. amend. XIV, § 1, and the Nebraska Constitution, Neb. Const. art. I, §§ 1 and 25. The district court held that the act violated the Equal Protection Clauses "[b]y expending or crediting tax revenue for the benefit of a special, closed class, i.e., licensed horse racing tracks and owners of horses racing within the State." (Emphasis omitted.) The municipal corporations concede that they are not afforded protection under the Equal Protection Clauses, which they are not, because that provision has no application to acts of a state against its own political subdivisions. See *Triplett v. Tiemann*, 302 F. Supp. 1239 (D. Neb. 1969). The individual taxpayers contend, however, that they are afforded protection under the Equal Protection Clauses.

To challenge a statute's constitutionality under the Equal Protection Clauses, an individual's right must be affected. *Ritums v. Howell*, 190 Neb. 503, 209 N.W.2d 160 (1973). That individual must demonstrate a direct nexus between the statute's operation and the individual's interest; in other words, an

individual must establish "an interest . . . greater than that accruing to every other taxpayer with a desire for good government, however commendable that desire may be." *Id.* at 506, 209 N.W.2d at 163. An individual taxpayer " ' "must show *that the alleged unconstitutional feature of the statute injures him and so operates to deprive him of a constitutional right . . .*" ' " *Id.* (quoting *State ex rel. Nelson v. Butler*, 145 Neb. 638, 17 N.W.2d 683 (1945)). However, an exception to this general rule exists when an individual taxpayer seeks to enjoin an illegal act by a municipal body. *Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth.*, 220 Neb. 504, 371 N.W.2d 258 (1985); *Martin v. City of Lincoln*, 155 Neb. 845, 53 N.W.2d 923 (1952).

As we have demonstrated, L.B. 795, § 6, is an "illegal act" because it violates article III, § 24. The individual taxpayers therefore have standing to challenge the constitutionality of L.B. 795, § 6, on equal protection grounds. However, in light of our holding that L.B. 795, § 6, violates article III, § 24, it is unnecessary for us to engage in an analysis of the individual taxpayer's claim that L.B. 795, § 6, violates the Equal Protection Clauses of the U.S. and Nebraska Constitutions.

In holding that L.B. 795, § 6, is unconstitutional because it violates Neb. Const. art. III, § 24, we affirm the district court's decision. The commissioner is permanently enjoined from enforcing L.B. 795, § 6.

AFFIRMED.

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

I concur with the majority in its holding that 1991 Neb. Laws, L.B. 795, § 6, is not special legislation and, consequently, does not violate article III, § 18, of the Nebraska Constitution. I also concur in the majority's holding that the Equal Protection Clauses of the Nebraska and U.S. Constitutions are not applicable to acts of a state against its own political subdivisions.

I respectfully dissent from the majority's opinion that L.B. 795, § 6, is unconstitutional. The question of whether L.B. 795, § 6, violates article III, § 24, of the Nebraska Constitution is not before this court. The parties did not raise this argument, and the district court did not rule on it. Consequently, I express no opinion on the subject.

[Opinion modified; pages 784-85 left blank.]

STATE OF NEBRASKA, APPELLEE, V. JOHN W. YELLI, APPELLANT.
530 N.W.2d 250

Filed April 7, 1995. No. S-94-206.

1. **Paternity: Proof.** In a civil action, only a preponderance of the evidence is necessary to sustain the establishment of paternity.
2. **Criminal Law: Proof.** The burden in a criminal proceeding is to produce proof

beyond a reasonable doubt of every element of a charged offense.

3. **Res Judicata: Collateral Estoppel: Proof.** The doctrines of res judicata and collateral estoppel are not applicable when the burden of persuasion is different in the subsequent proceeding.
4. **Issue Preclusion: Proof.** A party who has carried the burden of establishing an issue by a preponderance of the evidence is not entitled to assert preclusion in a later action that requires proof of the same issue by a higher standard.
5. **Res Judicata: Actions: Judgments.** An acquittal or dismissal in a prior criminal prosecution is no bar to the prosecution of a later civil action, and such acquittal or dismissal concludes no issues in a later civil action.
6. **Juvenile Courts: Jurisdiction: Criminal Law.** A parent's conduct may be grounds for a juvenile court to acquire jurisdiction notwithstanding that the parent was acquitted of a criminal charge for conduct detrimental to the child.
7. **Res Judicata: Paternity: Child Support.** A judgment in a civil paternity adjudication is res judicata as between the same parties in a subsequent civil action such as a support modification proceeding.
8. **Due Process: Right to Counsel: Paternity.** Both federal and state due process dictate that an indigent defendant in a state-assisted civil paternity action has the right to the services of appointed counsel.
9. **Right to Counsel: Records: Presumptions: Appeal and Error.** Where a record is silent as to a defendant's opportunity for counsel, an appellate court may not presume that such rights were respected.
10. **Right to Counsel: Paternity: Criminal Law: Evidence.** A civil paternity adjudication obtained in a state-initiated proceeding in which the defendant was denied the right to counsel lacks the reliability that warrants its admission in a criminal proceeding.
11. **Paternity: Proof.** A mother's testimony that one is the father of her child is sufficient only if she be corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal act, the inference of paternity may be drawn.
12. **Double Jeopardy.** The Double Jeopardy Clauses of the federal and state Constitutions forbid a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.
13. **Double Jeopardy: Appeal and Error.** While the Double Jeopardy Clauses of the federal and state Constitutions do not protect against a second prosecution for the same offense where a conviction is reversed for trial error, they bar retrial if the reversal is necessitated because the evidence was legally insufficient to sustain the conviction.

Petition for further review from the Nebraska Court of Appeals, CONNOLLY, IRWIN, and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Holt County, WILLIAM CASSEL, Judge. Judgment of Court of Appeals affirmed as modified.

John Jedlicka, Holt County Public Defender, for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

CAPORALE, J.

## I. STATEMENT OF CASE

The plaintiff-appellee, State of Nebraska, charged the defendant-appellant, John W. Yelli, with two counts of criminal nonsupport of two minor children, in violation of Neb. Rev. Stat. § 28-706 (Reissue 1989). More specifically, the State claims that Yelli failed to make the support payment he was previously ordered to make in each of two separate state-initiated civil paternity actions in which he was determined to be the father of the minor who was the subject of each action. Pursuant to verdict, the district court adjudged Yelli guilty as charged and imposed sentence. Yelli then appealed to the Nebraska Court of Appeals, urging that as there had been no showing that he had either been represented by or waived counsel in the paternity actions, the district court erred in receiving the prior adjudications in evidence over his objection. The Court of Appeals agreed and thus vacated the judgment of the district court. *State v. Yelli*, 3 Neb. App. 148, 524 N.W.2d 353 (1994). The State thereafter successfully petitioned this court for further review, asserting, in summary, that the Court of Appeals erroneously (1) ruled the prior adjudications to have been inadmissible, (2) concluded that the evidence did not otherwise support the verdicts, and (3) determined to vacate the judgment of the district court. We now modify, and as modified affirm, the judgment of the Court of Appeals.

## II. SCOPE OF REVIEW

A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994). However, an appellate court has an obligation to reach conclusions of law independent of those of the inferior courts. See *Jindra v. Clayton, ante* p. 597, 529

N.W.2d 523 (1995).

## III. FACTS

In addition to the evidence detailed in part I above, the mother of one of the minors in question testified that her child was born on November 12, 1982; that although she had never been married to Yelli, she engaged in sexual intercourse with him at some unspecified time; and that Yelli was her child's father. This mother further testified, over Yelli's objection, that she had been involved in a prior paternity adjudication and that Yelli was ordered to pay child support.

The mother of the other minor testified that the child was born on January 22, 1986. This second mother also testified that although she had never married Yelli, he was her child's father. Over Yelli's objection, she testified in addition that the court previously had determined that Yelli was the child's father and had ordered him to pay child support.

## IV. ANALYSIS

Section 28-706(1) provides: "Any person who intentionally fails, refuses, or neglects to provide proper support which he or she knows or reasonably should know he or she is legally obliged to provide to a . . . minor child . . . commits criminal nonsupport." The offense is a felony if the nonsupport is in violation of any order of any court, § 28-706(7); otherwise, the offense is a misdemeanor, § 28-706(6).

### 1. Admissibility of Prior Adjudications

In the context of the charges in this case, the requirement of § 28-706(1) that one know or reasonably should know that one has an obligation to support a minor child makes an adjudication that Yelli is the father of the minor whose support is at issue an essential element of each of the crimes charged. In addition, the requirement of § 28-706(7) that there be in existence a court order directing support makes such order an essential element of the crime.

#### (a) Noncollateral Attack

The State urges that Yelli cannot be permitted to collaterally attack the final adjudications of paternity and support entered in the prior civil paternity actions. Clearly, collateral attack on a

previous judgment is impermissible unless the attack is grounded upon lack of jurisdiction over the parties or subject matter. *VonSeggern v. Willman*, 244 Neb. 565, 508 N.W.2d 261 (1993); *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992); *Shade v. Kirk*, 227 Neb. 775, 420 N.W.2d 284 (1988); *State ex rel. Ritthaler v. Knox*, 217 Neb. 766, 351 N.W.2d 77 (1984); *State v. Reuter*, 216 Neb. 325, 343 N.W.2d 907 (1984); *Griffin v. Vandersnick*, 210 Neb. 590, 316 N.W.2d 299 (1982). Even if erroneous, a judgment is not subject to collateral attack unless it is void, such as would be the case where a judgment is entered without jurisdiction over the person or subject matter. *VanDeWalle v. Albion Nat. Bank*, 243 Neb. 496, 500 N.W.2d 566 (1993).

But a mere challenge to the admissibility of a prior judgment as evidence in a subsequent trial does not constitute an attack on the validity of the prior judgment. Yelli has not asserted that the courts entering the prior civil adjudications of paternity lacked jurisdiction, nor has he challenged the validity of the adjudications. Therefore, Yelli has not collaterally attacked the prior adjudications; he has simply objected to their admissibility as evidence of the essential elements of the criminal nonsupport charges filed against him.

(b) No Issue or Claim Preclusion

With such distinction in mind, it is necessary to consider whether a prior civil adjudication of paternity and concurrent order of support are admissible in a subsequent criminal nonsupport trial as evidence of the elements of the criminal offense.

It must be borne in mind that in a civil action, only a preponderance of the evidence is necessary to sustain the establishment of paternity. *Gregory v. Davis*, 214 Neb. 408, 334 N.W.2d 1 (1983); *Snay v. Snarr*, 195 Neb. 375, 238 N.W.2d 234 (1976); Neb. Rev. Stat. § 43-1412 (Reissue 1993). In contrast, the burden in a criminal proceeding is to produce proof beyond a reasonable doubt of every element of a charged offense. *State v. McHenry, ante* p. 167, 525 N.W.2d 620 (1995).

Traditionally, judgments have been regarded as hearsay and

not within any exception to the hearsay rule; a prior judgment is hearsay, since it is based on the opinion of a judge or jury consisting of persons who have not been cross-examined and have no personal knowledge of the underlying facts. Hiroshi Motomura, *Using Judgments as Evidence*, 70 Minn. L. Rev. 979 n.4 (1986), citing 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 803(22)[01] (1995). Courts had therefore been unwilling to admit prior judgments into evidence. McCormick on Evidence § 298 (John W. Strong 4th ed. 1992). As a consequence, doctrines of claim and issue preclusion, res judicata, and collateral estoppel have developed, which allow for the admission of prior judgments in a subsequent proceeding.

However, the doctrines of res judicata and collateral estoppel are not applicable when the burden of persuasion is different in the subsequent proceeding. See 18 Charles A. Wright et al., Federal Practice and Procedure § 4422 (1981). Consequently, a party who has carried the burden of establishing an issue by a preponderance of the evidence is not entitled to assert preclusion in a later action that requires proof of the same issue by a higher standard. *Id.*

Restatement (Second) of Judgments § 28 at 273 (1982) provides:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> . . . [.]
>
> (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action.

To apply issue preclusion in the cases described in subsection (4) of the Restatement would be to hold, in effect, that the losing party in the first action would also have lost had a significantly different burden been imposed. The Restatement,

*supra*, comment *f*. While there may be many occasions when such a holding would be correct, there are many others in which the allocation and weight of the burden of persuasion (or burden of proof) are critical in determining who should prevail. *Id.* Since the process by which the issue was adjudicated cannot be reconstructed on the basis of a new and different burden, preclusive effect is properly denied. *Id.* See, *Grogan v. Garner*, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991) (a judgment for fraud won by preponderance of evidence standard would not support preclusion in proceedings to establish nondischargeability if standard in subsequent bankruptcy proceedings required proof by clear and convincing evidence); *In re Braen*, 900 F.2d 621 (3d Cir. 1990), *cert. denied* 498 U.S. 1066, 111 S. Ct. 782, 112 L. Ed. 2d 845 (1991) (issue preclusion not available if state jury finding of malicious intent based on preponderance of evidence rested on lower standard of proof than judgment creditor must meet in establishing malice to avoid discharge of debt in bankruptcy); *General Dynamics Corp. v. American Tel. & Tel. Co.*, 650 F. Supp. 1274 (N.D. Ill. 1986) (changes in burden of proof may defeat collateral estoppel).

Thus, we have held that an acquittal or dismissal in a prior criminal prosecution is no bar to the prosecution of a later civil action, and such acquittal or dismissal concludes no issues in a later civil action. *State ex rel. Douglas v. Morrow*, 216 Neb. 317, 343 N.W.2d 903 (1984). Similarly, in *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992), we determined that because of the different standards of proof, a parent's conduct may be grounds for a juvenile court to acquire jurisdiction notwithstanding that the parent was acquitted of a criminal charge for conduct detrimental to the child.

Therefore, the doctrines of res judicata and collateral estoppel are not applicable as bases for the admission of prior civil judgments in a subsequent criminal trial. Specifically, the judgment in a civil paternity action is not binding under the doctrines of res judicata or collateral estoppel in a subsequent criminal case. *Nordgren v. Mitchell*, 716 F.2d 1335 (10th Cir. 1983).

However, as suggested in *Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988), *cert. denied* 488 U.S. 1019, 109 S. Ct.

817, 102 L. Ed. 2d 807 (1989), because the burdens of proof would be the same, a judgment in a civil paternity adjudication is res judicata as between the same parties in a subsequent civil action such as a support modification proceeding. See, *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994); *Callison v. Naylor*, 108 N.M. 674, 777 P.2d 913 (N.M. App. 1989); *Spindlow v. Spindlow*, 512 So. 2d 918 (Ala. App. 1987), *cert. denied* 512 So. 2d 921; *State ex rel. Mart v. Mart*, 380 N.W.2d 604 (Minn. App. 1986); *Hackley v Hackley*, 426 Mich. 582, 395 N.W.2d 906 (1986); *In re Marriage of Detert*, 391 N.W.2d 707 (Iowa App. 1986); *McCrary v. McCrary*, 408 So. 2d 523 (Ala. App. 1981).

(c) Not Otherwise Reliable

Therefore, we must determine whether the prior civil adjudications are admissible in this instance notwithstanding that the doctrines of res judicata or collateral estoppel do not apply.

Although a judgment is technically hearsay, for which no specific exception is provided, courts have nonetheless admitted judgments as evidence in subsequent proceedings when the prior judgment possessed the evidentiary reliability that the hearsay rule seeks to promote. See *Eagle, etc., Ins. Co. v. Heller*, 149 Va. 82, 140 S.E. 314 (1927) (prior criminal conviction for arson admissible in subsequent civil action to determine whether insured could recover under fire insurance policy). See, also, *Williams v. Bennett*, 689 F.2d 1370 (8th Cir. 1982), *cert. denied* 464 U.S. 932, 104 S. Ct. 335, 78 L. Ed. 2d 305 (1983); *Indiana State Highway Commission v. Rickert*, 425 N.E.2d 620 (Ind. 1981).

The hearsay rule is directed against the danger that evidence which is untested by the traditional conditions present when a witness testifies at trial will be unreliable because faults in the perception, memory, and narration of the declarant will not be exposed. 4 Jack B. Weinstein and Margaret A. Berger, Weinstein's Evidence ¶ 800[01] (1995). Historically, three conditions are believed to cause the witnesses to be accurate and to expose inaccuracies in perception, memory, or narration when a witness testifies at trial: the oath, personal presence at

the trial, and cross-examination. *Id.*; McCormick on Evidence § 245 (John W. Strong 4th ed. 1992).

When these conditions are not met, the traditional indicia of reliability are lacking, and such evidence is inadmissible unless there are equivalent guarantees of trustworthiness. Neb. Evid. R. 803(22), Neb. Rev. Stat. § 27-803(22) (Reissue 1989). See, *In re Estate of Schoch*, 209 Neb. 812, 311 N.W.2d 903 (1981) (reliability of witness' testimony that hearsay statement was made not to be considered in deciding admissibility; consideration is circumstantial guarantees of trustworthiness of statement being reported); *United States v. American Tel. & Tel. Co.*, 498 F. Supp. 353 (D.C. 1980) (rationale for admissibility of factual findings contained in public records is their fundamental trustworthiness); *Frazier v. Continental Oil Co.*, 568 F.2d 378 (5th Cir. 1978) (dangers inherent in hearsay testimony can be obviated by requirement that such statements be trustworthy and necessary); *Sabatino v. Curtiss National Bank of Miami Springs*, 415 F.2d 632 (5th Cir. 1969), *cert. denied* 396 U.S. 1057, 90 S. Ct. 750, 24 L. Ed. 2d 752 (1970) (evidence must be necessary and exhibit intrinsic probability of trustworthiness); *Mid-City Bank & Trust Co. v. Reading Co.*, 3 F.R.D. 320 (D.N.J. 1944) (rules of evidence designed to obtain truth and intended to exclude unreliable testimony).

Typically, the circumstances surrounding a civil adjudication support the reliability of the judgment. Therefore, we have admitted evidence concerning prior civil adjudications in subsequent criminal proceedings even though such prior judgments were not received as conclusive proof of the issue in question. Evidence of prior civil adjudications has been admitted in a subsequent criminal nonsupport proceeding to establish the defendant's obligation to support the child. *State v. Menuey*, 239 Neb. 513, 476 N.W.2d 846 (1991); *State v. Beck*, 238 Neb. 449, 471 N.W.2d 128 (1991); *State v. Bright*, 238 Neb. 348, 470 N.W.2d 181 (1991); *State v. Meyer*, 236 Neb. 253, 460 N.W.2d 656 (1990); *State v. Eichelberger*, 227 Neb. 545, 418 N.W.2d 580 (1988); *State v. McGee*, 221 Neb. 557, 378 N.W.2d 674 (1985); *State v. McKichan*, 219 Neb. 560, 364 N.W.2d 47 (1985); *State v. Reuter*, 216 Neb. 325, 343 N.W.2d 907 (1984); *State v. Munn*, 212 Neb. 265, 322 N.W.2d 429 (1982); *State v. Englehaupt*, 210 Neb. 182, 313 N.W.2d 437

(1981).

Similarly, other jurisdictions have determined that evidence of a prior civil adjudication of paternity is admissible against the defendant in a subsequent criminal nonsupport proceeding. However, in such jurisdictions the defendant is not estopped from denying paternity in the subsequent criminal proceeding. Thus, the prior civil adjudications are admitted as nonconclusive evidence of the defendant's support obligation. See, *State v. Hoy*, 742 S.W.2d 206 (Mo. App. 1987) (due process violated in criminal nonsupport action when court denied defendant's pretrial request for blood tests to contest paternity due to preclusive effect given to civil decree of dissolution); *County of El Dorado v. Schneider*, 191 Cal. App. 3d 1263, 237 Cal. Rptr. 51 (1987) (prior adjudication of paternity would not allow trial court to withhold question of paternity from jury); *Patterson v. Municipal Court*, 232 Cal. App. 2d 289, 42 Cal. Rptr. 769 (1965) (interlocutory divorce decree determining husband was father of child not res judicata against husband in subsequent prosecution for nonsupport).

However, in the present case, the prior paternity adjudications lack reliability because they do not affirmatively show that Yelli was represented by or waived his right to counsel. Recognizing the risk of error should an indigent paternity defendant go unrepresented, that counsel was necessary to inform the defendant of his right to a jury trial as well as his right to blood testing, and that the use of scientific evidence involved in blood testing contributed to the complexity of the litigation and the risk of error when the defendant was unassisted, we, in *Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988), *cert. denied* 488 U.S. 1019, 109 S. Ct. 817, 102 L. Ed. 2d 807 (1989), concluded that both federal and state due process dictate that an indigent defendant in a state-assisted paternity action has the right to the services of appointed counsel.

Where a record is silent as to a defendant's opportunity for counsel, an appellate court may not presume that such rights were respected. *State v. Ristau*, 245 Neb. 52, 511 N.W.2d 83 (1994); *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983).

Since the record in the prior paternity adjudications is silent,

we cannot assume that Yelli was represented by or waived his right to counsel in the prior paternity proceedings. When a paternity defendant is denied the opportunity for the assistance of counsel in a state-initiated paternity proceeding, the risk of error is substantial. Such an uncounseled paternity adjudication lacks the circumstantial guarantees of trustworthiness that other judgments possess. Therefore, a civil paternity adjudication obtained in a state-initiated proceeding in which the defendant was denied the right to counsel lacks the reliability that warrants its admission in a criminal proceeding.

It necessarily follows therefrom that the adjudications in the prior civil paternity actions should not have been received in evidence in this proceeding, and the mothers should not have been permitted to testify concerning them. There is thus no merit to the State's first assignment of error.

### 2. Sufficiency of Other Evidence

Next, the State urges that even without proof of the prior determinations of paternity and orders of support, there existed sufficient evidence to support the jury's verdict. However, that contention overlooks that excluding any evidence of the prior adjudications, the record consists of nothing more than the uncorroborated testimony of each minor's mother that Yelli was the father. A mother's testimony that one is the father of her child is sufficient only if she be corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal act, the inference of paternity may be drawn. § 43-1412. See, *Wade v. Hicks*, 191 Neb. 847, 218 N.W.2d 222 (1974); *Lockman v. Fulton*, 162 Neb. 439, 76 N.W.2d 452 (1956); *State ex rel. Klostermeier v. Klostermeier*, 161 Neb. 247, 72 N.W.2d 848 (1955). Here, there was nothing which corroborated the mothers' bald assertions of paternity; the mothers' testimony is thus insufficient to establish paternity and the resulting obligation to pay.

As a consequence, there was a complete failure of proof to support the charges against Yelli, and there is no merit to the State's second assignment of error.

### 3. Vacation of Judgment

The State reads the judgment of the Court of Appeals to mean that the within cause has been dismissed. Although it is not entirely clear to us that the mere vacation of the district court's judgment achieves that end, we determine that such is indeed the result which must obtain.

It is clear that the Double Jeopardy Clauses of the federal and state Constitutions forbid a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986). Thus, while the Double Jeopardy Clauses do not protect against a second prosecution for the same offense where a conviction is reversed for trial error, they bar retrial if the reversal is necessitated because the evidence was legally insufficient to sustain the conviction. *Burks v. United States, supra*; *Palmer v. Grammer*, 863 F.2d 588 (8th Cir. 1988), *appeal after remand, Palmer v. Clarke*, 961 F.2d 771 (8th Cir. 1992); *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988); *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), *cert. denied* 484 U.S. 872, 108 S. Ct. 206, 98 L. Ed. 2d 157 (1987).

The third and last of the State's assignments of error is therefore also meritless.

## V. JUDGMENT

Accordingly, we modify the judgment of the Court of Appeals as hereinafter stated and as thus modified affirm it; the cause is remanded to the Court of Appeals with the direction that it reverse the judgment of the district court and remand the cause to that court with the direction that it dismiss the within action.

Affirmed as modified.

Connolly, J., not participating.

# LEWIS R. CIMINO ET AL., APPELLANTS, V. FIRSTIER BANK, N.A., ET AL., APPELLEES.

530 N.W.2d 606

Filed April 14, 1995. No. S-93-493.

1. **Pleadings: Motions to Strike.** For the purposes of determining the relevancy and materiality of allegations in a pleading, a motion to strike admits the truth of all facts well pleaded and any inferences fairly deducible therefrom.
2. **Summary Judgment.** Summary judgment is proper 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. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Pleadings: Actions: Contracts: Torts.** To determine whether an action is based on a contract or a tort, a court must examine and construe the petition's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the petition or the form of the pleading. Consideration must be given to the facts which constitute the cause of action.
5. **Pleadings: Actions: Breach of Contract: Torts.** If the petition contains a cause of action for breach of contract, additional averments appropriate to a cause of action for a wrong will not change the action from contract to tort, and if there is a doubt as to the character of the action, it will be resolved in favor of an action in contract. In such an instance, the statements appropriate to an action in tort will be considered surplusage.
6. **Contracts: Words and Phrases.** A condition precedent is a condition which must be performed before the parties' agreement becomes a binding contract or a condition which must be fulfilled before a duty to perform an existing contract arises.
7. **Contracts: Offers to Buy or Sell: Parties.** To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract.
8. ____: ____: ____. For a binding contract to result from an offer and acceptance, the minds of the parties must meet at every point; nothing can be left open for future arrangement.
9. **Contracts: Parties: Time.** An agreement to make a future contract is not binding upon either party unless all terms and conditions are agreed upon and nothing is left to future negotiation.
10. ____: ____: ____. A contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangement.
11. **Contracts.** An agreement to agree, rather than a complete contract that could simply be memorialized at a later time, is not enforceable in Nebraska.

12. **Contracts: Parties.** The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.
13. **Contracts.** In order for the implied covenant of good faith and fair dealing to apply, there must be in existence a legally enforceable contractual agreement.
14. **Pleadings.** The decision whether to allow or deny an amendment to any pleading lies within the discretion of the court to which application is made.
15. **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 the judicial system.
16. **Pleadings: Time.** The time at which an amendment to a petition occurs is not dispositive of whether a party was prejudiced.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed.

Michael C. Cox and Terrance S. DeWald, of Koley, Jessen, Daubman & Rupiper, P.C., for appellants.

Thomas E. Johnson and Steven C. Turner, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellees.

WHITE, C.J., FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

CONNOLLY, J.

Lewis R. Cimino, individually, and Richard D. Cimino and Robert M. Cimino (collectively, the Ciminos), individually and as trustees of the Cimino Family Estate Trust (Family Trust), brought this action against the defendants, FirsTier Bank, N.A., FirsTier Leasing Corp., and FirsTier Bank, N.A., Omaha (collectively, FirsTier). The Ciminos appeal the decision by the district court for Douglas County wherein the district court sustained FirsTier's motion to strike certain factual allegations and three theories of recovery from the Ciminos' second amended petition, as well as the district court's decision to sustain FirsTier's motion for summary judgment on the Ciminos' third amended petition. The Ciminos also complain that the district court erred in overruling the Ciminos' motion for leave to file a fourth amended petition. We affirm the judgment of the district court for the reasons stated below.

## I. FACTUAL BACKGROUND

### 1. Procedural History

The Ciminos filed their second amended petition in the district court on April 23, 1991. Based on the factual background detailed herein, the Ciminos alleged five theories of recovery: breach of an oral contract, breach of the obligation of good faith and fair dealing, breach of fiduciary duty, intentional interference with contractual relationship, and misrepresentation. The first two theories of recovery sounded in contract, while the last three sounded in tort. FirsTier filed a motion to strike paragraphs 18 and 26, as well as counts III (breach of fiduciary duty), IV (intentional interference with contractual relationship), and V (misrepresentation) from the second amended petition. The district court sustained FirsTier's motion to strike.

Later, the Ciminos filed a motion for new trial, reconsideration, and clarification of the district court's ruling on the motion to strike. The district court denied that motion. The Ciminos then filed their third amended petition, which reflected the changes necessitated by the order to strike.

FirsTier filed a motion for summary judgment on the third amended petition. Almost 5 months later, on March 3, 1993, the day of the hearing on the summary judgment motion, the Ciminos filed a motion for leave to file a fourth amended petition. On May 13, the district court sustained FirsTier's motion for summary judgment on the Ciminos' third amended petition, holding that the evidence, viewed in a light most favorable to the Ciminos, failed as a matter of law to establish the requisite meeting of the minds necessary for the creation of the alleged December 10, 1987, oral contract. The district court held that the deposition testimony of the participants in the December 10 meeting indicated that no one shared the same understanding of the terms of the loan guaranty and that each participant, as reflected by the written documentation prepared after the December 10 meeting, expected further negotiations before the deal could be closed.

On May 20, 1993, the district court denied the Ciminos' motion for leave to file a fourth amended petition. This appeal followed.

### 2. The Parties

Plaintiff Lewis Cimino became involved in the trucking business in the mid-1960's. In 1967, Lewis purchased and began operating a long-haul over-the-road refrigerated trucking business known as Silvey Refrigerated Carriers (Silvey). The Family Trust owned all the common stock in Silvey, and Lewis owned all the preferred stock. Lewis formed several subsidiary companies for the purposes of buying and selling other Cimino business ventures, leasing equipment to Silvey, and owning real estate for Silvey.

Lewis financed the purchase of Silvey with a loan from the Omaha National Bank, now known as FirsTier. During the 1980's, the relationship between Silvey and FirsTier expanded to include leased equipment, equipment purchased with industrial development authority bonds (IDA bonds), a revolving line of credit, and letters of credit for fuel and service work required for the trucking operation. At the time the instant proceedings were filed, Silvey and the related companies had outstanding debt to FirsTier totaling approximately $8.9 million.

Richard and Robert Cimino, Lewis' sons, are both attorneys. In the late 1970's or early 1980's, Richard and Robert began working for Silvey. Sometime during the mid-1980's, Lewis decided to diminish his role in Silvey's administration, leaving the company in Richard and Robert's hands.

Thomas Grojean, the owner of a number of other trucking businesses, formed a holding company in 1987 for the purpose of acquiring Silvey. John Muehlstein and Rich Traub, attorneys from the Chicago law firm of Pedersen & Haupt, represented Grojean in his attempt to acquire Silvey. Richard Cimino negotiated with Grojean on behalf of Silvey and the other Cimino companies, and retained an Omaha law firm to assist in preparing documentation and to render any necessary legal opinions.

### 3. The Transaction

In June 1987, Richard and Robert decided to seek a buyer for Silvey and the related companies. The Ciminos retained a broker, which prepared a brochure about the business and

distributed it to several potential purchasers.

(a) The Negotiations

One of the potential buyers who contacted the Ciminos about purchasing Silvey and the related companies was Grojean. Robert considered Grojean's offer very attractive because Grojean proposed to purchase the entire company, including the stock and liabilities, and because Grojean offered substantially more money than other potential buyers. The Ciminos entered into negotiations with Grojean and executed a stock purchase and redemption agreement (Purchase Agreement) on November 30, 1987. Following execution of the Purchase Agreement, the only significant issue to be resolved prior to closing was obtaining FirsTier's consent to the sale.

Though FirsTier did not actively participate in negotiating the Purchase Agreement, the Ciminos kept the bank apprised of the situation with Grojean. All parties were aware that FirsTier would have to approve the terms of the sale to Grojean because the transaction involved the sale of stock and required that FirsTier relinquish its security interest in several million dollars of Silvey's accounts receivable and other assets. The accounts receivable and other assets were to be pledged to American National Bank, the financier behind Grojean's proposed purchase of Silvey, because American National demanded a first priority security interest in the assets collateralizing its loan to Grojean.

(b) The October 16, 1987, Meeting

On October 16, 1987, Richard called a meeting at FirsTier's offices between himself, Grojean, and FirsTier representative Lawrence Uebner, as well as other FirsTier representatives, to introduce the FirsTier representatives to Grojean and to enable the FirsTier representatives to become familiar with the ongoing negotiations between the Ciminos and Grojean. During the meeting, Grojean outlined the preliminary terms of the proposed transaction and presented his financial projections for the companies following the sale. As part of the proposed transaction, Grojean's bank, American National, offered to pay off Silvey's existing revolving line of credit and letters of credit at FirsTier (totaling approximately $1.8 million). In return,

American National proposed that FirsTier release its security interest in Silvey's accounts receivable and equipment, which served as collateral for the revolving line and letters of credit. Under Grojean's proposal, FirsTier would retain the approximately $7.1 million in debt represented by the IDA bonds, equipment leases, and other assorted debt. FirsTier requested that Grojean personally guarantee the debt which was to remain at FirsTier. At the October 16 meeting, Grojean stated that he would not personally guarantee that debt.

(c) The December 10, 1987, Meeting

The parties continued to negotiate Grojean's personal guaranty of the remaining debt. At the Ciminos' request, on December 10, 1987, FirsTier representatives Uebner, John Nahas, and Lee Mayhan met with Grojean and Lewis and Richard Cimino at FirsTier's offices. The Ciminos alleged in their third amended petition that FirsTier entered into an oral agreement with the Ciminos at the December 10 meeting, whereby FirsTier agreed to consent to the sale of Silvey to Grojean in return for a "tiered" guaranty from Lewis and a "conditional" guaranty from Grojean. Specifically, the Ciminos contend that FirsTier agreed that Lewis would guarantee the first 40 percent of the approximately $7.1 million in debt remaining with FirsTier, Grojean would guarantee the next 36 percent, and Lewis would be liable for the remaining 24 percent.

The Ciminos allege that at the same meeting, FirsTier reached a *separate* agreement with Grojean, whereby FirsTier agreed to retain the $7.1 million debt for Grojean's conditional guaranty discussed above. At the conclusion of the meeting, the FirsTier representatives suggested that the agreement be reduced to writing using the bank's forms. However, Grojean insisted that his attorneys furnish the written version of the guaranty. The FirsTier representatives agreed to allow Grojean's attorneys to draft the document, stating that they would take a look at it and see if it was acceptable.

(d) The Documentation

The following day, December 11, 1987, Uebner prepared two internal bank documents, a "Watch List Loan Memo" and a

"Problem Loan Update" (collectively, internal documents) setting forth the terms of the alleged December 10 agreement. The terms set forth in the internal documents appear consistent with the agreement which the Ciminos contend the parties reached on December 10.

The record reflects that, pursuant to FirsTier's procedures, the FirsTier general banking loan committee and senior loan committee approved the transaction detailed in the Watch List Loan Memo. Following committee approval, Uebner drafted a letter to Jim Morgan at American National detailing American National's payoff to FirsTier on Silvey's revolving line and letters of credit, and the release of the accounts receivable collateral. Uebner indicated that he would be at the closing.

On December 16, 1987, Grojean's attorney Muehlstein forwarded an "initial draft" (the Muehlstein draft) of the alleged December 10 guaranty agreement between FirsTier and Grojean to Mayhan at FirsTier. The Muehlstein draft differed from the FirsTier internal documents in that it required FirsTier to *collect* the first 40 percent of the outstanding debt before FirsTier could look to Grojean to fulfill his conditional personal guaranty.

The following day, December 17, 1987, Mayhan rejected the Muehlstein draft and faxed a revised version of agreement (the Mayhan revision) to Muehlstein. The Mayhan revision significantly changed the above-cited language in the Muehlstein draft by eliminating the requirement that FirsTier collect 40 percent of the outstanding debt from Lewis before it could proceed against Grojean. The Mayhan revision kept intact the 36-percent limitation on Grojean's liability, but it would have allowed FirsTier to proceed immediately against Grojean to collect the 36 percent. Grojean objected and told FirsTier that it had changed the terms of their agreement and that he could not proceed with the transaction under the terms proposed in the Mayhan revision. A representative from FirsTier informed Grojean that the Mayhan revision was the only agreement acceptable to the bank. Grojean never agreed to the terms in the Mayhan revision, so FirsTier never gave its consent to the sale.

## II. ASSIGNMENTS OF ERROR

The Ciminos contend that the district court erred in (1)

sustaining FirsTier's motion to strike paragraphs 18 and 26 and counts III, IV, and V from their second amended petition; (2) overruling the Ciminos' motion for new trial, reconsideration, and clarification; (3) granting summary judgment on the Ciminos' third amended petition; and (4) overruling the Ciminos' motion for leave to file a fourth amended petition.

## III. STANDARD OF REVIEW

For the purposes of determining the relevancy and materiality of allegations in a pleading, a motion to strike admits the truth of all facts well pleaded and any inferences fairly deducible therefrom. *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956).

Summary judgment is proper 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. *Jim's, Inc. v. Willman, ante* p. 430, 527 N.W.2d 626 (1995); *Gravel v. Schmidt, ante* p. 404, 527 N.W.2d 199 (1995); *Heath Consultants v. Precision Instruments, ante* p. 267, 527 N.W.2d 596 (1995). In reviewing a summary judgment, an appellate 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. *Jim's, Inc. v. Willman, supra*; *Gravel v. Schmidt, supra*; *Huntwork v. Voss, ante* p. 184, 525 N.W.2d 632 (1995).

## IV. ANALYSIS

### 1. Motion to Strike

The Ciminos contend that the district court erroneously sustained FirsTier's motion to strike the three tort claims in their second amended petition, as well as two factual paragraphs that supported the tort claims. In sustaining the motion to strike, the district court found that the three tort claims merely restated the breach of contract claims and did not constitute separate causes of action.

To determine whether an action is based on a contract or a

tort, a court must examine and construe the petition's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the petition or the form of the pleading. *J.L. Healy Constr. Co. v. State*, 236 Neb. 759, 463 N.W.2d 813 (1990); *L. J. Vontz Constr. Co. v. State*, 230 Neb. 377, 432 N.W.2d 7 (1988). Consideration must be given to the facts which constitute the cause of action. *Thomas v. Countryside of Hastings*, 246 Neb. 907, 524 N.W.2d 311 (1994); *L. J. Vontz Constr. Co. v. State, supra*; *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984). If the petition contains a cause of action for breach of contract, additional averments appropriate to a cause of action for a wrong will not change the action from contract to tort, and if there is a doubt as to the character of the action, it will be resolved in favor of an action on contract. *Fuchs v. Parsons Constr. Co.*, 166 Neb. 188, 88 N.W.2d 648 (1958). In such an instance, the statements appropriate to an action in tort will be considered surplusage. *Id.*

We hold that even if the Ciminos stated facts sufficient to establish that FirsTier owed them a fiduciary duty, intentionally interfered with the Ciminos' contractual relations, and made material misrepresentations, the Ciminos failed to plead those theories as independent tort actions. Each of the allegations contained in the Ciminos' tort claims relates directly to FirsTier's refusal to consent to the sale of Silvey to Grojean. That same refusal forms the basis of the Ciminos' breach of contract claims. The Ciminos failed to allege any separate and distinct factual occurrences that could stand alone as a separate cause of action sounding in tort. Therefore, we affirm the trial court's order to strike counts III, IV, and V, as well as paragraphs 18 and 26, from the Ciminos' second amended petition. See *Fuchs v. Parsons Constr. Co., supra*.

Since we have held that the district court properly sustained FirsTier's motion to strike counts III, IV, and V, as well as paragraphs 18 and 26 of the Ciminos' second amended petition, we likewise affirm the district court's decision overruling the Ciminos' motion for new trial, reconsideration, and clarification.

## 2. Motion for Summary Judgment

### (a) Oral Contract Claim

The Ciminos allege that the district court erred in granting FirsTier's motion for summary judgment on the Ciminos' third amended petition. As described previously, the district court found that the Ciminos failed as a matter of law to establish a meeting of the minds necessary for the creation of the alleged December 10 oral contract. The district court held that the deposition testimony of the participants in the December 10 meeting indicated that no one had the same understanding of the terms of the loan guaranty and that each participant, as reflected by the written documentation prepared after the December 10 meeting, expected further negotiations before the deal could be closed.

The Ciminos argue that the parties reached two separate agreements on December 10: FirsTier orally contracted with the Ciminos to retain $7.1 million in debt in return for Grojean's conditional personal guaranty, and FirsTier orally contracted with Grojean as to the terms of that personal guaranty:

> As alleged in the Third Amended Petition, FirsTier orally agreed with Cimino to consent to the sale in return for a guaranty from Grojean "on the terms set forth in [the Muehlstein draft]" attached thereto. The *written* guaranty agreement contemplated between FirsTier and Grojean is not the *oral* agreement between FirsTier and Cimino. Instead, it is merely evidence of some of the "terms" of the Cimino oral agreement, much like the December 11, 1987 FirsTier [internal documents] . . . .
>
> FirsTier's repeated reference to the fact Grojean and FirsTier intended to finalize *their* guaranty agreement in writing is irrelevant to whether an *oral* contract was made between FirsTier and Cimino at the December 10 meeting.

(Emphasis in original.) Reply brief for appellants at 2-3. The Ciminos contend that we should not be misled by FirsTier's arguments regarding the confusion surrounding the FirsTier-Grojean guaranty, because that agreement was separate and distinct from the FirsTier-Cimino oral contract, which the Ciminos seek to enforce.

We find no merit in the Ciminos' argument that the FirsTier-Grojean agreement was separate from and unrelated to the FirsTier-Cimino agreement. Rather, the FirsTier-Grojean agreement was a condition precedent to the FirsTier-Cimino agreement. A condition precedent is a condition which must be performed before the parties' agreement becomes a binding contract or a condition which must be fulfilled before a duty to perform an existing contract arises. *Donaldson v. Farm Bureau Life Ins. Co.*, 232 Neb. 140, 440 N.W.2d 187 (1989); *Schmidt v. J. C. Robinson Seed Co.*, 220 Neb. 344, 370 N.W.2d 103 (1985). Clearly, before the Ciminos could enforce a contract wherein FirsTier agreed to consent to the sale of Silvey to Grojean based on a tiered personal guaranty from Grojean, FirsTier and Grojean had to agree on the terms and structure of the tiered agreement. Therefore, in order for the Ciminos to successfully enforce their alleged oral contract with FirsTier, they also had to prove that FirsTier and Grojean entered into an enforceable agreement, thus satisfying the condition precedent to the FirsTier-Cimino alleged oral contract.

To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract. *Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 508 N.W.2d 820 (1993). For a binding contract to result from an offer and acceptance, the minds of the parties must meet at every point; nothing can be left open for future arrangement. *Sayer v. Bowley*, 243 Neb. 801, 503 N.W.2d 166 (1993).

The record reflects that the parties in the instant case did reach at least a tentative guaranty agreement at the December 10 meeting regarding the percentages of personal liability to be assigned to Lewis and Grojean. Each participant at the December 10 meeting testified that Lewis agreed to be liable for 40 percent of the outstanding debt, that Grojean agreed to be responsible for the next 36 percent, and that Lewis would assume responsibility for any remaining debt. On December 11, FirsTier prepared its internal documents, which reflected essentially the same terms. The Ciminos contend that the internal documents evidenced FirsTier's belief that the parties had reached a contractual agreement.

Viewing the evidence in a light most favorable to the Ciminos, we determine that the record supports a finding that there was a meeting of the minds among the parties that Grojean would personally guarantee the debt remaining with FirsTier in a tiered agreement. Likewise, the record supports the inference that the parties may have agreed upon the percentage of tiered liability to be assigned to Lewis and Grojean. However, the record clearly indicates that certain material aspects of the alleged oral agreement were left unresolved, thus preventing legal enforcement of the agreement.

*(i) Meeting of the Minds Regarding Triggering Event*

FirsTier contends that the Ciminos' oral contract argument is unsupported by the record because the deposition testimony and exhibits clearly demonstrated that further negotiations were necessary before the parties could agree to certain material terms of the contract, particularly the events that would trigger Grojean's liability. Uebner testified that he understood the December 10 agreement to mean that FirsTier could proceed immediately against Grojean for his full 36 percent liability without waiting to liquidate the existing collateral. Nahas testified that no agreement had been reached regarding liability triggers under the tiered agreement. In contrast, the record reflects that Grojean and Richard and Lewis Cimino all testified that Grojean's personal guaranty would become effective when Silvey's outstanding debt was reduced by 40 percent, whether the reduction be by forgiveness or collection of Lewis' personal guaranty of that first 40 percent. However, the Ciminos cited the Muehlstein draft as the document memorializing the December 10 oral agreement.

*(ii) The Muehlstein Draft*

FirsTier contends that the deposition testimony of the Ciminos and Grojean provides conclusive evidence that the parties did not agree on the terms contained in the Muehlstein draft. Therefore, FirsTier argues that no meeting of the minds took place at the December 10 meeting.

In their third amended petition, the Ciminos alleged that the "terms of [the December 10 oral] agreement are set forth in [the Muehlstein draft] attached hereto and incorporated herein by

reference." The record clearly reflects that the Muehlstein draft added a previously nonexistent component to the alleged December 10 agreement by requiring that FirsTier *collect* 40 percent of the outstanding debt from Lewis before it could proceed against Grojean. Therefore, the Muehlstein draft is inconsistent with what the Ciminos claim the parties agreed upon at the December 10 meeting.

The third amended petition, read in a light most favorable to the Ciminos, clearly states that the terms of the December 10 oral agreement were embodied in the Muehlstein draft. Since the Muehlstein draft on its face contradicts the oral contract described by the Ciminos and Grojean, as well as the testimony of Uebner and Nahas, we hold as a matter of law that there could not have been a meeting of the minds as to all the material terms of the agreement at the December 10 meeting. Thus, we affirm the district court's decision to sustain FirsTier's motion for summary judgment.

*(iii) Intent for Further Negotiations*

FirsTier also argues that no enforceable contract could have been formed at the December 10 meeting because the parties agreed that further negotiations were necessary to close the deal. An agreement to make a future contract is not binding upon either party unless all terms and conditions are agreed upon and nothing is left to future negotiation. *Schlake v. Jacobsen*, 246 Neb. 921, 524 N.W.2d 316 (1994); *Sayer v. Bowley*, 243 Neb. 801, 503 N.W.2d 166 (1993). A contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangement. *Schlake v. Jacobsen, supra*. An agreement to agree, rather than a complete contract that could simply be memorialized at a later time, is not enforceable in Nebraska. See *Sayer v. Bowley, supra*.

FirsTier cites Richard's and Lewis' deposition testimony as evidence that the participants in the December 10 meeting intended to engage in further negotiations before reaching a final agreement. Richard testified as follows:

> Q. . . . Mr. Grojean's response to that was what, sir?
> A. He says that might work, I want to review it with my

lawyers, and it's, you know, it's some — you know, I've talked with Mr. Perry. Now he was talking to Greg Perry at his firm, who was a senior partner at the Pedersen & Houpt [sic] firm in Chicago.

And he said that might work, but I want to review it one more time with my attorneys and I'll call you, I'll be in Chicago tomorrow.

Similarly, Lewis offered this version of the conclusion of the December 10 meeting:

Q. Okay. Now going back to the meeting where you claim this agreement was reached, Nahas said — as I understand it, Nahas said to Grojean that he would look to Lou [sic] for the first 40 percent of the loss. Remember that conversation?

A. Roughly.

Q. What was Grojean's response after Nahas made this statement?

A. Well, he — I think he wanted to think about it, and he wanted to talk to his attorneys on how to structure it and agree to it. And he said — in the final analysis, he says okay, we got a deal.

Q. But he wanted to talk to his attorneys about how to structure it?

A. Yeah. Well, he talked to his attorneys on — and he has a financial advisor back there, too, that — he talks to them on dotting all the I's and crossing all the Ts.

From Richard's and Lewis' testimony, it is clear that they were under the impression that the parties had more work to do before FirsTier and Grojean could reach a final agreement. Construing all the evidence in the Ciminos' favor, it is impossible to envision how an enforceable agreement could have been created at the December 10 meeting without further negotiations. Therefore, the district court correctly determined that the parties did not form an enforceable oral contract at the December 10 meeting. See, *Schlake v. Jacobsen, supra*; *Sayer v. Bowley, supra*.

(b) Bad Faith Refusal to Consent to Transaction

The Ciminos' second theory of recovery in their third

amended petition alleged that FirsTier breached its implied covenant of good faith and fair dealing in its relationship with the Ciminos by unreasonably withholding its consent to the sale of Silvey to Grojean. The district court granted FirsTier's motion for summary judgment as to this claim because it found that the evidence did not support an argument that FirsTier, the Ciminos, and Grojean were legally bound to any agreement. In other words, the district court found that FirsTier could not have breached its duty of good faith because there was no contract upon which to impose liability.

The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract. See *Dunfee v. Baskin-Robbins, Inc.*, 221 Mont. 447, 720 P.2d 1148 (1986). However, in order for the implied covenant of good faith and fair dealing to apply, there must be in existence a legally enforceable contractual agreement. In the case at bar, we have held that the Ciminos failed to prove the existence of an enforceable oral contract. Therefore, as a matter of law, we hold that the district court properly sustained FirsTier's motion for summary judgment as to the Ciminos' implied covenant claim.

3. Motion for Leave to File Fourth Amended Petition

Just prior to the scheduled hearing on FirsTier's motion for summary judgment, the Ciminos filed a motion for leave to file a fourth amended petition. In the proposed fourth amended petition, the Ciminos deleted the language in the third amended petition which cited the Muehlstein draft as the document containing the terms of the alleged December 10 agreement. The Ciminos replaced that language with a general outline of the terms of the alleged December 10 oral agreement, which reflected the deposition testimony of Grojean and Richard and Lewis Cimino. In accordance with our analysis above, that amendment altered the Ciminos' petition in such a manner as to create a factual dispute regarding whether the participants in the December 10 meeting did in fact execute an oral contract. The district court, however, overruled the Ciminos' motion for leave to file the fourth amended petition.

The decision whether to allow or deny an amendment to any pleading lies within the discretion of the court to which application is made. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). 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 the judicial system. *Pendleton v. Pendleton, ante* p. 66, 525 N.W.2d 22 (1994); *Grady v. Visiting Nurse Assn.*, 246 Neb. 1013, 524 N.W.2d 559 (1994); *Schlake v. Jacobsen*, 246 Neb. 921, 524 N.W.2d 316 (1994).

FirsTier argues that even if the fourth amended petition would have survived its motion for summary judgment, the trial court did not abuse its discretion in denying the Ciminos' motion for leave because the proposed amendment substantially changed the nature of the Ciminos' claim. The Ciminos contend that the proposed amendment merely conformed the petition to the then-known evidence.

The Ciminos filed the original petition in the case at bar February 23, 1990. That petition, and the three amended petitions that followed, all stated that the terms of the alleged December 10 oral agreement were set forth in the Muehlstein draft. The deposition testimony supporting the proposed amendment had all been taken by March 1991. FirsTier filed its motion for summary judgment October 9, 1992. Throughout the litigation, both parties had proceeded under the premise that the Muehlstein draft reflected the terms of the alleged December 10 agreement. On March 3, 1993, 5 months after FirsTier filed its motion for summary judgment and over 3 years and three amended petitions after the instant case was originally filed, the Ciminos proposed a fourth amended petition which substantially changed the nature of the Ciminos' breach of contract claim.

In the past, this court has stated that the time at which an amendment occurs is not dispositive of whether a party was prejudiced. See, *Collection Associates, Inc. v. Eckel*, 212 Neb. 607, 324 N.W.2d 808 (1982); *Lippire v. Eckel*, 178 Neb. 643, 134 N.W.2d 802 (1965). However, in the instant case, the

amendment proposed by the Ciminos significantly altered the basis of their breach of oral contract claim. That fact, combined with the circumstances outlined above, convinces us that the district court did not err in refusing to grant the Ciminos' motion for leave to file a fourth amended petition. See *Collection Associates, Inc. v. Eckel, supra*.

## V. CONCLUSION

The district court properly sustained FirsTier's motion to strike the Ciminos' tort claims and the factual assertions supporting those claims in the Ciminos' second amended petition because the Ciminos failed to plead a separate and distinct set of facts distinguishing the tort claims from the Ciminos' properly pled contract claims. The district court also correctly sustained FirsTier's motion for summary judgment because the pleadings and evidence, read in a light most favorable to the Ciminos, failed to present an issue of material fact sufficient to prevent judgment as a matter of law for FirsTier. The district court did not err in denying the Ciminos leave to file a fourth amended petition, because the proposed amendment would have prejudiced FirsTier under the circumstances presented in the instant case.

AFFIRMED.

CAPORALE, J., not participating.

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TRUDI MILLER, PERSONAL REPRESENTATIVE OF THE ESTATE OF TIMOTHY MILLER, DECEASED, APPELLEE, V. STAN E. WALTER, APPELLANT.

530 N.W.2d 603

Filed April 14, 1995. No. S-93-874.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.

2. **Constitutional Law: Foreign Judgments: States: Collateral Attack.** The Full Faith and Credit Clause of the U.S. Constitution prohibits a Nebraska court from reviewing the merits of a judgment rendered in a sister state, but a foreign judgment can be collaterally attacked by evidence that the rendering court was without jurisdiction over the parties.
3. **Jurisdiction.** Jurisdiction is a question for the court, not the jury.
4. **Jury Trials: Jurisdiction: Statutes.** There is no right to a jury trial on the issue of whether the rendering court had personal jurisdiction over the defendant in an action to register a foreign judgment brought pursuant to the Uniform Enforcement of Foreign Judgments Act.

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

Allan J. Eurek and Lisa K. Piscitelli, of Pierson, Fitchett, Hunzeker, Blake & Loftis, for appellant.

Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

LANPHIER, J.

Appellee, Trudi Miller, brought this action against appellant, Stan E. Walter, to register a California judgment in the district court for Lancaster County, Nebraska, pursuant to the Uniform Enforcement of Foreign Judgments Act. Appellant asserted the California court lacked personal jurisdiction over him because of failure of personal service, and he resisted registration of the judgment. Appellant demanded a jury trial on the issue of whether the California court possessed personal jurisdiction. The district court denied appellant's demand for a jury trial and proceeded to register the judgment. Appellant's sole assignment of error is that he was denied a jury trial on the issue of personal jurisdiction. We hold there is no right to a jury trial on the issue of personal jurisdiction. We affirm.

## BACKGROUND

On January 31, 1990, Timothy Miller obtained a default judgment against Stan E. Walter in a California municipal court. Timothy Miller died on August 10, 1992. On March 11, 1993, Trudi Miller, Timothy Miller's personal representative,

filed a second amended petition for registration of the California judgment pursuant to the Uniform Enforcement of Foreign Judgments Act in the district court for Lancaster County, Nebraska.

Appellant answered Miller's petition, alleging as an affirmative defense that the California court lacked personal jurisdiction over him and thus its judgment was not entitled to full faith and credit in Nebraska. Appellant asserted that the manner of service failed to comply with laws of the State of California. By her reply, Miller denied appellant's allegations.

On September 3, 1993, proceedings were had in the district court. Appellant demanded a jury trial on the issue of whether the California court had personal jurisdiction. The district court denied appellant's demand for a jury trial and registered the California judgment. Appellant refused to proceed with a trial to the bench because he feared that by proceeding, he would waive his right to a jury trial. Appellant and his counsel left the hearing without offering any evidence.

After appellant was excused, Miller offered her second amended petition for registration of the California judgment, several affidavits attesting to the manner of service, and certified copies of the proof of service. By its order of September 3, 1993, the district court registered the judgment of the California court as a final personal judgment.

## ASSIGNMENT OF ERROR

For his sole assignment of error, appellant asserts the district court erred in overruling his demand for a jury trial on the issue of whether the California court which entered the judgment to be registered had personal jurisdiction over appellant.

## STANDARD OF REVIEW

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Grady v. Visiting Nurse Assn.*, 246 Neb. 1013, 524 N.W.2d 559 (1994); *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994); *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994).

## ANALYSIS

The Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. § 25-1587 et seq. (Reissue 1989) provides the statutory framework for bringing an action on a foreign judgment in this state. Although the Full Faith and Credit Clause of the U.S. Constitution prohibits a Nebraska court from reviewing the merits of a judgment rendered in a sister state, a foreign judgment can be collaterally attacked by evidence that the rendering court was without jurisdiction over the parties. *First Fed. Sav. & Loan Assn. v. Wyant*, 238 Neb. 741, 472 N.W.2d 386 (1991); *Olson v. England*, 206 Neb. 256, 292 N.W.2d 48 (1980).

In his answer to Miller's petition to register the California judgment, appellant alleged that the California court lacked personal jurisdiction over him and, thus, that its judgment should not be given full faith and credit in Nebraska. Appellant asserts that by virtue of § 25-1594, he is entitled to a jury trial on this issue. Section 25-1594 provides in pertinent part: "Any defense, setoff or counterclaim, which under the law of this state may be asserted by the defendant in an action on the foreign judgment may be presented by appropriate pleadings and the issues raised thereby *shall be tried and determined as in other civil actions*." (Emphasis supplied.)

Appellant asserts that in other civil actions, issues of fact are tried by a jury. Neb. Rev. Stat. § 25-1104 (Reissue 1989) states that "[i]ssues of fact arising in actions for the recovery of money or of specific real or personal property, shall be tried by a jury unless a jury trial is waived . . . ." Appellant argues that given the alleged factual disputes regarding whether the manner of service complied with California law, he is entitled to a jury trial, as in other civil actions. Appellant cites no cases in support of his argument.

However, jurisdiction, whether the question is subject matter jurisdiction or personal jurisdiction, is a question for the court, not the jury. *State ex rel. Grape v. Zach, ante* p. 29, 524 N.W.2d 788 (1994) (stating that subject matter jurisdiction under the Uniform Child Custody Jurisdiction Act is a determination entrusted to the discretion of the court); *Chew v. Newsome Chevrolet, Inc.*, ____ S.C. ____, 431 S.E.2d 631

(S.C. App. 1993) (subject matter jurisdiction a question for the court, not the jury); *Board of County Com'rs v. Amarillo Hosp.*, 835 S.W.2d 115 (Tex. Civ. App. 1992); *Walker v. Superior Court*, 53 Cal. 3d 257, 807 P.2d 418, 279 Cal. Rptr. 576 (1991) (personal jurisdiction a question for the court); *Tigges v. City of Ames*, 356 N.W.2d 503 (Iowa 1984) (stating a court must determine its own authority to hear a case even if the issue requires a factual determination).

Generally, a defendant may make a special appearance for the purpose of objecting to the jurisdiction of the court over the person of the defendant. Neb. Rev. Stat. § 25-516.01 (Reissue 1989). Personal jurisdiction is a preliminary matter for the court to decide. See, e.g., *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994); *Line v. Rouse*, 241 Neb. 779, 491 N.W.2d 316 (1992); *Fisher v. City of Grand Island*, 239 Neb. 929, 479 N.W.2d 772 (1992).

Appellant's argument that he was entitled to a jury trial on the issue of personal jurisdiction necessarily fails because in the words of § 25-1594, in "other civil actions," personal jurisdiction questions are within the power of the court to decide.

## CONCLUSION

There is no right to a jury trial on the issue of whether the rendering court had personal jurisdiction over the defendant in an action to register a foreign judgment brought pursuant to § 25-1587 et seq. Appellant assigns no other errors regarding the district court's registration of the California judgment, and accordingly, we affirm the district court.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. ROBERT HAASE, APPELLANT.
530 N.W.2d 617

Filed April 14, 1995. No. S-95-164.

1. **Affidavits: Words and Phrases.** An affidavit is a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation

of the party making it, taken before a person having authority to administer such oath or affirmation.

2. ____: ____. A document subscribed and sworn to before a person not authorized by law to administer oaths is not an affidavit and is void as such.
3. **Public Officers and Employees.** The power of a notary to perform notarial functions is limited to the jurisdiction in which the commission issued.
4. **Affidavits: Fees: Appeal and Error.** A poverty affidavit serves as a substitute for the docket fee otherwise required upon appeal by Neb. Rev. Stat. §§ 33-103 (Reissue 1993) and 25-1912 (Cum. Supp. 1994).
5. **Fees: Time: Appeal and Error.** The timely depositing of the docket fee is a jurisdictional step in perfecting an appeal.
6. **Affidavits: Fees: Time: Appeal and Error.** A poverty affidavit taking the place of the docket fee must be filed within the time that the docket fee would otherwise have been required to be deposited.

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

Thomas J. Gaul, Deputy Hall County Public Defender, for appellant.

No appearance for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

CAPORALE, J.

On January 20, 1995, the district court, considering unconstitutional the statutes under which it had been asked to act, refused to change the sentence it had previously imposed upon the defendant, Robert Haase. On February 17, 1995, Haase filed in the district court a notice of his intention to appeal therefrom to this court, a motion to proceed in forma pauperis, and a purported "Affidavit of Poverty" in support of said motion.

The so-called poverty affidavit represents that it was signed before notary Thomas J. Gaul, also the Deputy Hall County Public Defender, but bears no notarial seal. Because of such lack, we issued an order directing Haase to show cause why the appeal should not be dismissed.

Haase then, through Gaul, filed a motion to extend the time within which to file another poverty affidavit. The motion recited that the notarial seal had been inadvertently omitted from the original filing.

We thereupon issued a further order directing that an affidavit be filed attesting as to whether at the time Gaul signed the original filing as a notary he was "a duly qualified notary public in the State of Nebraska."

Rather than doing so, Haase, again through Gaul, filed a "Modified Motion for Extension of Time" within which to file a proper poverty affidavit. In this motion, Gaul confesses that although when he signed the original document he was an Iowa notary, he was not then a Nebraska notary and professes not to have been aware that an Iowa notary could not act as such in Nebraska.

In connection with the means by which evidence may be taken, Neb. Rev. Stat. § 25-1240 (Reissue 1989), the Legislature has defined an affidavit as a "written declaration under oath, made without notice to the adverse party," Neb. Rev. Stat. § 25-1241 (Reissue 1989). For the purposes of more general use, we define an affidavit as a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation. See *State v. Knight*, 219 Kan. 863, 549 P.2d 1397 (1976).

Obviously, a document subscribed and sworn to before a person not authorized by law to administer oaths is not an affidavit and is void as such. *Lanning v. Haases*, 89 Neb. 19, 130 N.W. 1008 (1911). See, also, *In re Interest of K.D.B.*, 233 Neb. 371, 445 N.W.2d 620 (1989) (poverty affidavit must show it was duly sworn to).

Just as manifestly, the power of a notary to perform notarial functions is limited to the jurisdiction in which the commission issued. Iowa Code Ann. §§ 9E.10 and 9E.11 (West Supp. 1994); *Garza v. Serrato*, 699 S.W.2d 275 (Tex. App. 1985); *Shipley v. Stephenson County Elec. Board*, 130 Ill. App. 3d 900, 474 N.E.2d 905 (1985); *Lewis v. City of Liberty*, 600 S.W.2d 677 (Mo. App. 1980); *In re State ex rel. Wootan*, 313 So. 2d 621 (La. App. 1975), *cert. denied* 318 So. 2d 47, *cert. denied* 424 U.S. 912, 96 S. Ct. 1110, 47 L. Ed. 2d 317 (1976); *United Services Automobile Ass'n v. Ratterree*, 512 S.W.2d 30 (Tex. Civ. App. 1974). See, also, Neb. Rev. Stat. § 64-107 (Reissue

1990). Thus, it is clear that the original document filed as a poverty affidavit in this case was no such thing.

A proper poverty affidavit serves as a substitute for the docket fee otherwise required upon appeal by Neb. Rev. Stat. §§ 33-103 (Reissue 1993) and 25-1912 (Cum. Supp. 1994). Neb. Rev. Stat. § 29-2306 (Cum. Supp. 1994) (criminal defendant filing poverty affidavit within 30 days after decision not required to pay docket fee). See, also, *State v. Hunter*, 234 Neb. 567, 451 N.W.2d 922 (1990) (under another statute, poverty affidavit served in lieu of docket fee in appeal from county court to district court). The timely depositing of the docket fee is a jurisdictional step in perfecting an appeal. *American Legion Post No. 90 v. Nebraska Liquor Control Commission*, 199 Neb. 429, 259 N.W.2d 36 (1977). See, also, *Madison County v. Crippen*, 143 Neb. 474, 10 N.W.2d 260 (1943) (appellate jurisdiction obtained upon filing of notice of appeal and deposit of docket fee within time prescribed by statute).

Since the poverty affidavit takes the place of the docket fee, it necessarily follows that if the affidavit is not filed within the time that the docket fee would otherwise have been required to be deposited, this court acquires no jurisdiction. See *State v. Spotted Elk*, 227 Neb. 869, 420 N.W.2d 707 (1988) (appellate court obtained jurisdiction upon filing of notice of appeal and payment or waiver of fees within time prescribed by statute). So far as is relevant here, § 25-1912(1) requires that the docket fee be deposited within 30 days after the decision from which the appeal is undertaken.

No proper poverty affidavit having been filed and the time for filing such having long since passed, we overrule Haase's motions for extension of the time within which to file same, and dismiss the within attempted appeal.

APPEAL DISMISSED.

# DILLARD DEPARTMENT STORES, INC., APPELLEE, V. YVETTE POLINSKY, APPELLEE, AND DAN DOLAN, COMMISSIONER OF LABOR OF THE STATE OF NEBRASKA, APPELLANT.

530 N.W.2d 637

Filed April 21, 1995. No. S-93-515.

1. **Administrative Law: Courts: Appeal and Error.** In an appeal from the Nebraska Appeal Tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record, but on review by the Court of Appeals or the Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors appearing on the record.
2. **Final Orders: Appeal and Error.** When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the district court's ruling.
4. **Administrative Law: Presumptions: Proof.** A rebuttable presumption of validity attaches to the actions of administrative agencies. The burden of proof rests with the party challenging the agency's action.
5. **Employment Security: Termination of Employment.** Each job and the facts of its termination must be considered separately with regard to disqualification for benefits.
6. **Employment Security.** Ordinarily, the Employment Security Law does not grant benefits to employees who leave their work purely voluntarily.
7. ____. The Employment Security Law is to be liberally construed to accomplish its beneficent purposes.
8. ____. The rule of construction that the Employment Security Law is to be liberally construed in order that its beneficent purposes may be accomplished applies to the interpretation of the law but not to consideration of the evidence offered in support of a claim under the law.
9. **Employment Security: Time.** The statutory language of Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1992) links the timing of disqualification from benefits to the period immediately following the week in which the employee has left work voluntarily without good cause.
10. ____: ____. The week in which an employee actually leaves work is the determinative factor regarding subsequent eligibility for benefits.
11. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.
12. ____. It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.

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

John F. Sheaff and John H. Albin for appellant.

David A. Barron, of Cline, Williams, Wright, Johnson & Oldfather, for appellee Dillard Dept. Stores.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, and CONNOLLY, JJ., and MILLER-LERMAN, Judge.

MILLER-LERMAN, Judge.

## INTRODUCTION

This case involves the issue of whether an employee is entitled to unemployment compensation benefits under the Employment Security Law, Neb. Rev. Stat. § 48-601 et seq. (Reissue 1988 & Cum. Supp. 1992), where the employee gave notice to the employer and was terminated during the notice period. The Commissioner of Labor (Commissioner) appeals the order of the Douglas County District Court of May 11, 1993, which reversed the decision of the appeal tribunal of the Nebraska Department of Labor and found that Yvette Polinsky, a former employee of Dillard Department Stores, Inc. (Dillard), was not entitled to unemployment compensation benefits, except for certain dates within the notice period, namely October 10 to 14, 1992.

## RECORD

The testimony to which reference is made was given before the Nebraska Appeal Tribunal on November 25, 1992. This testimony became the bill of exceptions before the district court and was received in evidence by the district court at the hearing on the petition for review on April 2, 1993.

## FACTS

The essential facts are undisputed. Dillard, appellee, employed Polinsky as an auditor in the customer service department from October 9, 1991, until October 2, 1992. On September 30, 1992, Polinsky gave Dillard a written 3-week notice of resignation. The parties agree that Polinsky shortened her notice period to 2 weeks, apparently because tension developed between Polinsky and her supervisor after Polinsky had tendered her notice of resignation. In the absence of discharge, Polinsky's notice period would have expired on

October 14, 1992. Polinsky testified that she was willing and available to work through the full 2-week notice period.

The record shows that upon being advised of her resignation, Dillard began seeking a replacement for Polinsky. Dillard informed Polinsky on October 2 that her employment would end at the end of her shift that day. On October 13, Polinsky received her final compensation, which consisted of accrued vacation benefits of $230. Dillard did not pay Polinsky wages for the notice period.

Cat McGrath-Farmer, the operations manager for Dillard's customer service department, testified that Dillard terminated Polinsky prior to the expiration of Polinsky's notice period because Dillard was seeking a replacement worker and that the budget allowed for only one employee per position at a time. The record shows that Kathy Grigaitis was hired as Polinsky's replacement. Grigaitis first applied for an auditor's position with Dillard on August 10, 1992, and was still available for employment on October 2, when she was called in to interview for Polinsky's position. Grigaitis began work on October 5.

## PROCEDURAL HISTORY

Polinsky applied for unemployment compensation benefits. Polinsky informed the unemployment office that she had given notice to Dillard, but had been released prior to the expiration of her notice period. On October 30, 1992, a deputy at the unemployment office determined:

> You were separated from your job with the above employer on 09-30-92 after submitting your resignation notice. Your employer did not allow you to continue work until the effective date of your resignation. Your actual separation was due to a discharge for reasons other than misconduct, and not a voluntary quit.
>
> No disqualification is assessed on this separation. Benefits are allowed if otherwise payable.

The deputy concluded that Polinsky was disqualified from receiving unemployment compensation benefits from October 4 through 10, 1992, because the accrued vacation benefits that Dillard paid to Polinsky exceeded the weekly benefit amount. The deputy also found that no other disqualification from

benefits was required.

Dillard appealed the deputy's findings to the Nebraska Appeal Tribunal. The administrative law judge held a hearing on November 25, 1992. At the hearing, McGrath-Farmer testified for Dillard and Polinsky testified on her own behalf. On December 2, 1992, the administrative law judge affirmed the claims deputy's determinations. The administrative law judge found that Dillard "severed the employment relationship on October 2, 1992," and that the "separation [was] at the discretion of the employer, and therefore a discharge." The administrative law judge found that there was "no evidence of misconduct" and that the separation "was non-disqualifying." The administrative law judge concluded that Polinsky "was discharged under non-disqualifying conditions and is entitled to benefits for weeks claimed, if otherwise eligible."

On January 8, 1993, Dillard filed in the district court for Douglas County a petition for review of the decision of the Nebraska Appeal Tribunal. A hearing was held on April 2, 1993. On May 11, the district court issued an order reversing the decision of the Nebraska Appeal Tribunal and disqualifying Polinsky from unemployment compensation benefits for not less than 7 nor more than 10 weeks after her intended resignation date of October 14, 1992. The district court order provided that Polinsky was entitled to receive unemployment compensation benefits "only for the period between October 10 and 14, 1992."

In its order, the trial court found that "in this case, Polinsky's separation was brought about entirely by her own volition, i.e., her notice of resignation." The district court reasoned that to permit unemployment compensation benefits would unjustly enrich the employee. The district court also stated that the decision of the Nebraska Appeal Tribunal

> places an employer at a disadvantage, since it must either wait to fill the prospectively vacant position, and thus risk losing a potential new employee, or it may fill the position before the end of the notice period, and suddenly become liable for unemployment compensation benefits for which it would otherwise have no liability.

In so finding, the district court relied on decisions from other

states. Polinsky and the Commissioner appeal the May 11, 1993, order of the district court.

## ASSIGNMENTS OF ERROR

In the Commissioner's brief on appeal the assignments of error are stated generally as follows: (1) The district court erred by finding that Polinsky voluntarily left her employment; (2) the district court erred by requiring an employee who is discharged prior to the date of her intended resignation to establish good cause for leaving; and (3) the district court erred by failing to liberally construe the Employment Security Law for the beneficent purpose of paying benefits. Polinsky has not separately assigned errors.

## STANDARD OF REVIEW

In an appeal from the Nebraska Appeal Tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record, but on review by the Court of Appeals or the Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors appearing on the record. § 48-638, Neb. Rev. Stat. §§ 84-917 and 84-918 (Reissue 1994). When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Lee v. Nebraska State Racing Comm.*, 245 Neb. 564, 513 N.W.2d 874 (1994). However, when reviewing a question of law, an appellate court reaches a conclusion independent of the district court's ruling. *Hausse v. Kimmey, ante* p. 23, 524 N.W.2d 567 (1994).

A rebuttable presumption of validity attaches to the actions of administrative agencies. The burden of proof rests with the party challenging the agency's action. *In re Application of United Tel. Co.*, 230 Neb. 747, 433 N.W.2d 502 (1988); *Haven Home, Inc. v. Department of Pub. Welfare*, 216 Neb. 731, 346 N.W.2d 225 (1984).

## ANALYSIS

The Commissioner argues on appeal that the district court erred by characterizing Polinsky's termination from work as

voluntary, thus disqualifying Polinsky from benefits except for the period October 10 to 14, 1992. The Commissioner also argues that the district court erred by ordering intermittent benefits because there is no statutory provision which permits the same set of facts to be treated as both a discharge and a voluntary separation. In response, Dillard argues that Polinsky's unemployment is the result of her voluntary resignation, that the district court's order was proper, and that *Speedway Motors v. Commissioner of Labor*, 1 Neb. App. 606, 510 N.W.2d 341 (1993), was incorrectly decided.

This case is decided by reference to the Employment Security Law, § 48-601 et seq. The standard for disqualification from benefits applicable to this case is established by § 48-628(a)(1), which states that an individual shall be disqualified for benefits

> [f]or the week in which he or she has left work voluntarily without good cause, if so found by the Commissioner of Labor, and for not less than seven weeks nor more than ten weeks which immediately follow such week, as determined by the commissioner according to the circumstances in each case . . . .

The remaining subsections of § 48-628, (b) through (k), outline other behaviors or scenarios which disqualify an employee from receiving benefits and are not applicable here. It is undisputed that Polinsky was not discharged for misconduct connected with her work or for any other disqualifying event.

Under the undisputed facts of this case, Dillard had the option of accepting Polinsky's 2-week notice and allowing her to work for 2 weeks. At the end of that time, Polinsky could have filed for unemployment compensation benefits, but under § 48-628(a)(1), she would have had the burden of proving that she left her employment with good cause. See, *Stackley v. State*, 222 Neb. 767, 386 N.W.2d 884 (1986); *Taylor v. Collateral Control Corp.*, 218 Neb. 432, 355 N.W.2d 788 (1984); *Glionna v. Chizek*, 204 Neb. 37, 281 N.W.2d 220 (1979). However, because Dillard elected to terminate Polinsky's employment prior to the date given in her notice, Polinsky did not pursue this course, and we are instead presented with a case in which an employee was terminated during the notice period.

Dillard argues that awarding benefits to an individual who

was terminated but had intended to leave work unjustly enriches the employee. Dillard argues that such result is "incorrect from a legal standpoint, and [is] also bad policy." Brief for appellee Dillard at 4. As to the legal argument, Dillard disagrees with the decision of the Court of Appeals in *Speedway Motors, supra*, and relies on case law from other jurisdictions. The legal issue raised by this appeal has not been the subject of an opinion of this court. In connection with the policy argument, Dillard argues that it is inequitable to require an employer to continue employing an individual who has given notice, "no matter how lengthy that notice may be, and despite the fact that the employer has been able to find a replacement employee before the notice period has expired." Brief for appellee Dillard at 4–5.

In 1972, the Nebraska Appeal Tribunal in In re Wiese, vol. 72 No. 213, concluded under facts similar to those presented here that, in effect, the termination of an employee during the notice period was for the sake and convenience of the employer and that the employee was entitled to unemployment compensation benefits without disqualification. Pursuant to the Commissioner's authority to make rules and regulations, § 48–607, the decisions of the Nebraska Appeal Tribunal are to be accorded precedential value in subsequent tribunal proceedings. The Nebraska Appeal Tribunal's December 2, 1992, decision in this case was consistent with its previous decisions. In the instant case, Dillard has the burden of overcoming the rebuttable presumption of the validity of the administrative agency's action. See, *In re Application of United Tel. Co.*, 230 Neb. 747, 433 N.W.2d 502 (1988); *Haven Home, Inc. v. Department of Pub. Welfare*, 216 Neb. 731, 346 N.W.2d 225 (1984).

A review of other states' decisions displays a split among jurisdictions. As urged by the Commissioner, some states award benefits to employees who are terminated during the notice period. See *Eide v. Project for Pride in Living*, 493 N.W.2d 596 (Minn. App. 1992) (holding that employee who was discharged when she submitted notice of resignation was entitled to full unemployment compensation benefits). Accord, *Hendricks & Lamers, Ltd. v. Vadnais*, 389 N.W.2d 262 (Minn. App. 1986);

*Ackerberg v Grant Comm Hosp*, 138 Mich. App. 295, 360 N.W.2d 599 (1984); *West Jordan v. Morrison*, 656 P.2d 445 (Utah 1982); *Cotright v. Doyal*, 195 So. 2d 176 (La. App. 1967); *Mauro v. Administrator*, 19 Conn. Supp. 362, 113 A.2d 866 (1954). As noted by Dillard, other states deny benefits to an employee who is terminated during the notice period, except for the portion of the notice period between the date of discharge and the intended date of resignation (intermittent awards). See *Stephen's Nu-Ad, Inc. v Green*, 168 Mich. App. 219, 423 N.W.2d 625 (1988) (holding that employee who was fired after giving 2-week notice was entitled to unemployment benefits for period between time he gave notice and time he intended to quit). Accord, *Ennis v. Employment Division*, 37 Or. App. 281, 587 P.2d 102 (1978); *Amado Unempl. Compensation Case*, 177 Pa. Super. 506, 110 A.2d 807 (1955). The court is also aware of the line of cases, including some from Nebraska, where an employer advises the employee of an impending layoff and the employee quits before the layoff date, in which the employee is awarded benefits as of the employer's announced layoff date. See, *Perkins v. Equal Opportunity Comm.*, 234 Neb. 359, 451 N.W.2d 91 (1990) (holding that employee who quit before his extended period of probationary employment ended after being informed he would be fired at the end of this period did not leave his employment voluntarily and was entitled to unemployment benefits); *School Dist. No. 20 v. Commissioner of Labor*, 208 Neb. 663, 305 N.W.2d 367 (1981) (holding that superintendent who resigned after being told that in an upcoming meeting the board of education would not reelect him was entitled to unemployment benefits as he did not voluntarily leave his employment). Accord, *Barren River Mental Health v. Bailey*, 783 S.W.2d 886 (Ky. App. 1990); *Fiskewold v. H.M. Smyth Co., Inc.*, 440 N.W.2d 164 (Minn. App. 1989); *S.D. Stockgrowers Ass'n v. Holloway*, 438 N.W.2d 561 (S.D. 1989); *In re Poteat v. Employment Security Comm.*, 319 N.C. 201, 353 S.E.2d 219 (1987); *McCammon v. Yellowstone Co., Inc.*, 100 Idaho 926, 607 P.2d 434 (1980); *Johnston v. Florida Dept. of Commerce*, 340 So. 2d 1229 (Fla. App. 1976).

Under Nebraska law each job and the facts of its termination must be considered separately with regard to disqualification for

benefits. *Gilbert v. Hanlon*, 214 Neb. 676, 335 N.W.2d 548 (1983). This court recognizes that ordinarily the Employment Security Law does not grant benefits to employees who leave their work purely voluntarily. *Glionna v. Chizek*, 204 Neb. 37, 281 N.W.2d 220 (1979). The Employment Security Law is to be liberally construed to accomplish its beneficent purposes. *IBP, inc. v. Aanenson*, 234 Neb. 603, 452 N.W.2d 59 (1990); *Hanlon v. Boden*, 209 Neb. 169, 306 N.W.2d 858 (1981). "The rule of construction that the Employment Security Law is to be liberally construed in order that its beneficent purposes may be accomplished applies to the interpretation of the law but not to consideration of the evidence offered in support of a claim under the law." *McClemens v. United Parcel Serv.*, 218 Neb. 689, 691, 358 N.W.2d 748, 750 (1984).

The Commissioner urges this court to reverse the ruling of the district court because the facts demonstrate that Polinsky did not voluntarily leave work as "voluntarily" is used in the controlling statute. The Commissioner refers us specifically to the statutory language of § 48-628(a)(1) which links the timing of disqualification from benefits to the period immediately following "the week in which [the employee] left work voluntarily without good cause." The Commissioner notes and the record shows that Polinsky left work on October 2, 1992, and did not return. Due to the termination of Polinsky's employment by Dillard on October 2, there never ensued a week in which she left work voluntarily, such as to require disqualification from benefits under § 48-628(a)(1).

In interpreting statutory language under a similar provision of the Utah Code Ann. § 35-4-5(a) (Supp. 1981), the Supreme Court of Utah stated in *West Jordan v. Morrison*, 656 P.2d 445, 446 (Utah 1982), "By its wording, the statute directs our attention to the week in which the claimant [employee] left work—not the week that he might have left work, or offered to leave work, but the week in which the claimant actually *left* work." The Utah court continued, "[T]he language of the statute is unambiguous: the week in which the claimant actually leaves work is the determinative factor regarding subsequent eligibility." *Id.* at 447. Thus, in *West Jordan*, the employee was found eligible for benefits. In so holding, the Utah court

rejected the employer's argument which "would have us consider the week in which the claimant offered to resign without regard for the week in which he actually left work." *Id.* at 446. We agree with the analysis applied by the Utah court.

"In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and 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. Flye*, 245 Neb. 495, 506, 513 N.W.2d 526, 533 (1994). Accord, *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994); *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985). It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985).

According to the plain meaning of § 48-628(a)(1), Polinsky would be disqualified in the weeks immediately following the week in which she actually left voluntarily, were there such a week. We decline to adopt or create a doctrine of constructive voluntary leave and find no statutory basis to do so. See *Ackerberg v Grant Comm Hosp*, 138 Mich. App. 295, 423 N.W.2d 625 (1984). Under the plain language of the controlling Nebraska statute and the facts of this case, Polinsky is not disqualified from benefits. This result is consistent with the rationale in *Speedway Motors v. Commissioner of Labor*, 1 Neb. App. 606, 510 N.W.2d 341 (1993).

Dillard argues that it is unfair to an employer to restrict its ability to fire an employee during a lengthy notice period or, if the employer discharges the employee, to run the risk of an award of benefits, thereby injuring the employer's experience rating. The argument continues that "lame duck" employees, especially those with lengthy notice periods, tend to have a negative impact on the morale of the workplace. The employer has not explored the hypothetical in which an employee gives notice and the employer terminates the employee but pays the employee wages for the remainder of the notice period. In other jurisdictions, such fact patterns have resulted in disqualification for benefits. See, *Safeco Ins. Co. v. Meyering*, 102 Wash. 2d 385, 687 P.2d 195 (1984); *Piggly Wiggly Op. W., Inc. v. State,*

*Dept. of Emp. Sec.*, 292 So. 2d 257 (La. App. 1974).

In view of the facts of this case, the controlling statute, and precedent, Dillard's policy arguments are not persuasive. In this regard, we note that under Minnesota law, an individual who voluntarily resigns is ordinarily disqualified from benefits. Minn. Stat. Ann. § 268.09, subd. 1(a) (West 1992). However, the Minnesota Legislature has provided an exception to disqualification in § 268.09, subd. 1(c)(5), which provides that an employee is not disqualified from receiving benefits where "the individual is terminated by the employer because the individual gave notice of intention to terminate employment within 30 days." Thus, Minnesota has employed a legislative remedy in connection with concerns similar to those raised by Dillard in this case.

The judgment of the district court is reversed, and the cause is remanded with directions to affirm the decision of the Nebraska Appeals Tribunal.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

FAHRNBRUCH, J., concurs in the result.

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LUET, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS CLYDE'S PARKWAY LOUNGE, APPELLEE, V. THE CITY OF OMAHA, A MUNICIPAL CORPORATION, AND THE CITY COUNCIL OF THE CITY OF OMAHA, APPELLANTS.

530 N.W.2d 633

Filed April 21, 1995. No. S-93-568.

1. **Administrative Law: Jurisdiction: Appeal and Error.** Petition-in-error jurisdiction is limited by statute to a review of a judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court.
2. **Administrative Law: Appeal and Error.** In reviewing a decision based on a petition in error, an appellate court determines whether the inferior tribunal acted within its jurisdiction and whether the inferior tribunal's decision is supported by sufficient relevant evidence.

3. **Judgments: Appeal and Error.** When the record demonstrates that the decision of the trial court is correct, although such correctness is based on different grounds from those assigned by the trial court, an appellate court will affirm.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Affirmed.

Herbert M. Fitle, Omaha City Attorney, and Thomas O. Mumgaard for appellants.

Leroy Rogers for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

WRIGHT, J.

Luet, Inc., which operates Clyde's Parkway Lounge in Omaha, Nebraska, brought a petition in error against the City of Omaha, the city council of the City of Omaha, and the Nebraska Liquor Control Commission (Commission). Luet sought review of the decision of the city council which denied Luet's application for renewal of its class C retail liquor license. The Commission was subsequently dismissed from the action. In its order, the district court held that the city council had not followed the proper procedure to challenge the license renewal and ordered that Luet be allowed to continue to operate its business for the 1992-93 liquor license year. The city and the city council appeal.

## SCOPE OF REVIEW

Petition-in-error jurisdiction is limited by statute to a review of a judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court. *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 517 N.W.2d 113 (1994).

## FACTS

Luet was first issued a class C liquor license in 1989. The license had been renewed under the automatic renewal provisions of the Nebraska Liquor Control Act for each subsequent year, including the license year of November 1, 1992, to October 31, 1993. On October 26, 1992, Luet, via one of its stockholders, received a letter from the Omaha city clerk

notifying Luet that complaints had been received about criminal activity and disruptions caused in the vicinity of the lounge operated by Luet. The letter stated that the city council would hold a hearing the next day with regard to a resolution which would request that the Commission require Luet to submit a formal application to renew its license for the 1992-93 license year. At the October 27 hearing, the city council passed just such a resolution. On October 28, the Commission sent Luet a certified letter directing Luet to file a formal application known as a long-form application. Luet submitted the application to the Commission on December 2. The application was forwarded by the Commission to the city clerk on December 3 for action by the city council. At a hearing held on December 22, the city council adopted a resolution denying Luet's application.

Luet filed a petition in error in the district court, alleging that the city council erred in instituting a procedure which required Luet to file a long-form application when Luet had already been issued its 1992-93 liquor license under the automatic renewal provisions of Neb. Rev. Stat. §§ 53-135 and 53-135.02 (Reissue 1993). The district court noted that Luet's 1992-93 liquor license had automatically been renewed under §§ 53-135 and 53-135.02 at or about the same time that the city council, at its October 27 meeting, adopted a resolution requesting the Commission to require Luet to file a long-form application. The district court found that under the renewal privileges established by law, a licensee is entitled to renewal of a liquor license if, at the time for renewal, the licensee meets the requirements which existed when the license was initially issued. The court found that the city council's request that the Commission require Luet to file a long-form application was not timely, since the hearing was held less than 4 days prior to the expiration of the liquor license, and that the untimely request was not sufficient to stop the issuance of the license or to nullify the license which had already been issued. The court held that the city council's action in denying renewal of the liquor license was contrary to law and not supported by the evidence and that the nonrenewal of the license should be reversed and set aside.

## ASSIGNMENTS OF ERROR

In summary, the city and city council claim that the district court erred in its application of the law to the facts, in its determination of the proper procedure for challenging renewal of a liquor license, and in its not finding that the evidence supported the city council's decision to deny renewal of Luet's liquor license.

## ANALYSIS

We begin by noting the scope of our review. In cases arising under the Nebraska Liquor Control Act, our review is ordinarily by appeal, which means the decision of the Commission is reviewed de novo on the record. See *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994). However, this action was filed in the district court as a petition in error under Neb. Rev. Stat. § 25-1901 (Reissue 1989). In this case, the filing of a petition in error properly invoked the jurisdiction of the district court.

"Petition-in-error jurisdiction is limited by statute to a review of '[a] judgment rendered or final order . . . made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court.' " *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 140, 517 N.W.2d 113, 115 (1994). The review sought in this case is a review of the action of the city council, which is a tribunal inferior in jurisdiction to the district court. In reviewing a decision based on a petition in error, an appellate court determines whether the inferior tribunal acted within its jurisdiction and whether the inferior tribunal's decision is supported by sufficient relevant evidence. See *Ashby v. Civil Serv. Comm.*, 241 Neb. 988, 492 N.W.2d 849 (1992).

We next point out that we have held on more than one occasion that the Nebraska Liquor Control Act was unconstitutional. For example, in *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988), we declared that 1986 Neb. Laws, L.B. 911, which granted local governing bodies the option of making binding recommendations to the Commission concerning the approval or denial of liquor licenses, was unconstitutional and that the entire enactment was

unenforceable. In *Kwik Shop v. City of Lincoln*, 243 Neb. 178, 498 N.W.2d 102 (1993), we held that 1989 Neb. Laws, L.B. 781, passed by the Legislature in an attempt to cure earlier defects in the Nebraska Liquor Control Act, was unconstitutional.

As a result of these decisions, the applicable liquor license renewal statute is § 53-135 (Reissue 1984). Pursuant to this statute, a license may automatically be renewed by the Commission without formal application. Here, although the city council adopted a resolution denying Luet's application to renew its liquor license, the Commission had previously renewed Luet's license for the 1992-93 license year. We therefore address the effect of the city council's December 22, 1992, decision, which purported to deny Luet's application to renew its liquor license.

In the bill of exceptions, exhibit 1 is the transcript of proceedings, testimony, and evidence of the city council's December 22, 1992, hearing concerning Luet's application to renew its liquor license for the 1992-93 license year. The resolution of the city council provides:

> [I]n accordance with the provisions of the Nebraska Liquor Control Act, as amended, after a hearing held within 45 days after receipt of a notice and copy of the license application and upon due consideration of all standards and criteria provided by law, this Council hereby denies the following application for an On and Off Sale Beer and Alcoholic Liquor retail license (Class C) for the licensing year ending October 31, 1993.

The district court correctly pointed out that the city council was trying to revoke or cancel Luet's liquor license under the guise of taking action on renewal of the license. The city council had no authority to act in this manner. The license, which had been renewed by the Commission pursuant to § 53-135 (Reissue 1984), could not be revoked by the city council.

If the city council desired to cancel or revoke Luet's liquor license, the council should have followed the provisions of Neb. Rev. Stat. § 53-134 (Reissue 1984), which gives a local governing board the authority to cancel or to revoke a liquor license. However, the statute requires that the governing board

follow a multistep process. Any cancellation or revocation would then be subject to the right of appeal to the Commission. A decision by the Commission in turn could be appealed to the district court for Lancaster County pursuant to Neb. Rev. Stat. § 53-1,116 (Reissue 1984). It is clear that the city council did not follow the procedure outlined in § 53-134. Because the city council had no authority with regard to the automatic renewal of Luet's liquor license, the decision of the city council denying Luet's application to renew its license is of no force and effect.

The district court, relying upon the Nebraska Liquor Control Act as it existed in 1992, held that the city council's action in denying renewal of the license was contrary to law. The court stated that *Kwik Shop v. City of Lincoln, supra*, which invalidated the 1989 amendment to the liquor control laws, did not control in this case. We disagree. However, the district court reached the correct result in finding that the city council's denial of Luet's application to renew its liquor license should be reversed.

When the record demonstrates that the decision of the trial court is correct, although such correctness is based on different grounds from those assigned by the trial court, an appellate court will affirm. *In re Estate of Trew*, 244 Neb. 490, 507 N.W.2d 478 (1993). Luet was entitled to continue to operate with the class C liquor license issued by the Commission for the 1992-93 license year. We therefore affirm the judgment of the district court.

AFFIRMED.

# LEE UNLAND, APPELLANT, V. CITY OF LINCOLN, NEBRASKA, APPELLEE.

530 N.W.2d 624

Filed April 21, 1995. No. S-93-736.

1. **Actions: Employment Contracts: Appeal and Error.** A suit under an employment contract is an action at law, and an appellate court will overturn factual findings of the trial court only if they are clearly wrong.
2. **Judgments: Appeal and Error.** As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
3. ____: ____. In reviewing a judgment awarded in a bench trial, the appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
4. **Public Officers and Employees: Termination of Employment: Property: Due Process.** Public employees may have a property right in continued employment. When such property rights exist, they are created not by the Constitution, but by an independent source such as state law. If an employee has a property right in continued employment, he or she may not be discharged from his or her job without due process.
5. **Property: Due Process: Notice.** It is fundamental to established principles of due process that as a prerequisite to an intentional deprivation of a protected property interest, the government must provide some notice and an opportunity for hearing appropriate to the nature of the case.
6. **Public Officers and Employees: Termination of Employment: Property: Due Process: Notice.** A public employee with a property interest in continued employment who is given posttermination administrative procedures must, before termination, be given (1) oral or written notice of the charges against him, (2) an explanation of the employer's evidence, and (3) an opportunity to present his side of the story.
7. **Termination of Employment: Due Process.** A pretermination procedure functions only as an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. The pretermination process need not resolve the propriety of the discharge. All process that is due is provided by a pretermination opportunity to respond, coupled with posttermination procedures.
8. **Attorney and Client: Notice.** The general rule is that notice to, or knowledge of facts by, an attorney is notice to, or knowledge of, his client.
9. **Actions: Attorney and Client: Proof.** A litigant is not permitted to thrust his lack of knowledge into litigation as a foundation or condition necessary to sustain a claim against another while simultaneously retaining the attorney-client privilege to frustrate proof of knowledge negating the very foundation or condition necessary to prevail on the claim asserted.

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

Thom K. Cope, of Bailey, Polsky, Cope, Wood & Knapp, for appellant.

William F. Austin, Lincoln City Attorney, and Don W. Taute for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

FAHRNBRUCH, J.

Claiming that he was constructively discharged from his employment with the City of Lincoln without due process, Lee Unland petitioned the district court for Lancaster County to order his reinstatement as a police officer.

The district court held that Unland received the procedural due process to which he was entitled and dismissed Unland's petition. Unland appealed that determination.

We affirm the holdings of the district court in all respects.

## STANDARD OF REVIEW

This is an action alleging breach of an employment contract and a denial of procedural due process. A suit under an employment contract is an action at law, and an appellate court will overturn factual findings of the trial court only if they are clearly wrong. *Hammond v. City of Broken Bow*, 239 Neb. 437, 476 N.W.2d 822 (1991).

As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review. *Winslow v. Hammer, ante* p. 418, 527 N.W.2d 631 (1995); *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994).

In reviewing a judgment awarded in a bench trial, the appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Ashland State Bank v. Elkhorn Racquetball, Inc.*, 246

Neb. 411, 520 N.W.2d 189 (1994).

## FACTS

Unland was hired by the City of Lincoln (City) as a police officer in 1978. On September 1, 1988, the City entered into a written labor agreement with the Lincoln Police Union, of which Unland was a member. Article 8 of the agreement provides that discipline and discharge of police officers shall occur only for cause. Unland held his position with the police department until July 1990.

John Becker, then a captain with the Lincoln Police Department, testified that in early July 1990, problems with Unland's performance in a robbery investigation were brought to his attention. Becker testified that Sgt. Roger D. Schmidt, Unland's first line supervisor, informed Becker that a member of his investigation team had been assigned to duplicate the investigation of the July 1990 robbery case because Unland had not completed the necessary reports.

Becker testified that on July 19, he and Schmidt met with Unland to discuss the deficiencies in the robbery investigation. Becker testified that Unland was informed of the duplicate investigation and told that the failure to complete reports in the investigation was a violation of policy and procedure.

Becker testified that on July 24, he again met with Unland and specifically outlined the direction of the discipline he wanted to follow in the matter. Within the previous 6 months, Unland had received 1- and 3-day suspensions for performance deficiencies. Becker testified that he specifically told Unland that he would be recommending to Police Chief Allen Curtis that Unland be terminated because of the prior disciplinary situations and that he did not see the City "going backwards" in the disciplinary process.

Unland testified that he had a discussion with Schmidt and Becker. He testified that he was questioned about the robbery investigation and the timeliness of specific reports. Unland said that he did not recall any discussion regarding the earlier disciplinary matters. Unland also testified that he told Becker that "you . . . think I shouldn't work here."

Unland received a written notice, dated July 24, 1990, that a

"Personnel Action Report" had been filed by his first line supervisor and team commander. The notice advised Unland that the report would be reviewed at a hearing to be held July 27, at which Unland's attendance was required.

Becker also testified that on either July 25 or 26, he met with Unland's attorney, J. David Thurber. Becker testified that the two discussed the reasons for the upcoming July 27 hearing and his recommendation for Unland's termination.

Thurber testified that when he and Becker met, Becker indicated that he would be recommending Unland's termination because of the pattern of performance deficiencies shown by Unland, his prior disciplinary history, and the current circumstances involving the robbery investigation. Thurber also testified that he reviewed various reports Becker had in his possession concerning the factual circumstances of the current complaint against Unland. Thurber further testified that he told Unland of his discussions with Becker and that termination of his employment was a "real possibility in this case."

Thurber testified that prior to the July 27 hearing, he also contacted Curtis, and that Curtis indicated his concerns about Unland's prior history and the possibility of the termination of Unland's employment.

On July 27, Unland and Thurber attended a hearing over which Chief Curtis presided. Curtis, Becker, and Thurber testified that Curtis began the meeting by asking if anyone wanted him to review the facts and allegations of the situation. Allen Berndt, Lincoln Police Union president, agreed that the accounts of these witnesses reflected what actually occurred at the meeting. It was Unland's testimony that he did not recall specifically what Curtis' general opening comments were as to why they were conducting the hearing. Unland testified that at the hearing, he gave a brief statement on his own behalf regarding why he felt he was "a good police officer and could continue to be a good police officer . . . ."

Thurber testified that he stated on behalf of his client that it was not necessary to have the facts reviewed. Thurber further testified that he presented a proposal as an alternative to Unland's termination. Curtis testified that Thurber's proposal for Unland included a 30-day suspension, 1 year's probation,

and termination without any right to appeal in the event that Unland violated any police procedures during his probation period.

Chief Curtis did not accept Thurber's proposal, and suspended Unland for 15 days, at the end of which period his employment would be terminated.

Unland testified that after the hearing was adjourned, he asked his attorney if it was still possible for him to resign. Unland explained at trial that "a firing would not reflect well on a resume, and a resignation would be a better item to approach another employer." Thurber talked to Curtis after the meeting and asked if he would accept Unland's resignation instead of terminating his employment. Curtis testified that he answered in the affirmative, and on July 31, Curtis received Unland's resignation letter.

On August 5, Unland filed a notice of appeal with the personnel director of the City pursuant to the grievance procedures set forth in article 9, § 5, of the agreement between the City and the Lincoln Police Union. The City denied Unland's request for a hearing because he had resigned.

On February 26, 1991, Unland filed this action in district court against the City, requesting, inter alia, damages for loss of wages and reinstatement as a member of the Lincoln Police Department. Unland alleged he was not given notice of the charges against him "prior to his constructive discharge, nor was he given an opportunity to respond." Unland claimed he was terminated from his position without due process of law and in breach of the express employment agreement between him and the City.

The trial court found that Unland had a property interest in his continued employment with the City and that under the police union contract he could be dismissed only for cause. The trial court also found that Unland (1) had notice of the charges against him through conversations with his supervisory officers and with his attorney, (2) had notice of the hearing and had an opportunity to present his case, and (3) was afforded procedural due process. The trial court ordered Unland's petition dismissed.

Unland appealed to the Nebraska Court of Appeals. Pursuant

to our authority to regulate the caseloads of the appellate courts, this case was removed from the Court of Appeals' docket to this court's docket.

## ASSIGNMENTS OF ERROR

Unland claims that the district court erred in ruling that (1) pretermination due process was adequate and (2) no posttermination due process was required.

## ANALYSIS

### PRETERMINATION DUE PROCESS

> Public employees may have a property right in continued employment. [Citations omitted.] When such property rights exist, they are created not by the Constitution, but by an independent source such as state law. [Citations omitted.] If an employee has a property right in continued employment, he may not be discharged from his job without due process.

*Riggins v. Bd. of Regents of University of Nebraska*, 790 F.2d 707, 710 (8th Cir. 1986), citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), and *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

In this case, the City concedes in its brief that Unland had a property interest in his job by virtue of article 8 of the labor agreement between the City and the Lincoln Police Union. Article 8 provides that police officers may be discharged only for good cause. The issue, then, is whether Unland received the process that was due him in connection with his 15-day suspension followed by dismissal at the end of that period.

It is fundamental to established principles of due process that as a prerequisite to an intentional deprivation of a protected property interest, the government must provide some notice and an opportunity for hearing appropriate to the nature of the case. *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). In *Cleveland Board of Education v. Loudermill, supra*, the U.S. Supreme Court held that a public employee with a property interest in continued employment who is given posttermination administrative procedures must

nevertheless, before termination, be given (1) oral or written notice of the charges against him, (2) an explanation of the employer's evidence, and (3) an opportunity to present his side of the story.

A pretermination procedure functions only as "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Loudermill*, 470 U.S. at 545–46. The pretermination process need not resolve the propriety of the discharge. *Loudermill, supra*. All process that is due is provided by a pretermination opportunity to respond, coupled with posttermination procedures. *Id*. See, also, *Linton v. Frederick County Bd. of County Com'rs*, 964 F.2d 1436 (4th Cir. 1992); *Duchesne v. Williams*, 849 F.2d 1004 (6th Cir. 1988); *Morton v. Beyer*, 822 F.2d 364 (3d Cir. 1987); *Riggins, supra*.

We now examine whether the City afforded Unland the three elements of pretermination due process set forth in *Loudermill*. As to the first element, Unland claims that he did not have any notice of the specific charges against him or that termination of his employment was a possibility. The record clearly reflects that prior to the July 27 hearing, Unland did receive notice of specific charges against him and that termination of his employment was a possibility.

Under the second element of *Loudermill*, an employee, prior to termination of his employment, is entitled to an explanation of the employer's evidence against the employee. Unland claims that he did not know that previous disciplinary actions against him would be considered. However, Becker's testimony that he told Unland that he would be recommending termination to Curtis based on Unland's previous disciplinary history was sufficient for the trial court to find that Unland had notice that his disciplinary history would be used as evidence against him at his pretermination hearing.

Moreover, the record also reveals that the discussions between Becker and Thurber, Unland's attorney, were sufficient to give Unland both notice of the charges against him and an explanation of the City's evidence against him. The general rule is that notice to, or knowledge of facts by, an attorney is notice

to, or knowledge of, his client. *State v. McKenna*, 228 Neb. 29, 421 N.W.2d 19 (1988); *City of Hastings v. Jerry Spady Pontiac-Cadillac, Inc.*, 212 Neb. 137, 322 N.W.2d 369 (1982).

Unland argues that his former attorney should not have testified at the trial to his conversations with Unland, due to the attorney-client privilege. Unland objected to his former attorney's testimony at trial. However, this court has held in *League v. Vanice*, 221 Neb. 34, 374 N.W.2d 849 (1985), that a litigant is not permitted to thrust his lack of knowledge into litigation as a foundation or condition necessary to sustain a claim against another while simultaneously retaining the attorney-client privilege to frustrate proof of knowledge negating the very foundation or condition necessary to prevail on the claim asserted. Unland's alleged lack of knowledge is central to this case. Unland may not assert the attorney-client privilege as to conversations between him and Thurber concerning whether Unland had notice of the charges or an explanation of the City's evidence against him.

We now consider whether Unland had an opportunity to tell his side of the story. Unland himself testified that at the hearing, he gave a "brief speech on why I felt I was—had been a good police officer and could continue to be a good police officer . . . ." At the hearing, through his attorney, Unland also presented an alternative discipline proposal which outlined discipline that did not include termination. The record reflects that Unland had a meaningful opportunity to respond to the charges and the evidence against him.

On the basis of the evidence presented at trial, it cannot be said that the trial court was clearly wrong in finding that Unland was accorded procedural due process of law in relation to his termination.

### Posttermination Hearing

We now address Unland's claim that the trial court erred in ruling that no posttermination due process was required.

Article 9, § 5, of the police union's labor agreement provides that in the event of *dismissal*, an employee may appeal to the personnel board of the City. The labor agreement does not provide for an appeal in the event of a voluntary resignation.

Although Unland submitted a letter of resignation which was accepted, he argues that his resignation was not voluntary and that he was constructively discharged. The record reflects that Unland approached his attorney of his own accord and asked if he could resign in lieu of being terminated. Unland testified that he felt it would be better to have a resignation rather than a termination on his employment record. Thus, the trial court was not clearly wrong in finding that Unland's letter of resignation waived any right to appeal the City's decision to suspend Unland and terminate his employment.

## CONCLUSION

The trial court was not clearly wrong in finding from the evidence and the reasonable inferences therefrom that Unland received all the procedural due process to which he was entitled before he was terminated as a Lincoln police officer and that Unland, by voluntarily resigning as a police officer, waived his right to a posttermination hearing. The trial court's dismissal of Unland's petition must be affirmed.

AFFIRMED.

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## VRT, INC., A NEBRASKA CORPORATION, APPELLEE, V. DUTTON-LAINSON COMPANY, A NEBRASKA CORPORATION, APPELLANT.

530 N.W.2d 619

Filed April 21, 1995. No. S-93-907.

1. **Declaratory Judgments.** Whether a declaratory judgment action is treated as an action at law or one in equity is determined by the nature of the dispute.
2. **Breach of Contract.** An action for an alleged breach of a contract is one at law.
3. **Appeal and Error.** In a law action tried to the court, the findings of the court will not be disturbed on appeal unless clearly wrong.
4. **Contracts: Actions: Substantial Performance.** To successfully bring an action on a contract, a plaintiff must first establish that the plaintiff substantially performed the plaintiff's obligations under the contract.

5. **Contracts: Substantial Performance.** To establish substantial performance under a contract, any deviations from the contract must be relatively minor and unimportant.
6. ____: ____. If there is substantial performance, a contract action may be maintained but without prejudice to any showing of damage on the part of the defendant for failure to receive full and complete performance.
7. ____: ____. Substantial performance is shown when the following circumstances are established by the evidence: (1) The party made an honest endeavor in good faith to perform its part of the contract, (2) the results of the endeavor are beneficial to the other party, and (3) such benefits are retained by the other party. If any one of the circumstances is not established, the performance is not substantial and the party has no right to recover.
8. ____: ____. Substantial performance is a relative term and whether it exists is a question to be determined in each case with reference to the existing facts and circumstances.
9. **Attorney and Client: Agency.** The relationship between attorney and client is one of agency; the general agency rules of law apply to the relation of attorney-client.
10. **Attorney and Client: Negligence.** The omissions and commissions of an attorney are to be regarded as the acts of the client whom the attorney represents, and the attorney's neglect is equivalent to the neglect of the client.
11. ____: ____. A client is bound by the acts, omissions, neglect, and fraud of the client's attorney when such is within the attorney's scope of express, implied, apparent, or ostensible authority.

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

James W.R. Brown and James R. Brown, of Brown & Brown, for appellant.

Carl J. Sjulin, of Rembolt Ludtke Parker & Berger, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and RONIN, D.J., Retired.

CAPORALE, J.

The plaintiff-appellee seller, VRT, Inc., formerly known as Sanitas, Inc., sought a judgment declaring its right to past and future royalties under a provision within a purchase and sale contract. VRT alleged that the defendant-appellant buyer, Dutton-Lainson Company, breached its contract with VRT by failing to pay VRT royalties contemplated under the royalty provision. The district court ruled that Dutton-Lainson was obligated to pay both past-due and future royalties as provided

in the contract. Dutton-Lainson thereupon appealed to the Nebraska Court of Appeals, asserting, in summary, that the district court erred in finding that VRT had substantially performed its obligation under the contract. Under our authority to regulate the caseloads of the appellate courts, we, on our motion, ordered the matter removed to this court. For the reasons hereinafter set forth, we now reverse the judgment of the district court and remand the cause for dismissal.

Whether a declaratory judgment action is treated as an action at law or one in equity is determined by the nature of the dispute. *Nebraska Pub. Emp. v. City of Omaha, ante* p. 468, 528 N.W.2d 297 (1995). As the dispute here arises from the alleged breach of a contract, the action is one at law. *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993). Being a law action tried to the court, the findings of the district court will not be disturbed on appeal unless clearly wrong. See *Kuehl v. Diesel Power Equip. Co.*, 228 Neb. 353, 422 N.W.2d 361 (1988).

Sanitas was formed to manufacture, market, and distribute James Vanderheiden's invention, which improved devices used in hospitals and nursing homes to lift and move patients, hereinafter referred to as the patient care equipment.

After retaining an attorney to file a patent application on the patient care equipment, Sanitas sought out a manufacturer. Having been told by Sanitas that a patent application on the patient care equipment had been filed and having been assured by its own patent attorney that there was good reason to expect that a patent would issue, Dutton-Lainson and Sanitas executed a contract whereunder Sanitas sold and Dutton-Lainson purchased those Sanitas assets which related to the patient care equipment. Section 1 of the contract, entitled "Purchased Assets," provides that in addition to certain inventory, tooling, jigs, fixturing devices, and equipment, Sanitas shall sell and assign and Dutton-Lainson shall purchase and acquire the following assets:

> All current patents, patent applications, inventions, blueprints, drawings, plans, specifications, procedures and confidential information related to the production and marketing of Sanitas' Patient Care Equipment and any

such items acquired, applied for or produced by Sanitas during the five-year period following the date of this Agreement; all vendor and sales information related to the marketing of the Sanitas Patient Care Equipment including customer lists and other marketing information; and the name "Sanitas, Inc." and any other related or similar trade names used in the production or marketing of the Patient Care Equipment.

Section 2 of the contract is labeled "Payment" and provides in relevant part:

> The purchase price of the assets described . . . above shall be an amount equal to five percent (5%) of the annual billed and collected sales of the Patient Care Equipment products produced by Dutton-Lainson from the plans and inventions acquired from Sanitas. Such amount shall be payable for the 10-year period following the close of this purchase and sale or, if longer, the period of any patent or patents issued upon the Patient Care Equipment; provided, however, that Dutton-Lainson shall not be required to make any payments for any period after the ten-year period described above, if (1) Dutton-Lainson reasonably determines that the value of the patent claims or the likelihood of success in an infringement action does not justify the cost of litigating the validity of the patent or of seeking to enjoin infringement; (2) Dutton-Lainson ceases to use the invention disclosed by the patent claims; or (3) Dutton-Lainson receives an opinion from qualified patent counsel that the patent claims are invalid and thereafter institutes no action to enforce them. Dutton-Lainson's billed and collected sales shall be determined for each quarter of the year and payment shall be made to Sanitas within thirty (30) days following the close of each quarter of the year.

The contract further requires Sanitas to deliver to Dutton-Lainson at the closing "[s]pecific assignments to the assets described . . . above as shall be reasonably required by Dutton-Lainson."

At the closing, Sanitas delivered to Dutton-Lainson a document labeled "BILL OF SALE AND ASSIGNMENT,"

assigning to Dutton-Lainson all of its "current inventions, blueprints, drawings, plans, specifications, procedures and confidential information; all vendor and sales information including customer lists and other marketing information; and the name Sanitas, Inc. and any other related or similar trade name relating to the production and marketing of Sanitas, Inc.'s Patient Care Equipment." Sanitas also delivered documents purporting to assign to Dutton-Lainson the patent application and Sanitas' interest in the invention disclosed therein. Sanitas thereafter changed its name to VRT, Inc. Although the contract refers to patents and applications for patents, there was but one application and it referred to the patent being sought. There was no other patent. Dutton-Lainson produced the patient care equipment and sold it with some modifications to the invention; part of the invention was not being used at all because the design was unstable.

It turns out that Sanitas' attorney had not filed the patent application when he represented that he had and did not file it until after the parties executed the contract. It was stipulated that because of the late filing, a patent could not issue. As a result, VRT filed an action for professional negligence against its attorney, claiming that the attorney had been negligent in failing to file the patent application, in concealing his failure, and in providing false information. VRT further claimed that as a result of those actions, it was forced to incur substantial legal fees to enforce the royalty contract against Dutton-Lainson and sought recovery from its attorney for the loss of royalties beyond the 10th year. In addition, VRT claimed its future royalty payments would be reduced because Dutton-Lainson would not have the exclusive right to manufacture and market the patient care equipment. VRT and its attorney ultimately settled the action.

To successfully bring an action on a contract, a plaintiff must first establish that the plaintiff substantially performed the plaintiff's obligations under the contract. See, *ADC-I, Ltd. v. Pan American Fuels, ante* p. 71, 525 N.W.2d 190 (1994); *First Data Resources, Inc. v. Omaha Steaks Int., Inc.*, 209 Neb. 327, 307 N.W.2d 790 (1981). To establish substantial performance under a contract, any deviations from the contract must be

relatively minor and unimportant. *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993). If there is substantial performance, a contract action may be maintained but without prejudice to any showing of damage on the part of the defendant for failure to receive full and complete performance. *Church of the Holy Spirit v. Bevco, Inc.*, 215 Neb. 299, 338 N.W.2d 601 (1983).

Substantial performance is shown when the following circumstances are established by the evidence: (1) The party made an honest endeavor in good faith to perform its part of the contract, (2) the results of the endeavor are beneficial to the other party, and (3) such benefits are retained by the other party. If any one of the circumstances is not established, the performance is not substantial and the party has no right to recover. *Lange Bldg. & Farm Supply v. Open Circle "R"*, 216 Neb. 1, 342 N.W.2d 360 (1983). Substantial performance is a relative term and whether it exists is a question to be determined in each case with reference to the existing facts and circumstances. *First Data Resources, Inc., supra.*

The relationship between attorney and client is one of agency. *Spier v. Thomas*, 131 Neb. 579, 269 N.W. 61 (1936). See, also, *Professional Service Industries, Inc. v. Kimbrell*, 758 F. Supp. 676 (D. Kan. 1991); *Jensen v. Snellings*, 636 F. Supp. 1305 (E.D. La. 1986), *affirmed in part, reversed in part* 841 F.2d 600 (5th Cir. 1988); *Smith v. Fladstol*, 248 Mont. 18, 807 P.2d 1361 (1991); *Peterson v. Worthen Bank & Trust Co.*, 296 Ark. 201, 753 S.W.2d 278 (1988); *Security Bank v. Klicker*, 142 Wis. 2d 289, 418 N.W.2d 27 (Wis. App. 1987); *Jarnagin v. Terry*, 807 S.W.2d 190 (Mo. App. 1991); *In re Estate of Maslowski*, 204 Ill. App. 3d 379, 561 N.E.2d 1183 (1990); *Creative Restaurants v. Memphis*, 795 S.W.2d 672 (Tenn. App. 1990); *Boros, P.A., v. Carter, M.D., P.A.*, 537 So. 2d 1134 (Fla. App. 1989); *Newell v. Brown*, 187 Ga. App. 9, 369 S.E.2d 499 (1988); *Burger v. Brookhaven Med. Arts Bldg.*, 131 A.D.2d 622, 516 N.Y.S.2d 705 (1987). Therefore, the general agency rules of law apply to the relation of attorney-client.

Consequently, the omissions and commissions of an attorney are to be regarded as the acts of the client whom the attorney represents, and the attorney's neglect is equivalent to the neglect

of the client. *In re Marriage of Castor*, 249 Mont. 495, 817 P.2d 665 (1991); *Graham v. Town of Loris*, 272 S.C. 442, 248 S.E.2d 594 (1978); *International Vacuum, Inc. v. Owens*, 439 N.E.2d 188 (Ind. App. 1982); *Kaslavage v. West Kern Cty. Water Dist.*, 84 Cal. App. 3d 529, 148 Cal. Rptr. 729 (1978). Moreover, a principal holding out an agent as having authority to represent the principal and thereby asserting or impliedly admitting that the agent is worthy of trust and confidence is bound by all the agent's acts within the apparent scope of the employment. Hence, the principal may be held responsible for the fraudulent acts of the agent. *Berkovitz v. Morton-Gregson Co.*, 112 Neb. 154, 198 N.W. 868 (1924); *McFadden v. Lynn*, 49 Ill. App. 166 (1892). Indeed, we have written: " 'Where one of two innocent persons must suffer through the misfeasance of the agent of one, that one must suffer who has placed the agent in a position to perpetrate the fraud complained of.' " *Berkovitz*, 112 Neb. at 159, 198 N.W. at 869, quoting *Bull v. Mitchell*, 47 Neb. 647, 66 N.W. 632 (1896). See, also, *Rehmeyer v. Lysinger*, 109 Neb. 805, 192 N.W. 337 (1923).

Accordingly, the client is bound by the acts, omissions, neglect, and fraud of the client's attorney when such is within the attorney's scope of express, implied, apparent, or ostensible authority. The misrepresentation of VRT's attorney is therefore imputable to VRT.

The contract reveals that the very essence of the transaction was to enable Dutton-Lainson to manufacture, market, and distribute the improvements which were the subject of the patent application. While Dutton-Lainson took the risk that, for reasons beyond the control of the parties, a patent might not issue, Dutton-Lainson did not bargain for the certainty that a patent would not issue because, contrary to the representation made to it, no application had been filed.

Thus, VRT's failure to deliver and assign a filed application was not a relatively minor and unimportant deviation from VRT's obligation. As a consequence, VRT's misrepresentation with regard to the application means there was no honest endeavor in good faith on its part to perform its part of the contract. It therefore necessarily follows that there was no substantial performance on its part and that it is precluded from

maintaining this action against Dutton-Lainson.

As revealed in the first paragraph hereof, the judgment of the district court is reversed and the cause remanded for dismissal.

REVERSED AND REMANDED.

CONNOLLY, J., not participating.

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ANITA L. RUST AND PAUL M. RUST, APPELLEES, V. JERRY BUCKLER AND MARTI BUCKLER, APPELLANTS.

530 N.W.2d 630

Filed April 21, 1995. No. S-94-891.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the trial court.
2. **Statutes: Legislature: Intent.** Statutes relating to the same subject matter are in pari materia and may be considered conjunctively so as to determine the intent of the Legislature and to maintain a consistent and sensible scheme.
3. ____: ____: ____. In construing 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.
4. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Reversed and remanded.

Thomas F. Dowd, of Dowd & Dowd, for appellants.

Jerome J. Ortman for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

CAPORALE, J.

The defendants-appellants, Jerry Buckler and Marti Buckler, husband and wife and the maternal grandparents and adoptive parents of Jason Dwayne Buckler, a minor boy named "Jesse

James Rust" at birth, challenge the order of the district court granting the plaintiffs-appellees, Anita L. Rust and Paul M. Rust, wife and husband and the paternal grandparents of said boy, the right to visit with him. The Bucklers appealed to the Nebraska Court of Appeals, asserting that the district court erred in ruling that the Rusts are entitled to such visitation rights under the provisions of the grandparent visitation act, Neb. Rev. Stat. §§ 43-1801 through 43-1803 (Reissue 1993). Under our authority to regulate the caseloads of the two appellate courts, we, on our own motion, removed the case to this court. We now reverse the judgment of the district court and remand the cause with the direction that it be dismissed.

The boy was born March 7, 1993, after which his biological parents separated, the mother moving in with the Bucklers, taking the boy with her, and the father moving in with the Rusts. Both of the biological parents died on or about September 19, 1993.

The Bucklers, who had been raising the boy since he was approximately 6 weeks old, took custody of him. The Rusts thereupon filed this suit in order to establish visitation with the boy. Pursuant to the parties' agreement, the district court entered a "Temporary Order" granting the Rusts specified visitation rights. The Bucklers thereafter adopted the boy and changed his name as mentioned earlier. They then petitioned the district court to set aside the temporary visitation order. The district court overruled the motion and made the Rusts' visitation permanent.

The question is one of statutory interpretation, a matter of law in connection with which we have an obligation to reach an independent conclusion irrespective of the determination made by the trial court. See *State ex rel. Perkins Cty. v. County Superintendent, ante* p. 573, 528 N.W.2d 340 (1995).

Thus, we turn first to § 43-1801, which reads:

> As used in sections 43-1801 to 43-1803, unless the context otherwise requires, grandparent shall mean the biological or adoptive parent of a minor child's biological or adoptive parent. Such term shall not include a biological or adoptive parent of any minor child's biological or adoptive parent whose parental rights have

been terminated.

Section 43-1802 provides in relevant part:

> (1) A grandparent may seek visitation with his or her minor grandchild if:
>
> (a) The child's parent or parents are deceased;
>
> (b) The marriage of the child's parents has been dissolved or petition for the dissolution of such marriage has been filed, is still pending, but no decree has been entered; or
>
> (c) The parents of the minor child have never been married but paternity has been legally established.

With that statutory language in mind, we turn our attention to Neb. Rev. Stat. § 43-110 (Reissue 1993) of the adoption statutes, which declares:

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

Neb. Rev. Stat. § 43-111 (Reissue 1993) reads in relevant part: "[A]fter a decree of adoption has been entered, the natural parents of the adopted child shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over such adopted child or to his or her property by descent and distribution."

While it is true that statutes relating to the same subject matter are in pari materia and may be considered conjunctively so as to determine the intent of the Legislature and to maintain a consistent and sensible scheme, see *State ex rel. Scherer v. Madison Cty. Comrs., ante* p. 384, 527 N.W.2d 615 (1995), and *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993), the visitation act and the adoption statutes do not relate to the same subject. The former defines grandparents and their rights; the latter define parents and their rights. Grandparents simply are not parents.

Thus, the applicable rule is that in construing 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. *State ex rel. Perkins Cty. v. County Superintendent, supra.* In so doing, it is not within the province of a court to read a meaning into a statute that is not warranted by legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Dillard Dept. Stores v. Polinsky, ante* p. 821, 530 N.W.2d 637 (1995); *State ex rel. Perkins Cty. v. County Superintendent, supra.*

Because its resolution is not necessary to the adjudication of this case, we ignore the question as to whether an adoption serves to "terminate" the rights of even a deceased biological parent such as to remove the parent of such a deceased parent from the ambit of the visitation act. The determination is unnecessary because read in its plain, ordinary, and popular sense, the language of § 43-110 makes clear that as a result of the adoption, the Bucklers are now, in the eyes of the law, the boy's parents. See, *Redick v. Redick*, 220 Neb. 86, 368 N.W.2d 463 (1985); *In re Trust Estate of Darling*, 219 Neb. 705, 365 N.W.2d 821 (1985); *In re Estate of Luckey*, 206 Neb. 53, 291 N.W.2d 235 (1980).

The boy's parents not being deceased and there being no claim that they were never married or that their marriage has been dissolved or is in the process of dissolution, there no longer exists any condition under which the visitation act undertakes to grant grandparents the right to seek visitation with their grandchildren.

Accordingly, the judgment of the district court, as disclosed earlier in this opinion, is reversed and the cause remanded for dismissal.

REVERSED AND REMANDED.

# VISTAR BANK, A NEBRASKA BANKING CORPORATION, APPELLANT, V. RICHARD N. THOMPSON, APPELLEE.

530 N.W.2d 910

Filed April 27, 1995. No. S-93-687.

1. **Directed Verdict: Appeal and Error.** In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Directed Verdict.** To sustain a motion for directed verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion from the evidence.
3. **Trial: Debtors and Creditors: Proof.** Payment on a debt is an affirmative defense, and the burden of proving it rests with the party alleging it.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded for further proceedings.

Carl J. Sjulin, of Rembolt Ludtke Parker & Berger, for appellant.

Terrance A. Poppe, of Morrow, Poppe, Otte, Watermeier & Phillips, P.C., for appellee.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, and CONNOLLY, JJ., and RONIN, D.J., Retired.

WHITE, C.J.

In 1987, Richard N. Thompson engaged the law firm of Nelson & Harding to provide corporate legal services on open account in Thompson's establishment of a corporation, Ethanair Corporation. Thompson personally signed a contract retaining Nelson & Harding. Nelson & Harding drafted and filed Ethanair's articles of incorporation.

In 1989, Nelson & Harding merged with the law firm of Heron, Burchette, Ruckert & Rothwell; Heron Burchette thereafter established an $8 million credit line with Vistar Bank, using its accounts receivable as collateral. In March 1989, Heron Burchette sent Thompson a final invoice for $64,547.21 in legal services. In April 1990, Heron Burchette ceased doing

business, and in March 1991, Heron Burchette assigned the Thompson account to Vistar Bank for "collection purposes only and with full right of recourse."

Thompson allegedly failed to make any payments on his account, prompting Vistar Bank to file this action. After Vistar Bank had presented its case in chief, Thompson moved for a directed verdict, contending that Vistar Bank had failed to prove that he owed any money. The district court granted Thompson's motion and denied Vistar Bank's motion for a new trial. Vistar Bank appealed, contending that it had proven that Thompson owed money.

In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. To sustain a motion for directed verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion from the evidence. *Kroeger v. Ford Motor Co.*, *ante* p. 323, 527 N.W.2d 178 (1995); *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994); *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994).

In the case at bar, however, the district court committed reversible error by granting Thompson's motion for a directed verdict. First, the record contains a document titled "Assignment of Account," indicating that Thompson owed $64,547.21 in attorney fees to Heron Burchette, which had in turn assigned the account to Vistar Bank. Second, the following exchange transpired between the district court and Vistar Bank's counsel:

> THE COURT: What evidence is there that this [assigned account] hasn't been paid to Vistar [Bank]?
>
> [Vistar Bank's counsel]: Mr. Scudder's testimony. Are we required, Judge, to prove that up to the minute of time that there hasn't been any payment?
>
> THE COURT: Up at least to the minute of the petition.

The last statement by the district court clearly establishes that the district court erred by dismissing Thompson's motion for a directed verdict because payment on a debt is an affirmative defense, and the burden of proving it rests with the party alleging it. *Foremost Ins. Co. v. Allied Financial Services, Inc.*, 205 Neb. 153, 286 N.W.2d 740 (1980); *Poland v. Gibson*, 190 Neb. 696, 211 N.W.2d 900 (1973); *Haney v. L. R. Foy Constr. Co.*, 186 Neb. 528, 184 N.W.2d 628 (1971); *Department of Banking v. Lawhead*, 181 Neb. 722, 150 N.W.2d 734 (1967); *Hancock v. Parks*, 172 Neb. 442, 110 N.W.2d 69 (1961).

Since the district court erred by requiring Vistar Bank to prove one of Thompson's affirmative defenses, we reverse the judgment and remand this cause to the district court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

FAHRNBRUCH, J., not participating.

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WILLIAM WOLF, APPELLANT, V. DELBERT WALT AND MICHAEL RAINWATER, APPELLEES.

530 N.W.2d 890

Filed April 27, 1995. No. S-93-716.

1. **Corporations: Equity: Liability: Debtors and Creditors: Appeal and Error.** Proceedings seeking disregard of the corporate entity to impose liability on a shareholder for a corporation's debt or other obligation are equitable actions. An appeal of such a matter is reviewed de novo on the record, and the appellate court is required to reach factual findings independent of the trial court.
2. **Verdicts: Juries: Appeal and Error.** Generally, a jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.
3. **Equity: Trial: Juries.** A jury empaneled in an equitable action serves only in an advisory role, and its findings are not binding on the trial court.
4. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries the factual issues de novo on the record and reaches its conclusions independent of the trier of fact.

5. **Directed Verdict: Appeal and Error.** In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. The party against whom the motion is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. In order to sustain a motion for directed verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion from the evidence.
6. **Corporations: Liability: Debtors and Creditors.** A corporation is a legal entity separate and apart from its officers and shareholders. Generally, shareholders are not liable for corporate debts or liabilities.
7. **Corporations.** A court will disregard a corporation's identity only where the corporation has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another.
8. **Corporations: Proof.** A plaintiff seeking to pierce the corporate veil must allege and prove that the corporation was under the actual control of the shareholder and that the shareholder exercised such control to commit a fraud or other wrong in contravention of the plaintiff's rights.
9. **Corporations: Liability: Debtors and Creditors: Proof.** A plaintiff seeking to impose liability for a corporate debt on a shareholder has the burden to show by a preponderance of the evidence that the corporate identity must be disregarded to prevent fraud or injustice to the plaintiff.
10. **Corporations: Fraud.** Some of the relevant factors in determining whether to disregard the corporate entity on the basis of fraud are (1) grossly inadequate capitalization, (2) insolvency of the debtor corporation at the time the debt is incurred, (3) diversion by the shareholder or shareholders of corporate funds or assets to their own or other improper uses, and (4) the fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity.
11. **Corporations: Words and Phrases.** Inadequate capitalization means capitalization very small in relation to the nature of the business of the corporation and the risks entailed. The adequacy of capitalization is measured at the time of incorporation.
12. ____: ____. A corporation is insolvent if it is unable to pay its debts as they become due in the usual course of its business, or if it has an excess of liabilities of the corporation over its assets at a fair valuation. Whether a corporation is insolvent is usually a question of fact.
13. **Corporations: Fraud: Liability: Debtors and Creditors.** When a principal shareholder appropriates and uses corporate funds and property for his personal purposes and thereby defrauds and causes damages to creditors, the shareholder can be held individually liable for corporate debt.
14. **Conversion: Proof: Words and Phrases.** Conversion is any unauthorized or wrongful act of dominion exerted over another's personal property which deprives the owner of his property permanently or for an indefinite period of time. In order

to establish conversion, a plaintiff must allege and prove facts showing a right to immediate possession of the property at the time of the conversion.

15. **Fraud: Words and Phrases.** Constructive fraud involves a breach of fiduciary duty. A fiduciary duty arises out of a confidential relationship which exists when one party gains the confidence of the other and purports to act or advise with the other's interest in mind.
16. **Corporations: Fraud: Liability.** A stockholder can only be individually liable for a constructive fraud committed by the corporation where he had knowledge of and instigated the fraud.
17. **Appeal and Error.** Errors which are argued but not assigned will not be considered by an appellate court.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Affirmed.

Michael J. Mooney and Michael J. Whaley, of Gross & Welch, P.C., for appellant.

Denise E. Frost, of Domina & Copple, P.C., for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

LANPHIER, J.

Plaintiff-appellant, William Wolf, entered into a dairy lease agreement with Flat Top Dairy, Inc., in August 1989. Defendant-appellee Delbert Walt was the president and principal shareholder of Flat Top. Pursuant to the agreement, Flat Top leased and managed Wolf's cattle. Flat Top paid monthly rent to Wolf. Defendant-appellee Michael Rainwater was employed by Flat Top to manage the dairy cattle herd. Flat Top ceased making the required payments to Wolf after approximately 1 year. Wolf filed a petition in the district court for Cuming County and asserted that Flat Top's corporate identity should be disregarded and that Walt should be held personally liable for Flat Top's debt to Wolf. Before submission of the matter to the jury, the district court directed a verdict in favor of the defendants on three tort claims Wolf asserted. Following the trial, the jury refused to hold Walt personally liable. The district court entered judgment in favor of the defendants. The district court correctly granted directed verdicts for the defendants on the three tort claims. Wolf failed to prove by a preponderance of the evidence that Flat Top's corporate

identity should be disregarded. We affirm the district court's judgment.

## BACKGROUND

Flat Top's dairy lease program involved the lease of dairy cattle to Flat Top. The cows were to be purchased for Wolf by Walt, who was a buyer. Pursuant to the program, Wolf leased 40 head of dairy cows at a designated value of $1,000 per cow to Flat Top for a 5-year term. Flat Top agreed to pay Wolf $24 per month per head, totaling $960. On August 2, 1989, Wolf wired Flat Top $40,000, and sometime during that month, Walt purchased the cows and transported them to Flat Top. Rainwater testified that two of Wolf's cows died shortly after arriving at Flat Top. The remaining 38 cows were tagged in order to identify them as Wolf's.

In addition to his interest in Flat Top, Walt was a cattle order buyer. From January 1989 through June 1991, Walt traveled extensively in order to select and buy cattle on behalf of his customers. Rainwater managed the day-to-day operations, and Walt checked on the dairy's status by phone several times a week. Walt testified that Rainwater assured him that everything at the dairy was okay.

Pursuant to the lease agreement, Wolf received payments of $960 per month from Flat Top from October 1989 through December 1990. The source of the payments was the income from the sale of milk. From January through May 1991, Wolf did not receive the scheduled payments due him. Wolf repeatedly asked Rainwater about the overdue payments, and Rainwater advised him that the payments were delayed due to a change in milk companies. In June and July 1991, Wolf received his scheduled monthly payments.

In August 1991, Walt visited Flat Top and toured the premises. Walt testified that during this tour he discovered that the Flat Top herd was dramatically diminished and that many of the remaining cows were very thin or diseased. Only 19 of Wolf's 40 cows remained. Walt immediately fired Rainwater.

Walt stated that Wolf's remaining cows were so thin and diseased that he sold them for slaughter. On August 10, 1991, Walt tendered the proceeds of the sale, $10,424.62, to Wolf.

Walt made no further payments under the lease.

Apparently, the total dairy herd maintained at Flat Top numbered approximately 680 cows. However, inconsistent testimony was adduced regarding the size of the herd. The lease agreement provided that cows and calves would be culled from the herd as necessary. The proceeds of the sale of culled cows and calves were to be placed in an escrow account designated as the "herd replacement account." Culled cows were to be replaced. Rainwater testified that the goal was to maintain the size of the herd at its original level.

In his deposition in May 1992, Rainwater testified that approximately 30 percent of the cows were culled from the herd per year. Rainwater referred to records during his deposition that identified the culled cattle but testified that no records existed which would identify replacement cattle. The records used during Rainwater's deposition are not a part of the record before us.

Rainwater estimated during his deposition that about 180 cows were culled during the first year of Flat Top's existence. No distinction was made between Wolf's cows and the rest of the herd when culling. Rainwater also testified that only 60 cows were added to the herd and that none of the cows were added to Wolf's tagged herd. Rainwater testified that the proceeds of the sale of cows and calves were not sufficient to replace the culled cattle.

Although the herd replacement account was designated as an "escrow account," no third party held the funds. Walt was the only party authorized to sign checks on the account, and those funds were to be used only to replace culled cattle. Walt used over $30,000 in funds from the herd replacement account for purposes other than the purchase of cattle. However, Walt testified that approximately $17,260 out of the $30,000 from the replacement account was used to repay loans obtained for the purchase of cattle. The remaining funds were used to pay phone bills and taxes and to purchase feed in December 1990. Walt testified that he used the herd replacement account for these expenses because Rainwater had overdrawn the dairy's general account.

Walt testified that he made deposits into the herd replacement

account and that he believed Rainwater was also depositing the proceeds of all sales of culled cattle. Walt suspected that Rainwater may not have been depositing all of the proceeds in mid-1990. Walt questioned Rainwater, and Rainwater told him that he had needed the funds to buy feed. Rainwater agreed not to divert funds from the replacement account in the future.

On October 1, 1991, Wolf filed a lawsuit in the district court against Walt, Rainwater, and Flat Top. In his petition, Wolf alleged that the three defendants had failed to make the payments due under the lease and that the defendants had converted his cattle. Defendants Walt and Rainwater demurred and argued that the court lacked subject matter jurisdiction, that the causes of action were improperly joined, and that the petition failed to state facts sufficient to constitute a cause of action. By its order filed April 6, 1992, the district court sustained the defendants' demurrer and granted Wolf leave to file an amended petition.

Wolf's second amended petition named only Walt and Rainwater as defendants. Wolf alleged four causes of action: conversion, constructive fraud, breach of contract, and bailment. Wolf further alleged that Walt operated Flat Top as a facade for his personal business enterprises and asked the court for an order disregarding Flat Top's corporate identity.

Although Rainwater gave deposition testimony in this case in May 1992, he did not appear personally at trial, nor did counsel or any other person represent him after he demurred to Wolf's first petition.

The case went to trial before a jury on July 19, 1993. At the close of all evidence, both Wolf and Walt moved for directed verdicts on all of the causes of action. The district court overruled Wolf's motions but sustained Walt's motions for directed verdict on the conversion, constructive fraud, and bailment causes of action. The issues of breach of contract and piercing the corporate veil were given to the jury. The jury returned a verdict in favor of Walt and Rainwater. On August 6, the district court rendered judgment on the jury's verdict. Wolf timely appealed, and by order of this court the matter was removed from the Nebraska Court of Appeals' docket to this court.

## ASSIGNMENTS OF ERROR

Wolf argues that the district court erred in failing to disregard the corporate entity of Flat Top and hold it to be the alter ego of its principal shareholder, Walt. Wolf argues that the district court erred by failing to direct a verdict in his favor on his cause of action for breach of contract and by granting Walt's motions for directed verdict on the causes of action for bailment, conversion, and constructive fraud. Finally, Wolf argues that the district court erred in receiving an exhibit without proper identification or foundation and that the exhibit constituted hearsay.

## STANDARD OF REVIEW

Proceedings seeking disregard of the corporate entity to impose liability on a shareholder for a corporation's debt or other obligation are equitable actions. An appeal of such a matter is reviewed de novo on the record, and the appellate court is required to reach factual findings independent of the trial court. *Global Credit Servs. v. AMISUB*, 244 Neb. 681, 508 N.W.2d 836 (1993); *Southern Lumber & Coal v. M. P. Olson Real Est.*, 229 Neb. 249, 426 N.W.2d 504 (1988); *ServiceMaster Indus. v. J.R.L. Enterprises*, 223 Neb. 39, 388 N.W.2d 83 (1986).

Generally, a jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993); *Kozeny v. Miller*, 243 Neb. 402, 499 N.W.2d 75 (1993). However, a jury empaneled in an equitable action, such as this, serves only in an advisory role, and its findings are not binding on the trial court. *Synacek v. Omaha Cold Storage, ante* p. 244, 526 N.W.2d 91 (1995). In an appeal of an equitable action, an appellate court tries the factual issues de novo on the record and reaches its conclusions independent of the trier of fact. *Id.*

In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. The party against whom the motion is directed is entitled to have every controverted fact

resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. In order to sustain a motion for directed verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion from the evidence. *Kroeger v. Ford Motor Co.*, *ante* p. 323, 527 N.W.2d 178 (1995); *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994).

## ANALYSIS

### Piercing the Corporate Veil

For his first assignment of error, Wolf asserts that the district court erred in failing to disregard the corporate entity of Flat Top, to hold it to be the mere alter ego of its only shareholder, and to hold its shareholder personally liable for Flat Top's obligations.

A corporation is a legal entity separate and apart from its officers and shareholders. *Global Credit Servs.*, *supra*. Generally, shareholders are not liable for corporate debts or liabilities. *ServiceMaster Indus.*, *supra*; *Slusarski v. American Confinement Sys.*, 218 Neb. 576, 357 N.W.2d 450 (1984); *United States Nat. Bank of Omaha v. Rupe*, 207 Neb. 131, 296 N.W.2d 474 (1980). In fact, "one of the main reasons for the popularity of corporations is that the stockholders are not personally liable for the debts of the corporation. The corporation, and it alone, is liable. A stockholder stands to lose what he has dedicated to the corporate enterprise and nothing more." 1 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 14 at 464 (rev. perm. ed. 1990).

A court will disregard a corporation's identity only where the corporation has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another. *Global Credit Servs. v. AMISUB*, 244 Neb. 681, 508 N.W.2d 836 (1993). A corporation's identity as a separate legal entity will be preserved, as a general rule, until sufficient reason to the contrary appears. *Southern Lumber & Coal v. M. P. Olson Real Est.*, 229 Neb. 249, 426 N.W.2d 504 (1988); *J. L. Brock Bldrs., Inc. v. Dahlbeck*, 223 Neb. 493, 391 N.W.2d 110 (1986).

Here, Wolf entered into a contract with Flat Top and invested $40,000 of his own funds. Nothing in the record indicates that Wolf inquired into Flat Top's financial health before executing the dairy cattle lease agreement. Further, nothing in the record indicates that Walt volunteered any information regarding Flat Top's assets and liabilities. Wolf asks the court to use its equity powers to pierce Flat Top's corporate veil and allow him to hold Flat Top's principal shareholder accountable for his loss.

"A plaintiff seeking to pierce the corporate veil must allege and prove that the corporation was under the actual control of the shareholder and that the shareholder exercised such control to commit a fraud or other wrong in contravention of the plaintiff's rights." *Global Credit Servs.*, 244 Neb. at 686, 508 N.W.2d at 842. A plaintiff seeking to impose liability for a corporate debt on a shareholder has the burden to show by a preponderance of the evidence that the corporate identity must be disregarded to prevent fraud or injustice to the plaintiff. *Southern Lumber & Coal, supra*; *J. L. Brock Bldrs., Inc., supra*.

Some of the relevant factors in determining whether to disregard the corporate entity on the basis of fraud are:

> "(1) Grossly inadequate capitalization; (2) Insolvency of the debtor corporation at the time the debt is incurred; (3) Diversion by the shareholder or shareholders of corporate funds or assets to their own or other improper uses; and (4) The fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity."

*J. L. Brock Bldrs., Inc.*, 223 Neb. at 498, 391 N.W.2d at 115 (quoting *United States Nat. Bank of Omaha, supra*).

Inadequate capitalization means capitalization very small in relation to the nature of the business of the corporation and the risks entailed. The adequacy of capitalization is measured at the time of incorporation. *Global Credit Servs., supra*; *Southern Lumber & Coal, supra*. Wolf adduced evidence regarding the capitalization of Flat Top by calling Walt; the dairy's accountant; and the attorney who incorporated the dairy, Randall Weller.

Walt testified that the total value of the assets contributed to Flat Top was about $1.3 million. Most of the assets contributed consisted of the assets of S & W Dairy, formerly owned by Walt and his wife. Walt further testified that the value of the mortgages against the assets totaled between $950,000 and $1 million. According to Walt, Flat Top's net worth at the time of its incorporation was approximately $300,000. There is no evidence in the record indicating whether this net worth was adequate given the nature of the cattle leasing business and the risks entailed.

Wolf questioned Vaughn Nelson, Flat Top's accountant, regarding Flat Top's and S & W's annual corporate reports, which were required to be filed with the State of Kansas. S & W reported a negative net worth of $74,457.68 as of the end of the calendar year 1988. The Walts alleged that they transferred S & W's assets to Flat Top in early 1989. Flat Top failed to file an annual report for calendar year 1989 as required, and the secretary of state of Kansas ordered the corporation forfeited. As of the time of trial, Flat Top had not been reinstated.

During cross-examination, Nelson testified that the annual corporate reports do not accurately reflect corporate capitalization. According to Nelson, annual corporate reports reflect the tax basis of corporate assets, and the tax basis of an asset is not equal to its fair market value.

Nelson also testified that he prepared a corporate tax return for Flat Top for the corporate tax year 1989. That tax return indicated that the corporation had operating losses of $188,955.21. During cross-examination, Nelson testified that the tax return only reflected income and expenses, rather than Flat Top's assets and liabilities.

Bonnie Walt, Flat Top's corporate secretary-treasurer and Delbert Walt's wife, was called as a defense witness. Bonnie Walt testified that in forming the new corporation, the assets of S & W were merged into Flat Top. S & W's assets included 680 dairy cows. S & W did not own the dairy cows; rather, the cows were leased from investors. Additionally, Delbert and Bonnie Walt allegedly contributed another 200 heifers, 240 acres of land, a house, a barn, a grain storage facility, and grain and growing crops. Other than the Walts' testimony, we have no

other evidence before us to sufficiently indicate the value of Flat Top's corporate assets and liabilities.

The second factor in the test used to determine whether a corporation's identity should be disregarded is whether the corporation was insolvent at the time the debt was incurred. The Nebraska Business Corporation Act provides that a corporation is insolvent if it is unable to pay its debts as they become due in the usual course of its business, or if it has an excess of liabilities of the corporation over its assets at a fair valuation. Neb. Rev. Stat. § 21-2002(15) (Reissue 1991). See, also, *J. L. Brock Bldrs., Inc. v. Dahlbeck*, 223 Neb. 493, 391 N.W.2d 110 (1986). Whether a corporation is insolvent is usually a question of fact. *Id.* Here, the debt was incurred in August 1989. We know that Flat Top made the lease payments as they became due for over a year before they defaulted. We have no other evidence before us to sufficiently indicate whether or not Flat Top was unable to pay any other debts as they became due.

We turn now to the third factor. When a principal shareholder appropriates and uses corporate funds and property for his personal purposes and thereby defrauds and causes damages to creditors, the shareholder can be held individually liable for corporate debt. *Scribner Grain & Lumber Co. v. Wortman*, 204 Neb. 92, 281 N.W.2d 394 (1979). In this case, there is some evidence that funds intended to be used for herd replacement were diverted by Walt for other uses. Walt used those funds for the dairy's taxes, phone bills, and loan repayment. There is no evidence of personal use or waste of Flat Top's funds by Walt.

Finally, if the corporation is a facade for the personal dealings of the shareholder and the operations of the corporation are carried on by the shareholder in disregard of the corporate entity, the shareholder may be individually liable for corporate debt. *J. L. Brock Bldrs., Inc., supra*. In this case, the Walts were unable to produce any corporate records. Bonnie Walt, the corporation's secretary-treasurer, offered conflicting testimony regarding attendance at meetings of Flat Top's board of directors. Annual shareholder meetings were not conducted.

Although Flat Top failed to maintain corporate formalities, a court of equity is required to examine the whole transaction. We find that there is not sufficient evidence to determine that the

corporation was used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of Wolf's rights. See *Global Credit Servs. v. AMISUB*, 244 Neb. 681, 508 N.W.2d 836 (1993). Accordingly, we refuse to set aside Flat Top's corporate identity and hold Walt personally liable for the corporation's debts.

### DIRECTED VERDICTS

Wolf argues the district court erred by failing to direct a verdict in his favor on his causes of action and by granting Walt's motions for directed verdict on the causes of action for bailment, conversion, and constructive fraud. In granting Walt's motions for directed verdicts on the causes of action for bailment, conversion, and constructive fraud, the trial court declared that none of Wolf's tort theories were viable and that the matter was a contract case. Giving Wolf the benefit of every inference, we hold that the district court correctly directed a verdict as a matter of law on the issues of bailment, conversion, and constructive fraud.

First, if there was a bailment, the bailment was with Flat Top rather than with Walt. Flat Top is not a party to this action, and for the reasons stated above we refuse to disregard the corporation's identity and hold Walt individually liable.

Second, Wolf's action for conversion necessarily fails. Wolf alleged that the defendants, without notice or authority from him, converted, sold, delivered, or disposed of his 40 dairy cows. However, by the very terms of the dairy lease agreement, Wolf gave possession of the cattle to Flat Top for a 5-year term. Wolf further authorized Flat Top to cull calves and cows as necessary.

" 'Conversion is any unauthorized or wrongful act of dominion exerted over another's personal property which deprives the owner of his property permanently or for an indefinite period of time.' " *Cattle Nat. Bank v. York State Bank*, 229 Neb. 720, 723, 428 N.W.2d 624, 627 (1988). In order to establish conversion, a plaintiff must allege and prove facts showing a right to immediate possession of the property at the time of the conversion. *Id.* Wolf did not have an immediate right to possession of 40 specific cows. Wolf had only the right to

enforce one of the three options provided in the lease agreement at the expiration of its 5-year term. That agreement contemplated that Flat Top could (1) purchase the herd at 50 percent of its original cost, (2) return the herd subject to Wolf's acceptance, or (3) continue the lease for an additional 5-year period. As a matter of law, Wolf failed to establish that he had the right to the immediate possession of the cattle, and his cause of action for conversion necessarily fails.

Wolf's cause of action for constructive fraud also fails. Constructive fraud involves a breach of fiduciary duty. *Vogt v. Town & Country Realty of Lincoln, Inc.*, 194 Neb. 308, 231 N.W.2d 496 (1975). Wolf neither alleged nor proved that Flat Top had any fiduciary duty toward him. A fiduciary duty arises out of a confidential relationship which exists when one party gains the confidence of the other and purports to act or advise with the other's interest in mind. *Bloomfield v. Nebraska State Bank*, 237 Neb. 89, 465 N.W.2d 144 (1991). Further, a stockholder can only be individually liable for a constructive fraud committed by the corporation where he had knowledge of and instigated the fraud. *Vogt, supra*. Wolf failed to prove that Walt had any fiduciary duty toward him and failed to prove that Walt had knowledge of and instigated the purported fraud.

### Remaining Assignments of Error

Wolf argues that the district court erred in receiving an exhibit without proper identification or foundation and that the exhibit constituted hearsay. Having affirmed the district court's refusal to pierce Flat Top's corporate veil, we need not address this assignment of error.

Wolf argues in his brief that the district court erred in refusing to instruct the jury regarding the definition of inadequate capitalization. However, Wolf failed to assign this as error. Errors which are argued but not assigned will not be considered by an appellate court. *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994).

## CONCLUSION

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

AFFIRMED.

FLORENCE ANDERSON, OWNER, AND DENZEL ANDERSON, HUSBAND OF FLORENCE ANDERSON, APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

530 N.W.2d 899

Filed April 27, 1995. No. S-93-809.

**Property: Damages: Highways.** As a general rule, a property owner may not recover damages for the obstruction of a street or highway unless he or she has sustained an injury different in kind, and not merely in degree, from that suffered by the public at large.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Affirmed.

Daniel D. Jewell, of Jewell, Gatz, Collins, Fitzgerald & DeLay, for appellants.

Don Stenberg, Attorney General, and Jeffery T. Schroeder for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

CONNOLLY, J.

Florence and Denzel Anderson appeal from the ruling of the district court denying them compensation for damages caused by the closing of an intersection of a county road and U.S. Highway 81 (highway). For the reasons stated below, we affirm the ruling of the district court.

## BACKGROUND

The Andersons own property which is bordered on its west side by the highway, which runs generally north and south. The north border of the property includes a right-of-way on which a county road runs east and west. The county road intersects the highway at the northwest corner of the Andersons' property. In 1978, the State of Nebraska, through the Department of Roads (State), obtained a portion of the Andersons' property through condemnation. In the 1978 proceeding, the State acquired a fee simple title to a 2.59-acre triangular tract in the northwest corner of the Andersons' property. The State also acquired Andersons' right of access to the property along its western border. The documents which describe the State's interest deny

the Andersons the right to ingress or egress over the western border "except, over the existing public road along the north line of [Andersons' property]."

The Andersons' private drive exited the property onto the county road at a point immediately to the east of the highway. To access the highway, the Andersons could turn left out of the private drive onto the county road where it intersected the highway.

The State instigated this condemnation proceeding through which it obtained 3.44 acres of the Andersons' property. The State also barricaded the county road where it intersected the east side of the highway. The amount awarded in the condemnation proceeding for the 3.44 acres has not been contested. The Andersons sought additional compensation for the closing of the county road at the intersection of the highway. After the completion of a new county road, the Andersons will have access to the highway by turning right out of the private drive, traveling 1,400 feet along the existing county road, turning left onto a new county road, and traveling 1,000 feet to the intersection with the highway.

In the Andersons' suit for damages, the State filed a motion in limine to exclude evidence of the diminution of value of the property due to the closing of the intersection. The State argued that the evidence was immaterial because the Andersons had no compensable property right in the intersection. The State claimed that the right to maintain the access to the highway was a right in favor of the public.

The Andersons filed a motion for summary judgment asking the court to find that they had a property right in access to the highway. In considering the pretrial motions, the trial court ruled that the Andersons had no compensable, private property right in the intersection. The trial court ruled in favor of the State's motion in limine and against the Andersons' motion for summary judgment.

The case was tried on stipulated facts, including an offer of proof submitted by the Andersons regarding the diminution of value of the east property caused by the closing of the intersection, and the State's objection thereto. The trial court refused to allow the evidence, citing it as immaterial and

irrelevant. The Andersons were denied recovery of damages for the closing of the county road from which they had previously accessed the highway. This appeal followed.

## ASSIGNMENTS OF ERROR

The Andersons cite four errors of the trial court: (1) the granting of the State's motion in limine and refusing to allow evidence of diminution of value of the property due to the closing of the intersection because of immateriality; (2) the failing to grant the Andersons' motion for summary judgment; (3) the finding as a matter of law that the Andersons did not have a property right in access to the highway and, therefore, no special damages; and (4) the sustaining of the State's objection to the Andersons' offer of proof at trial.

## STANDARD OF REVIEW

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. *Kroeger v. Ford Motor Co., ante* p. 323, 527 N.W.2d 178 (1995); *Terry v. Duff*, 246 Neb. 524, 519 N.W.2d 550 (1994); *McDermott v. Platte Cty. Ag. Socy.*, 245 Neb. 698, 515 N.W.2d 121 (1994). The admissibility of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *Kroeger v. Ford Motor Co., supra*; *Sindelar v. Canada Transport, Inc.*, 246 Neb. 559, 520 N.W.2d 203 (1994); *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994).

With regard to questions of law, an appellate court is obligated to reach a conclusion independent from the trial court's conclusion. *Fiese v. Sitorius, ante* p. 227, 526 N.W.2d 86 (1995); *In re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994).

## ANALYSIS

Since in the instant case the facts are stipulated, this court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment. *Dobias v. Service*

*Life Ins. Co.*, 238 Neb. 87, 469 N.W.2d 143 (1991).

The Andersons rely primarily on *Danish Vennerforning & Old Peoples Home v. State*, 191 Neb. 774, 217 N.W.2d 819 (1974), as support for their contention that the blockage of the highway intersection with their abutting county road constituted a compensable taking. In *Danish Vennerforning & Old Peoples Home*, the plaintiff owned property in Omaha abutting North Ridge Drive, which provided the only public access to the plaintiff's property. From the point where the plaintiff's private drive intersected North Ridge Drive, the only available access route was east on North Ridge Drive to 30th Street, a north–south arterial. The westerly portion of North Ridge Drive ended in a dead end.

The defendant in *Danish Vennerforning & Old Peoples Home* was in the process of constructing an interchange for the interstate system at 30th Street. The defendant's plans required it to eliminate access to 30th Street via North Ridge Road, thus eliminating all public access to the plaintiff's land. The defendant entered into a promissory stipulation whereby it pledged to construct an access road from the plaintiff's property at approximately the location of the existing access road onto North Ridge Drive and extending south across North Ridge Drive to Howell Street, the next east–west street to the south of North Ridge Drive. The plaintiff did not consent to the defendant's plan, but the defendant commenced construction without resistance by the plaintiff.

The trial court in *Danish Vennerforning & Old Peoples Home* entered an injunction requiring the defendant to restore the plaintiff's access from North Ridge Drive to 30th Street. The defendant appealed. This court vacated the trial court's decision, but remanded the cause to the trial court to determine the "damages to plaintiff's property resulting from the taking or damaging of access rights." *Id.* at 781, 217 N.W.2d at 823. In the case at bar, the Andersons argue that our holding in *Danish Vennerforning & Old Peoples Home* mandates a finding that the State's act of blocking the intersection between the county road and the highway constituted a compensable taking.

We disagree. *Danish Vennerforning & Old Peoples Home* is distinguishable from the case at bar in that the Andersons still

have viable, useful access to the county road abutting their property. In *Danish Vennerforning & Old Peoples Home*, the plaintiff lost any useful access to North Ridge Road when the 30th Street intersection closed because North Ridge Road became a dead-end street in both directions. The holding in *Danish Vennerforning & Old Peoples Home* is strictly limited to the facts therein.

Our holding in *Fougeron v. County of Seward*, 174 Neb. 753, 119 N.W.2d 298 (1963), is more applicable to the case at bar. The plaintiffs in *Fougeron* owned 240 acres of land, part of which abutted the north side of Interstate 80, and part of which abutted the south side of U.S. Highway 6 in Seward County. The two tracts of land were separated by both Highway 6 and Interstate 80 and the half mile between Highway 6 and Interstate 80. As part of its construction of the interstate system, the state barricaded the intersection between Interstate 80 and a county road, one-quarter mile west of the area where the plaintiffs' property abutted Interstate 80. The plaintiffs sued, seeking damages on the grounds that they were inconvenienced and damaged by the barricading of the county road in that they would be required to travel a longer and more circuitous route in moving vehicles and farm machinery from one tract of land to the other.

This court denied the plaintiffs' claim for damages, holding that the closing of the intersection did not constitute a compensable taking:

> The evidence shows that neither of plaintiffs' tracts of land abuts the intersection at which the county road is being barricaded. Plaintiffs' home place in Section 23 is more than one-quarter mile east of the county road barricade. It is obvious that the barricade will prevent the use of the county road as plaintiffs have used it in the past. It will be necessary for the plaintiffs to use a more lengthy and circuitous route to move . . . from one tract to the other. Their immediate access to the county road is not impeded . . . .
>
> This court has determined that a property owner suffers a compensable damage on account of the construction or vacation of a public road when egress and ingress to his

> property are cut off or interfered with and he has no other reasonable means of access. The right of access under such circumstances is property which cannot be taken from him without compensation. But plaintiffs' access to the county road was in no way impeded. It was barricaded some distance from plaintiffs' property. They can still reach their lands by the public road system, although the distance will be greater and the route circuitous. The inconvenience sustained is the same as that sustained by the general public, although it may be greater in degree. . . . [Plaintiffs] have no claim for compensatory damages . . . .

*Id.* at 759-760, 119 N.W.2d at 303-04.

The case at bar differs slightly from the facts in *Fougeron* because the barricaded intersection is nearly adjacent to the Andersons' property. However, in the 1978 proceeding, the State acquired all of the Andersons' rights as abutting landowners of the highway. The Andersons cannot legally cross directly from their property onto the highway. Their only right of access is the abutting county road, and the barricading of the highway intersection does not impede that right of access.

As a general rule, a property owner may not recover damages for the obstruction of a street or highway unless he or she has sustained an injury different in kind, and not merely in degree, from that suffered by the public at large. *Kraft & Sons, Inc. v. City of Lincoln*, 182 Neb. 187, 153 N.W.2d 725 (1967). See, also, *Rossitto v. City of Omaha*, 199 Neb. 260, 258 N.W.2d 126 (1977). The Andersons only had rights as abutting property owners to the county road. Under *Fougeron*, the Andersons have not suffered an injury different in kind from that suffered by the public at large with regard to their right to access the county road. The fact that the Andersons will have to take a slightly longer and more circuitous route to access the highway reflects only a higher degree, not a different kind, of injury. The barricading of the highway intersection did not constitute a compensable taking.

AFFIRMED.

# METROMAIL CORPORATION, APPELLANT, V. SEWARD COUNTY BOARD OF EQUALIZATION, APPELLEE.

530 N.W.2d 903

Filed April 27, 1995. No. S-93-891.

**Taxation: Valuation.** The process of equalization cannot be applied to property that is not taxed.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Appeal dismissed.

Paul M. Schudel, of Woods & Aitken, for appellant.

C. Jo Petersen, Seward County Attorney, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and RONIN, D.J., Retired.

LANPHIER, J.

On April 10, 1991, appellant Metromail Corporation filed a protest with the Seward County Board of Equalization of the 1991 assessment of appellant's real property. Appellant stated the following in its protest:

> I request that my Real Estate Property in this County be equalized with the Personal Property that is exempt such as railroads, pipelines, livestock, etc. In order to equalize my Real Estate Property in this County, I request that my Real Estate should be assessed at 0% (percentage) of actual value.

On May 24, 1991, the board denied appellant's request. On July 15, appellant filed an appeal of the board's decision in the district court for Seward County. On September 7, 1993, the district court granted the board's motion for summary judgment and dismissed the action, concluding that the board lacked subject matter jurisdiction.

Appellant asserts the district court erred in (1) finding that the board lacked subject matter jurisdiction to equalize the valuation of appellant's property with personal property in Seward County not exempt from taxation in tax year 1991 and (2) finding that the district court lacked subject matter jurisdiction of appellant's petition which sought reversal of the board's denial of appellant's request for equalization.

In its assignments of error, appellant attempts to recharacterize the request made to the board. Appellant did not request that its property be equalized with nonexempt personal property; appellant requested that its property be equalized with exempt personal property. That appellant listed a category of exempt personal property, livestock, does not change its request. The exact issue appellant raises has recently been addressed by this court in *R-D Investment Co. v. Board of Equal. of Sarpy Cty.*, *ante* p. 162, 525 N.W.2d 221 (1995). There we held the process of equalization cannot be applied to property that is not taxed. This being the rule, appellant's claims must fail.

The district court properly determined that it lacked subject matter jurisdiction in this matter. We, therefore, also lack jurisdiction. See *id.* This appeal is dismissed.

APPEAL DISMISSED.

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STATE OF NEBRASKA, APPELLEE, V. JUSTEEN WILLIAMS, ALSO KNOWN AS JUSTEEN OFFING, APPELLANT.

530 N.W.2d 904

Filed April 27, 1995. No. S-94-716.

1. **Appeal and Error: Words and Phrases.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
2. **Rules of Evidence: Words and Phrases.** For the purposes of Neb. Evid. R. 403, probative value is a relative concept. The probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the issues of the case.
3. ____: ____. Unfair prejudice means an undue tendency to suggest a decision on an improper basis.
4. **Homicide: Intent: Proof.** While proof of motive is not an element of murder in the first degree, any motive for the crime charged is relevant to the State's proof of the intent element.
5. **Records: Appeal and Error.** The party appealing has the responsibility for including within the bill of exceptions matters from the record which the party

believes are material to the issues presented for review.

6. **Evidence: Records: Appeal and Error.** Evidence not made a part of the bill of exceptions may not be considered on appeal.
7. **Trial: Evidence: Waiver: Appeal and Error.** A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection.
8. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska rules of evidence commit the evidentiary question at issue to the discretion of the trial court.
9. **Rules of Evidence: Other Acts: Appeal and Error.** Because exercise of judicial discretion is implicit in Neb. Evid. R. 401, it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 404(2) and 403, and the trial court's decision will not be reversed absent an abuse of that discretion.
10. **Trial: Words and Phrases.** Judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
11. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2) is an inclusionary rule which permits the use of relevant prior bad acts for purposes except to prove the character of a person in order to show that such a person acted in conformity with that character. The rule sets forth the circumstances under which evidence of prior bad acts is admissible: as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
12. ____: ____. Evidence which is otherwise admissible under Neb. Evid. R. 404(2) may be excluded under Neb. Evid. R. 403 if its probative value is substantially outweighed by other considerations.
13. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court reviews the admission of evidence of other acts by considering (1) whether the evidence was relevant; (2) whether the evidence had a proper purpose; (3) whether the probative value of the evidence outweighed its potential for unfair prejudice; and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Mark A. Weber, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and MILLER-LERMAN, Judge.

LANPHIER, J.

Justeen Williams was charged with committing murder in the

first degree and with using a firearm to commit a felony for shooting and killing Tamiko Jones on October 11, 1993. After a jury trial in the district court for Douglas County, Williams was adjudged guilty on both counts in conformance with the jury's verdicts. Williams was sentenced to life in prison for the murder conviction and to a consecutive term of 2 to 5 years in prison for the conviction of use of a firearm in the commission of a felony. Williams appeals from this judgment and asserts that the district court erred by (1) allowing evidence of the emergency cesarean section birth of Jones' child immediately following Jones' death, (2) failing to grant Williams' motion for a mistrial following the appearance of a newspaper article, and (3) allowing evidence of a prior incident in which Williams stabbed Jones. Because these assigned errors were not preserved for appeal and do not constitute plain error, we affirm the judgment of the district court.

## BACKGROUND

It is undisputed that on October 11, 1993, Williams shot and killed Jones. Events leading up to the shooting concerned the fact that both Williams and Jones had been dating the same man, Bobby Ashley, and Jones was pregnant with Ashley's child.

On July 23, 1993, the two women fought outside of the apartment where Williams had been staying. By her own admission, Williams stabbed Jones during that fight. After the stabbing, Williams left Omaha and went to Albuquerque, New Mexico. She returned to Omaha about a month later.

On the day of the shooting, Williams and Jones came into contact at the LaFern Williams Recreational Center located in south Omaha. At that time, Williams told Jones that she no longer wanted Ashley and that Jones could have him. Williams was then asked by the manager to leave the recreational center, and she complied.

Later that day, Williams and Jones came into contact outside an apartment located at 2922 S Street. At trial, Williams testified that she was walking home with her neighbor Stephanie Hall and Williams' younger brother. According to Williams, the three walked up some stairs and saw Jones. Williams testified

that Jones began firing a gun at her and that Williams then shot back. However, at the sentencing hearing Williams' counsel stated that Williams had told counsel that the testimony about shooting in self-defense was not true and that Williams meant to hurt Jones, but not kill her.

Immediately after the shooting, Jones' baby was delivered by emergency cesarean section, but died 18 days later.

Jones died from blood loss secondary to a wound from a bullet which entered her back and exited her chest.

## EVIDENCE OF BIRTH

Williams' first assignment of error is that the trial court erred in allowing the prosecution to adduce evidence of the birth of Jones' child. Williams contends this evidence was unduly prejudicial and should have been excluded.

At trial during its opening statement, the State told the jury the following: "The ambulance was called and they rushed her [Jones] to University of Nebraska Medical Center where she died. They performed an emergency Caesarean section on her and a baby boy was delivered, a baby named Delvin. He died 18 days later."

No objections were made to these statements.

At trial, Doris Jones, the mother of Tamiko Jones, testified as follows:

> Q. And did you have a daughter by the name of Tamiko Jones?
>
> A. Yes.
>
> Q. What was her date of birth?
>
> A. January 3rd, 1976.
>
> Q. And did your daughter die?
>
> A. Yes.
>
> Q. What was the date of her death?
>
> A. October 11th.
>
> Q. 1993?
>
> A. Yes.
>
> Q. Was she pregnant at that time?
>
> A. Yes.
>
> Q. Was a child delivered of her by Caesarean section after she was shot?

A. Yes.

Q. And that was a male child by the name of Delvin; is that correct?

A. Yes.

Q. He passed away 18 days later?

A. Yes.

No objections were made to this testimony either. On appeal, however, Williams suggests the opening statement and this testimony should have been excluded as unduly prejudicial pursuant to Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989). Recognizing that generally, one who fails to make a timely objection to evidence waives the right on appeal to assert error in the reception of that evidence, Williams argues that we should find plain error.

Asserting or arguing plain error does not relieve a defendant of properly preserving errors for appellate review.

Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *State v. Campbell, ante* p. 517, 527 N.W.2d 868 (1995).

Rule 403 states in relevant part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."

For the purposes of this rule, probative value is a relative concept. The probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the issues of the case. *State v. Perrigo*, 244 Neb. 990, 510 N.W.2d 304 (1994). Unfair prejudice means an undue tendency to suggest a decision on an improper basis. *Id.*

The State submits this evidence was probative of Williams' motive for the killing. While proof of motive is not an element of murder in the first degree, any motive for the crime charged is certainly relevant to the State's proof of the intent element. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

As the State submits, evidence of the birth of Jones' child tended to prove that Jones was pregnant. From this evidence and from the testimony of Bobby Ashley, Williams' lover, to the effect that the child was his, the jury could have found beyond

a reasonable doubt that Williams deliberately killed Jones out of jealousy. Though the subsequent death of the child may have been somewhat inflammatory, we cannot say that the admission of this evidence in the context of this trial rises to the level of prejudicial or plain error.

## NEWSPAPER ARTICLE

Next, Williams contends the district court erred in failing to grant her motion for a mistrial on the grounds that a newspaper article involving the case was published during the course of trial. The article allegedly contained confidential juvenile court information as described in Neb. Rev. Stat. § 43-3001 (Reissue 1993). However, because the alleged article is not before us we cannot reach this assigned error. See *Bell Fed. Credit Union v. Christianson*, 244 Neb. 267, 505 N.W.2d 710 (1993). It is a basic tenet of Nebraska law that the party appealing has the responsibility for including within the bill of exceptions matters from the record which the party believes are material to the issues presented for review. *Id.* See, also, Neb. Rev. Stat. § 25-1140 (Cum. Supp. 1994). Evidence not made a part of the bill of exceptions may not be considered on appeal. *State v. Rust, ante* p. 503, 528 N.W.2d 320 (1995); *Bell Fed. Credit Union v. Christianson, supra*; *State v. Biernacki*, 237 Neb. 215, 465 N.W.2d 732 (1991).

## PRIOR BAD ACT

Finally, Williams contends the district court erred in admitting evidence that on a previous occasion Williams stabbed Jones. A pretrial hearing on the admissibility of evidence of this prior bad act was held upon the State's motion made pursuant to Neb. Evid. R. 404(3), Neb. Rev. Stat. § 27-404(3) (Cum. Supp. 1994). After that hearing, the district court determined that evidence of the prior bad act would be admissible at trial. However, Williams failed to object to this evidence when adduced at trial. It is fundamental that a party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection. *State v. Myers*, 244 Neb 905, 510 N.W.2d 58 (1994).

Even had these errors been properly preserved, we could not

say that the trial court abused its discretion in admitting this evidence. We note that Williams bases her argument on rules 404(2) and 403. The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska rules of evidence commit the evidentiary question at issue to the discretion of the trial court. *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994). We have held that because exercise of judicial discretion is implicit in Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1989), it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rules 404(2) and 403, and the trial court's decision will not be reversed absent an abuse of that discretion. *State v. Carter, supra*. Judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id.*

Rule 404(2) is an inclusionary rule which permits the use of relevant prior bad acts for purposes except to prove the character of a person in order to show that such a person acted in conformity with that character. *State v. Carter, supra*. The rule sets forth the circumstances under which evidence of prior bad acts is admissible: as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *State v. Carter, supra*.

However, evidence which is otherwise admissible under rule 404(2) may be excluded under rule 403 if its probative value is substantially outweighed by other considerations. *State v. Carter, supra*.

Accordingly, we review the admission of evidence of other acts by considering (1) whether the evidence was relevant; (2) whether the evidence had a proper purpose; (3) whether the probative value of the evidence outweighed its potential for unfair prejudice; and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted. *Id.*

Williams, in her brief, has conceded that the evidence was relevant, that it had a proper purpose, and that the trial court instructed the jury to consider the evidence only for the purpose for which it was admitted. Thus, the only issue raised is

whether the trial court abused its discretion in implicitly ruling that the probative value of the evidence did not outweigh its potential for unfair prejudice.

The trial court's ruling was not untenable and did not deny Williams a just result, especially since Williams' counsel elicited similar testimony on cross-examination and in presenting Williams' defense. While cross-examining Sgt. John Skanes, who investigated the stabbing incident, and while cross-examining Loretta Ashley, Bobby Ashley's mother, the defense elicited testimony concerning the stabbing incident. Later, during Williams' defense, Williams' counsel elicited testimony concerning the incident from Williams herself and from Williams' brother and mother.

## CONCLUSION

Finding the errors complained of not to have been preserved for appeal, and finding no plain error in the record, we affirm the judgment of the district court in all respects.

AFFIRMED.

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RODNEY E. RUSSELL, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, AND JACK C. CONRAD, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLEES.

531 N.W.2d 212

Filed May 5, 1995. No. S-93-484.

1. **Administrative Law: Motor Vehicles: Appeal and Error.** In actions brought under the Motor Vehicle Safety Responsibility Act, an appellate court's review of a district court's review of a decision of the Department of Motor Vehicles is de novo on the record.
2. **Statutes: Appeal and Error.** Absent anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of words which are plain, direct, and unambiguous.

3. **Administrative Law: Motor Vehicles: Proof.** Neb. Rev. Stat. §§ 60-507 and 60-508 (Reissue 1993) clearly set forth the proof of financial responsibility requirements that the vehicle operator or owner must meet in the event of an accident.
4. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Proof: Appeal and Error.** A licensee appealing from a Department of Motor Vehicles suspension order has the burden of proving the invalidity of the order.
5. **Constitutional Law: Motor Vehicles: Notice.** The Nebraska Motor Vehicle Safety Responsibility Act complies with the notice and hearing requirements of the federal and state Constitutions.
6. **Motor Vehicles: Highways: Public Health and Welfare.** The purpose of the Nebraska Motor Vehicle Safety Responsibility Act is to protect the public on the highways against the operation of motor vehicles by financially irresponsible persons. In the interests of the public the state may make and enforce regulations reasonably calculated to promote care on the part of all who use its highways.

Appeal from the District Court for Cheyenne County: JOHN D. KNAPP, Judge. Affirmed.

Gregory J. Beal, of Gregory J. Beal & Associates, P.C., for appellant.

Don Stenberg, Attorney General, and Paul N. Potadle for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

WHITE, C.J.

The Department of Motor Vehicles (DMV) suspended Rodney E. Russell's operator's license for failure to comply with Nebraska's Motor Vehicle Safety Responsibility Act (Act). Russell appealed the order of suspension to the district court for Cheyenne County, which affirmed the order. Russell appealed the district court's affirmance to the Nebraska Court of Appeals, and pursuant to our authority to regulate the caseloads of the appellate courts, we removed this case from the Court of Appeals' docket to the Nebraska Supreme Court docket.

Russell is an employee of Hooter Industries and/or Scrapco, a business dealing in scrap metal. In June 1992, while Russell was driving a truck owned by Scrapco, an unsecured boom which was attached to the top of the truck struck the underside of a railroad bridge. Scrapco did not carry insurance on the vehicle.

Russell reported the accident to his employer and filed an accident report with the DMV. Russell stated in his report that he was not the owner of the truck and that there was no visible damage to the bridge. Russell did not offer any proof of liability insurance in his report. Russell had automobile liability insurance at the time of the accident, but his insurance did not cover the operation of commercial vehicles. The DMV also received a report of the accident from police officer Larry Cox, who approximated the damage to the railroad bridge to be $60,000.

The DMV determined that there was a reasonable possibility that judgment would be rendered against Russell and established a security deposit of $25,000 to satisfy any damage claims. On July 27, 1992, the DMV issued a letter to Russell, asking that he provide proof of liability insurance and also informing Russell that if he was not insured he could take alternative steps to meet the requirements imposed upon him by the Act. Russell was also notified by this letter that failure to comply by August 11 would result in suspension of Russell's driving privileges.

Russell did not respond to the July 27 letter. In an August 11 letter, the DMV notified Russell that he failed to comply with the Act and that his license would be suspended on August 31 unless he provided evidence of financial responsibility. The August 11 letter also detailed the alternatives by which Russell could show proof of financial responsibility so that his license would not be suspended. Russell did not respond to the August 11 notice, and on August 31 the DMV issued an order of suspension. Russell appealed the DMV's order to the district court for Cheyenne County, which affirmed the suspension order.

Russell claims that the district court erred in affirming the suspension order, in determining that the statutes authorizing both the DMV's actions and the DMV's administrative procedures are constitutional, and in overruling Russell's motion for new trial.

In actions brought under the Motor Vehicle Safety Responsibility Act, an appellate court's review of a district court's review of a decision of the Department of Motor Vehicles is de novo on the record. *Clayton v. Nebraska Dept. of*

*Motor Vehicles*, 247 Neb. 49, 524 N.W.2d 562 (1994); *Wollenburg v. Conrad*, 246 Neb. 666, 522 N.W.2d 408 (1994); *Jacobsen v. Higgins*, 243 Neb. 485, 500 N.W.2d 558 (1993).

We note for clarification that the appeal procedures described in the Administrative Procedures Act (APA) do not apply to actions brought under the Motor Vehicle Safety Responsibility Act. Neb. Rev. Stat. § 60-503(2) (Reissue 1993). However, in certain cases not to be enumerated here, one can appeal a decision made by the DMV under other acts whose appellate procedures are in fact governed by the APA. In those cases where an appeal is taken under procedures set forth by the APA, and when a petition instituting review proceedings is filed in the district court on or after July 1, 1989, the district court's review of an administrative agency's final decision is de novo on the record of the agency. Neb. Rev. Stat. § 84-917(5)(a) (Reissue 1994); *Lynch v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 603, 514 N.W.2d 310 (1994). The district court's judgment or final order can then be vacated, modified, or reversed by an appellate court for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Reissue 1994). Because Russell brought this case pursuant to the procedures set forth in the Motor Vehicle Safety Responsibility Act, however, our standard of review in this case is de novo on the record as mentioned above.

Neb. Rev. Stat. § 60-507(1) (Reissue 1993) provides that the DMV shall suspend the operator's license of a person involved in an accident in Nebraska which results in bodily injury, death, or property damage in excess of $500 *unless* the operator provides proof of financial responsibility. See *Clayton, supra*. Section 60-507(2) and (3) provides that the DMV shall not suspend the operator's license if the DMV determines that there is no reasonable possibility that judgment could be entered against the operator upon considering "all reports and information filed in connection with the accident." Neb. Rev. Stat. § 60-508 (Reissue 1993) provides in part that § 60-507 does not apply

> (1) [t]o such operator or owner if such owner had in effect at the time of such accident an automobile liability policy with respect to the motor vehicle involved in such accident;

(2) [t]o such operator, if not the owner of such motor vehicle, if there was in effect at the time of such accident an automobile liability policy or bond with respect to his operation of motor vehicles not owned by him;

(3) [t]o such operator or owner if the liability of such operator or owner for damages resulting from such accident is, in the judgment of the department, covered by any other form of liability insurance policy or bond.

Sections 60-507 and 60-508 clearly detail what the Act requires of operators and owners of vehicles involved in accidents. Russell does not fall under any of the exemptions set forth in § 60-508, so the DMV is required to suspend his license if he cannot provide proof of financial responsibility as required by § 60-507. As we have consistently held, absent anything to the contrary, statutory language is to be given its plain and ordinary meaning; this court will not resort to interpretation to ascertain the meaning of words which are plain, direct, and unambiguous. *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (1994); *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994); *State on behalf of Matchett v. Dunkle*, 244 Neb. 639, 508 N.W.2d 580 (1993).

The Legislature in these statutes clearly used the words "operator" and "owner" and provided for how the Act affects each one. Russell argues that since he was not the owner of the truck involved in the accident, the DMV had no basis for determining that there was a reasonable possibility that judgment could be entered against Russell for damages resulting from the accident. However, §§ 60-507 and 60-508 clearly set forth the proof of financial responsibility requirements that the operator or owner must meet in the event of an accident.

Russell did not have insurance on the truck he was driving, his automobile liability insurance coverage did not cover the operation of commercial vehicles, and the owner of the truck failed to insure the vehicle. Russell does not fall within the purview of any of the exemptions set forth in § 60-508 and is thus subject to license suspension, since he could not provide proof of financial responsibility under § 60-507.

The Legislature did not create an exemption for persons in

the same situation as Russell's and that is something this court cannot remedy. The statutes clearly and unambiguously define the duties imposed upon operators and owners of vehicles, and we cannot create exemptions where there are none.

"A licensee appealing from a DMV suspension order has the burden of proving the invalidity of the order." *Clayton v. Nebraska Dept. of Motor Vehicles*, 247 Neb. 49, 54, 524 N.W.2d 562, 566 (1994); *Wroblewski v. Pearson*, 210 Neb. 82, 313 N.W.2d 231 (1981). Russell has not met this burden of proof. The record is void of proof of Russell's financial responsibility for the truck he was driving at the time of the accident, and Russell fails to show that he is exempt from the Act. We therefore hold that the district court did not err in affirming the DMV's order of suspension or in overruling Russell's motion for new trial.

Russell also argues that the statutes authorizing the DMV's actions and its administrative procedures have various constitutional infirmities. We have previously held that the Act complies with the notice and hearing requirements of the federal and state Constitutions and is thus not unconstitutional. *Clayton, supra*; *Wollenburg v. Conrad*, 246 Neb. 666, 522 N.W.2d 408 (1994). Furthermore, we have previously found the Act in general to be constitutional and have held that the purpose of the Act is to "protect the public on the highways against the operation of motor vehicles by financially irresponsible persons" and that "in the interests of the public the state may make and enforce regulations reasonably calculated to promote care on the part of all who use its highways." *Hadden v. Aitken*, 156 Neb. 215, 221, 55 N.W.2d 620, 623 (1952), *overruled on other grounds, Stauffer v. Weedlun*, 188 Neb. 105, 195 N.W.2d 218 (1972).

We continue to adhere to our holdings that the Act itself is constitutional. For these reasons, we find Russell's assignments of error regarding the constitutionality of the Act meritless.

Having found all of Russell's assignments of error meritless, we affirm the district court's affirmance of the order of suspension.

AFFIRMED.

CONNOLLY, J., concurring in the result.

I reluctantly agree with the decision reached by the majority in the case at bar. Under Neb. Rev. Stat. §§ 60-507 and 60-508 (Reissue 1993), the Department of Motor Vehicles (DMV) acted properly in suspending Russell's license upon his failure to provide proof of financial responsibility. Likewise, the majority correctly found the statutes authorizing the DMV's actions and administrative procedures to be constitutional. See, *Clayton v. Nebraska Dept. of Motor Vehicles, ante* p. 49, 524 N.W.2d 562 (1994); *Wollenburg v. Conrad*, 246 Neb. 666, 522 N.W.2d 408 (1994). My research indicates that the same result has been reached in other jurisdictions faced with a similar factual scenario. See, *Farrao v. Bureau*, 46 Ohio App. 2d 120, 346 N.E.2d 337 (1975); *Commonwealth v. Adcock*, 103 Pa. Commw. 298, 520 A.2d 118 (1987).

Notwithstanding the legal correctness of the majority's decision, I am disturbed by the inequitable result. Russell stands accused of violating Nebraska's Motor Vehicle Safety Responsibility Act (Act), but the record indicates that Russell did nothing that could be considered irresponsible. Russell owned a personal automobile and had insurance to cover that automobile. However, Russell was driving a company vehicle at the time of the accident herein. Russell had no ownership interest in the company vehicle, and not surprisingly, Russell's insurance did not cover the company vehicle.

Russell had to drive his employer's vehicle in the scope and course of his employment. His employer, however, neglected to procure insurance for its own vehicle. Thus, when Russell damaged the railroad bridge with the employer's vehicle, he became potentially liable for damages as the "operator" of the vehicle under § 60-507. The DMV instructed Russell to either produce evidence of insurance for the employer's vehicle or provide a $25,000 security deposit to cover any damage claims. Since Russell did neither, he lost his operator's license.

It disturbs me that under § 60-507, any employee who drives a company vehicle in the course of his or her employment, but fails to procure insurance for the vehicle *owned solely by the employer*, may have to furnish a security deposit of several thousand dollars or face the prospect of losing his or her

operator's license, even though the employee has properly insured his or her personal vehicle. That an employee is held responsible for insuring the employer's vehicle is alarming. Equally troublesome is the fact that very few citizens are going to be able to raise $25,000 (or whatever the amount might be) within the 2-week time period established by the Act.

However, as the law stands now, an employee who operates a company vehicle in the scope of his or her employment and who does not want to risk losing his or her operator's license is placed in the position of having to determine if his or her employer is in compliance with the Act. If the employee discovers that the vehicle is not covered by insurance, the employee has three choices: (1) terminate employment, (2) procure insurance for the employer's vehicle, or (3) have available several thousand dollars in the event that he or she is involved in an accident. In my opinion, such a law is repugnant and should be changed by the Legislature.

WRIGHT, J., joins in this concurrence.

LANPHIER, J., dissenting.

As I interpret the provisions of the Motor Vehicle Safety Responsibility Act (Act), Neb. Rev. Stat. § 60-501 et seq. (Reissue 1988 & Cum. Supp. 1992), Russell was not subject to the Act and his operator's license was improperly suspended.

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 of the court below. *In re Application of City of Grand Island, ante* p. 446, 527 N.W.2d 864 (1995); *Grady v. Visiting Nurse Assn.*, 246 Neb. 1013, 524 N.W.2d 559 (1994). Although Russell has not argued or assigned as error that the Act does not apply to him, an appellate court always reserves the right to note plain error which was not complained of at trial or on appeal. *State v. Campbell, ante* p. 517, 527 N.W.2d 868 (1995).

Russell was driving his employer's truck at the time of the accident. According to the record, Russell's employer, Hooter Industries and/or Scrapco, was engaged in the scrap metal business, although Russell was driving a boomtruck with a

grapple on it. Russell is to lose his operator's license because his employer's truck was uninsured.

According to § 60-507, the Department of Motor Vehicles (DMV) shall suspend the driver's license of an operator of a motor vehicle who is in any manner involved in an accident resulting in property damage in apparent excess of $500. Section 60-508 exempts financially responsible drivers from such mandatory suspension. The majority concludes that Russell did not meet any of the exemptions of § 60-508 and therefore affirms the DMV's suspension of his license.

However, the Act does not apply to any vehicle subject to the requirements of Neb. Rev. Stat. § 75-307 (Reissue 1990), which applies to motor carriers. See § 60-561. Section 75-307 requires all motor carriers to file with the Public Service Commission proof of insurance, self-insurance, or other security. A "[m]otor carrier shall mean any person who or which owns, controls, manages, operates, or causes to be operated any motor vehicle used to transport passengers or property over any public highway in this state." Neb. Rev. Stat. § 75-302(8) (Reissue 1990). That definition is very broad; clearly broad enough to encompass Russell's employer. Russell's employer hauls scrap metal and therefore meets the definition of a motor carrier.

Russell was driving a vehicle subject to the provisions of § 75-307, and such vehicle was exempt from the provisions of the Act which Russell is charged with violating. In my judgment, the DMV "pointed the finger" at the wrong party and acted improperly by suspending Russell's license. I would reverse.

ROSS A. PANTANO, APPELLEE, V. JOHN J. MCGOWAN, APPELLANT.

530 N.W.2d 912

Filed May 5, 1995. No. S-93-760.

1. **Pleadings: Motions to Strike.** The proper manner in which to challenge the appropriateness of a counterclaim is by a motion to strike rather than by a demurrer.
2. **Appeal and Error.** To be considered by an appellate court, an error must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred.
3. ____. Errors which are argued but not assigned will not be considered by an appellate court.
4. ____. Where an appellant fails to assign any specific error, the decision appealed from will be affirmed unless the court elects to note plain error.
5. **Appeal and Error: Words and Phrases.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
6. **Appeal and Error.** Plain error may be noted by an appellate court on its own motion.
7. **Contracts.** An agreement that depends upon the wish, will, or pleasure of one of the parties is unenforceable.

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

Mark E. Novotny and Robert J. Murray, of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Allen E. Daubman, of Koley, Jessen, Daubman & Rupiper, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and BUCKLEY, D.J.

FAHRNBRUCH, J.

Ross A. Pantano wanted to buy Business Interiors and Design, Inc. (Company), a family-owned corporation, by purchasing all of its outstanding capital stock for $1,060,000.

Pursuant to a written agreement with the Company and its shareholders, Pantano purchased 345 shares of the Company's stock for $40,000. In the agreement, the shareholders granted Pantano an option to purchase the Company's remaining outstanding capital stock. John J. McGowan, the Company's

majority shareholder, agreed that if Pantano did not exercise his option, that he, McGowan, would personally purchase Pantano's 345 shares of stock for $40,000.

After Pantano failed to obtain financing, he did not exercise his option to purchase the remaining outstanding stock. Pursuant to the written agreement, Pantano demanded in writing that McGowan purchase from him the 345 shares Pantano had purchased from the Company's shareholders. Pantano's demand was sent by certified mail to, and received by, McGowan. McGowan refused to purchase Pantano's stock.

Pantano successfully sued McGowan for breach of the written contract in which McGowan agreed to purchase Pantano's stock. McGowan filed two counterclaims against Pantano, but those were dismissed by the trial court.

McGowan appealed the judgment entered by the district court for Douglas County to the Nebraska Court of Appeals, but on appeal he did not assign any errors. In order to regulate the caseloads of the appellate courts of this state, we removed this case to the Supreme Court.

Because McGowan failed to assign any error, we limit our review to plain error. Noting plain error, we vacate the district court's award of prejudgment interest.

## ADDITIONAL FACTS

The written agreement between Pantano and the Company and its shareholders was entered into on October 23, 1991.

Paragraph 11 of the agreement provides: "All notices, offers, acceptances, *exercise of options*, waivers and other acts under this Agreement *shall be in writing* and shall be deemed to have been duly given when delivered in person or sent by certified mail addressed to the Company . . . ." (Emphasis supplied.)

Paragraph 12(a) of the agreement provides: "This instrument and the agreements referred to herein contain the entire agreement among the parties . . . and *no modification shall be binding upon a party unless set forth in writing* and duly executed by each party affected." (Emphasis supplied.)

Also on October 23, McGowan, as president of the Company, executed an employment contract under which the Company hired Pantano for 1 year, retroactive from July 1991 to July

1992, at a salary of $6,250 per month for the first 6 months and thereafter at $4,166.66 per month plus commissions.

Paragraph 16 of the employment agreement provides: "This Agreement and the Agreement referred to in the recitals hereto constitutes the full and complete understanding and agreement of the parties . . . *and cannot be amended, changed, or modified without the consent, in writing, of the parties hereto.*" (Emphasis supplied.)

On March 10, 1993, Pantano filed his petition seeking $40,000 plus interest because of McGowan's refusal to personally purchase the 345 shares of stock Pantano had bought from the Company's shareholders.

In his answer, McGowan alleged that between July and September 1992, Pantano and McGowan had orally modified the stock purchase agreement so that McGowan would continue to pay Pantano the original salary of $6,250 per month "until such time [Pantano] exercised his option."

As previously stated, McGowan also filed two counterclaims. The first counterclaim alleged that the oral agreement to employ Pantano at $6,250 per month until such time as Pantano exercised his option modified the stock purchase agreement and the employment contract. McGowan alleged that the oral modification caused Pantano to receive enhanced wages. McGowan sought $27,083.42 in damages plus interest and attorney fees due to McGowan's reliance on the purported oral modification of the two agreements.

In the second counterclaim, McGowan alleged that since June 1991, "extraordinary events" reduced the Company's net worth approximately 66 percent. McGowan sought damages in his second counterclaim in the amount of between $244,100.14 and $739,697.40 plus interest and attorney fees because of Pantano's alleged breach of the alleged oral modification to the stock purchase agreement.

Pantano filed a demurrer to McGowan's answer and counterclaims, and the district court sustained the demurrer based upon the statute of frauds contained in Neb. U.C.C. § 8-319 (Reissue 1992). The court dismissed the counterclaims after McGowan elected to stand on them.

Pantano then filed a motion for summary judgment which

was sustained by the district court. The court entered judgment for Pantano in the amount of $40,000 plus prejudgment interest from March 2, 1993, the date McGowan received Pantano's demand letter for the $40,000.

## ANALYSIS

Initially, we note that the proper manner in which to challenge the appropriateness of a counterclaim is by a motion to strike rather than by a demurrer. *Barks v. Cosgriff Co.*, *ante* p. 660, 529 N.W.2d 749 (1995). We will treat Pantano's action as a demurrer because both parties and the district court treated it as such. See *id.*

As previously stated, McGowan's brief does not contain any assignment of error. To be considered by an appellate court, an error must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred. *Gravel v. Schmidt*, *ante* p. 404, 527 N.W.2d 199 (1995). See, also, Neb. Ct. R. of Prac. 9D(1)d (rev. 1992). Thus, errors which are argued but not assigned will not be considered by an appellate court. *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994).

Where an appellant fails to assign any specific error, the decision appealed from will be affirmed unless the court elects to note plain error. *In re Interest of A.W.*, 224 Neb. 764, 401 N.W.2d 477 (1987). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *First Nat. Bank in Morrill v. Union Ins. Co.*, 246 Neb. 636, 522 N.W.2d 168 (1994). Plain error may be noted by an appellate court on its own motion. See *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994).

Upon sustaining Pantano's summary judgment motion, the district court entered judgment for Pantano in the amount of $40,000 plus prejudgment interest. We elect to note plain error in regard to the trial court's award of prejudgment interest.

At the time the trial court entered its judgment, a litigant in all causes of action needed to comply with Neb. Rev. Stat. § 45-103.02 (Reissue 1993), in order to receive prejudgment interest. Section 45-103.02 provides, in relevant part:

> [J]udgment interest shall also accrue on decrees and

> judgments for the payment of money from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the rendition of judgment if all of the following conditions are met:
>
> (1) The offer is made in writing upon the defendant by certified mail, return receipt requested, to allow judgment to be taken in accordance with the terms and conditions stated in the offer;
>
> (2) The offer is made not less than ten days prior to the commencement of the trial;
>
> (3) A copy of the offer and proof of delivery to the defendant in the form of a receipt signed by the party or his or her attorney is filed with the clerk of the court in which the action is pending; and
>
> (4) The offer is not accepted prior to trial or within thirty days of the date of the offer, whichever occurs first.

There is nothing in the record to reflect that Pantano complied with the provisions of § 45-103.02. Thus, at the time the district court entered its judgment, Pantano was not entitled to any prejudgment interest. It was plain error for the district court to award prejudgment interest to a litigant who failed to comply with § 45-103.02. See *Peterson v. Kellner*, 245 Neb. 515, 513 N.W.2d 517 (1994).

The trial court's order sustaining Pantano's demurrer to McGowan's amended counterclaims, which counterclaims incorporate the employment agreement and the stock purchase agreement containing the stock option, was correct because each document plainly states that neither could be modified except in writing. Each counterclaim alleged an oral modification of written agreements. Therefore, neither of the counterclaims stated a cause of action. We also note that the stock agreement expressly provides that Pantano's option to purchase additional stock could be exercised only in writing. There is no allegation in the pleadings that Pantano ever exercised in writing his option to purchase the remaining outstanding stock of the Company.

Pantano's demurrer was also sustainable even if there was a purported oral exercise of his agreement by the words "until such time [as] I exercise the option." Those words are illusory and do not constitute an enforceable promise. See *Chadd v.*

*Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1987) (holding that an agreement that depends upon the wish, will, or pleasure of one of the parties is unenforceable). For the reasons stated herein, the trial court properly sustained Pantano's demurrer, and we need not address the district court's ruling on the statute of frauds. See *Schlake v. Jacobsen*, 246 Neb. 921, 524 N.W.2d 316 (1994).

The district court order sustaining Pantano's summary judgment motion was also proper as a matter of law. McGowan's affidavit in response to the summary judgment motion does not demonstrate a genuine issue of material fact. According to McGowan's affidavit, Pantano spent the spring and summer of 1992 trying to "[obtain] the necessary financing." In January 1993, Pantano notified McGowan that "he was having serious difficulty in obtaining financing." In his affidavit, McGowan stated that in the alleged "oral modification" he promised to provide Pantano continued employment "until such time as [Pantano] could finalize the necessary financing." On February 4, Pantano informed McGowan that he "was unable to obtain financing and was unable to consummate the sale and purchase of the Company."

Giving McGowan the benefit of all reasonable inferences, the record fails to reflect that Pantano orally offered an enforceable promise upon which McGowan could rely. Without question, the district court was correct in holding that McGowan was contractually obligated to purchase the 345 shares of the Company's capital stock from Pantano.

## CONCLUSION

We vacate the district court's award of prejudgment interest to Pantano, but in all other respects affirm the judgment of the district court.

AFFIRMED AS MODIFIED.

# THE NEBRASKA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION, APPELLEE, V. JERRY DOBIAS AND ANNE DOBIAS, HUSBAND AND WIFE, AND PAM DOBIAS, AN INDIVIDUAL, APPELLANTS, AND JOHN THOMAS, AN INDIVIDUAL, APPELLEE.

531 N.W.2d 217

Filed May 5, 1995. No. S-93-962.

1. **Declaratory Judgments.** Whether a declaratory judgment action is treated as an action at law or one in equity is determined by the nature of the dispute.
2. **Statutes: Appeal and Error.** The interpretation of statutory language presents 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.
3. **Statutes: Legislature: Intent: Appeal and Error.** When asked to interpret a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
4. **Statutes: Legislature: Intent.** To determine the legislative intent of a statute, a court generally considers the subject matter of the whole act, as well as the particular topic of the statute containing the questioned language.
5. **Statutes.** Absent 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.
6. **Insurance: Contracts: Liability.** The language of Neb. Rev. Stat. §§ 44-2702(4) and 44-2707(3)(b) (Reissue 1993) does not encompass liability of an insolvent insurer arising under law rather than under the provisions of the policy such insurer issued.
7. **Statutes: Appeal and Error.** It is not within the province of the courts to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute.

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

John Thomas and Gregory M. Neuhaus for appellants.

Susan Kubert Sapp, of Cline, Williams, Wright, Johnson & Oldfather, for appellee Nebraska Life & Health.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, and CONNOLLY, JJ.

CAPORALE, J.

## I. STATEMENT OF CASE

In this declaratory judgment action, the defendants-

appellants, Jerry Dobias; his wife, Anne Dobias; and their daughter, Pam Dobias, and the defendant-appellee, their attorney, John Thomas, challenge the summary judgment entered by the district court in favor of the plaintiff-appellee, The Nebraska Life and Health Insurance Guaranty Association, determining that the association is not obligated to pay the interest, costs, and attorney fees awarded the Dobiases on a judgment entered in their favor in another case. The brief filed in the Nebraska Court of Appeals asserts that the district court erred in concluding that the language of the Nebraska Life and Health Insurance Guaranty Association Act, Neb. Rev. Stat. §§ 44-2701 through 44-2720 (Reissue 1993), precludes such payment. Under our authority to regulate the caseloads of the two appellate courts, we, on our own motion, removed the matter to this court. We now affirm the judgment of the district court.

## II. SCOPE OF REVIEW

Whether a declaratory judgment action is treated as an action at law or one in equity is determined by the nature of the dispute. *VRT, Inc. v. Dutton-Lainson Co.*, *ante* p. 845, 530 N.W.2d 619 (1995). As resolution of the dispute here rests upon the interpretation of statutory language, the questions presented are matters of law, in connection with which we have an obligation to reach an independent conclusion irrespective of the determination made by the court below. See *Rust v. Buckler*, *ante* p. 852, 530 N.W.2d 630 (1995).

## III. FACTS AND CONTENTIONS

The Dobiases were insured under a health insurance policy issued by Service Life Insurance Company of Omaha. After our determination in *Dobias v. Service Life Ins. Co.*, 238 Neb. 87, 469 N.W.2d 143 (1991), that the expenses incurred as the result of the daughter's injuries and which Service Life had refused to pay were covered under the policy, the Dobiases obtained a judgment against Service Life in the amount of $31,462.23 for the covered expenses, plus $9,609.34 for interest, $494.56 for costs, and $13,748.48 for an attorney fee (a total of $55,314.61).

Before payment of the judgment, Service Life became Omaha

Life Insurance Company and, as such, requested and obtained approval of a bulk reinsurance contract under which Legacy Life Insurance Company, a Nebraska insurance corporation, assumed and reinsured Omaha Life's business.

Legacy Life thereafter became insolvent and was ordered dissolved. As of the summary judgment hearing, the liquidation of Legacy Life had not been completed, and the liquidator had neither denied nor objected to the claim for payment of all sums awarded which the Dobiases presented to the liquidator. The claim before the liquidator, however, is not before us. What is before us is the claim the Dobiases filed with the association for $55,314.61, representing the total of the sums the association had previously been awarded against Service Life. The association caused payment to the Dobiases in the amount of $31,462.33 but has refused to cause payment of the remaining sums, asserting that it is prohibited from doing so by statute.

The Dobiases urge that as interest, costs, and attorney fees were awarded pursuant to law incident to the judgment resulting from their successful prosecution of an action against their insurer, the association is obligated to cause payment of said items to them.

## IV. ANALYSIS

The association's obligation under the act being the issue before us, we recall that when asked to interpret a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Arizona Motor Speedway v. Hoppe*, 244 Neb. 316, 506 N.W.2d 699 (1993). To determine the legislative intent of a statute, a court generally considers the subject matter of the whole act, as well as the particular topic of the statute containing the questioned language. *Anderson v. Peterson*, 221 Neb. 149, 375 N.W.2d 901 (1985).

The stated purpose of the act is to protect resident policyowners and insureds against the failure of an insolvent or financially impaired insurer to perform its contractual obligations and to assist in the detection and prevention of insurer insolvencies. § 44-2701. The funds required to carry out

the powers and duties of the association are obtained by assessments levied against member insurers. § 44-2708. In determining premium rates and policyowner dividends, member insurers may consider the amount reasonably necessary to meet their assessment obligations under the act. § 44-2708(7). Every insurance company transacting business in Nebraska pays a tax consisting of a percentage of the gross amount of direct writing premiums received by the company during the preceding calendar year. Neb. Rev. Stat. § 77-908 (Cum. Supp. 1994).

The act applies to health insurance policies. § 44-2703. If a domestic health insurer is insolvent, the association is, subject to the approval of the director, to "[a]ssure payment of the contractual obligations of the insolvent insurer to residents." § 44-2707(3)(b). "Contractual obligation" is defined as "any obligation under a policy or contract or portion of such policy or contract for which coverage is provided under section 44-2703." § 44-2702(4). The act is to be construed liberally "to effect the purposes enumerated in section 44-2701 which shall constitute an aid and guide to interpretation." § 44-2704.

We have not heretofore been called upon to determine whether under the act's definition of contractual obligation the association is obliged to pay interest, costs, or attorney fees awarded pursuant to law on a judgment against an insolvent insurer.

However, a review of the decisions of other jurisdictions reveals that the majority of decisions which have considered the issue under statutes similar to ours holds that a guarantor such as the association is not obligated to pay such items. This is so because such a guarantor is not the legal successor of the insolvent insurer. *City of Greensboro v. Reserve Insurance Co.*, 70 N.C. App. 651, 321 S.E.2d 232 (1984). Rather, as a statutory creation, the guarantor is only liable to the extent provided by the statute creating the guarantor. *Virginia Prop. and Cas. Ins. v. Int'l Ins.*, 238 Va. 702, 385 S.E.2d 614 (1989); *Saylin v. Cal. Ins. Guarantee Ass'n*, 179 Cal. App. 3d 256, 224 Cal. Rptr. 493 (1986); *City of Greensboro, supra*.

For example, in *Rowley v. First Columbia Life Ins.*, 741 F. Supp. 1259 (S.D. Miss. 1989), the court held that, under a statute defining "contractual obligation" as any obligation under

covered policies, the guarantor was not liable for the portion of a default judgment representing punitive damages and attorney fees obtained against an insolvent insurer, as the items were not contractual obligations owed by the insolvent insurer. *Rowley* relied heavily on *Crider v. Ga. Life & Health Ins. &c.*, 188 Ga. App. 407, 373 S.E.2d 30 (1988), a case on which the association here also places heavy reliance.

The *Crider* court held that the insureds of an insolvent insurance company were not entitled to recover penalties and attorney fees from the guarantor to satisfy a judgment rendered against the insurer prior to insolvency.

It is worth noting that by the time *Crider* was decided, the Georgia Legislature had amended the insurance guaranty statute to expressly exclude any claim or judgment for punitive damages and attorney fees associated therewith against any insolvent insurer, or the insurer's insolvency pool. However, in *Colwell v. Voyager Cas. Ins. Co.*, 184 Ga. App. 842, 363 S.E.2d 310 (1987), the court noted the amendment and rejected the argument that claims for punitive damages and attorney fees asserted prior to the amendment would have been enforceable against the guarantor. Noting that its pre-1985 amendment decisions interpreted contractual obligations as excluding punitive damages and attorney fees, the court concluded that the legislative amendment merely made explicit that which the statutory provision had previously made only implicit. See, also, *Garel v. Georgia Insurers' Insolvency Pool*, 191 Ga. App. 572, 382 S.E.2d 400 (1989).

*Florida Ins. Guar. Ass'n v. Price*, 450 So. 2d 596, 597 (Fla. App. 1984), held that when an insurance company, pursuant to its contractual duty to defend the insured, incurred court costs prior to its insolvency, such costs were not " 'covered claims' " within the meaning of the statute governing payment by the guarantor of covered claims under policies issued by insolvent insurers, since the costs were not incurred by the insured himself. Similarly, a guarantor was not obligated to pay attorney fees incurred by the insured before the insurer became insolvent. *Maguire, Ward, Maguire v. Idaho Ins. Guar.*, 112 Idaho 166, 730 P.2d 1086 (Idaho App. 1986). Moreover, while the insured of an insolvent workers' compensation carrier was

entitled to indemnification by the guarantor for the disability awards the employer would be required to pay the injured employee, the guarantor was not liable for interest on any amounts expended by the employer for the injured employee's claim. *Hankins Const. v. Missouri Ins. Guar. Ass'n*, 724 S.W.2d 583 (Mo. App. 1986).

In *City of Greensboro, supra*, the court held that the guarantor was not liable for prejudgment interest even though the insolvent insurer might have been liable for such interest. The *Greensboro* court acknowledged that statutory provisions allowed interest to be awarded in a breach of contract action but reasoned that interest arose from statute, not the contract, noting, as mentioned earlier, that the guarantor was a statutory creation rather than a legal successor of the insolvent insurer.

Jurisdictions which have held a guarantor liable for sums awarded incident to a judgment against an insolvent insurance company have done so under statutory language different than that before us, or under policy language which specifically provided for payment of the item. E.g., *Russell v. Pa. Ins. Guar. Ass'n*, 339 Pa. Super. 458, 489 A.2d 251 (1985) (statute required guarantor to assume all rights, duties, and obligations of insolvent insurer); *Carrier v. Hawaii Insurance Guaranty Assn.*, 68 Haw. 545, 721 P.2d 1236 (1986) (policy expressly provided for payment of attorney fee); *Commercial Union Ins. Co. v. Sepco Corp.*, 918 F.2d 920 (11th Cir. 1990) (statute encompassed all financial loss).

In interpreting a statute, it is our obligation, absent anything indicating to the contrary, to give the language 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. See *Dillard Dept. Stores v. Polinsky, ante* p. 821, 530 N.W.2d 637 (1995).

Read in its plain and ordinary sense, the language of §§ 44-2702(4) and 44-2707(3)(b) limits the association's liability to those obligations of Legacy Life which arose under the policy Legacy Life issued. The Legislature's admonition that the act be liberally construed does not grant us a license to add words to its language which the Legislature itself did not provide. The language of the foregoing statutes does not

encompass liability of an insolvent insurer arising under law rather than under the provisions of the policy such insurer issued. It is not within the province of the courts to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute. *Rust v. Buckler, ante* p. 852, 530 N.W.2d 630 (1995); *Dillard Dept. Stores, supra.*

## V. JUDGMENT

Consequently, as noted in part I, the judgment of the district court must be and hereby is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

WHITE, C.J., dissenting.

I dissent. The majority holds that The Nebraska Life and Health Insurance Guaranty Association is not obligated to pay the interest, costs, and attorney fees awarded in this case; that the plain language contained in Neb. Rev. Stat. §§ 44-2702(4) and 44-2707(3)(b) (Reissue 1993) does not cover interest, costs, and attorney fees.

In general, statutes in existence at the time the contract was made become part and parcel of the contract as if set forth therein. *In re Estate of Peterson*, 221 Neb. 792, 381 N.W.2d 109 (1986). See, also, *Haakinson & Beaty Co. v. Inland Ins. Co.*, 216 Neb. 426, 344 N.W.2d 454 (1984) (every law affecting a contract is read into the contract and becomes part of the contract); *Bickford v. Board of Ed. of Sch. Dist. # 82*, 214 Neb. 642, 336 N.W.2d 73 (1983) (contracts include all applicable statutes, whether specifically mentioned or not).

Specifically, statutes which affect insurance policies and which are in effect at the time contracts for insurance policies are made become part and parcel of the insurance policy. *Protective Fire & Cas. Co. v. Cornelius*, 176 Neb. 75, 125 N.W.2d 179 (1963). See, *Burstein v. State Mutual Life Assurance Co.*, 140 Neb. 624, 1 N.W.2d 115 (1941); *Reinsch v. Pacific Mutual Life Ins. Co.*, 140 Neb. 225, 299 N.W. 632 (1941); *Kelly v. Prudential Ins. Co.*, 130 Neb. 873, 266 N.W. 757 (1936). We held in *State Farm Mut. Auto Ins. Co. v. Fitzgerald*, 214 Neb. 226, 334 N.W.2d 168 (1983), that we must look beyond the terms of the insurance policy and examine

the laws in effect which formed part of the policy as if the laws were expressly referred to in the policy.

In the case now before us, Neb. Rev. Stat. § 45-104 (Reissue 1993) provides that "[u]nless otherwise agreed, interest shall be allowed at the rate of twelve percent per annum on money due on any instrument in writing . . . ." This statute was in effect at the time the Dobiases bought the insurance policy. The statute affects the insurance policy and, by lack of a contractual provision otherwise changing the interest rate, clearly becomes part of the insurance policy. Neb. Rev. Stat. § 44-359 (Reissue 1993) allows an insured who successfully brings an action on an insurance policy to recover attorney fees to be taxed as costs. That statute was also in effect at the time the Dobiases bought the insurance policy. Section 44-359 clearly affects the insurance policy and also becomes part of the insurance policy.

Clearly, then, the insurer was obligated under its contract with the insured and the applicable statutes to pay interest and attorney fees. As the insurer was obligated to pay under the contract, so is the guaranty association.

FAHRNBRUCH, J., joins in this dissent.

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DALE E. WREDE ET AL., COPERSONAL REPRESENTATIVES OF THE ESTATE OF JUNE L. WREDE, DECEASED, APPELLANTS AND CROSS-APPELLEES, V. EXCHANGE BANK OF GIBBON, NEBRASKA, APPELLEE AND CROSS-APPELLANT.

531 N.W.2d 523

Filed May 5, 1995. No. S-93-1018.

1. **Parties: Standing: Appeal and Error.** Only an aggrieved party can take an appeal.
2. ____: ____: ____. A nonaggrieved party against whom an appeal is taken may cross-appeal.
3. ____: ____: ____. One who has been granted that which she or he sought has not been aggrieved.

4. **Judgments: Appeal and Error.** An appeal lies if the judgment granted possesses qualities and legal consequences different from those sought on alternative grounds.
5. **Securities Regulation: Banks and Banking: Words and Phrases.** For the purposes of the Securities Act of Nebraska, Neb. Rev. Stat. §§ 8-1101 through 8-1123 (Reissue 1991), a certificate of deposit issued by a regulated banking institution at a fixed rate of interest with virtually no risk of loss is not a security.
6. **Consumer Protection: Jurisdiction: Immunity.** While under Neb. Rev. Stat. § 59-1617(1) (Reissue 1993) particular conduct is not immunized from the operation of the Consumer Protection Act merely because the actor comes within the jurisdiction of some regulatory body, immunity does arise if the conduct itself is also regulated.
7. **Actions: Equity.** Assumpsit for money had and received lies whenever one has received money which in equity and good conscience one should pay to another.
8. ____: ____. Where a party has received money which in equity and good conscience one should pay to another party, the law implies a promise on the part of the party having the money to pay such money to the party who should have it.
9. **Actions.** Although founded on equitable principles, an action in assumpsit for money had and received is one at law.
10. **Banks and Banking: Statutes: Contracts.** Absent proof of fraud, contractual arrangements between a bank and its depositors with respect to the bank's right of setoff may supersede statutory provisions concerning such rights.
11. **Actions: Equity.** There must be some specific legal principle or situation which equity has established or recognized to bring a case within the scope of assumpsit for money had and received.
12. **Actions: Contracts.** Where the rights of parties to money or property are governed by a valid contract, an action for money had and received does not lie.
13. **Unjust Enrichment: Contracts.** One who is free from fault cannot be held to be unjustly enriched merely because one has chosen to exercise a legal or contract right.
14. **Actions: Contracts: Rescission.** When there are contract terms controlling and there is no duress, an action for money had and received for money paid on a contract cannot be maintained without rescission of the contract.
15. **Contracts.** An express and an implied contract for the same thing cannot exist at the same time.
16. ____. In the absence of fraud, one who signs an instrument without reading it, when one can read and has had the opportunity to do so, cannot avoid the effect of one's signature merely because one was not informed of the contents of the instrument.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Reversed and remanded with direction to dismiss.

Kent A. Schroeder, of Ross, Schroeder, Brauer & Romatzke, for appellants.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellee.

Robert J. Hallstrom, of Brandt, Horan, Hallstrom & Sedlacek, for amicus curiae Nebraska Bankers Association, Inc.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and BUCKLEY, D.J.

CAPORALE, J.

## I. STATEMENT OF CASE

The defendant-appellee, Exchange Bank of Gibbon, Nebraska, a banking institution organized and chartered under the laws of Nebraska, offset a claim against a certificate of deposit it had issued to June L. Wrede and others. Wrede thereupon instituted this suit to recover the amount of the setoff, asserting a number of theories of recovery as more particularly set forth in part IV hereof. Notwithstanding that the district court entered a judgment in her favor on one of her theories, Wrede undertook this appeal to the Nebraska Court of Appeals, asserting that the district court erred in ruling against her on her other theories. The Bank of Gibbon responded by cross-appealing, averring that the district court erred in ruling in favor of Wrede at all. We thereafter granted Wrede's petition to bypass the Court of Appeals. Wrede has since died, and the action has been revived in the names of her copersonal representatives, her children, Dale E. Wrede, Marilyn L. Ramsay, and Donna L. Ellis, as plaintiffs-appellants. For the reasons hereinafter set forth, we now reverse the judgment of the district court and remand the matter with the direction that it be dismissed.

## II. FACTS

Wrede initially purchased from the Bank of Gibbon certificates of deposit numbered 7463, 11604, and 11712, each having a face value of $18,725.

Later, Wrede's son and his wife bought a grocery store and borrowed $70,000 from the Bank of Gibbon, executing promissory notes totaling $70,000 in its favor. In order to secure the loans, Wrede pledged certificate 11712 as collateral, executing an "Assignment of Certificate of Deposit." The Bank

of Gibbon then took possession of the instrument.

Thereafter, Wrede asked that the names of her son and her daughter Marilyn Ramsay be added to all three of the certificates then outstanding. The bank complied by typing "or Dale Wrede and Marilyn Ramsay WROS" after Wrede's name.

During a later renewal period, Wrede decided of her own accord to cash certificate 11604 and purchase two new certificates in its place. She presented herself at the Bank of Gibbon, endorsed and surrendered certificate 11604, received $20,268.54, and with that money purchased and received a new 12-month nonrenewable certificate numbered 12024 in the amount of the original principal, $18,725, which bore a higher interest rate than the replaced certificate, and a 6-month certificate numbered 7651 with the remaining $1,543.54. At Wrede's request, each of the new certificates included the names of her son and her daughter Marilyn Ramsay in the same manner as their names had appeared on the replaced certificate.

However, the new certificates differed from the replaced certificate in that the new instruments contained a provision reading:

> RIGHT OF SET-OFF...Bank may, at any time and for any reason, charge to or set-off against any amount then on deposit in this and any other account, whether or not then due, any and all debts or liabilities then owed to bank by depositor or, in the case of a multiple-party account, by any party to such multiple-party account.

Wrede did not read the new certificates, and the employee of the Bank of Gibbon issuing them did not know of the setoff provision.

The son and his wife thereafter defaulted on their loan, and the Bank of Gibbon set off its claim against a certificate substituted for previously assigned certificate 11712. The Bank of Gibbon later satisfied the balance of $15,384.54 remaining due on the loan by setting off that sum against certificate 12024.

## III. SCOPE OF REVIEW

As the analysis which follows will demonstrate, the questions presented turn out to be questions of law, in connection with which this court has an obligation to reach an independent conclusion irrespective of the determination made by the trial

court. *Rust v. Buckler, ante* p. 852, 530 N.W.2d 630 (1995).

## IV. ANALYSIS OF WREDE APPEAL

Wrede complained that in one way or another, the district court ruled against her on three of the theories of recovery she had pled, namely, on the claimed violations of the Bank of Gibbon's alleged duty to disclose the offset provisions to her; its alleged duty to comply with the Securities Act of Nebraska, Neb. Rev. Stat. §§ 8-1101 through 8-1123 (Reissue 1991); and its alleged duty to comply with the provisions of the Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 through 59-1623 (Reissue 1993).

Wrede had also claimed she was entitled to recover on the theory of assumpsit for money had and received. In connection with that theory, the district court found that it could not "in good conscious [sic] find that the contractual provisions of 'right of set-off', should be enforceable" and entered judgment for Wrede in the sum of $15,384.54, plus interest at the certificate rate from about the date of setoff.

The first question which presents itself is whether, having obtained a judgment in her favor, Wrede had standing to appeal and, if so, what she had standing to question. Only an aggrieved party can take an appeal. *Atokad Ag. & Racing v. Governors of Knts. of Ak-Sar-Ben*, 237 Neb. 317, 466 N.W.2d 73 (1991), *overruled in part, Eccleston v. Chait*, 241 Neb. 961, 492 N.W.2d 860 (1992); *Federal Dep. Ins. Corp. v. Swanson*, 231 Neb. 148, 435 N.W.2d 659 (1989), *overruled in part, Eccleston, supra*. However, a nonaggrieved party against whom an appeal is taken may cross-appeal. *Eccleston, supra*; Neb. Ct. R. of Prac. 1E (rev. 1992). One who has been granted that which she or he sought has not been aggrieved. *Federal Dep. Ins. Corp., supra*; *Saum v. L. R. Foy Constr. Co., Inc.*, 190 Neb. 783, 212 N.W.2d 648 (1973). However, an appeal lies if the judgment possesses qualities and legal consequences different from those sought on alternative grounds. See, *Galvan v. Miller*, 79 N.M. 540, 445 P.2d 961 (1968); *Aetna Casualty and Surety Company v. Cunningham*, 224 F.2d 478 (5th Cir. 1955).

Wrede sought and was entitled only to money damages under

either of the assumpsit and nondisclosure theories. Thus, the judgment she obtained under the assumpsit theory embodies the same qualities and legal consequences as would a judgment entered under the nondisclosure theory. As a result, as of the time of her appeal, Wrede had not been aggrieved by the adverse ruling on the nondisclosure theory; as a consequence, she may not question the district court's adverse ruling in that connection.

However, had Wrede been successful under either the securities or consumer protection theory, she would have been entitled to an attorney fee in addition to the money damages she recovered under the assumpsit theory. §§ 8-1118 and 59-1609. Thus, any erroneous adverse ruling with respect to either of those theories would have aggrieved Wrede. We therefore turn our attention to those theories.

### 1. Securities Act of Nebraska

Without detailing what specific provision was involved, Wrede urged that the Bank of Gibbon's failure to call her attention to the differences between replaced certificate 11604 and new certificate 12024 somehow violated the Securities Act of Nebraska. The act defined "security" as meaning

> any note, stock, treasury stock, bond, debenture, units of beneficial interest in a real estate trust, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease, in general any interest or instrument commonly known as a security, or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing. Security shall not include any insurance or endowment policy or annuity contract issued by an insurance company.

§ 8-1101(12).

The parties note that this part of the Securities Act of Nebraska is patterned after the Uniform Securities Act, which, for the purposes of the definition of security in this context, is essentially the same as the federal Securities Act of 1933, 15 U.S.C. § 77b(1) (1988), and the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10) (1988). See *Marine Bank v. Weaver*, 455 U.S. 551, 102 S. Ct. 1220, 71 L. Ed. 2d 409 (1982). Therefore, federal court decisions interpreting the meaning of security are helpful.

In *Marine Bank*, the U.S. Supreme Court analyzed the issue of whether a conventional certificate of deposit is a security. Therein, the respondents had purchased a $50,000 certificate of deposit from the petitioner bank. The respondents then pledged it to guarantee a loan made by the bank to a company which was indebted to it. In exchange, the respondents were to share in the company's profits. The respondents claimed that the loan was to be used to provide working capital for the company, but that, instead, the bank immediately applied it to the company's overdue obligations, which resulted in the company going bankrupt and making it likely that the bank would liquidate the certificate to satisfy the company's obligations. The respondents alleged that the bank knew of the plan to apply the loan to the outstanding obligations rather than allow the company to use it for working capital and that the bank did not disclose this fact.

The *Marine Bank* Court noted that although the word "security" as defined was broad and intended to include many types of instruments including uncommon or irregular ones, the language reading unless " 'the context otherwise requires' " revealed that Congress did not intend to provide a broad federal remedy for all fraud. 455 U.S. at 556.

In distinguishing the certificate of deposit from capital shares in a savings and loan association, which had been held to be securities in *Tcherepnin v. Knight*, 389 U.S. 332, 88 S. Ct. 548, 19 L. Ed. 2d 564 (1967), the *Marine Bank* Court noted that the savings and loan association shares came with voting rights and did not pay a fixed rate of interest, but dividends based on profits, making them more like shares of stock.

In contrasting an ordinary certificate of deposit from other long-term-debt obligations often found to be securities, the

*Marine Bank* Court emphasized that the certificate had been issued by a heavily regulated bank which was federally insured, meaning that there was really no risk involved, as the purchaser was virtually guaranteed full payment rather than assuming the risk of the borrower's insolvency. The Court then concluded that in the context presented, there had not been a purchase or sale of a security.

In *Reves v. Ernst & Young*, 494 U.S. 56, 110 S. Ct. 945, 108 L. Ed. 2d 47 (1990), an agricultural cooperative had advertised and sold uninsured and uncollateralized demand promissory notes paying an adjustable interest rate, advertising them to be safe and secure investments. The cooperative then went bankrupt. The plaintiffs alleged that the defendant auditors for the cooperative had failed to follow generally accepted accounting principles, thereby inflating the value of the property and violating securities laws.

The *Reves* plurality indicated that in determining whether the transactions involved securities, it would take into account economic realities, considering substance over form to effectuate the Congressional purpose of regulating investments. Concluding that the term "*any* note" as used in the definition should not be read literally, as many notes are not securities, the *Reves* plurality nonetheless held the notes in question to be securities. In doing so, it noted that the purpose of the seller was to raise money for its general business operations; that the notes were bought to earn profits in the form of interest; that there was "common trading" of the notes, which were offered and sold to a broad segment of the public; that the public reasonably perceived from the advertisements that the notes were investments; that there was no risk-reducing factor; and that in the absence of applying the securities laws, the notes would escape federal regulation.

In short, the notes in *Reves* did not bear a " 'family resemblance' " to the list of items judicially determined not to be securities and thus did not overcome the presumption that any note payable after a sufficient length of time is a security. 494 U.S. at 67.

The situation here is more like that presented in *Marine Bank* than that presented in *Reves*. Deposits in Nebraska banks are

protected by reserve, reporting, and inspection requirements. See Neb. Rev. Stat. §§ 8-108, 8-110, 8-112, and 8-131 (Reissue 1991). Also, Nebraska banks must be federally insured or give notice that the fact is otherwise. Neb. Rev. Stat. §§ 8-103.01 and 8-702 (Reissue 1991). An insolvent Nebraska bank may not accept any deposits. Neb. Rev. Stat. § 8-138 (Reissue 1991). Thus, Wrede loaned money to a heavily regulated banking institution at a fixed rate of interest with virtually no risk of loss.

Under the circumstances, certificate of deposit 12024 was not a security as contemplated by the Securities Act of Nebraska; thus, if for no other reason, the district court correctly determined that there had been no violation of that act.

2. Consumer Protection Act

Wrede also asserted that the Bank of Gibbon's failure to call her attention to the differences between the replaced and new certificates somehow violated the Consumer Protection Act, although she did not explain in what particular. At the time of the transaction in question, the act exempted from its ambit "actions or transactions otherwise permitted, prohibited, or regulated under laws administered by the Director of Insurance, the Public Service Commission, the Federal Energy Regulatory Commission, or any other regulatory body or officer acting under statutory authority of this state or the United States." § 59-1617(1).

In *Kuntzelman v. Avco Financial Services of Nebraska, Inc.*, 206 Neb. 130, 291 N.W.2d 705 (1980), we concluded that the foregoing exemption excluded from the purview of the Consumer Protection Act a loan made pursuant to the installment loan act by one licensed thereunder to make such a loan. We found it significant that not only was the licensee regulated by the state under statutory authority, but the very act of making a loan was regulated. The teaching of *Kuntzelman* is that while particular conduct is not immunized from the operation of the Consumer Protection Act merely because the actor comes within the jurisdiction of some regulatory body, immunity does arise if the conduct itself is also regulated.

This teaching was applied in *McCaul v. American Savings*

*Co.*, 213 Neb. 841, 331 N.W.2d 795 (1983), wherein we concluded that because the lender was state regulated and the loans in question had been reported to and at least indirectly approved by the regulator, the Consumer Protection Act did not apply. We next held, in *Hydroflo Corp. v. First Nat. Bank*, 217 Neb. 20, 349 N.W.2d 615 (1984), that the Consumer Protection Act did not cover the bank's failure to require, contrary to its standard practice, a corporate resolution in opening a corporate account because not only did the Department of Banking and Finance have general supervision and control over the bank, it had a duty to " '*constructively aid banks in maintaining proper banking standards and efficiency*.' " (Emphasis in original.) *Id.* at 33, 349 N.W.2d at 622. Relying on *Kuntzelman* and *McCaul*, we then ruled in *Little v. Gillette*, 218 Neb. 271, 354 N.W.2d 147 (1984), without detailing our rationale other than to note that both a bank and realty company were state regulated, that their conduct was exempt from the Consumer Protection Act.

Here, not only was the Bank of Gibbon heavily regulated by the state, but the form of certificate used was at least indirectly approved by virtue of the authority of the state, through the director of the Department of Banking and Finance, to constructively aid banks in maintaining proper banking standards and efficiency. See, *Hydroflo Corp., supra*; *McCaul, supra*.

Because issuance of the certificate was exempted from the purview of the Consumer Protection Act, the district court, if for no other reason, correctly determined that there had been no violation of the act.

## V. ANALYSIS OF CROSS-APPEAL OF BANK OF GIBBON

That brings us to the Bank of Gibbon's cross-appeal, in which it is claimed, in summary, that the district court erred in entering judgment for Wrede on her assumpsit theory.

Assumpsit for money had and received lies whenever one has received money which in equity and good conscience one should pay to another. See *Hydroflo Corp., supra*. In such a circumstance, the law implies a promise on the part of the party having the money to pay such money to the party who should

have it. See *Sesostris Temple Golden Dunes v. Schuman*, 226 Neb. 7, 409 N.W.2d 298 (1987). Although founded on equitable principles, an action in assumpsit for money had and received is one at law. See *Barker v. Wardens & Vestrymen of St. Barnabas Church*, 171 Neb. 574, 106 N.W.2d 858 (1961).

*Uttecht v. Norwest Bank of Norfolk*, 221 Neb. 222, 376 N.W.2d 11 (1985), establishes that absent proof of fraud, contractual arrangements between a bank and its depositors with respect to the bank's right of setoff may supersede statutory provisions concerning such rights. Having a contractual right to the setoff, it cannot be said that the Bank of Gibbon received money which in equity and good conscience it should have paid to Wrede. Thus, the Bank of Gibbon had every right to include a setoff provision in its certificates of deposit, and its existence provided no basis for an action in assumpsit.

Although it appears we have not expressly so written heretofore, there must be some specific legal principle or situation which equity has established or recognized to bring a case within the scope of assumpsit for money had and received. See *University v. Forbes*, 88 N.H. 17, 183 A. 860 (1936). See, also, *Beauregard v. Orleans Trust Co.*, 108 Vt. 42, 182 A. 182 (1936) (no recovery of money received can be based upon unjust enrichment when recipient can show legal or equitable ground for keeping it); *Renn v. Wendt*, 185 Minn. 461, 241 N.W. 581 (1932) (where rights of parties to money or property are governed by valid contract, action for money had and received does not lie). Stated otherwise, one who is free from fault cannot be held to be unjustly enriched merely because one has chosen to exercise a legal or contract right. Cf. *Worthen Bank & Trust Co. v. Franklin Life Insurance Co.*, 260 F. Supp. 1 (E.D. Ark. 1966), *aff'd* 370 F.2d 97 (8th Cir.); *Pelser v. Gingold*, 214 Minn. 281, 8 N.W.2d 36 (1943); *Anderson v. Anderson*, 155 Kan. 69, 123 P.2d 315 (1942).

Moreover, it is generally held that when there are contract terms controlling and there is no duress, an action for money had and received for money paid on a contract cannot be maintained without rescission of the contract. *Harriss v. Tams*, 258 N.Y. 229, 179 N.E. 476 (1932); *Newell v. Rosenberg*, 275 Mass. 455, 176 N.E. 616 (1931); *Day v. Broyles*, 222 Ala. 508,

133 So. 269 (1931); *King v. Mortimer*, 83 Cal. App. 2d 153, 188 P.2d 502 (1948); *Huth v. Picotte*, 154 S.W.2d 382 (Mo. App. 1941); *Dahler v. Meistrell*, 224 Mo. App. 815, 24 S.W.2d 238 (1929). In a different context, we have held that as there cannot be an express and an implied contract for the same thing existing at the same time, one could not at one and the same time claim there were both an express and an implied contract covering the installation of a mechanical system. *Siebler Heating & Air Conditioning v. Jenson*, 212 Neb. 830, 326 N.W.2d 182 (1982).

Wrede did not attempt to rescind the contract represented by the certificate, nor was there shown any basis for doing so. The setoff provision was there to be read, and no fraud or misrepresentation on the part of the Bank of Gibbon has been established. In the absence of fraud, one who signs an instrument without reading it, when one can read and has had the opportunity to do so, cannot avoid the effect of one's signature merely because one was not informed of the contents of the instrument. *Smith v. Ganz*, 219 Neb. 432, 363 N.W.2d 526 (1985).

Nor is the ignorance of the existence of the setoff provision on the part of the Bank of Gibbon employee who sold certificate 12024 to Wrede of any significance. Since it was the Bank of Gibbon's language, it certainly knew of it. As a consequence, it cannot be said that there occurred in any sense a mutual mistake such that no contract between Wrede and the Bank of Gibbon came into being.

Accordingly, the Bank of Gibbon's cross-appeal is meritorious.

## VI. JUDGMENT

As noted in part I, the judgment of the district court is reversed and the cause remanded with the direction that it be dismissed.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

# STEPHEN R. HEMMERLING, APPELLANT, V. HAPPY CAB CO., APPELLEE.

530 N.W.2d 916

Filed May 5, 1995. No. S-94-173.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the compensation court after review shall have the same force and effect as a jury verdict in a civil case.
2. ____: ____. A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
3. **Master and Servant.** Where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law.
4. **Workers' Compensation: 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 methods or means used. Such a person is not an employee within the meaning of the workers' compensation statutes.
5. **Independent Contractor: Employer and Employee.** There is no single test to determine whether a worker is an employee or an independent contractor, but the determination must be made from all the facts in the case. Control or the right of control is the chief factor to be considered when identifying one acting on behalf of another as an employee or an independent contractor; it is not the conclusive factor.
6. **Independent Contractor: Employer and Employee: Contracts.** Employer-employee and employer-independent contractor relationships arise from the contract between the parties.
7. **Independent Contractor: Contracts.** When there is a written contract between the parties which denominates and describes the relationship as that of independent contractor, and nothing in the manner of performance by the parties is inconsistent with the relationship described, then the independent contractor is not deemed to be an employee as a matter of law.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and CONNOLLY and HANNON, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals reversed, and cause remanded with directions.

Howard A. Kaiman for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

LANPHIER, J.

While operating a Happy Cab Co. taxicab, appellant, Stephen R. Hemmerling, was involved in a traffic accident and suffered personal injuries. Hemmerling's claim for workers' compensation benefits was denied, and Hemmerling filed a petition in the Workers' Compensation Court. In his petition, Hemmerling stated that the matters in dispute were "whether accident occured [sic] arising out of course of employment, extent of disability[,] whether plaintiff was an employee, medical bills." The court held that Hemmerling was an independent contractor on the date of the accident and not an employee. Therefore, the court denied Hemmerling's claim for workers' compensation benefits without reaching any of the other disputed matters. Hemmerling appealed to the Workers' Compensation Court review panel, which affirmed the denial of benefits. Hemmerling appealed the review panel's decision to the Nebraska Court of Appeals, which also held that Hemmerling was an independent contractor rather than an employee and affirmed the lower courts' denial of benefits. *Hemmerling v. Happy Cab Co.*, 94 NCA No. 44, case No. A-94-173 (not designated for permanent publication). We granted Hemmerling's petition for further review and reverse the holdings of the lower courts. The contractual agreements between the parties placed the right of control over the taxicab in Happy Cab, and Happy Cab in fact exercised extensive control over the taxicab and its only driver, Hemmerling. Therefore, as a matter of law, Hemmerling is an employee rather than an independent contractor and thus is entitled to workers' compensation coverage. We remand the cause for a determination of the remaining matters in dispute.

## STATEMENT OF FACTS

On June 1, 1992, while Hemmerling was operating a Happy Cab taxicab, the taxicab was struck from behind by a rental truck, and Hemmerling was injured. Hemmerling testified that after the accident, he suffered lightheadedness and ringing in his ears. Hemmerling tried to return to work, but he did not feel he could safely drive a cab, and left the occupation.

At the time of the hearing in Workers' Compensation Court, Happy Cab operated approximately 95 cabs. Richard Anderson, president of Butler Holdings Company, which owns Happy Cab, testified that the Nebraska Public Service Commission (PSC) requires the cabs to be owned by the cab company. The cab company then leases the cabs to drivers. On September 13, 1991, the parties executed two agreements, a rental agreement and an equipment lease agreement.

In the rental agreement, Happy Cab is referred to as "Equipment Company" and Hemmerling is referred to as "Renter." Under the rental agreement, Happy Cab provided a taxicab to Hemmerling for a term of 1 month, such term to be automatically renewed unless canceled pursuant to the terms of the agreement. Hemmerling agreed to pay Happy Cab $275 per week for the use of the taxicab. Hemmerling was required to pay all expenses in operating and maintaining the taxicab. Further, paragraph 6 of the rental agreement states:

> Renter represents that it is renting this equipment in lieu of buying this or a comparable motor vehicle to permit Renter to enter into an independent contractor agreement with a certificated motor carrier approved by Equipment Company wherein Renter will provide a qualified and approved driver and fully maintained equipment to supplement the motor vehicle fleet of the motor carrier pursuant to the applicable directives of the Nebraska Public Service Commission.

By the terms of the second agreement, the equipment lease agreement, also executed on September 13, Hemmerling leased the taxicab to Happy Cab for a term of 1 year. Anderson testified that the lease agreement was drafted by the PSC and that the leases of all current cab operators had to be submitted to the PSC on a monthly basis.

In the equipment lease agreement, Hemmerling is referred to as the "lessor" and Happy Cab is referred to as the "lessee." The following terms of the equipment lease agreement are pertinent to this issue:

> 2. **LESSOR*, LESSEE*** shall pay for all gasoline, oil and other operating expenses, and all repairs necessary to keep such equipment in good running condition throughout the term of this lease. **LESSOR*, LESSEE*** shall be

responsible and pay all necessary licenses for such equipment as may legally be required. . . .

. . . .

*4. Possession and control of the equipment during the period of this lease is entirely vested in the Lessee, in such way as to be good against all the world, including the Lessor. Operation of the equipment shall be under the* ***exclusive control and supervision of the Lessee*** *which will be operated by Lessee in the ordinary course of Lessee's business.*

5. The driver of the equipment shall be exclusively the employee of the **LESSOR*, LESSEE*** and the **LESSOR*, LESSEE*** will pay the salaries of the personnel necessary to operate the equipment, and all cost of Workmen's Compensation Insurance or other employee insurance and taxes required by law.

(Emphasis supplied.)

Paragraphs 2 and 5 contain the alternative terms "lessor" and "lessee." The agreement states the parties were to strike the party (marked by an asterisk) which did not apply. The parties failed to strike the inapplicable party in both paragraphs. By the terms of the above agreements, Hemmerling had use of the cab on a 24-hour basis. Hemmerling had no set working hours but, according to PSC rules, could drive no more than 12 hours during a 24-hour period. Hemmerling could make personal use of the cab, but he could not subcontract the vehicle to another driver or set up his own taxi service. Although Happy Cab did not set hours for its drivers, it would call drivers to work if needed. If called, the driver was not required to respond.

Hemmerling kept all the fares generated by driving the cab. Drivers obtained passengers by taking orders off the radio. A driver would request an order for a fare from the dispatcher by first driving to a specified zone and calling the dispatcher by radio to notify the dispatcher that the driver was available in the zone. An order was then offered to the driver on a basis of "first come, first served." If the driver refused the order, the order would then be offered to the next driver. Once a driver refused an offer, Happy Cab required the driver to drive to another zone before that driver could receive another offer.

Drivers could solicit their own business independently of the dispatch service. Passengers could be solicited at the airport, the bus depot, and hotels. However, drivers were not allowed to carry beepers or cellular phones in their cabs. Anderson testified that drivers were not permitted phones or beepers for safety reasons.

Organizations such as the public schools and the Department of Social Services contracted with Happy Cab for cab service and paid for or charged this service directly to Happy Cab. In those instances, 100 percent of the fares generated were turned over to the driver by Happy Cab.

New drivers were required to complete an application stating their work history and to obtain a permit from the Omaha police department. Pursuant to Happy Cab policy, drivers were subject to drug screening and a criminal history background check before being hired. New drivers were given a collection of documents entitled "Taxicab Trainee Guide." The trainee guide contained information regarding Happy Cab's business principles, radio use, customer service, et cetera. At their option, new drivers received orientation regarding the dispatching procedures and could drive with a more experienced driver in order to learn how to work the radio and other operational procedures.

Drivers' employment could be terminated if Happy Cab received three complaints from passengers.

Drivers purchased their own gasoline and paid for the maintenance and repairs of their vehicles. Drivers were required to have their cabs serviced and inspected once a month by Happy Cab. In exchange for $20, Happy Cab changed the oil, air filter, and oil filter. The drivers were not allowed to have the monthly inspection done elsewhere, and if one failed to have the cab inspected, the driver was "taken off the air" until he or she brought the cab in for service. Being taken off the air meant that the dispatcher would not issue any orders to the driver.

Happy Cab had public liability insurance with a self-insurance retention of $25,000 per incident. Drivers contributed $25 per week to pay the claims incurred under the $25,000 deductible. The self-insurance fund was administered by Happy Cab's safety department, and that department

determined whether to pay any claims. Initially, Happy Cab provided an accounting of the self-insurance fund to the drivers and had returned some $40,000 in excess payments. Happy Cab discontinued accounting to the drivers sometime in 1990.

As stated above, Hemmerling paid Happy Cab $275 per week to lease the taxicab, $20 monthly inspection fee, and $25 per week self-insurance fee, plus he paid for all gasoline and other operating expenses. Hemmerling kept 100 percent of all fares received. The fare rates are set by the PSC. Happy Cab did not withhold any Social Security, state, or federal income tax.

## ASSIGNMENTS OF ERROR

In his petition for further review, Hemmerling assigns six errors. In summary, he asserts the Court of Appeals erred by holding that as a matter of law, there is no single test or conclusive factor which determines whether a worker is an employee or an independent contractor. Additionally, Hemmerling asserts that the Court of Appeals erred in determining that there was sufficient evidence in the record to support the trial court's finding that he was an independent contractor and in ignoring contrary evidence which supported a finding that he was an employee.

## STANDARD OF REVIEW

The findings of fact made by a Workers' Compensation Court trial judge are not to be disturbed upon appeal to a Workers' Compensation Court review panel unless they are clearly wrong on the evidence or the decision was contrary to law. Neb. Rev. Stat. § 48-179 (Reissue 1993). If the record contains evidence to substantiate the factual conclusions reached by the trial judge, the review panel shall not substitute its view of the facts for that of the trial judge. See *id.*

In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, the appellate court reviews the findings of the single judge who conducted the original hearing. Neb. Rev. Stat. § 48-185 (Reissue 1993). See, also, *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 513 N.W.2d 361 (1994).

> The judgment made by the compensation court after review shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the

> compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the compensation court do not support the order or award.

§ 48–185 (Reissue 1993).

Ordinarily, when a court is presented with a dispute regarding a party's status as an employee or an independent contractor, the party's status is a question of fact which must be determined after consideration of all the evidence in the case. See, *Delicious Foods Co. v. Millard Warehouse*, 244 Neb. 449, 507 N.W.2d 631 (1993); *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 286 N.W.2d 420 (1979); *Curry v. Bruns*, 136 Neb. 74, 285 N.W. 88 (1939). However, where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law. *Stephens v. Celeryvale Transport, Inc., supra*. See, also, *Smith v. Butler Manuf. Co.*, 230 Neb. 734, 433 N.W.2d 493 (1988).

## ANALYSIS

The right of control is the chief factor distinguishing an employment relationship from that of an independent contractor.

> 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. Such a person is not an employee within the meaning of the workmen's compensation statutes.

*Stephens v. Celeryvale Transport, Inc.*, 205 Neb. at 20, 286 N.W.2d at 425. Accord *Sortino v. Miller*, 214 Neb. 592, 335 N.W.2d 284 (1983). See, also, *Voycheske v. Osborn*, 196 Neb. 510, 244 N.W.2d 74 (1976).

Hemmerling argues that the lower courts erred by holding that as a matter of law, there is no single test or determinative factor which determines whether a worker is an employee or an independent contractor. In his brief in support of his petition for

further review, Hemmerling argues that the relationship created by the written agreements between the parties was that of employer-employee because the equipment lease agreement vested the right of control of the taxicab in Happy Cab. He asserts that the traditional and decisive test of the employer-employee relationship is the right of the employer to control the details of the work.

In its opinion, the Court of Appeals stated that this court has held that there is no single test to determine whether a worker is an employee or an independent contractor, but that the determination must be made from all the facts in the case. *Hemmerling v. Happy Cab Co.*, 94 NCA No. 44, case No. A-94-173 (not designated for permanent publication). The Court of Appeals further stated that Hemmerling's status could not be discerned solely from the two written agreements between the parties, primarily because those documents were inherently ambiguous. *Id.*

We have repeatedly stated that although control or the right of control is the chief factor to be considered when identifying one acting on behalf of another as an employee or an independent contractor, it is not the conclusive factor. *Delicious Foods Co. v. Millard Warehouse, supra*; *Eden v. Spaulding*, 218 Neb. 799, 359 N.W.2d 758 (1984); *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983); *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983).

Ordinarily, when a court is presented with a dispute regarding a party's status as an employee or an independent contractor, there is no contract vesting the right of control in an employer, and in such cases, the party's status is a question of fact. See *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 286 N.W.2d 420 (1979). See, also, *Delicious Foods Co. v. Millard Warehouse, supra*; *Curry v. Bruns*, 136 Neb. 74, 285 N.W. 88 (1939). However, where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law. *Stephens v. Celeryvale Transport, Inc., supra*. See, also, *Smith v. Butler Manuf. Co., supra*. Here, we are presented with a question of law for the reasons more fully explained below. By contract, Happy Cab had the right to control Hemmerling. Further, an application of the analysis we

have used to discern the true nature of an employment versus independent contractor relationship creates a clear inference that a master-servant relationship exists.

Both an employer-employee and an employer-independent contractor relationship arise from the contract between the parties. *Stephens v. Celeryvale Transport, Inc., supra.* In *Knowlton v. Airport Transportation Co.*, 235 Neb. 96, 454 N.W.2d 278 (1990), we stated that when there is a written contract between the parties which denominates and describes the relationship as that of independent contractor, and nothing in the manner of performance by the parties is inconsistent with the relationship described, then the independent contractor is not deemed to be an employee as a matter of law. "If there exists a written contract, it must, of course, be considered and may be of prime importance. . . . However, a writing which merely denominates the relationship may not be used to conceal the true arrangement." (Citations omitted.) *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. at 19, 286 N.W.2d at 424.

Hemmerling argues that *Knowlton* does not apply in this case because the contract in this matter denominates the relationship as one of employment rather than as that of an independent contractor. He speculates that public policy provides the rationale for looking beyond a contract denominating the relationship as that of an independent contractor and that the same public policy precludes doing so when the relationship is denominated as one of employment. Hemmerling's argument fails because neither contract clearly or consistently denominates the relationship between the parties. In fact, in the quoted sections above, Hemmerling is variously described as an independent contractor, a lessor, a lessee, a renter, and a driver. However, the contracts between the parties are important not due to the labels they used, but because in those documents we can discern that Happy Cab possessed the right to control the equipment. That controls Hemmerling.

Paragraph 4 of the equipment lease agreement vests the exclusive control, supervision, and possession of the taxicab in Happy Cab. Paragraph 4 gives Happy Cab the right to control the only equipment used by Hemmerling. This language does not denominate the relationship between the parties; rather, it

proves the first, and most important, factor, which thus establishes that an employment relationship existed between the parties. According to paragraph 4, Happy Cab had the right to control the methods or means used by Hemmerling in the course of operating the taxicab by virtue of its exclusive control over the taxicab. Although there are ambiguities in the equipment lease agreement arising from the parties' failure to strike the surplus terms, those ambiguities do not detract from the clear right of control possessed by Happy Cab by virtue of paragraph 4.

When previously presented with the question of whether a cabdriver operating under a lease is entitled to workers' compensation benefits, we analyzed the conduct of the parties and concluded that the cabdriver was an employee. *Employers Ins. of Wausau v. Greater Omaha Trans. Co.*, 208 Neb. 276, 303 N.W.2d 282 (1981). The evidence in this case is strikingly similar to the evidence leading us to conclude that an employment relationship existed in *Employers Ins. of Wausau*.

The evidence indicates here, however, that not only did Happy Cab possess the right to control, it exercised such control. Happy Cab permitted Hemmerling 24-hour use of his vehicle, but the PSC limited operation of the vehicle as a taxicab to no more than 12 hours during a 24-hour period. Happy Cab prohibited Hemmerling from subcontracting the vehicle or setting up his own taxi service. Hemmerling could solicit passengers at the airport, the bus depot, and hotels but was not permitted to carry a beeper or a cellular phone. As we noted in *Employers Ins. of Wausau*, theoretically a driver could function without using the dispatch service, but no evidence of any drivers' doing so was offered. The solicitation of fares from the Happy Cab dispatcher was heavily controlled by use of zones and other rules. Hemmerling was required to have his cab serviced and inspected once a month by Happy Cab or be terminated from employment. Hemmerling was required to pay into the self-insurance fund or be terminated from employment. A fairly comprehensive training guide expounding Happy Cab's operations and customer service philosophy was provided to Hemmerling. All of these facts clearly support the conclusion that Happy Cab exerted control over the means and the methods

Hemmerling used in the course of operating the taxicab.

Although the right to control the means or methods of the work is the chief factor in resolving a dispute regarding the true nature of the relationship between the parties, the answer fully lies in the application of the analysis that we recently reiterated in *Delicious Foods Co. v. Millard Warehouse*, 244 Neb. 449, 507 N.W.2d 631 (1993). That analysis is that factors to be considered are

> (1) the extent of control which, by the agreement, the employer may exercise over the details of the work, (2) whether the one employed is engaged in a distinct occupation or business, (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision, (4) the skill required in the particular occupation, (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work, (6) the length of time for which the one employed is engaged, (7) the method of payment, whether by the time or by the job, (8) whether the work is part of the regular business of the employer, (9) whether the parties believe they are creating an agency relationship, and (10) whether the employer is or is not in business.

*Delicious Foods Co. v. Millard Warehouse*, 244 Neb. at 456, 507 N.W.2d at 636 (citing *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983)).

Not all of the remaining factors are applicable in this case, but those that are further support the conclusion that an employment relationship existed between the parties. Hemmerling was not engaged in a distinct occupation or business from that of Happy Cab. Happy Cab argues that it was in the business of leasing cabs, but in fact, Happy Cab held the certificate of public convenience to provide cab services, and Hemmerling did that work. The type of work is that which can be done by employees rather than specially skilled independent contractors. *Employers Ins. of Wausau v. Greater Omaha Trans. Co.*, 208 Neb. 276, 303 N.W.2d 282 (1981).

It is a question of interpretation as to whether Happy Cab or

Hemmerling supplied the prime instrumentality, the taxicab. Happy Cab rented the cab to Hemmerling. On that very same day, Hemmerling leased the cab back to Happy Cab. The net effect of these transactions is that Happy Cab supplied the instrumentality of the trade.

Another key factor is the method of payment, whether by the time or by the job. Here, Happy Cab argues that Hemmerling was working by the job, in that he kept all fares and paid his own expenses. Thus, Happy Cab asserts that Hemmerling was working for a profit and that he controlled that profit. However, Hemmerling was faced with fixed expenses such as $275 cab rental and gasoline. A ceiling was placed on Hemmerling's income given that the rates were set by the PSC and that he could drive no more than 12 hours in any 1 day. Clearly, Hemmerling's ability to control his own profit, or wage, was limited.

Happy Cab did not withhold taxes. It is true that we have said that " ' "[t]he deduction of social security taxes and the withholding of income tax tends to indicate an employer-employee relationship, while the failure to do so is a contrary indication." ' " *Anthony v. Pre-Fab Transit Co.*, 239 Neb. 404, 409, 476 N.W.2d 559, 563 (1991) (quoting *Eden v. Spaulding*, 218 Neb. 799, 807, 359 N.W.2d 758, 763 (1984)). However, as in *Employers Ins. of Wausau*, this is the only factor that supports an independent contractor status, and given all the other indicia that an employment relationship existed between the parties, this one factor does not sufficiently support a finding of an independent contractor relationship.

## CONCLUSION

We reverse the order of the Court of Appeals which affirmed the review panel's order upholding the trial court's decision, and remand the matter to the trial court for a determination of the benefits due Hemmerling.

REVERSED AND REMANDED WITH DIRECTIONS.

CONNOLLY, J., not participating.

FAHRNBRUCH, J., concurs in the result.

# STATE OF NEBRASKA, APPELLEE, V. RONALD E. WILLIAMS, APPELLANT.

531 N.W.2d 222

Filed May 5, 1995. No. S-94-542.

1. **Homicide: Intent.** Malice is a material element of second degree murder.
2. **Postconviction: Appeal and Error.** Ordinarily, an appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.
3. **Jurisdiction: Sentences: Appeal and Error.** An appellate court is compelled to accept jurisdiction when the sentence entered by the trial court is invalid due to plain error in the proceedings.
4. **Appeal and Error.** An appellate court always reserves the right to note plain error of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process.
5. **Postconviction: Proof: Appeal and Error.** A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous.
6. ____: ____: ____. A criminal defendant in a postconviction proceeding has the burden of alleging and proving that a claimed error is prejudicial.
7. **Postconviction: Proof.** A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution.
8. **Courts: Judgments: Judicial Notice.** When cases are interwoven and interdependent and a controversy has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has the right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.
9. **Postconviction: Effectiveness of Counsel: Proof.** The Nebraska Supreme Court has adopted a two-part test for proving a claim of ineffective assistance of counsel. When a defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.
10. **Criminal Law: Trial: Jury Instructions: Proof.** In a criminal trial, the court in its instructions must delineate for the jury each material element the State is required to prove beyond a reasonable doubt to convict the defendant of the crime charged.
11. **Jury Instructions: Homicide: Intent: Appeal and Error.** It is plain error for a jury instruction on second degree murder to omit malice as an element.
12. **Criminal Law: Trial: Effectiveness of Counsel: Jury Instructions.** The failure

of defense counsel in a criminal trial to object to an instruction which omits a material element of the crime charged cannot be considered to be within the wide range of professionally competent assistance.

13. **Homicide: Intent.** The essential elements of the crime of murder in the second degree are that the killing be done purposely and maliciously.
14. **Criminal Law: Jury Instructions.** Jury instructions that set forth only the statutory elements of a crime are insufficient when they do not set forth all the essential elements of the crime.
15. **Criminal Law: Trial: Judges: Jury Instructions.** It is the duty of the trial judge in a criminal case to instruct the jury on the pertinent law of the case, whether requested to do so or not.
16. **Jury Instructions: Appeal and Error.** An instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous.
17. **Homicide: Intent: Jury Instructions: Appeal and Error.** Failure to include the element of malice in the jury instruction on second degree murder constitutes plain error.
18. **Criminal Law: Trial: Jury Instructions: Effectiveness of Counsel: Appeal and Error.** Reversal for trial error, such as incorrect instructions and ineffective assistance of counsel, implies nothing with respect to the guilt or innocence of a defendant. Rather, it is only a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect.
19. **Criminal Law: Trial: New Trial: Appeal and Error.** Reversal based upon trial error does not bar a retrial of a criminal defendant.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded with direction.

Ronald E. Williams, pro se.

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

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

PER CURIAM.

Ronald E. Williams, through a postconviction relief motion, asked the district court for Douglas County for a new trial in regard to his second degree murder conviction. That court denied Williams' request, and he appealed.

We find that the postconviction trial court erred when it failed to grant Williams postconviction relief.

## ASSIGNMENTS OF ERROR

In his brief, Williams, in substance, claims the

postconviction court committed four errors. To dispose of this appeal, we need discuss only two of the issues raised by the assigned errors: (1) whether the court at Williams' original trial erred when it failed to include in its instruction to the jury that "malice" is a material element of second degree murder, and (2) whether Williams was denied effective assistance of counsel when his trial counsel did not object to the original trial court's omission in its jury instructions of "malice" as a material element of second degree murder.

## FACTS

On October 6, 1986, a jury found Williams guilty of second degree murder and use of a firearm to commit a felony in the April 13, 1986, death of Eric Holmes. Williams was sentenced to 20 years' imprisonment for the second degree murder charge and 3 years' imprisonment on the firearm charge, the sentences to run consecutively. This court detailed the facts surrounding Holmes' death in *State v. Williams*, 226 Neb. 647, 413 N.W.2d 907 (1987), and held that the State presented sufficient evidence to support the conviction.

On July 12, 1988, Williams, acting pro se, filed a motion to vacate and set aside his conviction for second degree murder because of ineffective assistance of trial counsel. The district court appointed counsel, held an evidentiary hearing, and denied the motion. On appeal, we held that Williams failed to establish a basis for postconviction relief, and we affirmed the judgment of the district court. *State v. Williams*, 234 Neb. 890, 453 N.W.2d 399 (1990). Thereafter, Williams filed a petition for a writ of habeas corpus in the U.S. District Court for the District of Nebraska, alleging that there was insufficient evidence to support his conviction and that he had had ineffective assistance of counsel. The federal court denied Williams' petition. On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed the trial court's judgment. The appeals court held that the evidence was more than sufficient to support Williams' conviction and that he had failed to establish that the alleged errors by his counsel prejudiced his defense. *Williams v. Dahm*, 963 F.2d 216 (8th Cir. 1992), *cert. denied* 506 U.S. 891, 113 S. Ct. 260, 121 L. Ed. 2d 191.

Williams, at his jury trial and on his direct appeal to this court, was represented by the Douglas County public defender's office. In his postconviction relief motion, Williams had appointed counsel. He also had appointed counsel in his federal court proceedings in the Eighth Circuit Court of Appeals. None of Williams' counsel in any of those proceedings brought to any court's attention that the court at Williams' jury trial had failed to instruct the jury that malice is a material element of second degree murder and that to convict Williams, it was necessary for the State to prove beyond a reasonable doubt not only that Williams intentionally caused the death of Holmes without premeditation but that he did so with malice. Malice is that condition of the mind which is manifested by intentionally doing a wrongful act without just cause or excuse. *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994).

On April 4, 1994, Williams filed pro se a second motion for postconviction relief in the district court for Douglas County. Williams alleged that the trial court violated his rights under Neb. Const. art. I, § 3, and the 5th and 14th Amendments to the U.S. Constitution by not including in its jury instructions that malice is an element of second degree murder. Williams also alleged that he received ineffective assistance of counsel in violation of Neb. Const. art. I, § 11, and the Sixth Amendment to the U.S. Constitution because his counsel failed to object to the trial court's omission of malice as an element of second degree murder in its instructions to the jury. Williams requested an evidentiary hearing and moved for appointment of counsel.

The district court denied Williams' request for an evidentiary hearing and overruled his April 4, 1994, motion for postconviction relief. The second postconviction relief court held that Williams procedurally defaulted by not raising the issue of the jury instruction in his direct appeal or in his previous postconviction motion. The district court then proceeded to address the merits of the motion. The court acknowledged that the jury instructions did not include malice as an element of second degree murder. The court, contrary to the holdings of this court, then held that the trial court acted appropriately in omitting malice as an element of second degree murder.

In his assignments of error, Williams claims that the second postconviction district court erred in failing to find that (1) the original trial court improperly instructed the jury by omitting malice as a material element of second degree murder, and (2) Williams received ineffective assistance of trial counsel.

Initially, we note that the district court, in its denial of Williams' postconviction motion, was most critical of this court's reasoning and holdings in *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), and its progeny: *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992); *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991); *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991); *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. Ettleman*, 229 Neb. 220, 425 N.W.2d 894 (1988); *State v. Moniz*, 224 Neb. 198, 397 N.W.2d 37 (1986); and *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983), which continued to hold that malice is a material element of second degree murder. We take this opportunity to remind lower court judges that if the facts are the same as those involved in a holding of this court in a similar case, it is not only their duty but also their obligation to follow the law as has been announced by the Nebraska Supreme Court.

As previously stated, Williams' counsel did not challenge the erroneous jury instruction in his original motion for postconviction relief. Ordinarily, an appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion. See, *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994); *State v. Luna*, 230 Neb. 966, 434 N.W.2d 526 (1989). However, an appellate court is compelled to accept jurisdiction when the sentence entered by the trial court is invalid due to plain error in the proceedings. See *State v. Rolling*, 218 Neb. 51, 352 N.W.2d 175 (1984). An appellate court always reserves the right to note plain error of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process. *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994).

A criminal defendant seeking postconviction relief has the

burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous. *State v. Barrientos*, 245 Neb. 226, 512 N.W.2d 144 (1994). Furthermore, a criminal defendant in a postconviction proceeding has the burden of alleging and proving that a claimed error is prejudicial. See *State v. Jones*, 246 Neb. 673, 522 N.W.2d 414 (1994).

A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution. *State v. Sims*, 244 Neb. 771, 509 N.W.2d 6 (1993).

The record presented in this appeal does not contain the jury instructions. However, the second postconviction district court found that the instructions had, in fact, failed to include malice as an element of second degree murder. Moreover, when cases are interwoven and interdependent and a controversy has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has the right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action. *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994); *State v. Meis*, 233 Neb. 355, 445 N.W.2d 610 (1989), *overruled on other grounds, State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993). Thus, we take judicial notice of the record in Williams' direct appeal to this court.

The record from Williams' direct appeal shows that the State charged Williams with murder in the first degree and use of a firearm to commit a felony. Among the instructions given to the jury was instruction No. 5. It was a "step" instruction directing the jury to find Williams guilty or not guilty of first degree murder, and if it found that he was not guilty of first degree murder, then to make a finding regarding second degree murder or, if necessary, manslaughter. As to second degree murder, the instruction read:

> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of murder in the second degree are:
>
> 1. That defendant killed Eric Holmes;
>
> 2. That defendant did so intentionally but without

premeditation;

3. That defendant did so on or about April 13, 1986;

4. That defendant did so in Douglas County, Nebraska; and

5. That defendant's actions were not justified as set out in Instruction No. 10.

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements of the crime of murder in the second degree necessary for conviction.

The court further emphasized the distinctions between first degree murder, second degree murder, and manslaughter in jury instruction No. 7, which read, in relevant part: "A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation."

It is undisputed that Williams' trial counsel did not object to jury instruction No. 5 or 7. Williams claims that he received ineffective assistance of counsel due to counsel's failure to object to the instructions.

This court has adopted a two-part test for proving a claim of ineffective assistance of counsel, as set forth by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). When a defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions. *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993). See *State v. Clausen, ante* p. 309, 527 N.W.2d 609 (1995).

The first prong in determining the propriety of Williams' claim is whether the trial attorney, in representing the defendant, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. A defendant, therefore, must show that counsel's performance fell below an objective standard of reasonableness. *State v. White*, 246 Neb.

346, 518 N.W.2d 923 (1994).

In a criminal trial, the court in its instructions must delineate for the jury each material element the State is required to prove beyond a reasonable doubt to convict the defendant of the crime charged. *State v. Nielsen, supra.*

In *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), we held that it is plain error for a jury instruction on second degree murder to omit malice as an element. Williams' jury trial court committed the identical error in its jury instruction in defining the elements of second degree murder. Williams' counsel's failure to object to the erroneous jury instruction permitted the jury to find Williams guilty of second degree murder without consideration of whether his actions satisfied a material element of the crime. The failure of defense counsel in a criminal trial to object to an instruction which omits a material element of the crime charged cannot be considered to be within the wide range of professionally competent assistance. See *Gray v. Lynn*, 6 F.3d 265 (5th Cir. 1993).

The State, referring to a "line of cases" in which we upheld second degree murder convictions even though malice was not mentioned, brief for appellee at 8, contends that in 1986 it could not be ineffective assistance for a criminal defense attorney to not object to the instruction given the Williams jury. As we stated in *State v. Grimes*, 246 Neb. 473, 484, 519 N.W.2d 507, 516 (1994):

> The State's argument that this court only recently, in *State v. Myers, supra*, added malice as an element of second degree murder, shows ignorance of, or the disregard for, 11 years of consistent holdings by this court. The suggestion that including malice as an element of second degree murder "transgresses important and well-established principles of law" [citation omitted], itself transgresses important and well-established principles of law. As we pointed out in *Myers*, if malice were not an element of second degree murder, the homicide statutes would not make sense.

Our holding in *State v. Myers* regarding the essential elements of second degree murder, contrary to the State's position, did not establish a new rule of law but reinforced that

"this court has continued to require malice as an element of second degree murder." 244 Neb. at 908, 510 N.W.2d at 63. We have continuously held that the adoption of the current criminal code did not eliminate malice as an element of second degree murder. We reaffirm those holdings as hereinafter set forth.

According to Neb. Rev. Stat. § 28-304(1) (Reissue 1989), "[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." The Legislature adopted the current criminal code in 1977, with an effective date of July 1, 1978. See 1977 Neb. Laws, L.B. 38, § 325. Since the effective operative date of 1977 Neb. Laws, L.B. 38, the following cases have specifically held that the essential elements of the crime of murder in the second degree are that the killing be done purposely and maliciously: *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994); *State v. Ladig*, 246 Neb. 542, 519 N.W.2d 561 (1994); *State v. Grimes, supra*; *State v. Blackson*, 245 Neb. 833, 515 N.W.2d 773 (1994); *State v. Myers, supra*; *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992); *State v. Smith*, 240 Neb. 97, 480 N.W.2d 705 (1992); *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991); *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991); *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. Ettleman*, 229 Neb. 220, 425 N.W.2d 894 (1988); *State v. Moniz*, 224 Neb. 198, 397 N.W.2d 37 (1986); *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983); *State v. Samuels*, 205 Neb. 585, 289 N.W.2d 183 (1980); *State v. Clermont*, 204 Neb. 611, 284 N.W.2d 412 (1979). Clearly, our holding in this case does not subject Williams' counsel to hindsight, as the State contends. Before Williams was tried, the current criminal code was in effect and we had already held that malice continued to be a material element of second degree murder.

The State also contends that an attorney with ordinary skill in the area of criminal law does not object to jury instructions which follow the statutory elements of a crime. Jury instructions that set forth only the statutory elements of a crime are insufficient when they do not set forth all the essential elements of the crime. See *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994) (citing *State v. Oman*, 265 Minn. 277, 121 N.W.2d 616 (1963); *Ex parte Allred*, 393 So. 2d 1030 (Ala. 1981);

*Stevens v. State*, 817 S.W.2d 800 (Tex. App. 1991)).

The fact that Williams' counsel fell below an objective standard of reasonableness does not alone amount to a Sixth Amendment violation. The second prong of the ineffective assistance of counsel standard centers upon whether the deficient performance of counsel prejudiced the defendant's case. The prejudice component focuses on whether counsel's deficient performance rendered the results of the trial unreliable or the proceeding fundamentally unfair by depriving the defendant of a substantive or procedural right. *Lockhart v. Fretwell*, ____ U.S. ____, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

It is the duty of the trial judge in a criminal case to instruct the jury on the pertinent law of the case, whether requested to do so or not. See *State v. Grimes, supra*. An instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous. *Id.* The essential elements in the crime of murder in the second degree are that the defendant killed the victim purposely and maliciously. Failure to include the element of malice in the jury instruction on second degree murder constitutes plain error. See *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994). The instruction relied upon by the jury in finding Williams guilty of second degree murder prejudiced the proceedings against Williams.

The jury convicted Williams of second degree murder based upon an incomplete definition of the crime. We note such an error is plain error which deprived Williams of a fundamentally fair and reliable trial. As a result of the prejudicial jury instructions and ineffective assistance of counsel, Williams' convictions must be overturned.

Reversal for trial error, such as incorrect instructions and ineffective assistance of counsel, implies nothing with respect to the guilt or innocence of a defendant. Rather, it is only a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect. Reversal based upon trial error does not bar a retrial of a criminal defendant. See, *Burks v. United States*, 437 U.S. 1, 98

S. Ct. 2141, 57 L. Ed. 2d 1 (1978); *State v. Chambers*, 233 Neb. 235, 444 N.W.2d 667 (1989).

We reverse the judgment of the second postconviction district court and grant Williams' postconviction relief motion. Because Williams' conviction for use of a weapon in the commission of a felony is dependent upon his conviction of an underlying felony, both the second degree murder charge and the charge of use of a weapon in the commission of felony are set aside, and the matter is remanded to the district court with direction to grant Williams a new trial on both of the charges.

REVERSED AND REMANDED WITH DIRECTION.

WRIGHT, J., dissenting.

I respectfully dissent from the majority's decision. As I have consistently stated since *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994) (Wright, J., dissenting), I disagree with the majority's holding that malice is an essential element of the crime of second degree murder. See, also, *State v. Martin*, 246 Neb. 896, 524 N.W.2d 58 (1994); *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994); *State v. Ladig*, 246 Neb. 542, 519 N.W.2d 561 (1994); *State v. Manzer*, 246 Neb. 536, 519 N.W.2d 558 (1994).

With *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), this court has used the plain error doctrine to expand the scope of its holding that malice is an essential element of second degree murder. In *Myers*, the court found plain error because the jury instructions did not include malice as an element of second degree murder. In *Manzer*, *Ladig*, and *Martin*, the court found plain error because the information charging second degree murder did not allege malice as an element of the crime.

This is Williams' second attempt at postconviction relief based on a claim of allegedly ineffective assistance of counsel. It is his burden to establish a basis for such relief. See *State v. Williams*, 234 Neb. 890, 453 N.W.2d 399 (1990). In order to sustain a claim of ineffective assistance of counsel, the party must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* In the appeal following Williams' first

postconviction relief request, we found that Williams had not established that his trial counsel was ineffective and had failed to establish any prejudice resulting from his trial counsel's decisions. On the appeal following the second postconviction relief request, the majority now holds that Williams had ineffective counsel because the issue of malice as an element of second degree murder was not raised during two prior visits to this court. I disagree.

In Williams' direct appeal, his sole assignment of error was that the evidence was insufficient to sustain the convictions. *State v. Williams*, 226 Neb. 647, 413 N.W.2d 907 (1987). The jury instructions were a part of the record on direct appeal, but this court did not find plain error in the fact that the jury instructions did not include malice as an element of second degree murder. In *Myers*, this court stated that the only issue on Williams' direct appeal was whether the evidence was sufficient to support a conviction for intentional killing rather than Williams' claim of self-defense.

In 1988, Williams filed his first motion for postconviction relief. At the evidential hearing in district court, Williams alleged 18 examples of ineffective assistance by his trial counsel. None of these examples mentioned the failure of trial counsel to object to the jury instructions. On appeal, Williams set forth five grounds for his claim of ineffective assistance of trial counsel. This court found no merit to any of these claims. We stated: "The evidence at trial against the defendant was overwhelming. His attorney was an experienced trial lawyer who performed as a lawyer possessing ordinary training and skill in criminal law in the area should have done." *Williams*, 234 Neb. at 899-900, 453 N.W.2d at 405.

At his jury trial and on direct appeal, Williams was represented by the Douglas County public defender's office. In his first postconviction action and in the U.S. Court of Appeals for the Eighth Circuit, Williams was represented by court-appointed counsel. None of these attorneys brought to any court's attention the fact that the jury instructions did not state that malice was an element of second degree murder.

In this second postconviction appeal, the majority states: "We have continuously held that the adoption of the current

criminal code did not eliminate malice as an element of second degree murder." Thus, the majority establishes that the basis for Williams' requested relief was available to him at the time of his first motion for postconviction relief and on appeal from the denial of that motion. As the majority notes, a second motion for postconviction relief will not ordinarily be entertained unless the motion affirmatively shows on its face that the basis for the requested relief was not available at the time the movant filed the prior motion. See, *State v. Keithley, ante* p. 638, 529 N.W.2d 541 (1995); *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994); *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993); *State v. Luna*, 230 Neb. 966, 434 N.W.2d 526 (1989). Williams cannot now claim ineffective assistance of counsel at trial, on direct appeal, or during the first postconviction proceeding. He had different counsel for the first postconviction proceeding, and the basis for the relief was available to him at his first postconviction proceeding.

Nor can Williams now argue that his counsel for the first postconviction appeal was ineffective for failing to raise the omission of malice from the jury instructions. One requesting postconviction relief cannot claim constitutionally ineffective assistance of counsel as a result of an attorney's service in a postconviction proceeding. See *State v. Stewart, supra*. In *Coleman v. Thompson*, 501 U.S. 722, 752, 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." The Nebraska Constitution's provision for assistance of counsel in a criminal case is no broader than its counterpart in the federal Constitution. *State v. Stewart, supra*.

The majority does not explain why Williams could not have raised the issue of ineffective assistance of counsel regarding the omission of malice from the jury instructions at the time of his first postconviction proceeding. " '[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.' " *Id.* at 718, 496 N.W.2d at 528. If, as the majority states, malice has continuously been an essential

element of second degree murder, the grounds for relief existed at the time of Williams' first motion for postconviction relief. 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. Stewart, supra.* Nor can those issues be raised in an appeal concerning a second motion for postconviction relief.

Therefore, I dissent from the opinion of the majority because I believe that Williams has no right to postconviction relief. As we stated in the first postconviction proceeding, the evidence against Williams was more than sufficient to sustain the convictions, and he was represented by an experienced trial lawyer who met the necessary standard to be considered effective. *State v. Williams*, 234 Neb. 890, 453 N.W.2d 399 (1990). I would affirm the district court's denial of Williams' request for postconviction relief.

HASTINGS, C.J., and CONNOLLY, J., join in this dissent.

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DOUGLAS L. RAWSON, APPELLANT, V. HARLAN COUNTY, NEBRASKA, A POLITICAL SUBDIVISION, APPELLEE.

530 N.W.2d 923

Filed May 5, 1995. No. S-94-596.

1. **Actions: Injunction: Equity.** The purpose of an injunction is to restrain actions that have not yet been taken. Injunctive relief is preventative, prohibitory, or protective, and equity usually will not issue an injunction when the action of which the plaintiff complains has been committed and the injury has been done.
2. **Taxation.** Neb. Rev. Stat. § 77-1727 (Cum. Supp. 1994) governs suits by taxpayers who seek to restrain the collection of any tax.
3. **Declaratory Judgments.** Where an exclusive statutory remedy is provided, the declaratory judgment act does not provide an additional remedy. A declaratory judgment action can afford no relief to one who has failed to pursue a full, adequate, and exclusive statutory remedy.

Appeal from the District Court for Harlan County: BERNARD SPRAGUE, Judge. Affirmed.

Larry R. Baumann and Steven P. Vinton, of Kelley, Scritsmier & Byrne, P.C., for appellant.

Douglas A. Kristensen, of Lieske and Kristensen, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

WHITE, C.J.

On May 15, 1990, the voters in Harlan County, Nebraska, voted to increase from 7 cents to 19 cents the tax levied to support the Harlan County Hospital, and to increase from 50 cents to 62 cents the tax levied to support the county. The ballot questions approved by the voters did not contain any limitation with regard to the duration of the increased levies. Consequently, since 1990, the county board of supervisors has been operating both the hospital and the county pursuant to these increased levies.

During August 1993, the board published a notice that a public budget hearing would be held August 24 for the "purpose of hearing support, opposition, criticism, suggestions or observations of taxpayers relating to the following proposed budget and to consider amendments relative thereto." At the hearing, however, the board failed to ask whether any taxpayer wished to speak. Subsequently, the board approved a budget that assessed a 14-cent levy to operate the hospital and a 63-cent levy to operate the county.

A taxpayer and real property owner, Douglas L. Rawson (taxpayer), sued Harlan County seeking injunctive and declaratory relief. He contended that the budget was void for failure to comply with the Nebraska Budget Act, Neb. Rev. Stat. § 13-501 et seq. (Reissue 1991, Cum. Supp. 1992, & Supp. 1993), and the Nebraska public meetings laws, Neb. Rev. Stat. § 84-1408 et seq. (Reissue 1987 & Cum. Supp. 1992). He also attempted to set aside the 1993 tax levies as violative of Neb. Const. art. VIII, § 5, and Neb. Rev. Stat. §§ 23-119 and 23-125 (Cum. Supp. 1994).

The district court denied the taxpayer's requests for relief. The taxpayer appealed. On appeal, the taxpayer contends that

the district court erred in determining that the (1) public hearing on the county budget held August 24, 1993, complied with the Nebraska Budget Act; (2) board was authorized to levy a tax of more than 7 cents per $100 of actual valuation for support of the hospital; (3) board was authorized to levy total taxes of 63 cents per $100 of actual valuation for fiscal year 1993; and (4) vote of the citizens of Harlan County in 1990 authorized the board to levy taxes in excess of the statutory and constitutional limits for fiscal year 1993. Before we reach the taxpayer's assigned errors, however, we must consider the threshold issue of whether the taxpayer sought the proper remedy in the district court. As noted previously, the taxpayer sought both an injunction to set aside the 1993 tax levy and a declaratory judgment to determine that the 1993 tax was illegal and unauthorized.

The purpose of an injunction is to restrain actions that have not yet been taken. *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989). Injunctive relief is preventative, prohibitory, or protective, and equity usually will not issue an injunction when the action of which the plaintiff complains has been committed and the injury has been done. *Id.*; *Propst v. Board of Educational Lands and Funds*, 156 Neb. 226, 55 N.W.2d 653 (1952); *Conrad v. Kaup*, 137 Neb. 900, 291 N.W. 687 (1940). Neb. Rev. Stat. § 77-1727 (Cum. Supp. 1994) governs suits by taxpayers who seek to restrain the collection of any tax. Section 77-1727 provides in relevant part: "No injunction shall be granted by any court or judge in this state . . . to restrain the collection of any tax, or any part thereof . . . ." In the case at bar, the tax has already been collected, and the taxpayer has paid that tax. Consequently, no court now could prevent or prohibit Harlan County from collecting its 1993 tax levy. The taxpayer's request for an injunction is therefore moot.

With regard to the taxpayer's request for a declaratory judgment, we note that "[w]here an exclusive [statutory] remedy is provided, the declaratory judgment act does not provide an additional remedy. A declaratory judgment action can afford no relief to one who has failed to pursue a full, adequate, and exclusive statutory remedy." *Scudder v. County of Buffalo*, 170

Neb. 293, 296, 102 N.W.2d 447, 450 (1960). Neb. Rev. Stat. § 77-1735 (Cum. Supp. 1994) provides an exclusive statutory remedy under which the taxpayer may seek relief. In *Scudder*, we specifically stated: "We think the foregoing section [77-1735] provides an exclusive remedy for recovering taxes paid where the tax was levied or assessed for an [alleged] illegal or unauthorized purpose." 170 Neb. at 297, 102 N.W.2d at 450.

However, in a subsequent case, *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 33, 388 N.W.2d 93, 98 (1986), we stated that the "[a]vailability of other remedies is a factor bearing upon a trial court's discretionary decision whether to entertain an action for a declaratory judgment." We further stated that "a trial court may, at its discretion, refuse to entertain an action for declaratory judgment where another 'equally serviceable remedy' has been provided by law." *Id.* In the case at bar, the taxpayer makes no claim of constitutionality and has paid the tax.

Therefore, in the case at bar either because the taxpayer's proper remedy is to file a refund action under § 77-1735 and litigate the issues he raises in such an action, or because an "equally serviceable remedy" has been provided by § 77-1735, we are precluded from reaching the issue of whether the 1993 tax levy was illegal or unauthorized.

Since the taxpayer failed to pursue his adequate statutory remedies pursuant to § 77-1735, and since that issue is dispositive, we affirm the decision of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. THOMAS A. WILSON, APPELLANT.
530 N.W.2d 925

Filed May 5, 1995. No. S-94-877.

1. **Appeal and Error.** An appellate court always reserves the right to note plain error of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process.
2. **Jury Instructions: Homicide: Intent: Appeal and Error.** Failure to include the element of malice in the jury instruction on second degree murder constitutes plain error.
3. **Criminal Law: Trial: Effectiveness of Counsel: Jury Instructions.** Counsel's failure to object to the trial court's omission in an instruction of an essential element of a crime charged falls below an objective standard of reasonableness and renders the results of the trial both unreliable and fundamentally unfair, thereby substantively prejudicing a defendant's rights.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and remanded for a new trial.

Thomas A. Wilson, pro se.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

WHITE, C.J.

In 1986, a jury convicted Thomas A. Wilson of second degree murder and of use of a firearm in the commission of a felony. He was sentenced to 35 years' imprisonment for the second degree murder conviction and 6 to 10 years' imprisonment for the use of a firearm conviction, the terms to run consecutively. We affirmed his convictions and sentences in *State v. Wilson*, 225 Neb. 466, 406 N.W.2d 123 (1987).

In May 1994, Wilson filed his second petition for postconviction relief in Douglas County District Court, contending that (1) the trial court at his original trial had erred when it failed to include malice as an essential element of second degree murder in its jury instructions, and (2) he was denied effective assistance of counsel when his trial counsel

failed to object to the trial court's omission of malice as an essential element of second degree murder in its jury instructions. In considering Wilson's second petition, the district court refused to apply our mandates, concluding, sua sponte, that malice is not an element of second degree murder. The district court therefore denied Wilson's request for postconviction relief, and he appealed.

An appellate court always reserves the right to note plain error of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process. *State v. Williams, ante* p. 931, 531 N.W.2d 222 (1995); *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994). Recently, in *Williams*, we addressed the very same issues Wilson raises. In *Williams*, also a case involving a defendant's second petition for postconviction relief, we held that "[f]ailure to include the element of malice in the jury instruction on second degree murder constitutes plain error." *Id.* at 940, 531 N.W.2d at 229. See, *State v. Martin*, 246 Neb. 896, 524 N.W.2d 58 (1994); *State v. Ladig*, 246 Neb. 542, 519 N.W.2d 561 (1994); *State v. Manzer*, 246 Neb. 536, 519 N.W.2d 558 (1994); *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994); *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994). We therefore granted Williams' postconviction relief motion and remanded his case for a new trial.

In addition, we held that Williams was denied effective assistance of counsel when his trial counsel failed to object to the trial court's omission of malice as an essential element of second degree murder in its jury instructions. *Williams, supra*. Counsel's failure to object to the trial court's omission in an instruction of an essential element of a crime charged falls below an objective standard of reasonableness and renders the results of the trial both unreliable and fundamentally unfair, thereby substantively prejudicing a defendant's rights. *Id.* See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As a result, Wilson is entitled to a reversal of his murder conviction and a new trial.

Furthermore, because Wilson's use of a firearm conviction was predicated on his conviction of an underlying felony, the

use of a firearm conviction also must be reversed. See *Williams, supra*.

The district court's order which denied Wilson's second petition for postconviction relief is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

WRIGHT, J., dissenting.

I respectfully dissent from the majority opinion for the reasons given in *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994) (Wright, J., dissenting), and *State v. Williams, ante* p. 931, 531 N.W.2d 222 (1995) (Wright, J., dissenting). Both *Williams* and the case at bar involved second motions for postconviction relief, and this court has granted relief on grounds of plain error because the jury instructions did not include malice as an essential element of second degree murder.

In *Williams*, the court held that the defendant was denied effective assistance of counsel because trial counsel failed to object to the trial court's omission of malice as an essential element of second degree murder in its jury instructions and that counsel's failure to object to the trial court's omission of an essential element of the crime charged fell below an objective standard of reasonableness and rendered the result of the trial both unreliable and fundamentally unfair, thereby prejudicing the defendant's rights. In the case at bar, the court notes plain error for the same reasons cited in *Williams*, reverses the judgment of the district court, and remands the cause for a new trial.

A second motion for postconviction relief will not ordinarily be entertained unless the motion affirmatively shows on its face that the basis for the requested relief was not available at the time the movant filed the prior motion. See, *State v. Keithley, ante* p. 638, 529 N.W.2d 541 (1995); *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994); *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993); *State v. Luna*, 230 Neb. 966, 434 N.W.2d 526 (1989). According to the majority, when counsel failed to object to the trial court's omission of malice as an essential element of second degree murder, counsel's conduct fell below the objective standard of reasonableness and rendered the results of the trial unreliable and fundamentally unfair. For

the reasons set forth in my dissent to *Williams*, I believe that such relief was available to Wilson at the time of the first postconviction proceeding and that there exists no basis to assert that the relief was not available to Wilson at that time. 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. Stewart, supra.*

In my opinion, there is no basis for Wilson to assert a claim of ineffective assistance of counsel in a second postconviction proceeding. I would affirm the district court's denial of Wilson's request for postconviction relief.

CONNOLLY, J., joins in this dissent.

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BETTY L. WAGNER, APPELLANT, V. DOUGLAS R. POPE, M.D., APPELLEE.

531 N.W.2d 234

Filed May 12, 1995. No. S-93-170.

1. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. After a movant for summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.
2. **Malpractice: Physicians and Surgeons: Affidavits: Negligence: Summary Judgment.** An affidavit of the defendant physician in a malpractice case, which affidavit states that the defendant did not breach the appropriate standard of care, presents a prima facie case of lack of negligence for the purposes of summary judgment.
3. **Malpractice: Expert Witnesses: Proof.** In a medical malpractice case, expert testimony is usually required to prove the defendant's departure from the applicable standard of care.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Robert R. Gibson for appellant.

William M. Lamson, Jr., and David J. Schmitt, of Kennedy, Holland, DeLacy & Svoboda, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, LANPHIER, and WRIGHT, JJ., and GRANT, J., Retired, and HOWARD, D.J., Retired.

GRANT, J., Retired.

Betty L. Wagner, plaintiff, filed this medical malpractice action against Douglas R. Pope, M.D., defendant, for the alleged negligence of defendant in failing to undertake appropriate procedures for diagnosis of plaintiff's appendicitis condition. The trial court sustained defendant's motion for summary judgment and dismissed plaintiff's action.

Plaintiff appealed to the Nebraska Court of Appeals, contending, in summary, that the trial court erred in entering summary judgment for defendant based on the court's conclusion that defendant's own affidavit as a medical doctor and expert had established a prima facie showing that defendant would be entitled to summary judgment if that affidavit were uncontroverted, and that plaintiff's affidavit, as that of a layperson, was not sufficient to controvert defendant's affidavit and raise a question of material fact. We removed the case to this court in order to regulate the caseloads of the two appellate courts. We affirm the judgment of the district court.

The record before us consists of the affidavit of defendant, the affidavit of plaintiff, the deposition of defendant, and the deposition of William T. Griffin, M.D., who was a surgeon called in by defendant and who later did surgery on plaintiff. The evidence is basically undisputed.

Plaintiff visited defendant's office on January 3, 1990, complaining of abdominal pain and other symptoms. Defendant diagnosed the problem as a urinary tract infection and prescribed medication accordingly. Plaintiff called defendant that evening and complained that her pain had increased. Plaintiff later went to the hospital emergency room, where x rays of plaintiff were taken. The attending physician there diagnosed plaintiff as having a kidney infection and, after calling defendant, admitted plaintiff to the hospital.

Defendant saw plaintiff the next morning, January 4, and took no action other than to continue the medication which had begun the night before. Defendant next saw plaintiff on the morning of January 5. Later that morning, plaintiff complained of severe abdominal pain and began vomiting. Defendant ordered an x ray taken, which showed the plaintiff had developed a bowel obstruction. Griffin, the surgeon, was called in by defendant and saw plaintiff later that day. Defendant and Griffin decided an operation was necessary, and surgery was begun at 2:59 p.m. on January 5.

The operation, which was performed by Griffin, revealed that plaintiff had suffered a ruptured appendix, which had led to the bowel obstruction. Plaintiff recovered from surgery and later filed this malpractice suit against defendant on the grounds that defendant had failed to properly diagnose her appendicitis.

Defendant filed a motion for summary judgment. Defendant stated in an affidavit that he had not breached the applicable standard of care. He later contended that plaintiff had not presented expert testimony which showed that defendant had breached the applicable standard of care. The district court granted defendant's motion, and plaintiff appealed.

In her brief, plaintiff contends that the district court erred in sustaining defendant's motion for summary judgment. In summary, plaintiff argues that (1) excessive weight was given to defendant's affidavit and deposition testimony as his own expert witness and (2) expert testimony establishing the standard of care, coupled with the lay testimony of plaintiff, established a question regarding the possibility of malpractice.

The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. After a movant for summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party. *Schlake v. Jacobsen*, 246 Neb. 921, 524 N.W.2d 316 (1994); *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994).

In reviewing an order granting 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 the evidence. *Healy v. Langdon, supra*; *VonSeggern v. Willman*, 244 Neb. 565, 508 N.W.2d 261 (1993).

We find no merit in either of plaintiff's contentions. Her contention that defendant's affidavit was insufficient to establish his right to judgment as a matter of law is not correct. This court has held that an affidavit of the defendant physician in a malpractice case, which affidavit states that the defendant did not breach the appropriate standard of care, presents a prima facie case of lack of negligence for the purposes of summary judgment. See, *Healy v. Langdon, supra*; *Marshall v. Radiology Assoc.*, 225 Neb. 75, 402 N.W.2d 855 (1987); *Hanzlik v. Paustian*, 216 Neb. 575, 344 N.W.2d 649 (1984).

The burden then shifts to plaintiff to show that an issue of material fact exists and that that fact prevents judgment as a matter of law. "After a movant for summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party." *Healy v. Langdon*, 245 Neb. at 4, 511 N.W.2d at 501. Accord, *Transamerica Commercial Fin. Corp. v. Rochford*, 244 Neb. 802, 509 N.W.2d 214 (1993); *Hanzlik v. Paustian*, 211 Neb. 322, 318 N.W.2d 712 (1982).

In a medical malpractice case, expert testimony is usually required to prove the defendant's departure from the applicable standard of care. Therefore, plaintiff had the burden of producing expert testimony which stated that defendant failed to provide care which met the applicable standard. See, *Marshall v. Radiology Assoc., supra*; *Reifschneider v. Nebraska Methodist Hosp.*, 222 Neb. 782, 387 N.W.2d 486 (1986).

Plaintiff obtained deposition testimony from Griffin, the operating surgeon, and submitted that deposition at the summary judgment hearing. Griffin's testimony presents the standard of care that was applicable to plaintiff's condition, thus satisfying the first step necessary to prove negligence. The second required step is not satisfied, because no testimony is given which shows that defendant did not meet that standard. In

fact, Griffin expressly stated that defendant had met the appropriate standard of care.

Plaintiff contends that no expert testimony is necessary to prove failure to meet the standard in this case. Plaintiff's proffered evidence of malpractice as a layperson, however, is not sufficient to prove a prima facie case of medical malpractice in this case. See *Locke v Pachtman*, 446 Mich. 216, 521 N.W.2d 786 (1994).

The judgment of the district court is affirmed.

AFFIRMED.

FAHRNBRUCH, J., not participating.

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TOM CALABRO ET AL., APPELLEES, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.

531 N.W.2d 541

Filed May 12, 1995. No. S-93-566.

1. **Summary Judgment.** Summary judgment is proper 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.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate 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.
3. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
4. **Municipal Corporations: Public Officers and Employees: Ordinances: Pensions.** A cost-of-living supplemental benefit provided to a city employee constitutes a pension despite the fact that it does not comply with the requirements of a city's home rule charter, when the ordinances enacting the supplemental benefit tie eligibility to receive the supplemental benefit with eligibility to receive regular pension payments, and nothing in the home rule charter or enacting ordinances puts the employee on notice that the supplemental benefit is a mere

gratuity from the city.

5. **Pensions: Words and Phrases.** Ordinarily, "vesting" refers to a provision in a retirement plan whereby the member's right to a benefit becomes effective upon fulfillment of specified qualifying conditions, such as service for a certain period of time, which right is not forfeited by separation from service prior to the prescribed age for retirement.
6. **Contracts: Pensions: Words and Phrases.** "Vesting," in a legal sense, refers to a contractual right to and interest in a pension that may be upheld at law.
7. **Constitutional Law: Public Officers and Employees: Pensions: Legislature.** A public employee's constitutionally protected right in his or her pension vests upon the acceptance and commencement of employment, subject to reasonable or equitable unilateral changes by the Legislature.
8. **Constitutional Law: Contracts: Public Officers and Employees.** In order to determine whether a governmental entity unconstitutionally interfered with its employees' contractual rights under article I, § 10, clause 1, of the U.S. Constitution, one must engage in a three-part analysis. One must determine (1) whether there has been impairment of a contract; (2) whether the governmental entity's actions, in fact, operated as a *substantial* impairment of the contractual relationship; and, if so, (3) whether that impairment is nonetheless a permissible, legitimate exercise of the governmental entity's sovereign powers.
9. **Constitutional Law: Municipal Corporations: Contracts.** In order for a city's action to pass constitutional muster under the third part of the test for article I, § 10, clause 1, of the U.S. Constitution, it must be both reasonable and necessary to serve an important public interest.
10. ____: ____: ____. The inquiry into the "necessity" component of the Contract Clause test can be considered in two levels: (1) whether less drastic modification of contractual obligations would have been sufficient to accomplish the city's purposes and (2) whether, without modifying its obligations at all, the city could have adopted alternative means of achieving its goals.
11. **Municipal Corporations: Contracts: Public Officers and Employees: Pensions.** A municipality may make reasonable changes or modifications in pension plans in which employees hold vested contract rights, but changes which result in disadvantages to employees must be accompanied by offsetting or counterbalancing advantages.
12. **Commission of Industrial Relations: Administrative Law.** The Commission of Industrial Relations is not a court and is in fact an administrative body performing a legislative function.
13. **Constitutional Law: Courts.** It is a settled principle of constitutional law that the construction and interpretation of the Constitution is a judicial function.
14. **Constitutional Law.** The Nebraska Constitution prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives.
15. **Declaratory Judgments: Claims: Notice.** A plaintiff's failure to file a notice of claim under Neb. Rev. Stat. § 14-804 (Reissue 1991) is not a ground for dismissing a declaratory judgment action under Neb. Rev. § 25-21,150 (Reissue 1989) when the plaintiff makes no claim for immediate money damages.
16. **Civil Rights: Claims: Notice.** A plaintiff's failure to file a notice of claim under

Neb. Rev. Stat. § 14-804 (Reissue 1991) cannot defeat the plaintiff's civil rights claim under 42 U.S.C. § 1983 (1988).

17. **Parties: Pleadings: Words and Phrases.** A necessary party is one who may be compelled to respond to the prayer of the plaintiff's petition, and where there is nothing such a one is called upon to do, or can be compelled to do as a duty, one is not a necessary party.

18. **Parties: Words and Phrases.** An indispensable or necessary party to a suit is one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents a court from making a final determination concerning the controversy without affecting such party's interest.

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

Herbert M. Fitle, Omaha City Attorney, Kent N. Whinnery, and Wendy E. Hahn for appellant.

John P. Fahey and Robert W. Kortus, of Broom, Johnson, Fahey & Clarkson, for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

CONNOLLY, J.

Certain current and retired firefighters (the plaintiffs) filed this class action seeking a declaration of their rights under a supplemental cost-of-living benefit provided by the City of Omaha, which the city eliminated in 1989. The plaintiffs' claims raise two threshold issues: (1) Did the supplemental cost of living benefit constitute a pension? and, if so, (2) When did the plaintiffs' constitutionally protected contract right in the pension vest? The district court for Douglas County granted the plaintiffs' motion for summary judgment, holding that the city violated the federal constitutional rights of the represented class when it terminated the plaintiffs' supplemental cost-of-living benefit. We affirm because the supplemental benefit constituted a pension in which the plaintiffs obtained a vested, constitutionally protected contractual right when they accepted and commenced employment with the city.

## I. FACTUAL BACKGROUND

### 1. HOME RULE CHARTER

The Omaha Home Rule Charter of 1956 (Home Rule

Charter), § 6.09, granted the City of Omaha the power to enact a pension and retirement system. Section 6.09, in relevant part, stated:

> The Council shall have authority to establish a pension and retirement system or systems for any or all groups of officers and employes in the service of the city. Each pension and retirement system shall be financed on an actuarially funded basis, with the city and the employe making substantially equal contributions . . . . Moneys required for pension administration . . . shall be provided by appropriation from the general fund . . . . The provisions of pension ordinances shall require actuarial evaluations at least once every five years, which shall serve as the basis for the determination of contribution rates and shall also provide for the maintenance of adequate actuarial reserves. Officers and employes of the city, except elected officials shall become members of the system as a condition of employment. . . . Provisions for vesting may be included. The legal right to a pension or benefit for the members and beneficiaries entitled thereto shall become effective when such pensions or benefits become payable, and the same shall not be impaired, abrogated, or diminished thereafter.

Section 6.10 of the Home Rule Charter required that a board of trustees be created by city ordinance and that title to the trust would vest in that board.

### 2. 1961 Pension Plan

Pursuant to the above provisions in the Home Rule Charter, the City of Omaha established the Police and Firemen's Retirement System (1961 pension plan) on July 1, 1961. The 1961 pension plan included provisions for vesting based on either 20 or 25 years of service or disability. Additionally, the 1961 pension plan conformed with the requirements of the Home Rule Charter by providing for financing on an actuarial basis, funding based on equal contributions by the city and the employees, an actuarial evaluation at least every 5 years, funding from an independent trust fund, and the creation of a board of trustees.

### 3. Supplemental Benefit Plan

On August 21, 1973, the City of Omaha enacted a system of "Supplemental Retirement Benefits" (supplemental benefit plan). The supplemental benefit plan provided for the payment of cost-of-living supplemental benefits in recognition of the adverse effects that retirees and their dependents were experiencing due to high inflation. In order to receive the cost-of-living supplemental benefit, an employee had to be eligible to receive benefits under the provisions of the 1961 pension plan. The supplemental benefit plan called for an increase in pension payments equal to a rate representing the percentage increase in cost of living as reflected in the Consumer Price Index. The ordinance enacting the supplemental benefit plan provided that the cost of the supplemental benefits would be paid by the city and that neither the city employees' retirement system nor the city police and firefighters' retirement system would make any contributions to the supplemental benefit plan. The supplemental benefit plan was neither financed on an actuarial basis nor subject to periodic actuarial evaluations.

The city amended the ordinances that enacted the supplemental benefit plan on several occasions, placing caps on the yearly percentage increases that retirees could collect and establishing minimum and maximum monthly supplemental payments.

### 4. Elimination of Supplemental Benefit Plan

In May 1989, the city proposed an ordinance to eliminate payments from the supplemental benefit plan to those employees who retired after the effective date of the ordinance. The city printed in at least one newspaper a notice to the public describing the proposed ordinance and announcing the hearing date. The record reflects that the ordinance passed by a unanimous city council vote on June 6, 1989. The ordinance became effective on June 21, 1989, thus denying supplemental benefit payments to any firefighter who became eligible to collect pension payments after that date.

### 5. Lawsuit

The plaintiffs filed the instant civil rights class action lawsuit

under Neb. Rev. Stat. § 25-21,150 (Reissue 1989) and 42 U.S.C. § 1983 (1988), on February 12, 1990. The plaintiffs claimed to represent the interests of current employees of the city's fire division and members of the Police and Firemen's Retirement System; former employees of the city's fire division who retired after June 21, 1989; and the dependents of employees of the city's fire division who retired or died in the line of duty subsequent to June 21, 1989. The plaintiffs sought a declaration that by eliminating the supplemental benefit plan, the city violated the class' contractual rights under article I, § 10, of the U.S. Constitution; the Due Process Clause found in § 1 of the 14th Amendment to the U.S. Constitution and article I, § 3, of the Nebraska Constitution; and the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.

The city demurred to the plaintiffs' petition, alleging that the district court lacked subject matter jurisdiction and that there was a material defect of parties. The district court overruled the city's demurrer. The plaintiffs then filed a motion for partial summary judgment, which the district court overruled.

Subsequent to the district court's decision overruling the plaintiffs' motion for partial summary judgment, the city filed a motion for summary judgment in its favor. In response, the plaintiffs filed a second motion for summary judgment in their favor. After an evidentiary hearing, wherein the district court received evidence substantially identical to that received at the hearing on the plaintiffs' first motion for summary judgment, the district court entered judgment in favor of the plaintiffs and denied the city's motion for summary judgment.

## II. ASSIGNMENTS OF ERROR

The city claims that the district court erred in (1) determining that the supplemental benefits were vested property or contract rights to be treated in the same fashion as the pension corpus and, in turn, determining that the plaintiffs' constitutional rights were violated; (2) failing to grant the city's motion for summary judgment; (3) finding that the plaintiffs had a property right protected by due process; (4) overruling the city's demurrer challenging the district court's subject matter jurisdiction; and

(5) failing to find that the plaintiffs failed to join necessary parties.

## III. STANDARD OF REVIEW

Summary judgment is proper 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. In reviewing a summary judgment, an appellate 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. *Medley v. Davis, ante* p. 611, 529 N.W.2d 58 (1995); *Wiekhorst Bros. Excav. & Equip. v. Ludewig, ante* p. 547, 529 N.W.2d 33 (1995).

In considering a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Dalition v. Langemeier*, 246 Neb. 993, 524 N.W.2d 336 (1994); *First Nat. Bank in Morrill v. Union Ins. Co.*, 246 Neb. 636, 522 N.W.2d 168 (1994); *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994).

## IV. ANALYSIS

### 1. Whether Supplemental Benefit Constituted a Pension

The primary issue raised in this appeal is whether the supplemental benefit plan constituted a pension in which the plaintiffs could and did obtain a constitutionally protected vested interest. The city contends that the supplemental benefit plan did not constitute a pension—instead, the city argues, the supplemental benefit plan was merely a gift or gratuity from the city to its employees. Without determining whether the city can provide a gratuity to its employees, we will analyze the city's arguments.

As support for its argument, the city attempts to draw an analogy to pension plans governed by the Employee Retirement

Income Security Act of 1974 (ERISA). The city argues that we should be persuaded to find that the supplemental benefit plan did not constitute a pension because such a plan is excluded from the definition of "pension" under ERISA. In particular, the city points to 29 C.F.R. § 2510.3-2 (1994), which reads in part:

> (g) *Supplemental payment plans*—(1) *General rule.* Generally, an arrangement by which a payment is made by an employer to supplement retirement income is a pension plan. Supplemental payments made on or after September 29, 1980, shall be treated as being made under a welfare plan rather than a pension plan for purposes of title I of [ERISA] if all of the following conditions are met:
>
> (i) Payment is made for the purpose of supplementing the pension benefits of a participant or his or her beneficiary out of:
>
> (A) The general assets of the employer . . .
>
> . . . .
>
> (ii) The amount payable under the supplemental payment plan to a participant or his or her beneficiary with respect to a month does not exceed the payee's supplemental payment factor . . . for that month . . . .
>
> (iii) The payment is not made before the last day of the month with respect to which it is computed.

Retirement plans provided to government employees are exempt from compliance with ERISA, so ERISA has no binding effect on the case at bar. 29 U.S.C. § 1003(b)(1) (1988). Our research uncovered only one case interpreting § 2510.3-2(g), *United Steelworkers v. Newman-Crosby Steel*, 822 F. Supp. 862 (D.R.I. 1993), and that case is clearly distinguishable on its facts and is of little help in interpreting § 2510.3-2(g) as it might apply to the supplemental benefit plan instituted by the city. Likewise, we have not found any cases that analyze whether a cost-of-living supplement provided by a governmental employer constitutes a pension, though some courts appear to have assumed that such supplemental benefits constituted pensions. See, *United Firefighters v. Los Angeles*, 210 Cal. App. 3d 1095, 259 Cal. Rptr. 65 (1989), *cert. denied* 493 U.S. 1045, 110 S. Ct. 843, 107 L. Ed. 2d 837 (1990); *Nash v. Boise City Fire*

*Dept.*, 104 Idaho 803, 663 P.2d 1105 (1983).

We hold that the supplemental benefit plan in the case at bar constituted a pension. The city's supplemental benefit plan is directly related to the pension plan instituted under the authority of the Home Rule Charter, since in order to receive the supplemental benefit, the employee had to qualify for the 1961 pension plan. The 1961 pension plan constituted "deferred compensation" for services rendered—the benefits were fixed when conferred, and only the *payment* of those benefits was deferred to a later date. See *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982). Accord, *Omer v. Tagg*, 235 Neb. 527, 455 N.W.2d 815 (1990); *Gossman v. State Employees Retirement System*, 177 Neb. 326, 129 N.W.2d 97 (1964); *Warsocki v. City of Omaha*, 1 Neb. App. 874, 510 N.W.2d 446 (1993).

The city argues that the supplemental benefit was a gift to the firefighters paid for by the taxpayers through the city's general fund. However, if the city wanted to classify the supplemental benefit as a gift, it could have stated such in the ordinance enacting the supplemental benefit. Nothing in the enacting ordinance puts employees or potential employees on notice that the supplemental benefit could be taken away with the stroke of a pen. Employees contemplating employment with the city or current employees considering leaving public employment may well have been induced to commence or remain working for the city because they knew they were guaranteed a cost-of-living benefit package in addition to their straight pension benefits.

The city also contends that since the supplemental benefit plan did not comply with the requirements of § 6.09 of the Home Rule Charter, the cost-of-living benefit cannot be classified as a pension. We disagree. It is true that the supplemental benefit plan was not financed on an actuarial basis, funded by equal contributions from the city and the employees, subject to an actuarial evaluation every 5 years, or funded by an independent trust, as required by the Home Rule Charter. However, for the purposes of determining whether the city contractually obligated itself to maintaining the supplemental benefit plan, we are not limited by the language of the city's Home Rule Charter. We find that due to the lack

of information from which an employee could ascertain that the supplemental benefit plan was a mere gratuity from the city, the city treated the supplemental benefit plan like a pension. As noted above, if the city wanted to limit the scope of the supplemental benefit plan to that of a mere gratuity, it could have plainly stated so in the enacting ordinance. Instead, the city tied the supplemental benefit plan to the existing 1961 pension plan, indicating to its employees that the supplemental benefit plan was part and parcel of the 1961 pension plan. Thus, for the purposes of the plaintiffs' civil rights action, the supplemental benefit plan constituted a pension.

### 2. Whether the Plaintiffs Had a Vested Right in the Supplemental Benefit Plan

#### (a) Applicable Nebraska Case Law

In *Lickert v. City of Omaha*, 144 Neb. 75, 12 N.W.2d 644 (1944), police officers employed by the City of Omaha sought a declaration of their rights under the city pension plan after the city amended the plan, raising the qualifying retirement age and length-of-service requirements. The trial court held that the police officers' rights in the pension vested upon acceptance of employment with the city. This court reversed the trial court's decision, holding that the mere acceptance of employment with the city did not establish a contract between the city and the police officers. This court stated that "[u]ntil the particular event happens upon which the pension is to be paid there is no vested right in the police officer to such payments." *Id.* at 84, 12 N.W.2d at 649. Therefore, until a police officer met the age and length-of-service requirements necessary to collect the pension benefits, that officer did not have a vested right in the pension. See, also, *Mollner v. City of Omaha*, 169 Neb. 44, 98 N.W.2d 33 (1959) (expressly reaffirming the rule announced in *Lickert*).

In *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982), this court overruled *Lickert* and expanded the time during which public employees' rights in their pension plans vested. We stated:

> "For the civil service employees, the price of the pension plan, whether specifically discussed or not, is part of the

> total wage package negotiated when salary raises are determined. Pensions are bargained as an integral part of the wage-and-fringe benefit calculus." [Citation omitted.] "[A]n employee who relies upon an offer of deferred benefits to his or her detriment, and to the benefit of the employer who gains the employee's valuable services and loyalty as a consequence thereof, has expectations which are protected by the law of contracts." [Citation omitted.] " 'State retirement systems create contracts between the state and its employees who are members of the system.' . . ." [Citation omitted.] Since Nebraska law recognizes that public pensions are deferred compensation . . . it follows that Nebraska public employees, no less than those in other states, have "reasonable expectations which are protected by the law of contracts" with regard to their pension rights. [Citation omitted.] To the extent that *Lickert* . . . is in conflict, it is overruled.

*Id.* at 898, 320 N.W.2d at 914.

In *Halpin*, this court held that public employees' rights in their pension plans vested prior to their becoming eligible to receive pension payments, based on the fact that other terms and conditions of employment, like salary, were directly affected by the pension plan in effect when the employee took the job. The *Halpin* court also differentiated the result in that case from cases where the language of the pension plan provided express requirements for vesting:

> Two previous Nebraska cases [*Lickert* and *Mollner*] held that pension rights for public employees did not vest until "the particular event happens upon which the pension is to be paid . . . ." [Citations omitted.] . . . The no-vesting holdings in *Mollner* and *Lickert* were based on specific charter provisions which prevented vesting of pension rights until retirement. Because Neb. Rev. Stat. §§ 60-441 et seq. (Reissue 1978) contain no provision preventing vesting until a certain time, the decisions in *Mollner* and *Lickert* are not applicable.

*Id.* at 900-01, 320 N.W.2d at 915.

In the case at bar, the city contends that the quoted language from *Halpin* indicates that *Lickert* was overruled only to the

extent that the latter applied to pension plans containing no express vesting language. According to the city, when the pension plan contains language setting forth express requirements for vesting, *Lickert* remains good law in that the express language establishes vesting requirements which should be enforced. The city implicitly asks us to overrule *Warsocki v. City of Omaha*, 1 Neb. App. 874, 510 N.W.2d 446 (1993), a case cited by both parties, wherein the Nebraska Court of Appeals rejected the city's reading of *Halpin* as it relates to *Lickert*.

The plaintiff firefighter in *Warsocki* claimed that he had a vested interest in a disability pension offered by the city prior to his retirement. The city argued that the holding in *Halpin* was inapplicable in *Warsocki* because of the express vesting language contained in the city's pension plan. The city claimed that *Lickert* and *Mollner* were still good law because the *Halpin* court endorsed the holdings in the earlier cases in which nonvesting provisions based on city charters were enforced and prevented vesting of pension rights until retirement. The Court of Appeals disagreed with the city and held that Warsocki's interest in the pension vested at the time he began working for the city.

The city presents a similar argument in the case at bar. The city claims that *Lickert* and *Mollner* constitute an exception to the earlier vesting rule in *Halpin*. Specifically, the city claims that the express vesting language contained in its pension plan controlled the timing of the plaintiffs' vested rights in that pension.

The city's argument confuses the definition of "vest" as it is used in the city's Home Rule Charter and ordinances with the definition of "vest" when it is used to describe the creation of a legally protected interest. Ordinarily, and in the city's Home Rule Charter and ordinances, vesting " 'refers to a provision in a retirement plan whereby the member's right to a benefit becomes effective upon fulfillment of specified qualifying conditions, such as service for a certain period of time, which right is not forfeited by separation from service prior to the prescribed age for retirement.' " *Fund Manager v. City of Phoenix Police Dept.*, 151 Ariz. 487, 489, 728 P.2d 1237, 1239

(Ariz. App. 1986) (quoting *Kraus v. Bd. of Trustees*, 72 Ill. App. 3d 833, 390 N.E.2d 1281 (1979)). However, for the purposes of determining the creation of a legally protected right, "vest" is used in a legal, rather than ordinary, sense. " 'Vesting in a legal sense . . . refers to a contractual right to and interest in a pension that may be upheld at law.' " *Id.*

The vesting language in the city's Home Rule Charter and ordinances, which form the basis of the pension plan in question, clearly defines the specific qualifying conditions that must be satisfied before an employee acquires the right to begin receiving pension payments. That language, however, does not control when the plaintiffs' legally protected contractual right in the pension accrued. In *Halpin*, this court clearly determined that an employee's protected interest in a pension vested before he or she became eligible to collect the pension.

(b) When Does Vesting Occur?

This court has not yet clearly stated when a public employee's rights in his or her pension vest for Contract Clause purposes, though in *Halpin*, we cited the California rule stated in *Miller v. State of California*, 18 Cal. 3d 808, 557 P.2d 970, 135 Cal. Rptr. 386 (1977), with approval. Accord, *Nash v. Boise City Fire Dept.*, 104 Idaho 803, 663 P.2d 1105 (1983); *Davis v. Annapolis*, 98 Md. App. 707, 635 A.2d 36 (1994); *Eagan v. Spellman*, 90 Wash. 2d 248, 581 P.2d 1038 (1978) (differentiating *Miller* on other grounds). The *Miller* court held that public employees' pension rights vest upon employment, but under certain circumstances the government may unilaterally modify them so long as the changes do not adversely alter the benefits or, if the benefits are adversely altered, they are replaced with comparable benefits. We now adopt the California rule as the rule in Nebraska and hold that a public employee's constitutionally protected right in his or her pension vests upon the acceptance and commencement of employment, subject to reasonable or equitable unilateral changes by the Legislature. Our holding is based primarily on policy grounds, in that we recognize that the availability of and security afforded by a pension plan may draw employees into government service. The cost-of-living adjustment provided by the supplemental benefit

plan in the case at bar is no different. Firefighters who accepted employment with the City of Omaha after the implementation of the supplemental benefit plan reasonably expected to receive the cost-of-living adjustment if they remained in public employment, and that expectation provided a powerful incentive to remain working for the city. Those employees who accepted employment after June 21, 1989, would have no such expectation and would not be entitled to the supplemental benefit plan.

### 3. Contract Clause Analysis

The district court held that the city unconstitutionally deprived the plaintiffs and members of the class of their contractual rights in their pensions in violation of article I, § 10, clause 1, of the U.S. Constitution, which states, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." In order to determine whether the city unconstitutionally interfered with those contractual rights, we must engage in a three-part analysis. We must determine (1) whether there has been impairment of a contract; (2) whether the city's actions, in fact, operated as a *substantial* impairment of the contractual relationship; and, if so, (3) whether that impairment is nonetheless a permissible, legitimate exercise of the city's sovereign powers. See *Baltimore Tchrs. Un. v. Mayor, Etc., of Baltimore*, 6 F.3d 1012 (4th Cir. 1993), *cert. denied* ____ U.S. ____, 114 S. Ct. 1127, 127 L. Ed. 2d 435 (1994).

We have already held that the plaintiffs and the represented class obtained a contractual right in the supplemental benefit plan. The city clearly impaired that contract by eliminating the plan. Furthermore, we do not hesitate to find that by eliminating the plan, the city enacted a *substantial* impairment on the plaintiffs' contractual rights. See *United Firefighters v. Los Angeles*, 210 Cal. App. 3d 1095, 259 Cal. Rptr. 65 (1989), *cert. denied* 493 U.S. 1045, 110 S. Ct. 843, 107 L. Ed. 2d 837 (1990) (3-percent cap on cost-of-living adjustment held to be a substantial impairment). Thus, the only remaining question is whether the city exercised legitimate, permissible sovereign power in eliminating the supplemental benefit plan.

We hold that the city did not act in a legitimate, permissible

manner when it eliminated the plaintiffs' supplemental benefit plan. In order for the city's action to pass constitutional muster, it had to be both reasonable and necessary to serve an important public interest. See, *United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977); *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982). As we stated in *Halpin*:

> "[T]he application of the tests of necessity and reasonableness requires a much greater degree of judicial scrutiny in cases, such as this one, involving [state action] which purports to abrogate a state's own financial obligation than in cases involving an impairment by the state of purely private contracts." *Singer v. City of Topeka*, 227 Kan. 356, 607 P.2d 467 (1980), states the rule in this manner: " 'To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.' "

211 Neb. at 901, 320 N.W.2d at 915.

In the instant case, the city claims that it faced potential bankruptcy if the supplemental benefit plan remained in effect. The city contends that due to fiscal troubles, it could not continue the supplemental payments for an indefinite period. The city refers us to financial reports prepared by third-party financial consultants as evidence that "continued funding of the supplemental benefit would cause serious fiscal problems for the City." Reply brief for appellant at 6.

The fatal flaw in the city's "fiscal crisis" argument is that the financial reports upon which they base this argument do not recommend or even suggest that the city eliminate the supplemental benefit fund. The first report, prepared in 1987, suggested that the city work "to either pre-fund [the supplemental benefit plan] or discontinue the cost from the General Fund." The second report, prepared in 1988, recommended that "the City continue to evaluate its options for funding [the supplemental benefit plan], and that actuarially sound methods be utilized to properly quantify the present and

future obligations of this plan." The most consistent thread connecting the 1987 and 1988 financial reports is the suggestion that the city seek alternate funding for the supplemental benefit plan. Neither report mentions discontinuing the plan.

The inquiry into the "necessity" component of the test can be considered in two levels: (1) whether less drastic modification of contractual obligations would have been sufficient to accomplish the city's purposes and (2) whether, without modifying its obligations at all, the city could have adopted alternative means of achieving its goals. *Pineman v. Oechslin*, 494 F. Supp. 525 (D. Conn. 1980), *vacated on other grounds* 637 F.2d 601 (2d Cir. 1981) (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977)). The city has not convinced us that terminating the supplemental benefit plan was the only viable alternative for correcting its alleged fiscal woes.

Additionally, the record is devoid of evidence that the city conferred any benefit on the plaintiffs and the class in exchange for eliminating the supplemental benefit. "[A] municipality may make reasonable changes or modifications in pension plans in which employees hold vested contract rights, but changes which result in disadvantages to employees must be accompanied by offsetting or counterbalancing advantages." *Singer v. City of Topeka*, 227 Kan. 356, 367, 607 P.2d 467, 476 (1980). Accord *Halpin v. Nebraska State Patrolmen's Retirement System, supra*. See, also, *Miller v. State of California*, 18 Cal. 3d 808, 557 P.2d 970, 135 Cal. Rptr. 386 (1977); *Allen v. City of Long Beach*, 45 Cal. 2d 128, 287 P.2d 765 (1955); *Nash v. Boise City Fire Dept.*, 104 Idaho 803, 663 P.2d 1105 (1983); *Davis v. Annapolis*, 98 Md. App. 707, 635 A.2d 36 (1994); *Bakenhus v. City of Seattle*, 48 Wash. 2d 695, 296 P.2d 536 (1956). The plaintiffs in the instant case were clearly disadvantaged by the elimination of the supplemental benefit plan. The city offered no evidence of corresponding benefits to the plaintiffs that would offset the elimination of the supplemental benefit. Thus, the city's decision to eliminate the supplemental benefit plan constituted an unreasonable alteration of the plaintiffs' pension rights. See *Nash v. Boise City Fire Dept., supra*.

4. SUBJECT MATTER JURISDICTION

The city challenges the subject matter jurisdiction of the district court over the instant case on two grounds: (1) the alleged failure of the plaintiffs to submit their claim to the Commission of Industrial Relations (CIR) and (2) the alleged failure by the plaintiffs to file a notice of claim.

(a) Commission of Industrial Relations

The city claims that since pensions constitute a term or condition of employment, the CIR, not the district court, was the proper forum for the plaintiffs' civil rights action. See Neb. Rev. Stat. § 48-810 (Reissue 1993).

The CIR is not a court and is in fact an administrative body performing a legislative function. *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979); *American Assn. of University Professors v. Board of Regents*, 198 Neb. 243, 253 N.W.2d 1 (1977). In *Transport Workers of America*, we stated:

> The CIR has no authority to grant either declaratory or equitable relief . . . .
>
> As a general rule administrative agencies have no general judicial powers, notwithstanding they may perform some quasi-judicial duties. Moreover, unless permitted by the Constitution, the Legislature may not authorize administrative officers or bodies to exercise powers which are essentially judicial in their nature, or to interfere with the exercise of such powers by the courts. [Citations omitted.] Likewise, the Constitution of the State of Nebraska firmly establishes that the judicial power in Nebraska is vested solely in the courts. Art. II, § 1, and Art. V, § 1, Constitution of Nebraska. As an administrative body the CIR may not exercise judicial functions.
>
> . . . .
>
> The entering of a declaratory judgment . . . [is] clearly [a] judicial [function].

205 Neb. at 34, 286 N.W.2d at 107.

In the case at bar, the plaintiffs requested a declaration that the city acted in an unconstitutional manner when it unilaterally

eliminated the supplemental benefit plan. It is a settled principle of constitutional law that the construction and interpretation of the Constitution is a judicial function. *Jaksha v. State*, 241 Neb. 106, 486 N.W.2d 858 (1992); *Davis v. General Motors Acceptance Corp.*, 176 Neb. 865, 127 N.W.2d 907 (1964). The Nebraska Constitution prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives. *Clemens v. Harvey, ante* p. 77, 525 N.W.2d 185 (1994). The CIR would have been constitutionally prohibited from taking jurisdiction over the instant case. Therefore, the city's argument that the plaintiffs should have brought this action in front of the CIR is without merit.

(b) Notice of Claim

The city also contends that the plaintiffs' action should be dismissed for lack of jurisdiction because the plaintiffs failed to file a notice of claim as required by Neb. Rev. Stat. § 14-804 (Reissue 1991). It is uncontradicted that the plaintiffs did not file a notice of claim with the city. This court has held that § 14-804 applies to claims for pensions and that compliance with the statute is mandatory. *Schmitt v. City of Omaha*, 191 Neb. 608, 217 N.W.2d 86 (1974). However, we hold that the failure to file a notice of claim does not require dismissal of the plaintiffs' declaratory judgment actions under § 25-21,150 and 42 U.S.C. § 1983.

*(i) § 25-21,150*

The issue before the court regarding the plaintiffs' § 25-21,150 action is whether a declaratory judgment action, wherein the plaintiffs do not seek immediate money damages, constitutes a "claim" for the purposes of § 14-804. We hold that it does not. Section 14-804 requires a plaintiff filing a "claim" against the city to verify that "the amount therein charged and claimed is due and unpaid." The plaintiffs did not claim that any amount of money was "due and unpaid" to them by the city. Rather, under § 25-21,150, the plaintiffs merely requested a determination of their rights under the supplemental benefit plan. Though the result of such a declaratory judgment action may be that the city will eventually have to pay money to the

plaintiffs, the action is not a claim for money damages. Rather, the action is for a declaration of rights under a city ordinance. The plaintiffs did not need to file a notice of claim under § 14-804 in order to obtain a judicial declaration of their rights.

*(ii) § 1983*

The plaintiffs' failure to file a notice of claim under § 14-804 also cannot defeat the plaintiffs' § 1983 civil rights claim. *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988). The Supreme Court in *Felder* held that the Supremacy Clause of the U.S. Constitution preempted a Wisconsin notice of claim statute which closely resembled the Nebraska notice of claim statute at issue in the instant case. The Court held that the notice of claim statute was inapplicable to a § 1983 claim brought in state court because conditioning the right of recovery under § 1983 upon compliance with a rule designed to minimize governmental liability, which directed injured persons to seek redress in the first instance from the very target of the federal legislation, was inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law. The holding in *Felder* is broad enough to apply to the Nebraska statute. Therefore, the plaintiffs' failure to file a notice of claim with the city in the instant case did not divest the district court of jurisdiction over the plaintiffs' § 1983 claim.

5. Failure to Join Necessary Parties

The city argues that the plaintiffs' amended petition should have been dismissed on the city's demurrer because the plaintiffs failed to name necessary parties to this action. Specifically, the city contends that the Police and Fire Pension Board of Trustees (board of trustees) should have been named as codefendant and that members of the Omaha police force, as well as four separate bargaining units—Police Union Local 101, Firefighters Union No. 385, police management, and fire management—should have been represented as members of the class of the plaintiffs.

(a) Board of Trustees

We find no merit in the city's contention that the board of

trustees was a necessary party to this litigation because the board of trustees took part in forming or funding the supplemental benefit plan. The city council created the supplemental benefit, and the funds for the supplemental benefit were derived solely from city funds. The board of trustees took no part in managing the supplemental benefit, and the board of trustees will face no liability if we find for the plaintiffs. A necessary party is one who may be compelled to respond to the prayer of the plaintiff's petition, and where there is nothing such a one is called upon to do, or can be compelled to do as a duty, one is not a necessary party. *State ex rel. Stenberg v. Murphy, ante* p. 358, 527 N.W.2d 185 (1995). Clearly, the board of trustees is not a necessary party.

(b) Police Officers and Bargaining Units

The city claims that the class represented by the plaintiffs in the instant case is incomplete because the four bargaining units identified above, which include the Omaha police officers, were necessary parties to the instant action. The city's argument is without merit.

An indispensable or necessary party to a suit is one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents a court from making a final determination concerning the controversy without affecting such party's interest. *Larson v. Vyskocil*, 245 Neb. 917, 515 N.W.2d 660 (1994); *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994); *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993). The city admits that the four named bargaining units negotiated separately regarding pension benefits. The unions representing the bargaining units are free to bring their own actions with regard to the supplemental benefit plan. We can make a final determination in the case at bar without affecting their interest.

## V. CONCLUSION

The supplemental benefit plan constituted a pension rather than a mere gratuity for the purposes of the Contract Clause of the U.S. Constitution, and the plaintiffs' constitutionally protected rights in that pension vested when they accepted

employment with the city and became members in the plan. Since the city's elimination of the supplemental benefit was neither necessary nor a reasonable alteration of the plaintiffs' pension rights, the city violated the plaintiffs' and the class' rights under the Contract Clause of the U.S. Constitution, in violation of § 1983.

AFFIRMED.

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GROVER, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS JALAPENO'S, APPELLANT, V. PAPIO-MISSOURI RIVER NATURAL RESOURCES DISTRICT, APPELLEE.

531 N.W.2d 531

Filed May 12, 1995. No. S-93-723.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate 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 that the moving party is entitled to judgment as a matter of law.
3. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court.
4. **Statute of Frauds: Contracts: Parties.** The defense of the statute of frauds cannot be asserted by a third party to a contract; the defense is personal to the parties to the contract and their privies.
5. **Parol Evidence: Contracts: Parties.** The parol evidence rule cannot be invoked by a third party to prevent a party to a writing from adducing extraneous evidence as to the terms of a contract, even if that evidence varies or contradicts the terms of a writing.
6. **Summary Judgment.** 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.
7. **Motions for New Trial: Appeal and Error.** A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded for further proceedings.

Joseph S. Daly, of Sodoro, Daly & Sodoro, P.C., for appellant.

Paul F. Peters, of Schmid, Mooney & Frederick, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, WRIGHT, and CONNOLLY, JJ., and CORRIGAN, D.J.

CONNOLLY, J.

Appellee, Papio-Missouri River Natural Resources District (NRD), petitioned to condemn certain tracts of land located in Douglas County, Nebraska. Appellant, Grover, Inc., doing business as Jalapeno's, claimed a leasehold interest in one of the tracts. Appraisers appointed by the county court for Douglas County determined that appellant sustained leasehold damages in the amount of $33,479 as a result of the NRD's taking.

Both parties appealed to the district court for Douglas County. The NRD moved in limine to prevent appellant from adducing evidence of a document entitled "Business Property Lease." The NRD also moved for summary judgment, asserting that there was no genuine issue as to whether appellant had a leasehold interest. The district court granted the NRD's motion for summary judgment, concluding as a matter of law that appellant's lease was invalid, since it had not been signed by the owners of the property. Having granted summary judgment, the court found it unnecessary to rule on the motion in limine.

The district court subsequently overruled appellant's motion for a new trial and granted the NRD's motion to have funds previously set aside for the condemnation of the leasehold interest refunded to the NRD.

## I. PARTIES' CONTENTIONS

On appeal, appellant claims the district court erred in concluding there was no leasehold interest. Appellant submits that the lease was signed by an agent of the owner and was therefore valid. In contesting the validity of the lease, the NRD raises the statute of frauds and the parol evidence rule as defenses. However, since the NRD is not a party to the lease contract, the NRD cannot raise either of those defenses.

There being no evidence but that appellant possessed a leasehold interest in the property to be condemned, the district

court erred in concluding otherwise. The rulings of the district court in various motions, having been based on this erroneous premise, are also erroneous. We, therefore, reverse the judgment of the district court and remand the cause for further proceedings.

## II. BACKGROUND

The NRD is acting as local sponsor for the U.S. Army Corps of Engineers in the corps' Papillion Creek Channel Improvement Project and the Trailhead Park Project. In its petition for appointment of appraisers, the NRD alleged that completion of the projects required the acquisition of certain tracts of land, Tract Nos. 501-502, Tract No. 503, and Tract No. 504. This appeal concerns only Tract Nos. 501-502.

According to deeds contained in the record, a part of the property referred to as Tract Nos. 501-502 was transferred from Robert F. Epsen to the Baron Corporation on January 13, 1986. Another part of Tract Nos. 501-502 was purportedly conveyed from Dennis R. McCreary and Bonnie McCreary to David E. Abboud, trustee, on January 10, 1986. On January 9, 1989, the Baron Corporation transferred its title to Nancy A. Abboud, trustee. David Abboud, trustee, subsequently transferred title to Nancy Abboud, trustee, on January 9, 1989. David Abboud was president of the Baron Corporation.

Appellant claims to have a leasehold interest in Tract Nos. 501-502 by virtue of a document entitled "Business Property Lease." The party listed as lessor on the lease is Commercial Realty, Inc., agent. David Abboud, president of Commercial Realty, signed the lease for Commercial Realty on November 1, 1988. The lease was for a 5-year term. An addendum to the lease purports to grant appellant an option to extend the lease for two additional 5-year terms. The document makes no mention of the owners of the property. As shown above, Commercial Realty did not have title to the property at this time. The Baron Corporation and David Abboud, trustee, each had title to a part of the property on November 1, 1988.

Affidavits filed by David Abboud state that Commercial Realty was acting as agent for the property owner, the Baron Corporation, on November 1, 1988, when making the business property lease.

## III. ASSIGNMENTS OF ERROR

Appellant asserts the district court erred in (1) finding that there was no valid leasehold interest in existence, (2) granting summary judgment to the NRD, (3) denying appellant a new trial, and (4) granting the NRD a refund of overpaid funds.

## IV. STANDARD OF REVIEW

In reviewing a summary judgment, an appellate 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. *Medley v. Davis, ante* p. 611, 529 N.W.2d 58 (1995). 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. *Id.* Regarding questions of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court. *Curtis O. Griess & Sons v. Farm Bureau Ins. Co., ante* p. 526, 528 N.W.2d 329 (1995).

## V. ANALYSIS

### 1. Leasehold Interest

One issue is determinative of all of appellant's assignments of error: whether the document entitled "Business Property Lease" granted appellant a valid leasehold interest for the purposes of a condemnation proceeding.

The NRD, relying upon *Morgan, et ux., v. Bergen, et ux.*, 3 Neb. 209 (1874); *Wheeler v. Walden*, 17 Neb. 122, 22 N.W. 346 (1895); *Persons v. McDonald*, 60 Neb. 452, 83 N.W. 672 (1900); *State v. Board of Commissioners of Cass County*, 60 Neb. 566, 83 N.W. 733 (1900); *Heenan & Finlen v. Parmele*, 80 Neb. 509, 114 N.W. 639 (1908); and *Witt v. Old Line Bankers Life Ins. Co.*, 89 Neb. 163, 131 N.W. 189 (1911), argues that the business property lease did not convey a leasehold interest. The NRD contends that the above-cited cases stand for the proposition that a contract, in order to be obligatory upon the principal when made by an agent, must be

executed in the name of the principal. The NRD argues that since the business property lease was not executed in the name of the principal, the lease is invalid.

In *Persons v. McDonald, supra*, the plaintiffs sued for specific performance of an alleged contract to convey certain property. The contract which allegedly conveyed the property to the plaintiffs was signed by a party purportedly acting as an agent for the owner. The owner sold the property via a separate transaction to the defendants. This court affirmed the trial court's decision to sustain the defendants' demurrer because the alleged contract between the plaintiffs and the owner was not signed by the owner. We held that since the owner had not signed the contract and the contract did not purport to be the owner's contract, the contract could not be specifically enforced.

The case at bar is similar to *Persons* in that the business property lease was signed by an agent of the property owner and made no mention of the owner. However, the instant case is distinguishable from *Persons* because there is evidence in the record establishing that the Baron Corporation, part owner of the property at the time the lease was signed, authorized David Abboud to negotiate and sign the lease as its agent. In the cases relied upon by the NRD, no extrinsic evidence of a principal-agent relationship appeared in the record.

The NRD argues that extrinsic evidence cannot be used to vary or contradict the terms of the business property lease. Specifically, the NRD contends that allowing appellant to present parol evidence regarding the property owner's identity and substituting the owner's name for that of the agent as lessor violates the statute of frauds. The flaw in the NRD's argument is that the NRD, as a third party to the lease agreement, cannot assert the statute of frauds as a defense because that defense is personal to the parties to the contract and their privies. See, *Happ v. Ducey*, 110 Neb. 429, 193 N.W. 918 (1923); *Dailey v. Kinsler*, 35 Neb. 835, 53 N.W. 973 (1892). Likewise, the NRD cannot invoke the parol evidence rule to prevent the parties to the lease agreement from adducing extraneous evidence as to the terms of the contract, even if that evidence varies or contradicts the terms of the writing. See, *State Bank of Beaver*

*Crossing v. Mackley*, 121 Neb. 28, 236 N.W. 165 (1931); *American Surety Co. v. School District*, 117 Neb. 6, 219 N.W. 583 (1928); *Nebraska Wesleyan University v. Smith*, 113 Neb. 208, 202 N.W. 625 (1925); *Woodruff v. Cooper*, 109 Neb. 857, 192 N.W. 725 (1923); *Durland Trust Co. v. Payne*, 106 Neb. 135, 182 N.W. 1016 (1921). Therefore, we hold that appellant's extrinsic evidence was admissible for the purpose of proving its leasehold interest in the property being condemned.

2. Summary Judgment

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. *Maloley v. Shearson Lehman Hutton, Inc.*, 246 Neb. 701, 523 N.W.2d 27 (1994); *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994). Having decided that extrinsic evidence was admissible to prove a leasehold rule, we find that the business property lease and the affidavits of the parties to the lease created a material factual issue regarding whether appellant possessed a leasehold interest in the property. It was error for the district court to grant the NRD's motion for summary judgment.

3. Motion for New Trial

A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Barks v. Cosgriff Co.*, *ante* p. 660, 529 N.W.2d 749 (1995); *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993). We have determined that the trial court committed prejudicial error when it granted the NRD's motion for summary judgment. Therefore, the trial court should have granted appellant's motion for new trial.

4. Refund of Deposit

Based on our findings with regard to the NRD's motion for summary judgment, the NRD was not entitled to a refund of the money deposited with the clerk of the court for the condemnation. The NRD's motion for a refund of overpaid funds should have been overruled.

Reversed and remanded for
further proceedings.

Lanphier, J., not participating.

# CRYSTAL CLEAR OPTICAL, INC., APPELLANT, V. LAWRENCE M. SILVER, APPELLEE.

531 N.W.2d 535

Filed May 12, 1995. No. S-93-893.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court; however, when the determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.
2. **Jurisdiction: Proof.** The burden of proof rests upon the plaintiff confronted with a special appearance to demonstrate the court's personal jurisdiction over the defendant.
3. **Due Process: Jurisdiction: States.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must, first, determine whether the long-arm statute is satisfied, and, if the long-arm statute has been satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
4. **Constitutional Law: Jurisdiction.** Neb. Rev. Stat. § 25-536(2) (Reissue 1989) expressly extends Nebraska's jurisdiction over nonresidents as far as the U.S. Constitution permits.
5. **Jurisdiction: Principal and Agent.** The "fiduciary shield doctrine" is not a bar to personal jurisdiction in Nebraska.
6. **Jurisdiction: Principal and Agent: Corporations.** When a corporate agent or employee is sued in Nebraska for acts committed in the course and scope of the defendant's employment in the corporation, the question of whether the Nebraska courts have personal jurisdiction over the corporation is irrelevant, unless the corporation is named as a party to the action.
7. **Jurisdiction: Principal and Agent: Due Process.** For the purpose of determining whether or not it has personal jurisdiction over a corporate agent, a Nebraska court should determine whether the agent personally had sufficient minimum contacts with Nebraska to satisfy federal due process requirements.
8. **Judgments: Appeal and Error.** Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Frederick S. Cassman, of Abrahams, Kaslow & Cassman, for appellant.

Kermit A. Brashear and Donald J. Straka, of Brashear & Ginn, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and CORRIGAN, D.J.

LANPHIER, J.

Crystal Clear Optical, Inc. (Crystal Clear), filed an action against Lawrence M. Silver, seeking a money judgment allegedly owed to Crystal Clear by National Consolidated Industries, Ltd. (NCI), a foreign corporation. Silver is alleged to have been the principal shareholder and officer of NCI and is alleged to have done acts which Crystal Clear claims should result in disregarding the corporate veil and holding Silver personally liable. The district court for Douglas County dismissed Crystal Clear's petition for lack of personal jurisdiction over Silver, on the ground that Crystal Clear failed to prove a prima facie case for piercing the corporate veil of NCI. We affirm the judgment of the district court on other grounds.

## I. FACTUAL BACKGROUND

Crystal Clear is a Nebraska corporation engaged in the manufacture and processing of optical lenses. Crystal Clear's principal place of business is Omaha, Nebraska. The record indicates neither NCI's place of incorporation nor its principal place of business, but it is apparent from the record that neither is in Nebraska. The record reflects that from June 1990 through March 1993, NCI purchased thousands of items from Crystal Clear at a cost of over $250,000. Crystal Clear brought this action to recover $16,682.47 allegedly still owed to it by NCI.

Crystal Clear sued Silver rather than NCI because it claimed that NCI was Silver's alter ego. In its petition, Crystal Clear alleged that Silver was NCI's principal shareholder and officer. Crystal Clear also claimed that Silver formed and continued to operate NCI with inadequate capital and that Silver commingled and utilized NCI's assets and revenues for his own personal use. Crystal Clear alleged that, in order to hinder and defraud Crystal Clear from collecting amounts due from NCI, Silver diverted all of NCI's assets to himself when NCI became insolvent.

On June 14, 1993, Silver filed a special appearance to challenge the district court's jurisdiction. A hearing on the

special appearance took place on August 2. Evidence was adduced in the forms of affidavits and exhibits. Crystal Clear offered the affidavit of its president, G. David Wormington, wherein Wormington restated the allegations in Crystal Clear's petition and claimed that he had personal knowledge of that information. Exhibit A attached to Wormington's affidavit states that Silver filed a security interest in all of NCI's accounts, inventory, equipment, general intangibles, contract rights, instruments, documents, chattel paper, and all proceeds, products, and accessions of and to that collateral. The filing instrument did not recite what consideration Silver had given to NCI in return for the security interest.

In addition to Wormington's affidavit and the security interest, Crystal Clear also offered into evidence numerous statements of NCI's account, detailing each purchase NCI made from Crystal Clear, as well as a monthly summary of NCI's account activity.

Silver's evidence at the special appearance hearing consisted of three affidavits: two from Silver and one from Patricia Tracy, NCI's chief operating officer and executive vice president from June 1990 to July 1992. In his affidavit, Silver stated that NCI incorporated in 1971, but denied that he was the incorporator. Silver stated that he became a minority shareholder in NCI on April 22, 1991. From June 1990 through July 1992, Silver reported that he served on NCI's board of directors, but not as an officer. During that same time period, Silver claimed that he was not involved in the day-to-day business of NCI and that he never had any contact with anyone from Crystal Clear. Silver stated that Tracy was responsible for transacting any and all business with Crystal Clear. Silver denied ever commingling NCI funds with his own or diverting NCI funds for his own personal use. Silver stated that NCI employed up to 40 people from June 1990 to July 1992.

Tracy testified that she oversaw all of NCI's business with Crystal Clear and that any such business was conducted via telephonic communication, overnight carriers, and U.S. mail. Tracy stated that an NCI employee, under Tracy's supervision, placed purchase orders with Crystal Clear. According to Tracy, NCI never had an office, bank account, telephone listing, sales

representative, or real property in Nebraska. Furthermore, Tracy stated that no officers, directors, or employees from NCI ever entered Nebraska to conduct business with Crystal Clear.

The district court sustained NCI's special appearance on September 8, 1993, holding that Crystal Clear failed to allege sufficient facts in its petition to establish a cause of action to pierce the corporate veil of NCI and therefore failed to show that the district court had jurisdiction over Silver. The district court dismissed Crystal Clear's petition on September 29.

## II. ASSIGNMENTS OF ERROR

Crystal Clear contends that the district court erred in (1) finding that Crystal Clear failed to establish a cause of action to pierce the corporate veil of NCI and (2) sustaining NCI's special appearance and dismissing Crystal Clear's petition.

## III. STANDARD OF REVIEW

When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court; however, when the determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect. *State ex rel. Grape v. Zach, ante* p. 29, 524 N.W.2d 788 (1994); *Bradley v. Hopkins*, 246 Neb. 646, 522 N.W.2d 394 (1994). The burden of proof rests upon the plaintiff confronted with a special appearance to demonstrate the court's personal jurisdiction over the defendant. *Wagner v. Unicord Corp., ante* p. 217, 526 N.W.2d 74 (1995); *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989).

## IV. ANALYSIS

### 1. Nebraska Long-Arm Statute

Before a court can exercise personal jurisdiction over a nonresident defendant, the court must, first, determine whether the long-arm statute is satisfied, and, if the long-arm statute has been satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.

*Williams v. Gould, Inc., supra.* Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1989), provides:

> A court may exercise personal jurisdiction over a person:
>
> (1) Who acts directly or by an agent, as to a cause of action arising from the person:
>
> (a) Transacting any business in this state;
>
> (b) Contracting to supply services or things in this state;
>
> (c) Causing tortious injury by an act or omission in this state;
>
> (d) Causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;
>
> (e) Having an interest in, using, or possessing real property in this state; or
>
> (f) Contracting to insure any person, property, or risk located within this state at the time of contracting; or
>
> (2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.

In addressing the special appearance in the case at bar, it is necessary to consider the breadth of the long-arm statute. *Wagner v. Unicord Corp., supra.* Section 25-536(2) expressly extends Nebraska's jurisdiction over nonresidents as far as the U.S. Constitution permits. *Wagner v. Unicord Corp., supra.* Accord *Barone v. Rich Bros. Interstate Display Fireworks*, 25 F.3d 610 (8th Cir. 1994), *cert. denied, Hosoya Fireworks Co., Ltd. v. Barone*, ____ U.S. ____, 115 S. Ct. 359, 130 L. Ed. 2d 313. Therefore, we need only address whether Silver had such minimum contacts with Nebraska that the exercise of personal jurisdiction would not offend federal constitutional principles. See *Wagner v. Unicord Corp., supra.*

### 2. District Court's Decision

#### (a) Fiduciary Shield Doctrine

In the instant case, the only allegations made by Crystal

Clear as to Silver's contacts with Nebraska relate to contacts allegedly conducted through NCI. Crystal Clear assigns as error the district court's decision not to pierce the corporate veil of NCI in order to reach Silver. Under Nebraska law, the district court did not need to determine whether or not to pierce NCI's corporate veil in order to determine if the court had jurisdiction over Silver.

The district court, in finding that it did not have jurisdiction over Silver, apparently mistakenly applied the precepts of the "fiduciary shield doctrine" in its analysis. Under the fiduciary shield doctrine, personal jurisdiction over a corporate agent or employee cannot be based on jurisdiction over the corporation for which the fiduciary acts, when the individual's activities in the forum state are conducted solely as the agent or employee of the corporation. *McGowan Grain v. Sanburg*, 225 Neb. 129, 403 N.W.2d 340 (1987). See, also, *Davis v. Metro Productions, Inc.*, 885 F.2d 515 (9th Cir. 1989); *Nat. Precast Crypt Co. v. Dy-Core of Pa., Inc.*, 785 F. Supp. 1186 (W.D. Pa. 1992); *Alpert v. Bertsch*, 235 Ill. App. 3d 452, 601 N.E.2d 1031 (1992), *appeal denied* 148 Ill. 2d 639, 610 N.E.2d 1259 (1993). Therefore, in order to assert personal jurisdiction over a foreign corporate agent or employee in a state recognizing the fiduciary shield doctrine, the plaintiff must prove a prima facie case to pierce the corporate veil in order to reach the individual defendant. *Davis v. Metro Productions, Inc., supra*; *Nat. Precast Crypt Co. v. Dy-Core of Pa., Inc., supra*.

In *McGowan Grain v. Sanburg, supra*, this court rejected the fiduciary shield doctrine as a bar to jurisdiction. *McGowan Grain* involved a breach of contract action brought by a Nebraska corporation against two agents from a Kansas corporation. The defendants in *McGowan Grain* argued that the Nebraska district court could not exercise personal jurisdiction over them because they were protected by the fiduciary shield doctrine. This court held that the fiduciary shield doctrine is irrelevant to determining whether personal jurisdiction existed:

> In disposing of the contention that the fiduciary shield doctrine precludes personal jurisdiction, we believe that, while such doctrine may have a bearing on substantive liability in some jurisdictions, we must agree with the statement: "Ignoring any notion that acting in a corporate

> capacity somehow provides the defendant with a jurisdictional shield eliminates unfairness to the plaintiff and permits a systematic application of jurisdictional principles as they are applied in other contexts." [Citation omitted.] We neither state nor imply that an employee of a corporation may be subjected to personal jurisdiction in any state where the corporate employer does business. However, if a defendant's contacts satisfy the standards imposed by the forum state's long-arm statute and the requirements of due process, the fiduciary shield doctrine does not prevent personal jurisdiction. Rather than misplaced emphasis on the fiduciary shield doctrine as a bar to personal jurisdiction, "the primary focus should be on the defendant's activities without regard to the role in which these activities were entered into. If such activities satisfy minimum contacts analysis, personal jurisdiction should be obtained."

*Id.* at 144-45, 403 N.W.2d at 350.

Under *McGowan Grain*, when a corporate agent or employee is sued in Nebraska for acts committed in the course and scope of the defendant's employment in the corporation, the question of whether the Nebraska courts have personal jurisdiction over the corporation is irrelevant, unless, of course, the corporation is named as a party to the action. In the case at bar, *McGowan Grain* dictates that the court need not find grounds for piercing the corporate veil in order to exercise personal jurisdiction over Silver. For the purpose of determining whether or not it has personal jurisdiction over Silver, the court should determine whether Silver himself had sufficient minimum contacts with Nebraska to satisfy federal due process requirements. See *id.* Accord, *Dakota Industries, Inc. v. Ever Best Ltd.*, 28 F.3d 910 (8th Cir. 1994); *Davis v. Metro Productions, Inc.*, *supra*.

(b) Effect of *McGowan Grain*

The district court dismissed this case because it found that Crystal Clear "failed to allege in its Petition facts sufficient to establish a cause of action to pierce the corporate veil of [NCI], and thereby subjecting the Defendant to the jurisdiction of this Court." Per *McGowan Grain*, Crystal Clear's failure to allege

facts sufficient to pierce the corporate veil of NCI was irrelevant to determine whether or not the district court had jurisdiction over Silver.

The district court apparently stopped its analysis after concluding that Crystal Clear had to pierce the corporate veil of NCI in order to assert personal jurisdiction over Silver. It therefore apparently never reached the question of whether Silver himself had sufficient minimum contacts with the state.

We review the record de novo to determine whether Crystal Clear satisfied its burden of proving that Silver had sufficient minimum contacts with Nebraska to justify the district court's taking personal jurisdiction over him.

### 3. Personal Jurisdiction Over Silver

The only evidence Crystal Clear offered to prove that Silver had sufficient minimum contacts with the state is the following statement from Wormington's affidavit:

> During the period from June 1990 to March 1992, Silver caused NCI to submit a vast number of separate purchase orders by fax, mail and telephone to Crystal Clear in Nebraska for the manufacturing and processing of optical lenses. Attached hereto as Exhibit "B" is a Summary of the account with accompanying statements.

Exhibit B contains a monthly summary of purchases NCI made from Crystal Clear, but nothing in that exhibit or in any of the other evidence submitted by Crystal Clear supports the conclusory allegations contained in Wormington's affidavit that Silver "caused" the orders. As detailed above, Silver submitted into evidence his and Tracy's affidavits, denying that Silver had any contact with Nebraska, either personally or through his work with NCI. We find, as a matter of law, that Crystal Clear failed to meet its burden of proving that Silver had sufficient minimum contacts with Nebraska.

The district court apparently held that Crystal Clear had to allege a prima facie case to pierce the corporate veil of NCI in order to satisfy its burden of proving that Silver was subject to the personal jurisdiction of the district court. Although such holding was incorrect, the district court correctly found that Crystal Clear failed to meet its burden of presenting facts to

demonstrate that the district court could properly exercise personal jurisdiction over Silver.

Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm. *Schlake v. Jacobsen*, 246 Neb. 921, 524 N.W.2d 316 (1994); *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994); *In re Estate of Trew*, 244 Neb. 490, 507 N.W.2d 478 (1993).

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. JOSEPH B. EGGERS, APPELLANT.

531 N.W.2d 231

Filed May 12, 1995. No. S-94-671.

1. **Postconviction: Proof: Appeal and Error.** A criminal defendant seeking postconviction relief has the burden of alleging and proving that a claimed error is prejudicial.
2. **Postconviction: Proof.** A defendant in a postconviction proceeding must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution.
3. **Jurisdiction: Sentences: Appeal and Error.** An appellate court is compelled to accept jurisdiction when the sentence entered by the court is invalid due to plain error in the proceedings.
4. **Appeal and Error.** An appellate court always reserves the right to note plain error of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process.
5. **Jury Instructions: Homicide: Intent: Appeal and Error.** The failure to include the element of malice in the jury instruction on second degree murder constitutes plain error.
6. **Criminal Law: Trial: Effectiveness of Counsel: Jury Instructions.** The failure of defense counsel in a criminal trial to object to an instruction which omits a material element of the crime charged cannot be considered to be within the wide range of professionally competent assistance.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded with direction.

Joseph B. Eggers, pro se.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

PER CURIAM.

Joseph B. Eggers, through a postconviction relief motion, asked the district court for Lincoln County for a new trial in regard to his second degree murder conviction. That court denied Eggers' request, and he appealed.

We reverse the district court's postconviction relief judgment and remand the cause for a new trial.

Eggers claims the postconviction court committed four errors. To dispose of this appeal, we need discuss only two of the issues raised by the assigned errors: (1) whether the original trial court erred when it failed to include in its instruction to the jury that malice is a material element of second degree murder, and (2) whether Eggers was denied effective assistance of counsel when his trial counsel did not object to the original trial court's omission in its jury instructions that malice is a material element of second degree murder.

The State charged Eggers with second degree murder for the July 14, 1984, death of a 3-year-old child. In 1984, a jury convicted Eggers of the charge. He was sentenced to life imprisonment. Unfortunately, the trial court omitted from its instruction on second degree murder the material element of malice.

Eggers appealed his conviction on the ground of insufficient evidence. This court affirmed the conviction, holding that the State presented sufficient evidence to support the second degree murder conviction. *State v. Eggers*, 220 Neb. 862, 374 N.W.2d 36 (1985).

On May 25, 1994, Eggers, acting pro se, filed a motion to vacate and set aside his conviction for second degree murder. Eggers alleged that the trial court committed plain error by omitting malice as a material element to second degree murder in the jury instructions. Eggers also alleged that he received ineffective assistance of counsel because his counsel failed to object to the prejudicial jury instruction.

The district court overruled Eggers' postconviction motion. In its order, the court stated that Eggers should have raised any plain error in his direct appeal and that attorneys are not required to anticipate changes in the law.

A criminal defendant seeking postconviction relief has the burden of alleging and proving that a claimed error is prejudicial. *State v. Jones*, 246 Neb. 673, 522 N.W.2d 414 (1994). A defendant in a postconviction proceeding must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution. *State v. Sims*, 244 Neb. 771, 509 N.W.2d 6 (1993).

As noted by the postconviction court, Eggers did not assign the plain error on direct appeal. Nevertheless, an appellate court is compelled to accept jurisdiction when the sentence entered by the court is invalid due to plain error in the proceedings. *State v. Williams, ante* p. 931, 531 N.W.2d 222 (1995). Moreover, an appellate court always reserves the right to note plain error of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process. *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994).

In *State v. Williams, supra*, this court addressed whether a defendant was entitled to postconviction relief from a second degree murder conviction when the court omitted the material element of malice from its jury instruction on second degree murder. We held that the failure to include the element of malice in the jury instruction on second degree murder constitutes plain error. We also held that the failure of defense counsel in a criminal trial to object to an instruction which omits a material element of the crime charged cannot be considered to be within the wide range of professionally competent assistance.

As a result of the prejudicial jury instruction and ineffective assistance of counsel, Eggers' conviction must be overturned. Upon retrial, the information, as well as the jury instruction, must state all material elements of the crime charged. See, *State v. Manzer*, 246 Neb. 536, 519 N.W.2d 558 (1994); *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994).

We reverse the judgment of the district court and grant Eggers' postconviction relief motion. This cause is remanded to

the district court with direction to grant Eggers a new trial.

REVERSED AND REMANDED WITH DIRECTION.

WRIGHT, J., dissenting.

I respectfully dissent. Eggers was convicted of second degree murder in connection with the death of a 3-year-old child. The evidence showed that the child died as the result of severe blows to the head and that there were marks on the walls in the corner of the dining room which indicated that something had been flailed against the walls. Eggers admitted he placed the child in a bathtub filled with water to make it look as though the child had drowned.

In denying Eggers' request for postconviction relief, the district court concluded that there was no denial or infringement on Eggers' rights which would render the judgment void or voidable under the Nebraska or U.S. Constitutions and that Eggers' counsel was not ineffective, but met the standard of an attorney with ordinary training and skill in criminal law. I agree with the district court's judgment. At no time prior to *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), had this court held that a defendant received ineffective assistance of counsel because counsel failed to object to a jury instruction which did not include malice as an element of second degree murder. In my opinion, malice is not an element of second degree murder, see *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994) (Wright, J., dissenting), and the trial court properly instructed the jury on the elements of the crime.

In granting postconviction relief to Eggers, the majority refers to *State v. Williams, ante* p. 931, 531 N.W.2d 222 (1995). In *Williams*, the majority held that the failure to include the element of malice in the jury instruction on second degree murder constitutes plain error and that the failure of defense counsel to object to an instruction which omits a material element of the crime charged demonstrates ineffective assistance of counsel.

To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have

been different. *State v. Clausen, ante* p. 309, 527 N.W.2d 609 (1995). Eggers cannot establish that a reasonable probability exists that the result of his trial would have been different had the jury instructions contained the element of malice.

A criminal defendant seeking postconviction relief has the burden of alleging and proving that the claimed error is prejudicial. *State v. Jones*, 246 Neb. 673, 522 N.W.2d 414 (1994). In my opinion, Eggers has not proven that the omission of the element of malice from the jury instructions was prejudicial, and the majority fails to explain how Eggers was prejudiced. Malice is defined as the intentional doing of an unlawful act without just cause or excuse. See *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994). Eggers could not have offered any excuse for his actions which resulted in the death of a 3-year-old child other than insanity, which he did not plead.

" '[I]t is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations.' " *State v. Timmerman*, 240 Neb. 74, 89, 480 N.W.2d 411, 420 (1992). See, also, *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). There has been no showing of prejudice to Eggers and clearly no showing that the result of the trial would have been different if the jury instructions had included the element of malice. In my opinion, Eggers is not entitled to postconviction relief.

CONNOLLY, J., joins in this dissent.

# HEADNOTES
## Contained in this Volume


Accounting 752
Actions 29, 244, 256, 404, 430, 592, 713, 723, 773, 785, 797, 837, 845, 907, 944
Administrative Law 49, 77, 162, 179, 233, 350, 358, 410, 452, 535, 723, 821, 831, 885, 955
Affidavits 260, 817, 951
Agency 845
Agents 547
Alimony 66, 371
Animals 100
Annexation 446
Appeal and Error 1, 23, 29, 49, 57, 66, 71, 77, 83, 94, 100, 112, 141, 150, 162, 167, 179, 184, 192, 209, 217, 227, 233, 244, 256, 260, 290, 298, 304, 309, 318, 323, 335, 350, 371, 392, 397, 404, 410, 418, 430, 436, 440, 446, 452, 468, 473, 482, 487, 503, 517, 522, 526, 535, 538, 547, 560, 573, 579, 586, 597, 608, 611, 623, 629, 638, 641, 648, 655, 660, 677, 685, 696, 707, 713, 723, 729, 735, 743, 746, 752, 761, 764, 769, 773, 785, 797, 813, 817, 821, 831, 837, 845, 852, 856, 858, 878, 885, 894, 900, 907, 919, 931, 948, 955, 975, 981, 989
Attorney and Client 404, 837, 845
Attorney Fees 141, 592, 620, 685
Aviation 227

Banks and Banking 907
Blood, Breath, and Urine Tests 318, 579
Breach of Contract 1, 538, 797, 845
Breach of Warranty 560

Charities 773
Child Custody 29, 260
Child Support 785
Circumstantial Evidence 150, 192, 323, 335
Civil Rights 955
Claims 397, 648, 955
Collateral Attack 358, 813
Collateral Estoppel 785
Commission of Industrial Relations 468, 955
Compromise and Settlement 323
Consideration 538
Conspiracy 192, 209, 547

Constitutional Law 29. 49. 77. 100. 167. 233. 260. 267. 290. 309. 335. 358. 440. 452. 473. 482. 487. 503. 586. 729. 773. 813. 885. 955. 981
Construction Contracts 397. 547
Consumer Protection 907
Contracts 1. 57. 71. 267. 298. 468. 487. 526. 538. 560. 597. 648. 685. 696. 797. 845. 894. 900. 907. 919. 955. 975
Controlled Substances 410. 473. 502
Conversion 858
Conveyances 623
Convicted Sex Offender 345
Convictions 83. 150. 167. 192. 256. 335. 503
Corporations 290. 547. 858. 981
Costs 473. 620
Counties 384
Courts 1. 66. 244. 260. 358. 452. 517. 522. 608. 821. 931. 955
Criminal Law 83. 192. 209. 256. 335. 503. 517. 567. 579. 586. 608. 729. 785. 931. 948. 989
Custom and Usage 1

Damages 49. 57. 290. 526. 538. 547. 871
Death Penalty 503
Debtors and Creditors 538. 641. 856. 858
Decedents' Estates 17. 648. 707. 752
Declaratory Judgments 77. 468. 482. 487. 685. 696. 723. 845. 900. 944. 955
Demurrer 66. 290. 298. 660. 955
Directed Verdict 1. 23. 112. 192. 323. 418. 677. 856. 858
Disciplinary Proceedings 735
Discrimination 244
Double Jeopardy 503. 785
Drunk Driving 579
Due Process 29. 167. 217. 473. 487. 502. 785. 837. 981

Easements 227. 761
Effectiveness of Counsel 309. 931. 948. 989
Employer and Employee 94. 919
Employment Contracts 660. 837
Employment Security 410. 821
Equal Protection 100. 487. 773
Equity 49. 71. 77. 100. 244. 335. 397. 430. 482. 487. 538. 597. 623. 648. 752. 761. 773. 858. 907. 944
Evidence 1. 29. 83. 112. 150. 162. 192. 209. 267. 309. 335. 371. 418. 436. 526. 597. 611. 660. 685. 713. 729. 735. 752. 785. 878
Expert Witnesses 1. 323. 611. 951

Fair Employment Practices 244
Fees 817
Final Orders 233. 288. 350. 410. 452. 535. 629. 660. 713. 821
Foreclosure 298. 397. 538

Foreign Judgments 813
Fraud 538, 858

Gifts 752
Good Cause 660

Habeas Corpus 260
Health Care Providers 620
Hearsay 323, 547, 592
Highways 112, 184, 384, 871, 885
Homicide 503, 878, 931, 948, 989

Immunity 723, 907
Implied Consent 318
Independent Contractor 919
Injunction 100, 227, 761, 944
Insurable Interest 597
Insurance 1, 49, 526, 597, 696, 900
Intent 29, 192, 233, 335, 358, 384, 446, 487, 517, 547, 560, 573, 597, 623, 685, 729, 752, 852, 878, 900, 931, 948, 989
Interest 371, 707
Invitor-Invitee 128, 304, 392, 677
Issue Preclusion 785

Joint Tenancy 597
Joint Ventures 418
Judges 29, 66, 209, 358, 430, 743, 797, 931
Judgments 29, 66, 150, 167, 217, 227, 233, 244, 256, 260, 288, 318, 350, 358, 418, 452, 503, 526, 535, 560, 579, 620, 629, 641, 677, 769, 785, 831, 837, 907, 931, 975, 981
Judicial Notice 452, 931
Juries 83, 112, 167, 209, 244, 858
Jurisdiction 29, 66, 162, 179, 217, 244, 260, 350, 452, 517, 522, 608, 629, 660, 723, 785, 813, 831, 907, 931, 981, 989
Juror Qualifications 167
Jurors 167
Jury Instructions 112, 167, 192, 304, 392, 660, 743, 931, 948, 989
Jury Trials 813
Justiciable Issues 696
Juvenile Courts 608, 629, 785

Legislature 29, 100, 192, 233, 260, 358, 384, 446, 473, 487, 573, 729, 852, 900, 955
Lesser-Included Offenses 192
Liability 128, 304, 526, 620, 677, 696, 858, 900
Libel and Slander 290
Licenses and Permits 49, 100, 318, 885
Liens 298, 620
Limitations of Actions 179, 298
Loans 298

Malpractice 404, 611, 951
Mandamus 384
Master and Servant 919
Mechanics' Liens 397
Medical Assistance 77
Modification of Decree 66
Mortgages 298, 538
Motions for Mistrial 167
Motions for New Trial 350, 660, 975
Motions to Dismiss 29, 244
Motions to Strike 660, 797, 894
Motions to Suppress 579, 729
Motor Vehicles 49, 112, 184, 761, 885
Municipal Corporations 446, 773, 955

Natural Resources Districts 233
Nebraska Power Review Board 446
Negligence 23, 57, 112, 128, 184, 304, 392, 404, 418, 677, 845, 951
New Trial 931
Notice 49, 128, 452, 473, 487, 677, 837, 885, 955

Offers to Buy or Sell 797
Ordinances 440, 955
Other Acts 878

Parent and Child 29
Parental Rights 629
Parol Evidence 1, 560, 975
Parties 358, 592, 773, 797, 907, 955, 975
Partnerships 685, 752
Paternity 29, 785
Pedestrians 112
Penalties and Forfeitures 335
Pensions 955
Physicians and Surgeons 611, 951
Pleadings 1, 29, 66, 112, 244, 290, 298, 358, 418, 538, 660, 797, 894, 955
Police Officers and Sheriffs 318, 579
Political Subdivisions 233, 773
Postconviction 638, 931, 989
Prejudgment Interest 397, 560
Presumptions 233, 298, 410, 452, 473, 482, 487, 785, 821
Pretrial Procedure 192
Principal and Agent 323, 752, 981
Proof 1, 49, 71, 112, 128, 167, 192, 209, 217, 233, 244, 290, 304, 309, 384, 392, 397, 404, 410, 418, 430, 436, 440, 452, 473, 482, 487, 538, 547, 560, 579, 592, 597, 611, 629, 641, 648, 660, 677, 735, 743, 746, 773, 785, 821, 837, 856, 858, 878, 885, 931, 951, 981, 989
Property 473, 623, 729, 752, 837, 871
Property Division 141, 371

Prosecuting Attorneys 167, 192
Proximate Cause 112, 128, 304, 526, 677
Public Health and Welfare 885
Public Officers and Employees 192, 358, 723, 817, 837, 955
Public Policy 57, 298
Public Utilities 446

Quiet Title 71, 623
Quo Warranto 358

Real Estate 298, 538, 648
Rebuttal Evidence 83
Records 1, 49, 138, 162, 323, 436, 452, 503, 522, 641, 785, 878
Recusal 29, 430
Res Judicata 769, 785
Rescission 907
Restitution 517
Revocation 49, 885
Right to Counsel 785
Rules of Evidence 83, 209, 323, 452, 547, 592, 878
Rules of the Supreme Court 641

Sales 267, 560, 641
Sanitary and Improvement Districts 384
Schools and School Districts 573
Search and Seizure 729
Secured Transactions 641
Securities Regulation 907
Sentences 256, 345, 503, 517, 567, 586, 931, 989
Service of Process 436, 535
Sexual Assault 83
Special Legislation 487, 773
Specific Performance 648
Standing 100, 592, 773, 907
State Equalization Board 179
States 29, 217, 267, 298, 813, 981
Statute of Frauds 975
Statutes 29, 49, 77, 100, 192, 233, 256, 267, 298, 318, 358, 384, 440, 446, 452, 473, 482, 487, 502, 517, 567, 573, 586, 707, 723, 729, 773, 813, 821, 852, 885, 900, 907
Stipulations 597
Subrogation 597
Substantial Performance 71, 845
Summary Judgment 57, 184, 267, 404, 430, 526, 547, 611, 655, 696, 707, 746, 764, 797, 951, 955, 975
Supreme Court 1, 100, 260

Taxation 162, 436, 607, 707, 773, 877, 944

Taxes 473, 502, 752
Termination of Employment 660, 821, 837
Testimony 1, 309
Time 350, 371, 446, 517, 535, 560, 586, 713, 761, 797, 817, 821
Title 648
Tort-feasors 597
Torts 547, 797
Trial 1, 23, 29, 83, 112, 138, 167, 209, 244, 309, 323, 335, 418, 430, 579, 660, 856, 858, 878, 931, 948, 989
Trusts 592

Uniform Commercial Code 560, 641
Unjust Enrichment 907

Valuation 162, 436, 607, 877
Vendor and Vendee 267, 560, 648
Venue 167
Verdicts 323, 335, 418, 660, 858
Voting 487

Wages 468, 713
Waiver 83, 244, 430, 660, 723, 878
Warranty 1
Weapons 567
Wills 17
Witnesses 29, 209
Words and Phrases 1, 17, 29, 49, 57, 66, 83, 100, 167, 209, 244, 260, 267, 290, 298, 323, 335, 358, 371, 384, 397, 418, 452, 517, 526, 535, 567, 597, 648, 696, 713, 729, 761, 773, 797, 817, 858, 878, 894, 907, 919, 955
Workers' Compensation 94, 713, 764, 919