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WEST GATE BANK, A NEBRASKA BANKING CORPORATION, APPELLANT, V. AMERICAN NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, APPELLEE.

550 N.W.2d 318

Filed July 5, 1996. No. S-94-1011.

1. **Bankruptcy: Courts: Actions: Pleadings.** A bankruptcy stay is automatic because it is triggered upon the filing of a bankruptcy petition. Any action taken in violation of the automatic stay is void. This prohibition applies equally to state courts and its officers.
2. **Courts: Actions: Estates: Property: Debtors and Creditors.** State court action comes within the terms of an automatic stay if it is to obtain property of an estate or to recover a claim against the debtor.

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

Carl J. Sjulin, of Rembolt Ludtke & Berger, for appellant.

Clayton Byam and Joseph C. Byam, of Byam & Byam, for appellee.

Christopher D. Curzon and David L. Crawford, of Schmid, Mooney & Frederick, P.C., for amicus curiae Richard D. Myers, Trustee for the Estate of Rine & Rine Auctioneers, Inc.

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

FAHRNBRUCH, J.

In this litigation, West Gate Bank, appellant, claims that American National Bank, appellee, converted proceeds from an auction conducted by an American National customer, Rine & Rine Auctioneers (Rine).

The district court for Douglas County sustained American National's motion for summary judgment and denied West Gate's motion for summary judgment.

We removed the case from the Nebraska Court of Appeals' docket to this court's docket under our power to regulate the caseloads of the appellate courts.

Interwoven with the case at bar, Rine filed for federal bankruptcy relief. West Gate, in a federal adversary proceeding, has challenged whether the bankruptcy trustee has a claim to

the same proceeds involved in this litigation. The federal court action is pending before the U.S. Court of Appeals for the Eighth Circuit. The record before this court does not reveal that any party to this action has sought relief from an automatic stay for the proceeds in question. Based upon the record before this court, it is apparent that a federal bankruptcy stay has been in effect since April 27, 1992, regarding these proceeds. Therefore, we dismiss West Gate's appeal and find the district court order to be void ab initio.

ASSIGNMENTS OF ERROR

West Gate claims that the trial court erred in (1) denying its motion for summary judgment and (2) granting American National's motion for summary judgment.

FACTS

On October 22, 1993, West Gate filed this action against American National in the district court for Douglas County. West Gate alleged that American National set off Rine's account in the amount of $21,354.02, which was the proceeds from a February 16, 1992, auction conducted by Rine. West Gate alleged that American National converted West Gate property and prayed for the immediate right to its proceeds of $21,354.02.

Both parties moved for summary judgment. Before the district court, both parties agreed that there were no factual disputes. The record reflects the following uncontroverted facts:

In January 1992, West Gate retained Rine to conduct a sale of personal property that West Gate had obtained from a customer who defaulted on a loan secured by the property. On February 16, Rine conducted the auction. On February 18, Rine deposited the proceeds from the auction into its commercial checking account at American National.

On February 18 and 24, American National made three debits from Rine's accounts under Rine's direction, totaling $21,354.02. It was a common practice for Rine to direct American National to debit from its account for payment on a debt.

On March 12, American National was notified by West Gate that West Gate had an interest in a part of the February 18 deposits.

On April 27, Rine filed for relief under chapter 7 of the U.S. Bankruptcy Code.

The trial court overruled West Gate's motion for summary judgment, sustained American National's motion for summary judgment, and dismissed the petition. In its order, the trial court found that Rine deposited the funds from the auction in its commercial checking account with American National and that the deposit was not designated as a special or trust deposit. The trial court found that the transactions were not setoffs, but, rather, advice of charge transactions directed by Rine and that American National was not notified of any claimed security interest in the funds until its advice of charge transactions were completed.

More telling than the uncontroverted facts in the district court record are the findings and order of the federal bankruptcy court in In re Rine & Rine Auctioneers, Inc., BK92-80770 (Bankr. D. Neb. 1995), and the affirmance of that order by the U.S. District Court in In re Rine & Rine Auctioneers, Inc., 8:CV95-00150 (D. Neb. 1995). The federal court judgments show that the trustee for the federal bankruptcy estate filed an adversary proceeding alleging voidable preference and fraudulent conveyance claims against transferees of Rine which include the Rine account with American National at issue in the case at bar. In response, West Gate filed an adversary proceeding asking the federal court to order the trustee to turn over to West Gate any proceeds which the trustee might recover from the auction conducted for West Gate by Rine. The federal district court, in affirming the bankruptcy court's order, followed its precedent in two previous cases involving Rine auctioneer clients and held that the relationship between Rine and West Gate was one of agent and principal and that, therefore, the auction proceeds, which were not committed to Rine's commission and expenses, should be turned over to West Gate. The two controlling opinions relied upon by the federal district court have been subsequently reversed by the U.S. Court of Appeals for the Eighth Circuit.

See, *In re Rine & Rine Auctioneers, Inc.*, 74 F.3d 854 (8th Cir. 1996); *In re Rine & Rine Auctioneers, Inc.*, 74 F.3d 848 (8th Cir. 1996). The trustee has appealed the district court's ruling regarding West Gate proceeds to the U.S. Court of Appeals for the Eighth Circuit.

ANALYSIS

The money involved in this appeal is also the subject of the federal bankruptcy proceedings in In re Rine & Rine Auctioneers, Inc. The bankruptcy case is currently pending before a federal appellate court. A bankruptcy stay is automatic because it is triggered upon the filing of a bankruptcy petition. *Elliott v. First Security Bank*, 249 Neb. 597, 544 N.W.2d 823 (1996). Any action taken in violation of the automatic stay is void. *Id.* This prohibition applies equally to state courts and its officers. *Id.* State court action comes within the terms of an automatic stay if it is to obtain property of an estate or to recover a claim against the debtor. See *In re Colonial Realty Co.*, 980 F.2d 125 (2d Cir. 1992).

The record fails to reflect that relief from the automatic bankruptcy stay has been granted in regard to the proceeds that West Gate seeks to recover in the case at bar and at the federal appellate court. Because there was no relief from the automatic stay, the actions by the district court as well as West Gate's appeal are void. Thus, this matter is left for the federal courts to resolve in the pending bankruptcy litigation.

CONCLUSION

West Gate's appeal is dismissed and the order of the district court dated October 11, 1994, is void because it violates an automatic federal bankruptcy court stay.

APPEAL DISMISSED.

IN RE INTEREST OF BRANDY M. ET AL., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLANT, V. BRANDY M. ET AL., APPELLEES.

550 N.W.2d 17

Filed July 5, 1996. Nos. S-94-1212, S-94-1214 through S-94-1222.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Statutes: Intent.** In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
3. **Statutes.** A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme.
4. **Statutes: Juvenile Courts: Time.** Neb. Rev. Stat. §§ 43-271 and 43-278 (Reissue 1993) confer a statutory right to a prompt adjudication hearing to all juveniles within Neb. Rev. Stat. § 43-247(1), (2), (3)(b), and (4) (Reissue 1993).
5. **Statutes: Words and Phrases.** As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion.
6. **Statutes: Intent: Words and Phrases.** While the word "shall" may render a particular provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done.
7. **Juvenile Courts.** A juvenile court proceeding is not a prosecution for crime, but a special proceeding that serves as an ameliorative alternative to a criminal prosecution.
8. **Statutes: Time.** A legislative enactment providing that an act be accomplished within a specified time period, with no sanction for failure to comply with that mandate, is directory.
9. **Statutes: Time: Minors.** Neb. Rev. Stat. §§ 43-271 and 43-278 (Reissue 1993) are directory and do not require absolute discharge of a juvenile not adjudicated within the prescribed time period.
10. **Minors: Juvenile Courts.** The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests.
11. ____: ____. It is within the discretion of the juvenile court to determine whether absolute discharge of a juvenile petition is in the best interests of a juvenile taking into consideration (1) the factors set forth in Neb. Rev. Stat. §§ 43-271 and 43-278 (Reissue 1993), (2) the right of the juvenile to a prompt and fair adjudication, and (3) the future treatment and rehabilitation of the juvenile in the

event of an adjudication. The benchmark of this determination is the protection of the best interests of the juvenile.

12. **Juvenile Courts: Appeal and Error.** An appellate court's review of the juvenile court's prompt adjudication determination shall be de novo on the record to determine whether there has been an abuse of discretion by the juvenile court.
13. ____: ____. Prompt adjudication determinations in juvenile cases are initially entrusted to the discretion of the juvenile court and will be upheld unless they constitute an abuse of discretion.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, MUES, and INBODY, Judges, on appeal thereto from the Separate Juvenile Court of Douglas County, DOUGLAS F. JOHNSON, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

James S. Jansen and Vernon Daniels for appellant.

Thomas M. Kenney, Douglas County Public Defender, Krista L. Tushar, and Sarah G. Hemming for appellees.

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

GERRARD, J.

I. INTRODUCTION

On December 7, 1994, the separate juvenile court sustained the motions for absolute discharge filed in 10 separate juvenile cases. Each motion was predicated upon the juveniles' statutory right to a prompt adjudication hearing pursuant to Neb. Rev. Stat. §§ 43-271 and 43-278 (Reissue 1993). In an opinion designated for permanent publication, the Nebraska Court of Appeals reversed the juvenile court, holding § 43-271 applied only to juveniles taken into custody pursuant to Neb. Rev. Stat. §§ 43-248, 43-250, and 43-253 (Reissue 1993), and, in any event, the Nebraska Juvenile Code provides no authority for a judge to dismiss a petition absent a showing of prejudice by the juvenile. *In re Interest of Brandy M. et al.*, 4 Neb. App. 115, 539 N.W.2d 280 (1995). It is from this decision that the juveniles have successfully sought further review. We now reverse the judgment of the Court of Appeals.

II. FACTUAL BACKGROUND

On December 5 and 6, 1994, 10 separate motions for absolute discharge were filed concerning juveniles who had not been brought before the juvenile court for an adjudication hearing within 6 months of the filing of their petitions. In each case, counsel for the child in interest did not request a continuance or file any pretrial motions within a 6-month period from the date the petition was filed. The parties stipulated to consolidation of the cases, as each case concerned the same issues of fact and law. The specific facts of each petition are as follows:

1. *In re Interest of Brandy M.*, case No. S-94-1212. The petition, filed June 1, 1994, alleged three counts pursuant to Neb. Rev. Stat. § 43-247(3)(b) (Reissue 1993): a wayward and disobedient child in need of supervision. A denial was entered on behalf of the child on July 6. An adjudication hearing was set for December 22. Motion for absolute discharge was filed December 6.

2. *In re Interest of James D.*, case No. S-94-1214. The petition, filed May 6, 1994, alleged six counts pursuant to § 43-247(1) and (2): commission of an act by a juvenile which would constitute a misdemeanor or infraction and commission of an act by a juvenile which would constitute a felony. James D. was charged with four counts of receiving stolen property and two counts of destruction of property. A denial was entered on behalf of the child on July 19. This case was never set for adjudication. Motion for absolute discharge was filed December 6.

3. *In re Interest of Thomas S.*, case No. S-94-1215. The petition, filed May 2, 1994, alleged two counts pursuant to § 43-247(1): commission of an act by a juvenile which would constitute a misdemeanor or infraction. Thomas S. was charged with trespassing and obstruction. A denial was entered on behalf of the child on July 6. This case was set for adjudication on December 22. Motion for absolute discharge was filed December 6.

4. *In re Interest of Stephanie P.*, case No. S-94-1216. The petition, filed April 22, 1994, alleged two counts pursuant to § 43-247(1) and (2): commission of an act by a juvenile which

would constitute a misdemeanor or infraction and commission of an act by a juvenile which would constitute a felony. Stephanie P. was charged with receiving stolen property and obstruction. A denial was entered on behalf of the child on July 6. This case was set for adjudication on December 12. Motion for absolute discharge was filed December 6.

5. *In re Interest of Arthur H.*, case No. S-94-1217. The petition, filed April 22, 1994, alleged one count pursuant to § 43-247(2): commission of an act by a juvenile which would constitute a felony. Arthur H. was charged with first degree assault. A denial was entered on behalf of the child on June 28. This case was set for adjudication on December 21. Motion for absolute discharge was filed December 5.

6. *In re Interest of Vincent P.*, case No. S-94-1218. The petition, filed April 19, 1994, alleged two counts pursuant to § 43-247(1): commission of an act by a juvenile which would constitute a misdemeanor or infraction. Vincent P. was charged with violation of the Omaha Municipal Code, refusing to leave property, and being an annoyance. A denial was entered on behalf of the child on June 28. This case was set for adjudication on December 21. Motion for absolute discharge was filed December 6.

7. *In re Interest of Jerry G.*, case No. S-94-1219. The petition, filed April 18, 1994, alleged two counts pursuant to § 43-247(1): commission of an act by a juvenile which would constitute a misdemeanor or infraction. Jerry G. was charged with third degree assault. A denial was entered on behalf of the child on June 21. This case was set for adjudication on December 16. Motion for absolute discharge was filed December 5.

8. *In re Interest of George M.*, case No. S-94-1220. The petition, filed April 13, 1994, alleged one count pursuant to § 43-247(2): commission of an act by a juvenile which would constitute a felony. George M. was charged with criminal mischief. A denial was entered on behalf of the child on June 21. This case was set for adjudication on December 13. Motion for absolute discharge was filed December 5.

9. *In re Interest of David C.*, case No. S-94-1221. The petition, filed April 13, 1994, alleged two counts pursuant to

§ 43-247(1): commission of an act by a juvenile which would constitute a misdemeanor or infraction. David C. was charged with carrying a concealed weapon and with violation of a municipal ordinance, being an annoyance. A denial was entered on behalf of the child on June 21. This case was set for adjudication on December 19. Motion for absolute discharge was filed December 6.

10. *In re Interest of Joe C.*, case No. S-94-1222. The petition, filed April 11, 1994, alleged one count pursuant to § 43-247(1): commission of an act by a juvenile which would constitute a misdemeanor or infraction. Joe C. was charged with shoplifting. A denial was entered on behalf of the child on June 7. This case was set for adjudication on December 13. Motion for absolute discharge was filed December 5.

1. PROCEEDINGS IN JUVENILE COURT

On December 7, 1994, a hearing was held in the juvenile court on the juveniles' motions for absolute discharge. Counsel for the juveniles argued the motion, but did not offer any evidence in support thereof. The State called two witnesses who testified generally about the crowded docket and lack of judicial resources, at that time, in the Douglas County Separate Juvenile Court. The testimony will be discussed more extensively in the analysis portion of this opinion.

The gist of the juveniles' argument was that § 43-271 required the State to bring a juvenile to an adjudication hearing within 6 months of the filing of a petition. In addition, because § 43-271 specifically incorporated the speedy trial right found in the criminal rules of procedure, Neb. Rev. Stat. § 29-1207 (Reissue 1995), if the State failed in its statutory obligation to adjudicate a child within 6 months of the filing of the petition, absolute discharge was mandated.

The State argued that juvenile adjudications are not criminal prosecutions; thus § 29-1207 should not be read so broadly as to compel the absolute discharge of these juveniles. Moreover, § 29-1207(4)(f) allows the speedy trial time period to toll if the court finds that there is good cause, and the current crowded docket in the juvenile court constitutes good cause.

After hearing evidence and argument by counsel, the juvenile court granted the motions and discharged all 10 cases. The juvenile court found that § 43-271 required the State to bring all juveniles before the court for adjudication as soon as possible, but, in all cases, within a 6-month period after the petition is filed. If the 6-month period has passed between the filing of a petition and an adjudication hearing, § 43-271 refers the court to the rules of criminal procedure, and, absent sufficient cause for the delay, the juvenile court found that an absolute discharge from the petition is statutorily mandated.

2. Decision of Court of Appeals

The Court of Appeals reversed the orders of the juvenile court finding that "[t]he language of § 43-271 is plain and unambiguous. It applies only to those juveniles entering the juvenile court system through the temporary custody process set forth in § 43-248." *In re Interest of Brandy M. et al.*, 4 Neb. App. 115, 119, 539 N.W.2d 280, 283 (1995). The record before the court did not indicate that any of the juveniles involved in the cases on appeal had at one time, without the issuance of a warrant, been in the temporary custody of an officer of the peace pursuant to § 43-248. Accordingly, the juveniles did not have a statutory right to adjudication within 6 months.

Moreover, the Court of Appeals found that even if there were a statutory speedy trial right applicable to the cases filed pursuant to § 43-247(1) and (2), because the Legislature failed to specify a consequence for the failure to provide a trial within 6 months, the 6-month time limit was merely directory rather than mandatory. Thus, for a juvenile to have his or her petition dismissed, he or she must show prejudice.

The Court of Appeals did note that of the 10 cases involved in the instant appeal, 1 case was filed pursuant to § 43-247(3)(b) and that § 43-278 provided this juvenile with a statutory right to an adjudication hearing within 90 days. However, the Court of Appeals found the use of the word "shall" in § 43-278 was likewise directory. Accordingly, this juvenile must demonstrate prejudice in order to obtain an absolute discharge.

III. ASSIGNMENTS OF ERROR

The juveniles contend that the Court of Appeals erred in the following two respects: (1) in construing § 43-271 so as to deny a statutory right to a prompt adjudication hearing for juveniles who do not first enter the system through temporary custody by an officer of the peace and (2) in holding that, in any event, a juvenile must demonstrate prejudice in order to receive discharge when the State has failed to comply with the statutory mandate of a prompt adjudication hearing found in §§ 43-271 and 43-278.

IV. ANALYSIS

1. Construction of §§ 43-271 and 43-278

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. *In re Interest of Archie C., ante* p. 123, 547 N.W.2d 913 (1996); *In re Estate of Soule*, 248 Neb. 878, 540 N.W.2d 118 (1995). In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *In re Interest of Lisa O.*, 248 Neb. 865, 540 N.W.2d 109 (1995); *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994). A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996); *Chrysler Corp. v. Lee Janssen Motor Co.*, 248 Neb. 281, 534 N.W.2d 568 (1995).

Section 43-271, titled "Prompt hearing and disposition," provides:

> A juvenile taken into custody pursuant to sections 43-248, 43-250, and 43-253 shall be brought before the court for adjudication as soon as possible after the petition is filed. On the return of the summons or other process, or mailing of the notice in lieu of summons, or as soon thereafter as legally may be, the court shall pro-

ceed to hear and dispose of the case as provided in section 43-279.

The hearing as to a juvenile *in custody* of the probation officer or the court shall be held *as soon as possible* but, in all cases, within a six-month period after the petition is filed, and as to a juvenile *not in such custody as soon as practicable* but, *in all cases*, within a six-month period after the petition is filed. The computation of the six-month period provided for in this section shall be made as provided in section 29-1207, as applicable.

(Emphasis supplied.)

The statutes specifically referenced in the first paragraph of § 43-271 are concerned with juveniles taken into custody without a warrant by an officer of the peace. Specifically, § 43-248 identifies circumstances when a juvenile may be taken into temporary custody by any officer of the peace without a warrant or order of the court. Section 43-250 identifies the measures that the officer must then follow subsequent to taking a juvenile into temporary custody by § 43-248. Section 43-253 is a requirement that an immediate investigation must be made of the situation and circumstances surrounding a juvenile who is taken into temporary custody by §§ 43-248 and 43-250.

The Court of Appeals construed § 43-271 to give what it admittedly recognized was an illogical result—that only those juveniles first temporarily detained without a warrant by an officer of the peace have a statutory right to a prompt adjudication hearing and that no such statutory right exists for juveniles not initially so detained. Such a construction is inconsistent and inharmonious with the clear meaning of other provisions in the juvenile code.

Neb. Rev. Stat. § 43-279(1) (Reissue 1993), in pertinent part, states:

> When the petition alleges the juvenile to be within the provisions of subdivision (1), (2), (3)(b), or (4) of section 43-247 and the juvenile or his or her parent . . . appears with or without counsel, the court shall inform the parties:
>
> . . . .

> (f) Of the right of the juvenile to a speedy adjudication hearing . . . .

The plain language of this provision of the juvenile code obviously contemplates that all juveniles who are within the provisions of § 43-247(1), (2), (3)(b), and (4) have a right to a prompt adjudication. Therefore, if, as the Court of Appeals held, only those juveniles who are first temporarily detained by an officer of the peace are afforded a statutory right to a prompt adjudication hearing, then the right to a speedy adjudication referred to in § 43-279(1)(f) for all other juveniles must be constitutionally grounded.

Even though this court has held that the U.S. and Nebraska Constitutions do not provide a "speedy trial" right in the context of a termination of parental rights proceeding, we have never specifically addressed the issue of whether a juvenile facing a delinquency adjudication has a constitutionally grounded right to a speedy adjudication. See *In re Interest of C.P.*, 235 Neb. 276, 455 N.W.2d 138 (1990). We have not been asked to make such a determination in the instant case, and we find no reason to decide this constitutional issue, as §§ 43-271 and 43-278, when properly construed, confer a statutory right to a prompt adjudication hearing to all juveniles within § 43-247(1), (2), (3)(b), and (4). This construction is based first of all upon the three conditions of custody identified in the clear and unambiguous language of § 43-271: (1) juveniles in the temporary custody of an officer of the peace without a warrant, (2) juveniles in the custody of the probation officer or court, and (3) juveniles not in custody.

The first condition of custody is identified in the first paragraph of § 43-271. "A juvenile taken into custody pursuant to sections 43-248, 43-250, and 43-253 shall be brought before the court for adjudication as soon as possible after the petition is filed." This right applies only to those juveniles who first enter the system through temporary custody by an officer of the peace pursuant to the above named statutes. In addition, Neb. Rev. Stat § 43-277 (Reissue 1993) provides that these juveniles are to be adjudicated within a 6-month period after a petition is filed, and if the juveniles do not receive an adju-

dication hearing within 6 months, the juvenile shall be released from custody.

The second condition of custody identified in § 43-271 is "a juvenile in custody of the probation officer or the court . . . ." An adjudication hearing for such juvenile "shall be held *as soon as possible* but, in all cases, within a six-month period after the petition is filed . . . ." (Emphasis supplied.)

The third condition of custody identified in § 43-271 is "a juvenile not in such custody . . . ." An adjudication hearing must be held as to these juveniles "*as soon as practicable* but, in all cases, within a six-month period after the petition is filed." (Emphasis supplied.)

It is readily apparent from the plain language of § 43-271 that the Legislature intended to provide a statutory right to a prompt adjudication hearing for all juveniles. However, those juveniles being held in custody are to receive an adjudication hearing as soon as *possible*, whereas the juveniles not being held in custody are to receive an adjudication hearing as soon as *practicable*. Both sets of juveniles should receive an adjudication hearing within a 6-month period after the petition is filed pursuant to § 43-271, but a statutory scheduling preference is granted to those juveniles that are in custody pending adjudication. Thus, nine of the juveniles in the instant case had a statutory right under § 43-271 to a prompt adjudication hearing.

One of the juvenile petitions at issue was filed pursuant to § 43-247(3)(b). Section 43-278 provides in relevant part: "All cases filed under subdivision (3) of section 43-247 shall have an adjudication hearing not more than ninety days after a petition is filed." Section 43-278 is likewise clear and unambiguous, and provides a statutory right to a prompt adjudication hearing for those juveniles that are alleged to be status offenders under subdivision (3) of § 43-247. Therefore, although not subject to a 6-month provision, this (3)(b) petition is subject to a 90-day prompt adjudication limitation.

2. Absolute Discharge as a Remedy

Our inquiry does not end with the determination that §§ 43-271 and 43-278 provide to juveniles a statutory right to

a prompt adjudication hearing. The Court of Appeals held that even if all juveniles subject to a § 43-247(1), (2), or (3)(b) petition have a statutory right to a speedy adjudication pursuant to § 43-271 or § 43-278, the use of the word "shall" in those statutes is merely directory, thus absolute discharge for the State's failure to comply is not mandated.

As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion. *Payne v. Nebraska Dept. of Corr. Servs.*, 249 Neb. 150, 542 N.W.2d 694 (1996). However, while the word "shall" may render a particular provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done. *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994).

The Court of Appeals concluded that even if the juveniles in question did have a statutory right to a prompt adjudication hearing, this right was not violated when the statutory 6-month limit of § 43-271 is merely directory and not mandatory. For a juvenile to receive discharge from a petition, the Court of Appeals held he or she must show that the juvenile was prejudiced by the delay. In reaching this conclusion, the Court of Appeals relied on *In re Interest of C.P.*, 235 Neb. 276, 455 N.W.2d 138 (1990).

In *In re Interest of C.P.*, this court determined that the use of the word "shall" in § 43-278 (Reissue 1988) was directory and not mandatory. The language of the former § 43-278 was identical to what is now the second paragraph of § 43-271, the statute at issue in the instant appeal. This court held because "shall" was directory, failure of the State to provide an adjudication hearing within the statutory 6-month limit did not require discharge from the petition, when the subject of the petition had not indicated how she had been prejudiced by the delay.

However, significant factual and legal distinctions exist between *In re Interest of C.P.* and the instant case. The interest at stake in *In re Interest of C.P.* was the termination of parental rights for a mother with a long history of neglect and abuse. In view of the fact that the juvenile's best interests are

the primary consideration in an adjudication hearing, we reasoned it would be absurd to construe the language in § 43-278 as mandatory, when the result would be to return a sexually abused child to the party who abused her for the sole reason that an adjudication hearing was held 181 days after a petition was filed.

Although our reasoning is persuasive within the factual context of *In re Interest of C.P.*—an abusive mother seeking to obtain an absolute discharge from the jurisdiction of the juvenile court—there are different interests at stake in the present case where it is the juveniles who seek absolute discharge from a delinquency petition after remaining unadjudicated in the juvenile court system.

Several other states have considered the question of whether the use of the word "shall" is mandatory or directory in the context of speedy adjudication statutes. The courts of two states have held the use of the word "shall" in its speedy adjudication statutes is mandatory. See, *In re Russell C.*, 120 N.H. 260, 414 A.2d 934 (1980); *Sanchez v. Family & Children Services*, 237 Ga. 406, 229 S.E.2d 66 (1976). In *In re Russell C., supra*, the New Hampshire Supreme Court concluded interpreting the word "shall" as mandatory is consistent with the goals of guaranteeing children their constitutional rights and encouraging the use of rehabilitative and treatment resources in a manner consistent with the protection of the public interest.

However, a majority of jurisdictions that have ruled on this issue have held speedy delinquency adjudication statutes to be directory out of concern for the juveniles' best interests, while balancing the juveniles' right to a prompt and fair adjudication. We are persuaded by the reasoning of those jurisdictions. In *In re Armour*, 59 Ill. 2d 102, 104-05, 319 N.E.2d 496, 498 (1974), the Illinois Supreme Court, in finding its speedy delinquency adjudication statute to be directory, stated:

> Society is interested for its own sake as well as for the minor's individual welfare in guiding and rehabilitating. These interests cannot always be served by a mechanical adherence to rote or formula. . . . We do not consider that the legislature intended that should an adjudicatory

> hearing not be held precisely within 30 days that the minor should be discharged or be abandoned, as it were, and that society's effort to correct, to rehabilitate and to guide should come to a halt.

See, also, *In Interest of A.E.O. III*, 437 N.W.2d 238 (Iowa 1989); *In re T.K.*, 11 Kan. App. 2d 632, 731 P.2d 887 (1987); *State in the Interest of C.B.*, 173 N.J. Super. 424, 414 A.2d 572 (1980), *cert. denied* 84 N.J. 482, 420 A.2d 1303; *In re Therklidsen*, 54 Ohio App. 2d 195, 376 N.E.2d 970 (1977); *In re J.V.*, 154 Vt. 644, 573 A.2d 1196 (1990).

First of all, we are compelled to conclude that a delinquent child in need of treatment 180 days after the filing of a delinquency petition is likely to require treatment on the 181st day as well. Clearly, a rigid and legalistic interpretation of a juvenile's statutory right to a speedy delinquency adjudication would often be contrary to a juvenile's best interests and, ultimately, contrary to the public interest. This is particularly true in cases where the juvenile is not in custody during the 180-day period, and remedial treatment is readily available after the adjudication.

We have long recognized that a juvenile court proceeding is not a prosecution for crime, but a special proceeding that serves as an ameliorative alternative to a criminal prosecution. See *In re Interest of A.M.H.*, 233 Neb. 610, 447 N.W.2d 40 (1989).

> "The purpose of our statutes relating to the handling of youthful offenders is, as in other states having juvenile court systems, the education, treatment and rehabilitation of the child, rather than retributive punishment. The emphasis on training and rehabilitation, rather than punishment, is underscored by the declaration that juvenile proceedings are civil, rather than criminal, in nature. Instead of a complaint or indictment we have a 'petition.' The hearing never results in a conviction, but may lead to an 'adjudication of delinquency.' Where confinement of the delinquent child is indicated as the proper treatment, the child is not sentenced to prison but, instead, is 'committed' to a 'training school.' The adjudication of delinquency does not carry with it any of the civil dis-

> abilities ordinarily resulting from conviction of crime, nor is the child considered to be a criminal because of such adjudication."

Id. at 614, 447 N.W.2d at 43 (quoting *Smith v. State*, 444 S.W.2d 941 (Tex. Civ. App. 1969)).

Moreover, §§ 43-271, 43-277, and 43-278, the provisions of our juvenile code which define a juvenile's right to a prompt adjudication, do so without specifying a sanction for noncompliance. A legislative enactment providing that an act be accomplished within a specified time period, with no sanction for failure to comply with that mandate, is directory. *In re Interest of C.P.*, 235 Neb. 276, 455 N.W.2d 138 (1990).

We are not persuaded by the juveniles' assertion that §§ 43-271 and 43-277's reference to § 29-1207, a portion of the statutory right to a speedy criminal trial, compels the absolute discharge of a juvenile from a delinquency petition which remains unadjudicated 6 months after filing. Section 29-1207 is only incorporated into the juvenile code to serve as a method by which computation of the 6-month period after the petition is filed shall be made. In and of itself, § 29-1207 does not mandate a criminal defendant's discharge if not brought to trial within the prescribed time. Instead, Neb. Rev. Stat. § 29-1208 (Reissue 1995) mandates that an *adult offender* will be entitled to absolute discharge if not brought to trial within the prescribed time, and § 29-1208 has *not* been incorporated into the juvenile code. That being so, § 29-1207 cannot be considered as authority for the juveniles' claim that absolute discharge from a delinquency petition is statutorily mandated when a juvenile is not adjudicated within the required time period.

Instead, § 29-1207(4)(a) through (e) requires a juvenile court judge to exclude from the 6-month period specifically identified periods of delay resulting from, for example, other proceedings concerning the juvenile, continuances granted at the request of the juvenile, or the absence or unavailability of the juvenile. In addition, § 29-1207(4) provides for the exclusion of "(f) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause."

Accordingly, the Court of Appeals was correct in concluding that §§ 43-271 and 43-278 are directory and do not require absolute discharge of a juvenile not adjudicated within the prescribed time period. However, we are mindful that the foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests. *In re Interest of Lisa O.*, 248 Neb. 865, 540 N.W.2d 109 (1995); *In re Interest of D.D.P.*, 235 Neb. 864, 458 N.W.2d 193 (1990). It is rarely in the best interests of a juvenile to have his or her case languish unadjudicated in the juvenile court for more than 6 months or 90 days in the case of a status offender. As in adult court, unreasonable delay at the adjudication stage may affect the quality and quantity of evidence presented, impairing the juvenile's defense and preventing a fair hearing. Further, in the event the juvenile is found to have committed the delinquent act or is adjudicated as a status offender, the delay is oftentimes detrimental to the youth's rehabilitation. See *In Interest of C. T. F.*, 316 N.W.2d 865 (Iowa 1982).

We therefore hold that it is within the sound discretion of the juvenile court to determine whether absolute discharge of a juvenile petition is in the best interests of a juvenile, taking into consideration (1) the factors set forth in §§ 43-271 and 43-278, (2) the right of the juvenile to a prompt and fair adjudication, and (3) the future treatment and rehabilitation of the juvenile in the event of an adjudication. The benchmark of this determination is the protection of the best interests of the juvenile. See *In re Interest of Lisa O., supra*. We further hold that an appellate court's review of the juvenile court's prompt adjudication determination shall be de novo on the record to determine whether there has been an abuse of discretion by the juvenile court. Prompt adjudication determinations are initially entrusted to the discretion of the juvenile court and will be upheld unless they constitute an abuse of discretion.

With the above standard of review in mind, we examine the record de novo to determine whether there has been an abuse of discretion by the juvenile court in dismissing the 10 separate petitions in the instant case. The court administrator for the Douglas County Separate Juvenile Court testified on behalf of the State. The court administrator testified that the juvenile

court caseload had dramatically increased in the past 10 years. During this time, both the county attorney and the public defender had added staff to handle the increase. However, there had not been a substantial increase in the number of juvenile court judges or number of judicial hours spent deciding juvenile matters. The court administrator also testified that his office had been active in doing whatever it could to reduce the backlog of cases.

On cross-examination, the court administrator testified that much of the time an entire juvenile courtroom was not in use and that a retired district judge was readily available to fill any judicial void. The court administrator further testified that there had been no attempt to bring in a juvenile court judge from Sarpy County to help reduce the Douglas County caseload and that most of the procedures implemented by his office to reduce the backlog of cases were instituted no sooner than mid-October 1994.

The juvenile court made findings that the juvenile docket was congested and that there was a need for additional judicial resources. However, the necessary relief had not been forthcoming at the time of the discharge, and, in spite of everyone's best interests, the juvenile court found that everyone's efforts had not been enough to keep up with the demand.

The juvenile court went on to find that the juveniles in the instant cases were prejudiced by the delay in adjudication because significant restraints are placed on a juvenile's liberty once the State files a delinquency petition against him or her. The juvenile court judge stated: "[A] petition from the county attorney stops that child dead in their tracks to appear for court because if they don't [sic] contempt can be cited against that child." In addition, the juvenile court noted that if a child failed to appear, they could eventually be placed in the Youth Development Center or be placed outside their home.

The State presented no evidence that would allow the juvenile court to make findings regarding specific causes of delay as enumerated in § 29-1207(4)(a) through (f) and the extensions attributable to such causes with respect to a particular juvenile. At best, the evidence adduced by the State only allows this court to conclude that in general, there was a

crowded docket in the Douglas County Separate Juvenile Court at the time of the discharge. No evidence was adduced concerning the rehabilitation needs, future treatment, or best interests of the juveniles in the case at bar. The juvenile court concluded that a crowded docket alone was insufficient as good cause to extend the 6-month period prescribed in § 43-271 or the 90-day period prescribed in § 43-278. Based upon our de novo review of the entire record, we find no abuse of discretion in the juvenile court's findings, nor with the juvenile court's use of the remedy of absolute discharge based on the circumstances of these juvenile cases.

V. CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals is reversed, and this matter is remanded to that court with directions to affirm the judgments of the juvenile court dismissing the juvenile petitions in the 10 separate cases that are the subject of this consolidated appeal.

REVERSED AND REMANDED WITH DIRECTIONS.

VERLIN J. KREUS, APPELLANT, V. STILES SERVICE CENTER ET AL., APPELLEES.

550 N.W.2d 320

Filed July 12, 1996. No. S-94-055.

1. **Motions to Dismiss: Directed Verdict.** A motion to dismiss in a nonjury trial is equivalent to a directed verdict in a jury trial.
2. **Motions to Dismiss: Proof.** In a court's review of evidence on a motion to dismiss, the nonmoving party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and the plaintiff has made a prima facie case, the motion to dismiss should be overruled.
3. **Judgments: Appeal and Error.** In review of a bench trial on a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong.
4. **Federal Acts: Employer and Employee: Wages: Courts: Jurisdiction: Actions.** Nebraska state courts have jurisdiction to hear an action under the Fair Labor Standards Act.

5. **Federal Acts: Employer and Employee: Wages.** Under the Fair Labor Standards Act, no employer shall employ an employee for a workweek exceeding 40 hours unless the employee is compensated for all hours beyond 40 at a rate of 1½ times the regular rate at which he is employed.
6. ____: ____: ____. Violation of the Fair Labor Standards Act overtime provisions entitles the employee to unpaid overtime compensation determined using the employee's regular rate plus an equal amount as liquidated damages.
7. **Employer and Employee: Wages.** The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid.
8. **Federal Acts: Employer and Employee: Wages: Proof.** An employee who brings an action for unpaid overtime compensation under the Fair Labor Standards Act has the burden of proving that he performed work for which he was not compensated.
9. **Federal Acts: Employer and Employee: Records: Wages: Proof.** Where an employer has failed to keep proper and accurate records in violation of the Fair Labor Standards Act, an employee maintains his burden of proof if he proves he has performed work for which he was improperly compensated and produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.
10. **Employer and Employee: Wages: Pleadings: Proof.** The burden of establishing a statutory exception or exclusion from the regular rate calculation rests on the employer, who must affirmatively plead and prove such exception.
11. **Federal Acts: Employer and Employee: Wages.** For a bonus to be excluded as discretionary under the Fair Labor Standards Act, both the fact of payment and the amount of payment must be determined at the sole discretion of the employer and must not be in relation to any prior contract, agreement, or promise made by the employer.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Reversed and remanded with directions.

Joseph A. Jordano, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., for appellant.

Jerome J. Ortman for appellees.

CAPORALE, FAHRNBRUCH, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

Verlin J. Kreus brought this action pursuant to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 through 219 (1988 & Supp. III 1991), to recover unpaid over-

time compensation from his former employer, Stiles Service Center, and its owner, Frank T. Stiles. After both sides rested, the district court for Douglas County sustained the defendants' motion for directed verdict, holding that Kreus had failed to prove that he was entitled to any additional unpaid overtime compensation. Kreus appealed to the Nebraska Court of Appeals, and this matter was transferred to this court in order to regulate the caseloads of the appellate courts. We conclude that Kreus has presented a prima facie case for unpaid overtime compensation. In computing Kreus' unpaid overtime compensation, we determine that Kreus' regular rate of pay was $6 per hour, and subsequently $6.25 per hour, rather than the $5 per hour found by the district court. We reverse the district court's order granting the defendants' motion for directed verdict and remand the cause with directions.

FACTUAL BACKGROUND

Prior to June 1991, Frank and Roger Stiles operated a service station in Omaha, Nebraska, known as Stiles Service Center. This business was incorporated by Frank Stiles in June 1991, and became known as TJKK, Inc., doing business as TJ's Food and Fuel.

Stiles hired Kreus as a service station attendant for Stiles Service Center in July 1990. Kreus continued in that position until August 5, 1991. There was no written contract of employment between Stiles and Kreus; all matters between the parties were discussed orally. The parties dispute the "regular wage" that Kreus received during this employment, an amount which is correspondingly used to compute overtime income.

The defendants assert that Kreus was actually hired at a wage of $5 per hour, although he averaged more, while Kreus asserts that he was promised $6 per hour. Stiles admits that he told Kreus that he would "see to it that he [Kreus] averaged $6 per hour," but denies that this was any promise of a regular wage. Stiles claims that he paid Kreus a base wage of $5 per hour, plus overtime at $7.50 per hour, plus any additional bonus compensation necessary in order to approximate $6 an hour on average.

It is undisputed that Kreus generally worked 99 hours every 2 weeks (45 hours one week and 54 hours the next) and that Kreus was actually paid approximately $6 per hour of work until October or November 1990, when he was given a 25-cent raise. Thereafter, the aggregate pay of Kreus divided by the number of hours worked approximated $6.25 per hour. Stiles Service Center did not keep a timeclock: employees recorded the hours they worked on makeshift timecards, which were actually blank receipts. Stiles collected the timecards, computed the hours thereon, and issued paychecks accordingly.

Employee paychecks stated neither the number of hours worked nor the regular hourly wage of the employee, although they sometimes contained notations of gross pay, withholding taxes, and federal and state income taxes. Kreus' last paycheck, for the period of August 5 through 11, 1991, consists of a paid vacation period, as Kreus actually stopped work as of August 5, 1991. During this vacation period, Stiles paid Kreus $306.25 for 49 hours, or $6.25 an hour.

After leaving his position, Kreus contacted the Nebraska Department of Labor, which conducted an informal investigation of the wage and hour practices of TJKK, Inc., formerly known as Stiles Service Center, and determined that Stiles owed Kreus $299 in unpaid overtime compensation. The department computed this amount based on employment wage records supplied by Stiles, which indicated a $5 per hour wage for Kreus. The records contained notations made by Stiles indicating the amount of regular pay (R), overtime pay (O), and additional compensation (C) paid to Kreus for each pay period. Based upon the department's recommendation, Stiles issued a check to Kreus for $299. Kreus cashed the check, but refused to sign an accompanying release.

Subsequently, Kreus filed this action for alleged unpaid overtime pay under the FLSA in state court, seeking to recover additional amounts allegedly owed. As evidence, the parties submitted some of the timeslips prepared by Kreus, Kreus' paychecks, and the employment records maintained by Stiles. At trial, the parties stipulated to coverage under the FLSA. As part of Kreus' case in chief, Kreus and Stiles testified. After Kreus rested, the defendants moved for a directed verdict,

claiming that Kreus' cashing of the $299 check for unpaid overtime compensation amounted to an accord and satisfaction. Kreus disputed this assertion, but the court reserved its ruling on the issue. While the defendants had cross-examined Kreus' witnesses, they rested without presenting further evidence. After the close of the evidence, the defendants renewed their motion for directed verdict.

The district court sustained the renewed motion for directed verdict, treating it as a motion to dismiss, and found that Kreus had failed to prove he was entitled to unpaid overtime compensation for the hours worked during his employment. However, the ruling of the district court appeared to reach the merits of the case, as the court held that Stiles did not promise a $6-per-hour wage and that any additional amounts Stiles paid to approximate this amount were excluded from the regular rate computation because they were discretionary. The court's journal entry mistakenly indicates that "[p]laintiff's renewed motion to dismiss is hereby sustained." However, the defendants moved for directed verdict and renewed that motion after the close of the evidence; therefore, it was the defendants' motion for directed verdict, rather than the plaintiff's, which the court sustained.

ASSIGNMENTS OF ERROR

Kreus avers that the district court erred in (1) finding that Kreus failed to prove a prima facie case for overtime pay under the FLSA, (2) incorrectly applying § 207(e)(3) of the FLSA to exclude a portion of Kreus' income from the calculation of the regular rate as discretionary bonus income, (3) failing to find that the defendants violated the wage and hour practices of the FLSA as a matter of law, and (4) finding that the defendants presented sufficient evidence to refute the presumption that their wage and hour practices violated § 207(a)(1) and (e) of the FLSA.

STANDARD OF REVIEW

A motion to dismiss in a nonjury trial is equivalent to a directed verdict in a jury trial. See *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994) (stating that motion to dismiss for failure to prove prima facie case should

be treated as motion for directed verdict). In a court's review of evidence on a motion to dismiss, the nonmoving party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and the plaintiff has made a prima facie case, the motion to dismiss should be overruled. *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994). This principle applies equally to motions for directed verdict. Cf., *Cloonan v. Food-4-Less*, 247 Neb. 677, 529 N.W.2d 759 (1995) (holding that because plaintiff failed to maintain prima facie case, granting of directed verdict was appropriate); *Sell v. Mary Lanning Memorial Hosp.*, 243 Neb. 266, 498 N.W.2d 522 (1993) (holding that directed verdict should have been granted where plaintiff failed to maintain prima facie case). See, also, *Krug v. Laughlin*, 208 Neb. 367, 303 N.W.2d 311 (1981) (holding that trial court correctly overruled motion for directed verdict where plaintiff proved prima facie case).

In review of a bench trial on a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *Ashland State Bank v. Elkhorn Racquetball, Inc.*, 246 Neb. 411, 520 N.W.2d 189 (1994).

ANALYSIS

JURISDICTION

Initially, it should be noted that Nebraska state courts have jurisdiction to hear an action under the FLSA. See, *Freudenberg v. Harvey*, 364 F. Supp. 1087, 1090 (E.D. Pa. 1973) (stating that phrase "any court of competent jurisdiction" in § 216(b) of FLSA includes a state court of general jurisdiction); *Goettel v. Glenn Berry Mfrs., Inc.*, 236 F. Supp. 884 (N.D. Okla. 1964) (holding that FLSA confers concurrent jurisdiction to both state and federal courts). See, also, *Banks v. Mercy Villa Care Center*, 225 Neb. 751, 407 N.W.2d 793 (1987). Therefore, we have jurisdiction to review this matter. Furthermore, the parties stipulated at trial that Stiles Service Center and TJKK, Inc., were engaged in commerce or the production of goods for commerce for purposes of the FLSA and

that Kreus was a covered employee under the FLSA during all pertinent times.

BACKGROUND

The FLSA provides that no employer shall employ any employee for a workweek exceeding 40 hours unless the employee is compensated for all hours beyond 40 at a rate of 1½ times the "regular rate" at which he is employed. § 207(a)(1). Violation of this requirement entitles the employee to unpaid overtime compensation determined using the employee's regular rate plus an equal amount as liquidated damages. § 216(b).

The "regular rate" is defined under § 207(e) of the FLSA to include "all remuneration for employment paid to, or on behalf of, the employee," *except*, (1) sums paid as gifts; (2) payments for vacations, holidays, illness, reasonable travel expenses, and other similar payments to an employee which are not made as compensation for hours of employment; (3) sums paid as a result of services performed if both the fact of payment and the amount are at the sole discretion of the employer or at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; (4) irrevocable contributions made by the employer to retirement or insurance plans; and (5) extra "premium" compensation paid for overtime work. The term "regular rate" has been further clarified in the accompanying federal regulations to mean "the hourly rate actually paid the employee for the normal, nonovertime workweek for which he is employed—an 'actual fact' . . . ." 29 C.F.R. § 778.108 (1991). "The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid." 29 C.F.R. § 778.109 (1991).

Furthermore, an employee who brings an action for unpaid overtime compensation under the FLSA has the burden of proving that he performed work for which he was not compensated. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S.

680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946). However, where an employer has failed to keep proper and accurate records in violation of the FLSA, an employee maintains his burden of proof "if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687. At this point, the burden of production shifts to the employer to produce evidence of the precise amount of work performed or evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. *Id.*

PRIMA FACIE CASE AND LACK OF PROOF OF EXCEPTION

In the present case, it is undisputed that Stiles Service Center did not keep proper and accurate employment records as required by the FLSA. The timecards recording the employees' hours were actually blank receipts on which the employees themselves recorded their hours. Stiles Service Center maintained neither a timeclock or similar device nor independent contemporaneous records of employee hours. Therefore, the district court correctly found that only the lesser burden of showing the amount and extent of uncompensated overtime work by just and reasonable inference applied to Kreus in this case.

Furthermore, the district court correctly found that Kreus met his burden of proof and that the burden shifted to the defendants to disprove the inference of unpaid overtime compensation. Kreus introduced his timecards and paychecks, which indicated that he worked overtime hours on a regular basis, and from which a just and reasonable inference could be drawn that his "regular rate" was $6 per hour, and later $6.25 per hour. When divided by the number of hours worked, every paycheck that Kreus received represented a pay rate of either $6 per hour, or later $6.25 per hour. These facts meet the standard definition of "regular rate," i.e., total remuneration per workweek divided by the number of hours worked in that week, as set forth in the regulations enacted pursuant to the FLSA. See 29 C.F.R. § 778.109.

The burden of establishing an exception or exclusion from this standard calculation rests on the employer, and such employer must affirmatively plead and prove an exception. *Corning Glass Works v. Brennan*, 417 U.S. 188, 94 S. Ct. 2223, 41 L. Ed. 2d 1 (1974); *McLaughlin v. McGee Bros. Co., Inc.*, 681 F. Supp. 1117 (W.D.N.C. 1988). In the present case, the defendants failed to both plead and prove that any amount received per hour over $5 fit within an exception to the regular rate calculation. Therefore, Kreus presented a prima facie case for overtime compensation under the FLSA, as the facts indicate that his "regular rate" was actually $6 per hour, and subsequently $6.25 per hour, rather than the $5 per hour figure used by the department to calculate overtime compensation owed. As Kreus presented a prima facie case, it was error for the district court to grant the defendants' motion for directed verdict.

After shifting the burden of proof to the employer in this case, the district court seemed to hold that any amount paid to Kreus above $5 per hour was excludable from the "regular rate" computation under 29 U.S.C. § 207(e)(3) as a discretionary bonus. In their answer to Kreus' amended petition, the defendants failed to raise any recognized exceptions to the regular rate calculation as affirmative defenses. While the defendants raised the affirmative defense of accord and satisfaction, this defense is not recognized under the FLSA. See § 207(e). Therefore, the district court erred in holding the amounts paid over $5 per hour to be excludable from the "regular rate" computation.

Furthermore, the defendants failed to establish that the amounts delineated as "bonus pay" met the requirements of a discretionary bonus under the FLSA. Under the regulations issued in conjunction with the FLSA, for a bonus to be excluded as discretionary, both the fact of payment and the amount of payment must be determined at the sole discretion of the employer. 29 C.F.R. § 778.211(b) (1991). The amount of the bonus must be determined by the employer without relation to a prior contract, agreement, or promise. *Id.* A promise in advance to pay a bonus causes the bonus to lose its discretionary character and to be included in the calculation of "reg-

ular rate." *Id.* Furthermore, the regulations specifically state "any bonus which is promised to employees upon hiring . . . would not be excluded from the regular rate . . . ." § 778.211(c). Section 778.211(b) gives the following examples of nondiscretionary bonuses, or bonuses paid pursuant to a promise:

> Thus, if an employer announces to his employees in January that he intends to pay them a bonus in June, he has thereby abandoned his discretion regarding the fact of payment by promising a bonus to his employees. . . . Similarly, an employer who promises to sales employees that they will receive a monthly bonus computed on the basis of allocating 1 cent for each item sold whenever, is his discretion, the financial condition of the firm warrants such payments, has abandoned discretion with regard to the amount of the bonus though not with regard to the fact of payment.

In the present case, Stiles admitted at trial that he told Kreus that "he would see to it that he [Kreus] averaged $6 per hour." Pursuant to the regulations, this constituted a prior agreement or promise to pay Kreus a "bonus" at a set amount, making any "bonus" amount paid nondiscretionary under the meaning of the FLSA. Consequently, the district court improperly excluded amounts over $5 per hour as discretionary bonuses.

Additionally, the amounts paid over $5 per hour do not meet the requirements of any of the other exceptions set forth in the FLSA. Again, the defendants did not affirmatively plead any other exceptions. These amounts would not qualify as excludable "gifts" under the FLSA because they were paid pursuant to an agreement between the parties, and the amount "given" was directly dependent on the amount of hours worked. Furthermore, there is no evidence the payments were for a retirement plan, for "idle" time, or for "premium pay" as defined by the FLSA. See 29 C.F.R. §§ 778.201 to 778.207, and 778.212 to 778.224 (1991). Therefore, the amounts paid over $5 per hour should not have been excluded from the regular rate calculation, and Kreus' regular rate under the FLSA was $6 per hour and $6.25 per hour for the respective peri-

ods. The trial court clearly erred when it found that the agreed rate of pay was not $6 per hour.

Kreus worked a total of 484 hours for which overtime compensation was owed. He was paid $6 of the $9 overtime rate for these hours. Thus, $1,452 was owed for his overtime hours. Subtracting the $299 in back overtime already paid, Kreus is entitled to $1,153 plus an equal amount as liquidated damages.

JUDGMENT

The order of the district court sustaining the defendants' motion for directed verdict is reversed, and the cause is remanded with directions. We enter judgment in favor of Verlin J. Kreus in the amount of $1,153, representing unpaid overtime compensation, together with an equal amount as liquidated damages, for a total of $2,306. Pursuant to 29 U.S.C. § 216(b), we grant Kreus' motion for attorney fees in the amount of $3,000, and costs in the amount of $1,426.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, C.J., and LANPHIER, J., not participating.

VERNON E. MCWHIRT, APPELLEE, V. MICHAEL W. HEAVEY ET AL., APPELLANTS.

550 N.W.2d 327

Filed July 12, 1996. No. S-94-589.

1. **Appeal and Error.** Errors assigned but not argued will not be addressed.
2. **Directed Verdict: Appeal and Error.** With regard to overruling a motion for directed verdict made at the close of all of the evidence, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law.
3. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.

4. ____. The party against whom a verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.
5. **Judgments: Verdicts.** In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
6. ____: ____. On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.
7. **Attorney and Client: Malpractice: Negligence: Proof.** A client who has agreed to the settlement of an action is not barred from recovering against his or her attorney for malpractice if the client can establish that the settlement agreement was the product of the attorney's negligence.
8. **Attorney and Client: Evidence: Judges.** It is the duty of the parties and their counsel to produce evidence on the issues before the court, and to place this duty on the trial judge would overstep the bounds of judicial propriety.
9. **Directed Verdict: Negligence: Evidence.** In a negligence case, a trial court should sustain a motion for directed verdict or for judgment notwithstanding the verdict only when the evidence, viewed in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence.
10. **Attorney and Client: Negligence: Proximate Cause: Proof.** There are three elements a plaintiff alleging attorney negligence must prove: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client.
11. **Trial: Expert Witnesses.** An objection to an opinion of an expert based upon lack of certainty in the opinion is an objection based upon relevance.
12. **Trial: Evidence: Waiver.** If, when evidence is offered, the party against whom such evidence is offered fails to object or to insist upon a 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.
13. **Trial: Expert Witnesses.** Triers of fact are not required to take opinions of experts as binding upon them.
14. ____: ____. The determination of the weight that should be given expert testimony is uniquely within the province of the fact finder.
15. **Proximate Cause: Words and Phrases.** The proximate cause of an injury is that which, in a natural and continuous sequence, without any efficient intervening cause, produces the injury, and without which the injury would not have occurred.
16. **Actions: Negligence: Damages: Proof.** As an element of a negligence cause of action, a plaintiff must prove damages with reasonable certainty.

17. **Negligence: Damages.** In a negligence case, the proper measure of damages is that which will place the aggrieved party in the position in which he or she would have been had there been no negligence.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed.

Francis T. Belsky, of Katskee, Henatsch & Suing, for appellants.

Thomas C. Emery, of Emery, Nye, Blazek, & Hemphill, for appellee.

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

WHITE, C.J.

This is a legal malpractice action brought by the plaintiff-appellee, Vernon E. McWhirt (McWhirt), for damages resulting from the alleged negligence of the defendants-appellants, Michael W. Heavey, individually; Michael W. Heavey, P.C., a Nebraska professional corporation; and Dwyer, Wood, Heavey & Grimm, a partnership. A jury returned a verdict in favor of McWhirt and awarded him $91,000, and the trial court entered a judgment accordingly. The defendants appeal.

The appellants assign the following errors: (1) The trial court erred in overruling the appellants' motions for directed verdict and for judgment notwithstanding the verdict and in submitting the case to the jury because McWhirt failed to adduce evidence pertaining (a) to the standard of care and the appellants' violation thereof, (b) to proximate causation, and (c) to damages; (2) the trial court erred in overruling the appellants' motion for summary judgment; (3) the trial court erred in overruling the appellants' demurrer ore tenus; and (4) the trial court erred in overruling the appellants' motion for new trial. We affirm.

On May 17, 1988, Florence McWhirt filed the underlying dissolution action against McWhirt. On May 20, McWhirt employed Heavey of Dwyer, Wood, Heavey & Grimm to represent his interests during the dissolution action. The dissolution action was scheduled for trial on November 23.

The contested issues in the divorce proceedings were (1) the division of real and personal property, (2) child support, (3) alimony, and (4) the characterization of approximately $41,000 in cash and property which McWhirt had inherited from his parents during the course of his marriage.

At the time of the divorce, the McWhirts had been married for 24 years. They had three children, two of whom had reached the age of majority. Custody of their 15-year-old son was awarded to Florence McWhirt.

Both parties were employed. McWhirt was earning $14.42 per hour. He also had a pension valued at $8,184. At the time of the divorce, Florence McWhirt was earning $4.80 per hour. The parties owned a $50,000 home. McWhirt had inherited property from his parents originally valued at $41,669.69. This property included an insurance policy, savings bonds, money, and other personal property. McWhirt testified that at the time of the divorce trial, this property was valued at approximately $37,537.39.

Close to the time the McWhirts separated, McWhirt recorded some of Florence McWhirt's phone conversations and placed a voice-activated tape recorder in their bedroom while he was out of town. McWhirt suspected that his wife was having an affair. After discovery of the recording devices, Florence McWhirt's counsel made threatening remarks about criminal prosecution for wiretapping.

The parties in the case at bar provided different versions at trial of how Heavey acted in his representation in the McWhirts' divorce. According to McWhirt, he met with Heavey on November 21, 1988, to discuss the dissolution proceedings that were to take place 2 days later. At this meeting, Heavey told McWhirt that he was going to present as an exhibit McWhirt's answers to the interrogatories requested by Florence McWhirt's counsel. This was the only exhibit that Heavey prepared for trial. Heavey told McWhirt that he would call him as a witness. Heavey never prepared McWhirt to be a witness. Heavey told McWhirt that he would cross-examine Florence McWhirt on her testimony if necessary. Heavey also told McWhirt that he should not worry about wiretapping threats.

At this meeting, Heavey failed to discuss and advise McWhirt as to (1) alimony obligations, (2) child support obligations, (3) disposition of the family residence, (4) disposition of McWhirt's inheritance property, (5) valuation of McWhirt's pension, (6) McWhirt's potential obligation to pay his wife's attorney fees, or (7) any other pertinent matters. Heavey did not inform him of what to expect at the trial.

McWhirt concedes that prior to this meeting Heavey and he did discuss his inheritance. He also concedes that Heavey informed him that inherited property is ordinarily set off from the marital property and granted to the recipient.

According to McWhirt, on the morning of November 23, the day of the trial, McWhirt met Heavey at the courthouse about an hour before the trial was to begin. At this time, Florence McWhirt's counsel presented Heavey and McWhirt with a proposal for settlement. McWhirt had not had any prior discussions of how the case should be settled.

Under the proposal, among other things, Florence McWhirt was to receive the house, and McWhirt was to pay a $20,000 lump-sum property distribution and $500 per month in alimony for Florence McWhirt's lifetime. Upon remarriage, the alimony would not terminate but could be considered by a court pursuant to an application to modify. McWhirt was also to pay $340 per month for child support. Florence McWhirt was also to receive a significant portion of the personal property that McWhirt inherited from his parents in the division of the parties' estate.

While McWhirt and Heavey were reviewing the proposal, Florence McWhirt's counsel approached them and mentioned the recording devices. Heavey told McWhirt not to be concerned with this because he did not think it was pertinent to the case.

After reviewing the proposal that morning, McWhirt thought "there was considerable amounts of inheritance property, inheritance money included in marital property." McWhirt then stated to Heavey, "I thought they could not include inheritance properties and monies and personal properties inherited into a marital property." Heavey responded by stating, "I didn't think they could." Heavey told McWhirt not

to worry about the personal property or inheritance money because alimony was a larger concern.

In discussing the alimony provision, McWhirt asked Heavey, "Is this right that they can award her alimony for life?" Heavey responded, "I don't know." Heavey said he would go find an attorney he knew who was at the courthouse and ask him. Heavey returned and told McWhirt that Judge Reagan, the presiding judge, often grants lifetime alimony. McWhirt had previously briefly discussed alimony with Heavey at an earlier date. At that time, Heavey told McWhirt that he would not have to pay alimony for a very long period and that the payment would not be very much in value.

McWhirt and Heavey discussed the settlement proposal further, and McWhirt then asked Heavey, "Well, what do you think about this?" According to McWhirt, Heavey responded, "I don't know, you know. . . . It's kind of up to you. We could go into trial. You could do worse. You could do better. . . . I'm not sure. It's kind of up to you."

Florence McWhirt's counsel then approached them and offered to reduce the lump-sum payment to $10,000 and the lifetime alimony payments to $400 per month. When his case was called, McWhirt again asked Heavey what he thought of the proposal and received no clear response. McWhirt testified that he then stated to Heavey, "Might as well accept this, if you think this is the best we can do." McWhirt subsequently accepted the settlement proposal with the modifications in the lump-sum payment and alimony.

Heavey's testimony conflicted with McWhirt's testimony in several respects. According to Heavey, he had several contacts with McWhirt prior to the trial, but he did not record all of these conversations on his billing statements. Heavey engaged in 7 hours of preparation for the trial; he prepared several trial exhibits but discarded them after the trial; he advised McWhirt concerning the possibility of having to pay alimony and the specific amount he would have to pay; and he told McWhirt that the settlement proposal was close to a "worst case scenario." Heavey claims he would have preferred to try the case and told McWhirt that he could probably do better at trial.

During the trial, Heavey did not present any evidence. Florence McWhirt's counsel gained admission of several exhibits pertaining to the child support calculations and documents regarding the property to be allocated to McWhirt and Florence McWhirt. At one point, the court asked McWhirt to acknowledge the settlement as the agreement that the parties negotiated and voluntarily entered. McWhirt made this acknowledgment. The court then found that the agreement was not unconscionable and approved the agreement.

McWhirt called Heavey within a few days after the trial and inquired whether the settlement could be set aside. Heavey referred McWhirt to another attorney.

McWhirt's new counsel filed an objection to the decree and a motion for new trial. On December 23, 1988, the court overruled the objection and motion. On appeal, this court affirmed the judgment of the trial court. *McWhirt v. McWhirt*, 236 Neb. xxii (1991).

On November 21, 1990, McWhirt filed this action. In his petition, McWhirt alleged that Heavey failed to exercise the knowledge, skill, and ability ordinarily possessed by members of the legal profession. He alleged that Heavey was negligent (1) in failing to prepare McWhirt to be a trial witness in his own divorce case, (2) in failing to prepare for the divorce trial, (3) in failing to exercise a reasonable degree of care and skill in negotiating a property settlement agreement, (4) in failing to know Nebraska law regarding inherited property and alimony, (5) by advising McWhirt that the trial judge ordinarily awarded alimony for life, and (6) by advising McWhirt that the trial result might be worse than the final proposed settlement offer.

On December 21, 1993, the appellants filed a motion for summary judgment. A hearing on this motion was held on January 13, 1994, where 10 exhibits were received into evidence. This evidence included depositions of McWhirt, Heavey, and Jerome Ortman, McWhirt's expert witness. On January 28, the appellants' motion was overruled.

Trial began on March 28, 1994. Heavey's counsel demurred ore tenus, contending that (1) the petition failed to state any cause of action in negligence against the appellants, (2) no

damages were cognizable under the law, (3) the allegations were not alleged as the proximate cause of any damages. The court overruled the motion.

McWhirt's expert witness, Ortman, is an attorney who has practiced law in Omaha, Nebraska, for 24 years. Approximately 50 percent of his practice consists of domestic relations cases.

In his testimony, Ortman first described the divorce process and divorce law in Nebraska. Regarding nonmarital property, Ortman testified that the general rule in Nebraska is that property inherited by one party of the marriage is considered to be outside the marital estate and set off for the party that inherited the property. He also testified that lifetime alimony is not favored in Nebraska.

Ortman recited the specific documents of the McWhirt divorce he reviewed in preparation of his testimony. Ortman was then asked to provide his opinions concerning different aspects of the McWhirt divorce.

Ortman specifically stated on numerous occasions, without objection, that it was his opinion that Heavey's conduct fell below the requisite standard of care. Ortman's opinions as to Heavey's specific deviations from the standard of care included, among other things, failure to prepare a child support worksheet, failure to prepare an exhibit identifying marital property, failure to obtain a real estate appraisal, failure to properly prepare for trial, failure to advise McWhirt concerning alimony and improper advice regarding lifetime alimony, and failure to advise McWhirt to reject the property settlement proposal. He also testified that it was his opinion that Heavey committed legal malpractice.

Ortman was also asked to respond to a hypothetical involving a factual situation that reflected the McWhirts' situation at the time of divorce. He testified as to how he would represent his client under the hypothetical. He gave his opinion as to the reasonable and probable outcome of a trial involving the hypothetical. He gave his opinion as to how much alimony would be awarded to the wife under the hypothetical. Ortman testified that the payment period would be between 2 to 3 years at a minimum and approximately 10 years at a maximum. He tes-

tified that if the court required payment for 2 to 3 years, the monthly payment would be approximately $400 per month. Ortman testified that if the court decided to spread out the obligation over 10 years, the payment would be approximately $200 per month.

Ortman also testified that under this hypothetical, he was of the opinion that the property inherited by the husband would be considered by the court as a nonmarital asset and would be set off to the husband outside the award of marital property. He testified that he was of the opinion that a court would divide the marital property evenly between the husband and wife. Ortman was also of the opinion that the husband would be required to pay some of the wife's attorney fees.

In summing up his testimony, Ortman testified that it was his opinion that in Heavey's representation of McWhirt, Heavey deviated from the standard of care required of domestic relations lawyers in the area in which Heavey practiced.

McWhirt also presented the expert testimony of Dennis Sullivan, an actuarial scientist. The parties stipulated that he was an expert. Sullivan testified as to the present value of McWhirt's pension. Sullivan also testified regarding the excess alimony McWhirt was paying when comparing his current payment with the alimony payment possibilities presented during Ortman's testimony. Exhibits were admitted to support Sullivan's testimony.

The appellants moved for a directed verdict at the close of McWhirt's case in chief and at the close of all of the evidence. These were overruled by the court. On April 7, 1994, the appellants filed a motion for judgment notwithstanding the verdict and a motion for new trial. These motions were overruled, and this appeal followed.

As previously mentioned, the appellants assign errors as to the court's denial of (1) summary judgment, (2) demurrer ore tenus, (3) directed verdict, (4) judgment notwithstanding the verdict, and (5) new trial.

Preliminarily, we can summarily dispose of the appellants' assignments of error regarding their motion for summary judgment, demurrer ore tenus, and motion for new trial. These were not discussed with any particularity in the briefs. The

appellants' brief did not contain any legal or factual discussion regarding these motions.

Errors assigned but not argued will not be addressed. *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995). Therefore, we will not address these motions and will address only the assigned errors regarding directed verdict and judgment notwithstanding the verdict.

With regard to overruling a motion for directed verdict made at the close of all of the evidence, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994). A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Nickell v. Russell*, 247 Neb. 112, 525 N.W.2d 203 (1995).

The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Id.*

In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Critchfield v. McNamara*, 248 Neb. 39, 532 N.W.2d 287 (1995).

On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Id.*

The appellants contend that they were entitled to judgment as a matter of law because McWhirt's acceptance of the settlement proposal is an absolute bar to a subsequent profes-

sional negligence action against his or her attorney. This argument is supported by the appellants' contention that pretrial settlement claims should be encouraged by the courts.

This court has never previously had the opportunity to determine this precise issue. However, other jurisdictions have decided the issue.

The Supreme Court of Connecticut decided a case similar to the instant case. In *Grayson v. Wofsey, Rosen, Kweskin*, 231 Conn. 168, 169, 646 A.2d 195, 197 (1994), the Supreme Court of Connecticut addressed the issue of "whether a client who has agreed to the settlement of a marital dissolution action on the advice of his or her attorney may then recover against the attorney for the negligent handling of her case." The defendants in *Grayson* argued that the plaintiff was barred as a matter of law because the plaintiff entered an agreement to settle the marital dissolution action. The defendants argued that their contention was particularly appropriate because the court presiding over the dissolution action reviewed and approved the settlement agreement.

The court in *Grayson* held that "a client who has agreed to the settlement of an action is not barred from recovering against his or her attorney for malpractice if the client can establish that the settlement agreement was the product of the attorney's negligence." *Id.* at 177, 646 A.2d at 201. The court stated:

> We reject the invitation of the defendants . . . to adopt a rule that promotes the finality of settlements and judgments at the expense of a client who, in reasonable reliance on the advice of his or her attorney, agrees to a settlement only to discover that the attorney had failed to exercise the degree of skill and learning required of attorneys in the circumstances. "Although we encourage settlements, we recognize that litigants rely heavily on the professional advice of counsel when they decide whether to accept or reject offers of settlement, and we insist that the lawyers of our state advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks."

Id. at 174-75, 646 A.2d at 199 (quoting *Ziegelheim v. Apollo*, 128 N.J. 250, 607 A.2d 1298 (1992)).

We share this view espoused by the Supreme Court of Connecticut. To clarify, we support the implementation of policies and procedures that encourage fair and amicable pretrial settlements. See Neb. Rev. Stat. § 42-366 (Reissue 1993). However, "we decline to adopt a rule that insulates attorneys from exposure to malpractice claims arising from their negligence in settled cases if the attorney's conduct has damaged the client." *Grayson*, 231 Conn. at 175, 646 A.2d at 200.

Our holding is in accord with the majority of jurisdictions that have addressed this issue. See, *Malfabon v. Garcia*, 898 P.2d 107 (Nev. 1995); *Grayson v. Wofsey, Rosen, Kweskin, supra*; *Ziegelheim v. Apollo, supra*; *Fishman v. Brooks*, 396 Mass. 643, 487 N.E.2d 1377 (1986); *Edmondson v. Dressman*, 469 So. 2d 571 (Ala. 1985); *Cook v. Connolly*, 366 N.W.2d 287 (Minn. 1985). But see *Muhammad v. Strassburger, et al.*, 526 Pa. 541, 587 A.2d 1346 (1991).

Nor do we think that a different result is required because of the fact that the judge presiding over the dissolution proceedings approved the settlement agreement.

Pursuant to § 42-366(2), the terms of a settlement agreement "shall be binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the agreement is unconscionable." However, in determining whether the proposed settlement meets the statutory requirement of conscionability, the trial judge has discretion to request the production of evidence on such issue, but has no affirmative duty to make such a request. See *Buker v. Buker*, 205 Neb. 571, 288 N.W.2d 732 (1980).

In *Buker*, this court stated, "It is the duty of the parties and their counsel to produce evidence on the issues before the court, and to place this duty on the trial judge would overstep the bounds of judicial propriety." *Id.* at 575-76, 288 N.W.2d at 735. The court's general inquiry pursuant to § 42-366(2) does not serve as a substitute for the diligent investigation and preparation for which counsel is responsible.

We note that this court has previously held that an attorney's failure to communicate an offer of settlement to a client does not constitute professional negligence unless the evidence establishes that the proposed settlement was not unconscionable. *Smith v. Ganz*, 219 Neb. 432, 363 N.W.2d 526 (1985). *Smith* involved an attorney's failure to communicate to his client a $25,000 settlement offer of a $147,000 marital estate. The plaintiff contended that the attorney's failure to communicate this offer was professional negligence because the plaintiff would have accepted the offer. The plaintiff's own expert witness, however, testified that the settlement offer was probably unconscionable. We concluded that without evidence that the settlement was not unconscionable and would have been accepted by the court, no action for malpractice existed because the plaintiff's acceptance would have been meaningless.

Smith is distinguishable from the case at bar. *Smith* involved the attorney's alleged failure to communicate the offer. In *Smith*, this court found that the attorney was following the guidelines as to what would be deemed by a court to be unconscionable. The case at bar, however, involves Heavey's alleged misrepresentations and lack of knowledge of divorce law as it pertained to the various settlement provisions offered by Florence McWhirt. Heavey's duty was not to determine whether the court would find the settlement conscionable, but, rather, to exercise the requisite knowledge and skill to competently advise his client of this settlement. The issue of conscionability is not determinative of this case.

In sum, the appellants were not entitled to judgment as a matter of law merely because of the fact that McWhirt agreed to the settlement.

The appellants also contend that the district court erred in overruling their motions for directed verdict and judgment notwithstanding the verdict because the evidence pertaining to the issues of negligence, proximate cause, and damages was insufficient as a matter of law and should not have been submitted to the jury.

"In a negligence case, a trial court should sustain a motion for directed verdict or for judgment notwithstanding the ver-

dict only when the evidence, viewed in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence." *Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. 911, 919, 473 N.W.2d 94, 100 (1991).

." 'There are three elements a plaintiff alleging attorney negligence must prove: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss [damages] to the client. . . .' " *Id.*

Heavey's employment is undisputed. Regarding Heavey's alleged neglect of a reasonable duty, the appellants set forth two arguments. First, the appellants contend that McWhirt failed, as a matter of law, to present sufficient expert testimony regarding the standard of care and regarding the certainty of the expert's opinions as to Heavey's failure to meet that standard of care.

As mentioned previously, McWhirt's expert, Ortman, testified that in his opinion Heavey fell below the standard of care in several aspects when handling McWhirt's case. Ortman recited several of Heavey's actions which he did not believe met the standard of care, including failing to trace the inherited assets, giving improper advice regarding lifetime alimony testimony, negotiating the settlement in the manner that he did, and failing to advise McWhirt to refuse the settlement.

Heavey's counsel failed to object to Ortman's opinions. He did make three objections. Twice he objected to questions which were leading, and he also objected to Ortman's giving his opinion as to whether McWhirt suffered damage as a result of Heavey's deviation from the required standard of care.

An objection to an opinion of an expert based upon lack of certainty in the opinion is an objection based upon relevance. *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). If, when evidence is offered, the party against whom such evidence is offered fails to object or to insist upon a 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. *Id.*

The appellants, having failed to raise objections to Ortman's testimony, are now precluded from asserting that Ortman's opinion lacked certainty.

Triers of fact are not required to take opinions of experts as binding upon them. *Vredeveld v. Clark*, 244 Neb. 46, 504 N.W.2d 292 (1993). The determination of the weight that should be given expert testimony is uniquely within the province of the fact finder. *Id.* Ortman's testimony regarding whether Heavey deviated from the requisite standard of care was properly submitted to the jury for consideration.

The appellants also argue that the conduct of Heavey amounted only to mere errors of judgment and not professional negligence. We find, however, that when looking at all of the evidence submitted in a light most favorable to McWhirt, reasonable minds could differ as to whether Heavey's conduct amounted to professional negligence or only to mere errors of judgment.

In regard to proximate cause and damages, the appellants contend that McWhirt failed, as a matter of law, to provide sufficient evidence regarding the appellants' conduct being the proximate cause of any loss sustained by McWhirt. The proximate cause of an injury is that which, in a natural and continuous sequence, without any efficient intervening cause, produces the injury, and without which the injury would not have occurred. *Steuben v. City of Lincoln*, 249 Neb. 270, 543 N.W.2d 161 (1996).

"As an element of a negligence cause of action, a plaintiff must prove damages . . . with reasonable certainty." *Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. 911, 919, 473 N.W.2d 94, 100 (1991). " 'In a negligence case . . . the proper measure of damages is that which will place the aggrieved party in the position in which he or she would have been had there been no negligence. . . .' " *Id.* at 920, 473 N.W.2d at 100.

The appellants argue that McWhirt's failure to provide expert testimony regarding the issue of proximate causation bars his claim as a matter of law. The appellants contend that

where the issue of causation is technical and not within the common knowledge of the jury, expert testimony is required to establish the same, citing the legal malpractice case *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991). They contend the case at bar is such a case. However, the appellants' use of the proposition set forth in *McVaney* is misplaced.

McVaney involved an action by a plaintiff against the defendant law firm for its alleged failure to timely file a negligence action against the Metropolitan Utilities District for an explosion that destroyed the plaintiff's building. In *McVaney*, when this court was discussing the need for expert testimony as to proximate cause, we were discussing the burden on the plaintiff in proving the underlying negligence action, not the legal malpractice action. We stated that "the issue of causation of the explosion in McVaney's building was highly technical and not within the common knowledge and usual experience of a factfinding jury." *Id.* at 463, 466 N.W.2d at 508.

The underlying action in the instant case is divorce. Therefore, to survive a directed verdict, McWhirt was required to adduce evidence that Heavey's negligent actions caused McWhirt to accept the settlement proposal, and to adduce evidence showing damages with reasonable certainty resulting from the acceptance of the settlement and from forgoing trial by comparing his obligations under the settlement with those obligations he would have incurred if the case had gone to trial.

McWhirt testified that he believed all of his damages to be caused by the negligence of Heavey. Specifically, he stated that because of Heavey's negligence causing him to accept the settlement, he lost the inherited property, he incurred higher alimony and child support obligations, and he incurred attorney fees in attempting to have the decree set aside. McWhirt stated that he was pressured by Heavey into accepting the proposal.

Based on the evidence when viewed most favorably to McWhirt, reasonable minds could conclude that McWhirt would not have accepted the settlement proposal if it was not for Heavey's alleged acts of professional negligence. The par-

ties conceded that if the settlement had not been accepted, the case would have proceeded to trial.

McWhirt produced sufficient evidence to enable a jury to determine with reasonable certainty the damages proximately caused by the appellants. Ortman accurately testified that the general rule in this state is that alimony allowances requiring a husband to pay a fixed amount for an indefinite period of time are not favored. See *Cole v. Cole*, 208 Neb. 562, 304 N.W.2d 398 (1981). He also accurately testified that inherited property is considered nonmarital property. See *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). Although expert testimony regarding the status of the law is generally not admissible, see *Sports Courts of Omaha v. Brower*, 248 Neb. 272, 534 N.W.2d 317 (1995), Heavey did not object to the admissibility of Ortman's opinions concerning the law.

McWhirt also presented Ortman's opinion as to what would have been the reasonable and probable result of the property distribution if the case had gone to trial. Ortman stated that the inherited property would be separated from the marital property and would remain McWhirt's separate property. He stated that the marital property would be divided evenly. Lastly, Ortman stated that the alimony would be anywhere from $200 to $400, depending on the amount of years of payment the court imposed.

Several exhibits were admitted during McWhirt's testimony regarding marital property, nonmarital property, attorney fees incurred in attempting to set aside the decree, and differences in child custody obligations under the Nebraska Child Support Guidelines.

Finally, McWhirt introduced the expert opinion of Sullivan as to the present value of McWhirt's pensions and differences in alimony payments between McWhirt's current payments and Ortman's opinion as to what the court would have imposed after a trial.

For the reasons stated above, we find that when drawing all reasonable inferences in McWhirt's favor, the court correctly refused to find in favor of the appellants as a matter of law. We therefore affirm.

AFFIRMED.

CAPORALE, J., participating on briefs.

RUTH P. WILLIAMSON BY MARY E. WILLIAMSON, GUARDIAN AND CONSERVATOR, APPELLANT AND CROSS-APPELLEE, V. PROVIDENT GROUP, INC., APPELLEE AND CROSS-APPELLANT.

550 N.W.2d 338

Filed July 12, 1996. No. S-94-755.

1. **Negligence: Evidence: Trial: Proof.** Before the issue of assumption of risk may be submitted to the jury, the defendant has the burden to establish the elements of assumption of risk: the plaintiff knew of the danger, understood the danger, and voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's injury.
2. **Negligence.** The standard to be applied in determining whether a plaintiff has assumed the risk of injury is a subjective one based upon the particular facts and circumstances of the event.
3. ____. One does not assume the risk of unknown or hidden dangers.
4. ____. With regard to assumption of risk, the standard to apply is subjective—what the particular plaintiff in fact sees, knows, understands, and appreciates.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Reversed and remanded for a new trial.

Thomas J. Walsh, Sr., of Walsh, Fullenkamp & Doyle, for appellant.

Thomas M. Locher and Scott A. Lautenbaugh, of Hansen, Engles & Locher, P.C., for appellee.

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

CONNOLLY, J.

Ruth P. Williamson, by her guardian and conservator, Mary E. Williamson, brought this negligence action against Provident Group, Inc., the owner and operator of Hickory Villa, an assisted living facility located in Omaha, Nebraska. Ruth Williamson suffered personal injuries in a fall that occurred while on an excursion organized by Hickory Villa. At trial, the jury rendered a verdict in favor of Provident. Williamson appeals. We conclude that there was insufficient evidence for the trial court to submit the issue of assumption of risk, and we therefore reverse, and remand for a new trial.

FACTUAL BACKGROUND

Williamson, a 93-year-old resident of Hickory Villa, participated in an excursion organized by Hickory Villa's activities director, Art Cornelius, to DeSoto Bend Wildlife Refuge. Williamson, seven other residents, Cornelius, Tami Kologenski (a volunteer), and Steve Wessel (the son of one of the residents) traveled to DeSoto Bend in a van rented by Hickory Villa for the purpose of the trip.

While at DeSoto Bend, several of the passengers requested a restroom stop, and Cornelius stopped the van in an unpaved parking area over which crushed rock was scattered. Wessel testified that he helped Williamson out of the van and then asked her if she could make it on her own from there. He testified that she answered, "Yes, I can." After he had turned his back on Williamson to help his father, Wessel heard Williamson say "oh, oh," turned, and saw that she had fallen.

Kologenski testified that she had assisted one of the other residents out of the van and taken her to the restroom. When she was returning to the van, Kologenski observed Williamson standing alone. Kologenski testified that her view of the van became obscured by trees, but when she could see the van again, she saw that Williamson had fallen.

The testimony is in conflict as to what Cornelius was doing at the time of Williamson's fall. Kologenski claims that he was talking on the telephone, while Cornelius claims to have been checking the tires of the van on the driver's side. Wessel testified that Cornelius came from the other side of the van after Williamson's fall. However, it is uncontroverted that Cornelius did not help Williamson or any other residents get out of the van, despite his admission that it was part of his job to help them do so. Furthermore, Cornelius testified that he had never seen Williamson get out of the van without assistance.

Williamson offered testimony that her vision was poor. Although she had previously had cataract surgery on one eye, there was macular degeneration behind the cataract; therefore, the surgery was not successful. She had glaucoma in her other eye. Her daughter, Mary Williamson, testified that her mother's vision was neither better near nor better far: she just did not see very well. Additionally, the monthly reports prepared

by Hickory Villa personnel indicated Ruth Williamson's mental state as "confused." Furthermore, she adduced evidence that one of the reasons she was living at Hickory Villa was for the extra assistance the facility promised because she had fallen before and broken her arm.

As a result of her fall at DeSoto Bend, Williamson broke her right hip. She brought this action against Provident, the owner and operator of Hickory Villa, for negligence in the performance of its residential agreement. Despite Williamson's objections, the trial court included in its instructions to the jury an instruction on "assumption of risk" and used a similar phrase in another instruction. Furthermore, the court did not allow evidence of Cornelius' prior criminal conviction. The jury returned a verdict in favor of Provident. Williamson appeals.

ASSIGNMENTS OF ERROR

Williamson assigns that the court erred in (1) submitting the defense of assumption of risk to the jury, (2) including the words "assuming the risk" in instruction No. 3A(4), (3) striking from the record the admission of Cornelius that he had been convicted of a felony in 1983, and (4) overruling her motion for a new trial.

On cross-appeal, Provident assigns that the court erred in overruling its motion for a directed verdict because Williamson failed to submit sufficient evidence to establish the standard of care for similar facilities in this locale and the breach of that standard of care.

ANALYSIS

We begin with Williamson's first assigned error: that the trial court erred in submitting the defense of assumption of risk to the jury. Before the issue of assumption of risk may be submitted to the jury, the defendant has the burden to establish the elements of assumption of risk: the plaintiff knew of the danger, understood the danger, and voluntarily exposed himself or herself to the danger which proximately caused the plaintiff's injury. *Talle v. Nebraska Dept. of Soc. Servs.*, 249 Neb. 20, 541 N.W.2d 30 (1995); *Winslow v. Hammer*, 247 Neb. 418, 527 N.W.2d 631 (1995).

Williamson argues that Provident failed to meet its burden of establishing the elements of assumption of risk. Specifically, she argues that there was insufficient evidence to show that she knew, understood, and voluntarily exposed herself to the danger of walking unassisted on the parking lot surface.

Provident argues that Williamson assumed the risk of walking without assistance on the parking lot surface, because she knew that she had fallen before and had previously asked for assistance while on outings. Thus, Provident concludes that Williamson knew that it was a danger to walk independently and that she voluntarily assumed that risk.

The standard to be applied in determining whether a plaintiff has assumed the risk of injury is a subjective one based upon the particular facts and circumstances of the event. *Talle v. Nebraska Dept. of Soc. Servs.*, *supra*. One does not assume the risk of unknown or hidden dangers. *Winslow v. Hammer, supra*. Thus, it was Provident's burden to show that Williamson knew that walking under these circumstances was dangerous, and that she knowingly and voluntarily exposed herself to the risk of walking on the parking lot surface.

We have reviewed the photographs that were offered into evidence and conclude that what has been described as crushed rock is more aptly described as small, crushed limestone of the type that is commonly scattered on walking paths. The evidence indicates that Williamson was 93 years old, had poor vision, and had been markedly "confused" for a long period of time. The evidence indicates that Williamson had fallen before and therefore knew that there was a general danger involved in walking, but that is not the issue here. What we must determine is whether there was sufficient evidence, either direct or circumstantial, to indicate that she knew that it was dangerous to walk unassisted at this particular time.

Provident argues that Williamson had specific knowledge of the danger presented because Wessel helped her out of the van and asked her if she could proceed alone. Furthermore, Provident argues that there is circumstantial evidence presented that Williamson was aware of the parking lot surface, saw the parking lot surface, and was aware of the possibility

that she might fall if she crossed it without assistance. We do not agree. The record does not disclose the exact location of Williamson's fall. However, our review of the exhibits indicates that the surface upon which the van parked is smooth dirt in some places, while the above-described limestone substance is scattered over other parts. There is nothing in the record to indicate that Williamson actually stepped out onto rocks, nor does the record indicate that Williamson actually felt rocks underneath her feet. We do not see how Williamson could have voluntarily exposed herself to the risk of walking on the crushed limestone when there is no evidence that she could see or feel that the walking surface was not smooth.

With regard to assumption of risk, the standard to apply is subjective—what the particular plaintiff in fact sees, knows, understands, and appreciates. *Mandery v. Chronicle Broadcasting Co.*, 228 Neb. 391, 423 N.W.2d 115 (1988). There is neither direct nor circumstantial evidence to indicate that Williamson knew of the danger presented by the parking lot surface, or that she voluntarily assumed that risk. We conclude that Provident has not met its burden of proving that Williamson knew, understood, and voluntarily exposed herself to the risk of walking. Therefore, the defense of assumption of risk should not have been submitted to the jury.

Because Provident failed to prove the elements of assumption of risk, it was error for the trial court to submit the issue to the jury. Having decided that we must reverse because assumption of risk was improperly submitted to the jury, we need not reach Williamson's other assigned errors.

On cross-appeal, Provident alleges that the trial court erred in failing to direct a verdict in its favor because Williamson did not show the standard of care exercised by similar facilities in providing similar services. Provident cites a number of cases setting forth the standard of care for professionals in the performance of professional services.

However, this appeal does not involve an allegation of professional negligence. As Williamson argues, this case was pled and tried on the theory that Provident breached its contractual duty to provide assistance to Williamson. Specifically, Williamson alleges that Provident's employee, Cornelius,

while acting within the scope of his employment as activities director, drove Williamson to Desoto Bend, parked in a parking lot upon which crushed rock was scattered, and left her unattended in the van. There is no allegation that either Cornelius or Hickory Villa breached a professional standard of care; therefore, this case should be treated as an ordinary negligence case, and no evidence of a special standard of care is necessary. Thus, the trial court correctly refused to direct a verdict in favor of Provident.

CONCLUSION

We conclude that Provident failed to establish the elements of assumption of risk. Therefore, it was error for the trial court to submit the affirmative defense of assumption of risk to the jury. Furthermore, the trial court properly refused to direct a verdict in favor of Provident. We reverse, and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

PAUL BALTENSPERGER, APPELLANT, V. UNITED STATES DEPARTMENT OF AGRICULTURE ET AL., APPELLEES.

549 N.W.2d 651

Filed July 12, 1996. No. S-94-778.

SUPPLEMENTAL OPINION

Appeal from the District Court for Otoe County: RONALD E. REAGAN, Judge. Supplemental opinion: Motions granted.

Robert Wm. Chapin, Jr., for appellant.

Thomas J. Monaghan, U.S. Attorney (District of Nebraska), and Sally R. Johnson for appellees U.S. Department of Agriculture, Farmers Home Administration, and United States of America.

Donald R. Witt and Allan E. Wallace, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee First National Bank of Syracuse.

Richard H. Hoch, of Hoch & Steinheider, for appellees Baltensperger and Kreifels.

William F. Davis for appellees Stukenholtz and Volkmer.

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

LANPHIER, J.

Following the release of this court's opinion dated June 7, 1996, *Baltensperger v. United States Dept. of Ag.*, *ante* p. 216, 548 N.W.2d 733 (1996), appellees filed motions for attorney fees and accompanying affidavits as provided in Neb. Ct. R. of Prac. 9F (rev. 1996) and request attorney fees and costs pursuant to Neb. Rev. Stat. § 25-824(2) (Reissue 1995).

Appellees Edward D. Baltensperger, Hannelore E. Baltensperger, LeRoy Kreifels, Velda Kreifels, Clint Kreifels, and Kim Kreifels request $2,170.15 in fees and expenses.

Appellees John Stukenholtz, Rita Stukenholtz, Larry Volkmer, and Carol Volkmer request $2,937.38 in fees and expenses.

Appellee First National Bank of Syracuse, Nebraska, requests $2,628.61 in fees and expenses.

These motions are opposed by appellant, Paul Baltensperger, who asserts in summary that his actions, as well as those of his attorney, Robert Chapin, Jr., were in good faith to assert what they saw to be genuine legal questions.

Consistent with this court's earlier opinion finding that Baltensperger and his attorney flagrantly ignored a fully binding adverse final judgment, appellees' motions for fees and costs are hereby granted as follows: $2,170.15 to Edward Baltensperger, Hannelore Baltensperger, LeRoy Kreifels, Velda Kreifels, Clint Kreifels, and Kim Kreifels; $2,937.38 to John Stukenholtz, Rita Stukenholtz, Larry Volkmer, and Carol Volkmer; and $2,628.61 to First National Bank of Syracuse.

Said sums are ordered to be paid by Baltensperger and his attorney, Chapin.

MOTIONS GRANTED.

RICHARD E. STEPHENS, APPELLEE, V. RADIUM PETROLEUM COMPANY, INC., AND INDUSTRIAL SERVICE CORPORATION, APPELLANTS.

550 N.W.2d 39

Filed July 12, 1996. No. S-94-784.

1. **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.
2. **Jury Instructions: Appeal and Error.** Generally, 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.
3. **Contracts: Appeal and Error.** The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determinations made by the court below.
4. **Pleadings.** A pleading should not be amended to conform to the proof where the proposed amendment substantially changes the nature of the claim or defense.
5. **Pleadings: Appeal and Error.** Prejudicial error results when a pleading is allowed to be amended where the amendment changes the issues and affects the quantum of proof as to any material fact.
6. **Jury Instructions: Pleadings: Evidence.** A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence.
7. **Contracts.** Whether a document is ambiguous is a question of law initially determined by a trial court.
8. ____. The proper construction of a written contract and an examination of a contract for ambiguity are questions of law.
9. **Contracts: Intent.** The interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Affirmed.

Gordon R. Hauptman and Terry M. Anderson, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellants.

Dennis E. Martin and Karen M. Verdirame, of Martin & Martin, P.C., for appellee.

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

FAHRNBRUCH, J.

Richard E. Stephens filed suit for wages and benefits from his former employer, Radium Petroleum Company, Inc. (Radium), which company Stephens claims terminated his employment in violation of the terms of an employment and noncompetition agreement executed by the two parties.

A jury trial was held in the district court for Douglas County. The jury returned a $20,018.75 verdict in favor of Stephens.

We affirm the judgment of the trial court.

ASSIGNMENTS OF ERROR

Restated and summarized, Radium claims that the trial court erred in (1) refusing to allow Radium to amend its answer on the first morning of the trial; (2) refusing Radium's proposed jury instructions; (3) providing the jury a supplemental instruction stating that, as a matter of law, the employment contract extended to any position held by Stephens with Radium during the term of the contract; (4) finding, as a matter of law, that the employment contract between Stephens and Radium was unambiguous; and (5) finding, as a matter of law, that the employment contract between Stephens and Radium was valid, binding, and neither modified nor rescinded.

STANDARD OF REVIEW

The decision whether to allow or deny an amendment to any pleading lies within the discretion of the court to which application is made. *Cimino v. FirsTier Bank*, 247 Neb. 797, 530 N.W.2d 606 (1995).

Generally, 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 com-

plaining party. *Bunnell v. Burlington Northern RR. Co.*, 247 Neb. 743, 530 N.W.2d 230 (1995).

The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determinations made by the court below. *C.S.B. Co. v. Isham*, 249 Neb. 66, 541 N.W.2d 392 (1996).

FACTS

On August 6, 1992, Stephens filed this lawsuit against Radium, alleging that he was an employee of Radium pursuant to an employment agreement executed by the two parties on December 13, 1986. Stephens alleged that Radium terminated his employment without cause on May 6, 1992, in violation of the employment agreement's requirement that Radium provide Stephens written notice of its intention to terminate 90 days prior to the expiration of the employment agreement. Stephens sought wages and benefits from May 7, 1992, through and including December 12, 1992.

The employment and noncompetition agreement between Stephens and Radium provided in paragraph 1:

> The Company hereby agrees to employ Employee for a five (5) year period from the date of the execution of this Agreement, *during which time Employee agrees to perform such services as the Company from time to time shall direct, and to devote his full time and effort to the business interests of the Company*. Employee's position at the Company shall be that of manager of the Omaha facilities. The duties of the Employee, as manager, shall include, but are not limited to, the overall supervision of the following:
>
> (1) The activities of each Employee of the Company; and
>
> (2) The assignment of routes to the Company drivers; and
>
> (3) Customer relations; and
>
> (4) The purchase and sale of waste oil. . . .
>
> The Company agrees that if the Employee shall perform the services requested by the Company, it shall not ter-

> minate the employment of said Employee during the term of this Agreement without just cause. *Said Employment Agreement shall automatically renew for one (1) year periods, unless either party hereto shall deliver to the other party ninety (90) days written notice of the intention to terminate the employment relationship prior to the expiration of this Agreement.*

(Emphasis supplied.)

In its answer, Radium admitted that Stephens was a former employee under the terms of the employment agreement referred to in Stephens' petition. Radium further answered that it delivered to Stephens on February 5, 1992, a 90-day written notice of Stephens' termination pursuant to paragraph 1 of the parties' employment and noncompetition agreement.

The record reflects that in December 1991, Stephens approached one of his superiors at Radium and said he did not want to be facilities manager any longer because the job was becoming difficult and that he would rather drive a truck. Stephens recommended that his son, who worked for Radium as plant manager, succeed him as facilities manager.

After meeting with Stephens' supervisors in early January 1991, Stephens and his son were directed by their supervisors to exchange job positions. Stephens' son became facilities manager, and Stephens became plant manager.

On February 5, 1992, Radium informed Stephens that he was receiving a 90-day written notice of termination pursuant to their employment agreement and that the effective termination date was May 6, 1992. The notice stated that Stephens was placed on leave of absence immediately.

On the first day of trial, Radium moved to amend its answer to allege as affirmative defenses (1) that the employment agreement had been modified, (2) that the employment agreement had been canceled, and (3) that there was an accord and satisfaction of the terms and conditions of the employment agreement. The trial court overruled the motion to amend the answer. The trial court found that the matter had been certified for trial for some time, that the issues had been joined, and that the addition of new affirmative defenses would open up new terrain in the litigation.

Following the close of all the evidence, the trial court refused Radium's proposed jury instruction which would have instructed the jury to find whether Radium had met its burden of proof to establish that the employment agreement had been canceled by mutual consent. The trial court also refused Radium's proposed jury instruction which would have instructed the jury to find whether Radium had established that the terms of the employment agreement had been orally modified.

During its deliberations, the jury asked the trial court if "it matter[s] that . . . Stephens was terminated under the plantman position yet the contract was written and signed for 'facility manager'? . . ." In a supplemental instruction, the court stated, "[Y]ou are hereby instructed as a matter of law that the contract extends to any position held by Mr. Stephens with Radium Petroleum Company during the term of the contract." The supplemental instruction also referred the jury to instruction No. 9, which instructed the jury that "the contract between the plaintiff and defendant, is a valid and binding contract."

The jury returned a $20,018.75 verdict in favor of Stephens. By special verdict, the jury found that Radium *failed to notify Stephens 90 days prior to the expiration* of the employment agreement of its intention to terminate him.

ANALYSIS

Initially, we note that Radium does not challenge the findings of the jury.

Radium claims that the trial court abused its discretion when it denied Radium's motion to amend its answer on the morning of the trial. Neb. Rev. Stat. § 25-852 (Reissue 1995) provides:

> The [trial] court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, permit a party upon motion to amend any pleading, process, or proceeding . . . by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by

conforming the pleading or proceeding to the facts proved.

In the case at bar, Radium sought to amend its answer on the day of trial. The proposed amended answer would have substantially changed the nature of Radium's defense and unfairly prejudiced Stephens' ability to present his case. A pleading should not be amended to conform to the proof where the proposed amendment substantially changes the nature of the claim or defense. *Malerbi v. Central Reserve Life*, 225 Neb. 543, 407 N.W.2d 157 (1987). Prejudicial error results when a pleading is allowed to be amended where the amendment changes the issues and affects the quantum of proof as to any material fact. *McCook Nat. Bank v. Myers*, 243 Neb. 853, 503 N.W.2d 200 (1993). The trial court did not abuse its discretion when it overruled Radium's motion to amend its answer. Radium's first assignment of error is without merit.

Radium further claims that the trial court erred in refusing Radium's proposed jury instructions. The proposed jury instructions regarding cancellation and oral modification of the contract were relevant only to Radium's amended answer, which the court properly refused, and not to the pleadings on which the case was tried. A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence. *Burns v. Metz*, 245 Neb. 428, 513 N.W.2d 505 (1994). The trial court did not err in refusing Radium's proposed jury instructions because they were not based upon the theories of the case presented by the pleadings.

Finally, Radium claims that the trial court erred in instructing the jury, in a supplemental instruction, that the employment agreement extended to any position held by Stephens during the term of the employment agreement with Radium. Radium also contends that the trial court erred in finding, as a matter of law, that the contract was unambiguous and binding. Whether a document is ambiguous is a question of law initially determined by a trial court. *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989). The proper construction of a written contract and an examination of a contract for ambiguity are

questions of law. *Professional Serv. Indus. v. J. P. Construction*, 241 Neb. 862, 491 N.W.2d 351 (1992).

Both parties in their pleadings agree that the employment agreement continued in effect after Stephens was moved from facilities manager to plant manager. The record reflects that in its notice terminating Stephens as plant manager, Radium relied upon language in paragraph 1 of the employment agreement. It appears from the record that the intent of the parties was not that Stephens was hired under the employment agreement only as a facilities manager, but that he was hired under the terms of the agreement to "*perform the services requested by the Company.*" (Emphasis supplied.) It further appears from the record that both parties acted under the employment and noncompetition agreement at all times during and after Stephens' receipt of notice of his termination of employment with Radium. The interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence. *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996). As a result, the employment agreement was unambiguous, was a valid and binding agreement, and was applicable to Stephens' employment as facilities manager and as plant manager. The trial court did not err in its supplemental jury instruction or in its findings that, as a matter of law, the contract was unambiguous and valid.

CONCLUSION

Radium wrongfully terminated the employment and noncompetitive agreement executed by Stephens and Radium. A jury found that Radium violated that agreement by not providing Stephens timely notification of his termination. We affirm the judgment of the trial court.

AFFIRMED.

JOHN RAINBOLT, APPELLEE, V. STATE OF NEBRASKA AND THE NEBRASKA DEPARTMENT OF SOCIAL SERVICES, APPELLANTS.

550 N.W.2d 341

Filed July 12, 1996. No. S-94-805.

1. **Administrative Law: Judgments: Final Orders: Appeal and Error.** The judgment rendered or final order made by the district court in an Administrative Procedure Act appeal may be reversed, vacated, or modified by the Supreme Court or the Court of Appeals for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** On an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings.
3. **Administrative Law: Final Orders: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act 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.
4. **Administrative Law: Appeal and Error.** Under Neb. Rev. Stat. § 84-917(5) (Reissue 1994), when a petition instituting proceedings for review under the Administrative Procedure Act is filed in the district court on or after July 1, 1989, the review shall be conducted by the court without a jury de novo on the record of the agency.
5. **Administrative Law: Courts: Appeal and Error.** In a de novo review by a district court of the decision of an administrative agency, the level of discipline imposed by the agency is subject to the district court's power to affirm, reverse, or modify the decision of the agency or to remand the case for further proceedings.

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

Don Stenberg, Attorney General, and Charles E. Lowe for appellants.

Lynnette Z. Boyle, of Tietjen, Simon & Boyle, for appellee.

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

LANPHIER, J.

John Rainbolt, appellee, was dismissed from his employment as a protective services worker by appellant the Nebraska Department of Social Services (DSS). DSS charged Rainbolt

with inefficiency, incompetence or neglect in the performance of a home evaluation, and failure to maintain a satisfactory working relationship with his supervisor concerning his custodial placement of a juvenile.

Subsequent to the termination of his employment, Rainbolt filed a grievance with the Nebraska State Personnel Board. A hearing officer recommended reinstatement. However, the State Personnel Board found that DSS had just cause to dismiss Rainbolt. Rainbolt filed a petition on appeal in Lancaster County District Court against DSS and the State of Nebraska for review of the decision of the State Personnel Board under the Administrative Procedure Act, specifically Neb. Rev. Stat. § 84-918 (Reissue 1994). The district court, following de novo review, found that DSS did not have just cause to dismiss Rainbolt and ordered Rainbolt reinstated with backpay. DSS and the State appealed to the Nebraska Court of Appeals. We removed the case to our docket pursuant to our power to regulate the caseloads of the lower courts. We affirm.

BACKGROUND

From September 1990 until March 1992, Rainbolt was employed by DSS as a protective services worker. In February and March 1992, employee disciplinary charges were brought against Rainbolt. The charges alleged inefficiency, incompetence or neglect in the performance of duties, and failure to maintain satisfactory working relationships. The charges were brought by Rainbolt's supervisor, Patricia Squires, and arose out of problems surrounding a home evaluation performed by Rainbolt for child custody purposes and lapses in communication between Rainbolt and Squires concerning Rainbolt's custodial placement of a juvenile.

As to the allegation concerning the home evaluation, Rainbolt completed his first home evaluation regarding the placement of juveniles from out of state on a form provided by DSS. After filling out the form, he attempted to turn it in to Squires. Squires was out of the office, and following her instructions, Rainbolt submitted the report to Squires' superior. Squires' superior signed the report. It later came to

Squires' attention that the subject of the home evaluation claimed the form contained inaccurate information.

The other allegations by DSS concerned events relating to the placement of a juvenile, which occurred amid the earlier disciplinary action brought by Squires against Rainbolt concerning the home evaluation. In January 1992, DSS was seeking appropriate placement for a juvenile who had been receiving in-patient treatment at a psychiatric hospital. Rainbolt was assigned the responsibility of placing the juvenile in a long-term group home. The group home had no room; thus Rainbolt was unable to make the desired placement. He then placed the juvenile in a short-term facility managed by the same organization as the group home. There are contradictions in the testimony, but it is clear that Squires, after several conversations with Rainbolt, was under the impression that the juvenile was in the long-term facility. Squires discovered that the juvenile had never been in the long-term facility when the juvenile ran away, the juvenile was found, and Squires attempted to get the juvenile "accepted back" into the long-term facility. Brief for appellant at 13.

After the investigation into the charges against Rainbolt, DSS dismissed him. Rainbolt filed a grievance of the decision with the State Personnel Board, and a hearing officer was appointed to the case. During the hearing, Squires' superior testified that Rainbolt stated that he had misled Squires. The superior also testified that Rainbolt did not state that he had intentionally misled Squires. The hearing officer subsequently recommended reinstatement.

DSS appealed to the State Personnel Board, which upheld DSS' termination decision, stating, "[We voted to] accept the factual findings of the Hearing Officer, but not to accept his recommendation of reinstatement and to agree with the agency as to [Rainbolt's] termination from employment, as the official decision of the State Personnel Board."

Rainbolt appealed to the district court, which found that (1) DSS did not have just cause to impose discipline with respect to the home evaluation incident, specifically stating, "If these matters were not so serious, the basis for Squire[s'] conclusions would be comical"; (2) DSS did have just cause to

impose discipline based upon the incident involving placement of the juvenile; and (3) dismissal from employment was too severe a sanction under the circumstances. The court stated:

> While the hearing officer did conclude that the facts supported the contention of DSS that Rainbolt had intentionally misled Squires, this court, while not disagreeing entirely with this conclusion, does find that such conclusion certainly is a view more favorable to DSS than the testimony may warrant. However, the hearing officer concluded that the transgression by Rainbolt was not sufficiently serious to warrant discharge. This court agrees.
>
> . . . Rainbolt was under substantial pressure to find a placement for the juvenile. Squires was out of the office on annual leave or at meetings at times critical to the placement. The placement at Freeway [the short-term facility] was not inappropriate and it is easy to see how the description of the various facilities could be confused, particularly in view of the lack of communications in the office. Specifically this court notes the following:
>
> a. Although regularly scheduled meetings were set up between Rainbolt and Squires, Squires testified that they often times did not occur.
>
> b. While Squires testified she had an "open door" policy with her employees, she also stated that she was aware that Rainbolt was hesitant to talk with her, yet she made no attempt to resolve the conflict with him and only minimal effort to keep the lines of communication open.
>
> c. There was confusion over the use of the term "YSS" and whether it denoted the group home [the long-term facility], the Freeway home, or the umbrella organization that established the various homes. While there was testimony that "YSS" was only used to refer to the umbrella organization, Squires herself uses the term "YSS" to refer to the Freeway home during her testimony.
>
> . . . While Rainbolt's actions may warrant discipline, they do not warrant dismissal. There were other forms of discipline available to DSS that could have appropriately dealt with the situation. The labor contract between the

State and Rainbolt provides that "[t]he level of discipline imposed shall be based on the nature and severity of the infraction. The employer shall not discipline an employee without just cause, recognizing and considering progressive discipline." Rainbolt had not been disciplined previously and had received above average reviews for his performance.

ASSIGNMENTS OF ERROR

The State and DSS argue that the court erred (1) in reversing the decision of the State Personnel Board and ordering Rainbolt reinstated to employment by DSS with backpay and benefits, (2) in substituting its judgment as to the proper degree of discipline to be imposed upon Rainbolt in connection with the juvenile placement incident for that of the agency head, and (3) in finding that DSS did not have just cause for imposing discipline upon Rainbolt in connection with the home evaluation incident.

STANDARD OF REVIEW

The judgment rendered or final order made by the district court in an Administrative Procedure Act appeal may be reversed, vacated, or modified by the Supreme Court or the Court of Appeals for errors appearing on the record. *Val-Pak of Omaha v. Department of Revenue*, 249 Neb. 776, 545 N.W.2d 447 (1996); *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995); *Rose Equip., Inc. v. Ford Motor Co.*, 248 Neb. 344, 535 N.W.2d 404 (1995); *Sunrise Country Manor v. Neb. Dept. of Soc. Servs.*, 246 Neb. 726, 523 N.W.2d 499 (1994).

On an appeal from the district court under the Administrative Procedure Act, an appellate court reviews the judgment for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Knowlton v. Harvey*, 249 Neb. 693, 545 N.W.2d 434 (1996); *Metro Renovation v. State*, 249 Neb. 337, 543 N.W.2d 715 (1996); *George Rose & Sons v. Nebraska Dept. of Revenue*, 248 Neb. 92, 532 N.W.2d 18 (1995).

When reviewing an order of a district court under the Administrative Procedure Act 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. *Knowlton, supra*; *Metro Renovation, supra*; *White v. State*, 248 Neb. 977, 540 N.W.2d 354 (1995).

ANALYSIS

DSS contends that the district court's power of review over the decision of the State Personnel Board did not include the ability to modify the decision of the board and order Rainbolt reinstated with backpay and benefits. We disagree.

Under Neb. Rev. Stat. § 84-917(5) (Reissue 1994), when a petition instituting proceedings for review under the Administrative Procedure Act is filed in the district court on or after July 1, 1989, the review shall be conducted by the court without a jury de novo on the record of the agency. *Metro Renovation, supra.*

In its de novo review of the decision of the administrative agency, the level of discipline imposed by the agency is subject to the district court's power to affirm, reverse, or modify the decision of the agency or to remand the case for further proceedings. See, *Lee v. Nebraska State Racing Comm.*, 245 Neb. 564, 513 N.W.2d 874 (1994); *Davis v. Wright*, 243 Neb. 931, 503 N.W.2d 814 (1993); § 84-917(6)(b).

In addition, the change in the level of discipline by the district court was based on a factual finding following its de novo review that some of the cause for the alleged misleading that Rainbolt did was due to a "failure to communicate" rather than intent on Rainbolt's part. Because there is competent evidence in the record to support same, we are obligated to accept that finding under our standard of review. Therefore, we find this assignment of error to be without merit.

The State and DSS further argue that the court's reasoning, evidenced in its order, is erroneous in its finding that DSS did not have just cause for imposing discipline upon Rainbolt in connection with the home evaluation incident. The statement of the district court of the reasons for its order, even if wrong,

is not necessarily cause for reversal when the standard of review is error appearing in the record. In our review of the district court's decision, we need not reanalyze each proffered reason for the district court's decision following its de novo review.

The proper scope of our review is whether the decision of the district court is supported by the law and the record. After a review of the record, we find that the decision of the district court regarding the discipline of Rainbolt for the home evaluation incident is in conflict. There is, however, evidence in the record to support the district court's decision; therefore, the judgment is consistent with the applicable law, is supported by the record, and is neither arbitrary, capricious, nor unreasonable.

CONCLUSION

Finding that the decision of the trial court conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable, we affirm. Rainbolt's motion for attorney fees of $1,836 is granted.

AFFIRMED.

CAPORALE, J., participating on briefs.

CONNOLLY, J., dissenting.

Although the majority has set forth the proper standard of review for errors appearing on the record, it has failed to properly apply it. When reviewing an order of a district court under the Administrative Procedure Act 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. *Keys v. Department of Motor Vehicles*, 249 Neb. 964, 546 N.W.2d 819 (1996); *Knowlton v. Harvey*, 249 Neb. 693, 545 N.W.2d 434 (1996); *Metro Renovation v. State*, 249 Neb. 337, 543 N.W.2d 715 (1996).

First, I would like to clarify what I assume to be a misstatement by the majority. The majority states that "[t]he statement of the district court of the reasons for its order, *even if wrong*, is not necessarily cause for reversal when the standard of review is error appearing in the record." (Emphasis sup-

plied.) Surely, the majority does not mean to say that if the court's reasons are incorrect, we may not reverse. If this statement were true, which it is not, it would pervert the entire review process.

Furthermore, the majority states that

> the change in the level of discipline by the district court was based on a factual finding following its de novo review that some of the cause for the alleged misleading that Rainbolt did was due to a "failure to communicate" rather than intent on Rainbolt's part. Because there is competent evidence in the record to support same, we are obligated to accept that finding under our standard of review.

The majority correctly determines whether the district court's decision is supported by competent evidence, but then fails to consider the last part of the standard—that the decision is "neither arbitrary, capricious, nor unreasonable."

I believe that the district court's decision was unreasonable. Presented with a case in which an employee of DSS lied to his supervisor, the district court decided that termination of the employee was "too severe." I do not agree that termination was "too severe" after Rainbolt lied to his supervisor about a crucial component of his work—the placement of a juvenile.

The need for open, truthful communications is especially compelling under the facts of this case because Rainbolt worked as a protective services worker—one who is charged with the care, custody, and placement of juveniles. A protective services worker who chooses to "mislead," or lie to, a supervisor potentially places the juvenile about whom he is lying in danger of failing to receive vital services. The consequences of Rainbolt's misrepresentations in the placement incident were not only that the juvenile failed to receive the proper care, but that he actually ran away from the short-term facility. Rainbolt continued his prevarication by pretending that the juvenile had been placed with the group home. However, he had not. In short, by the time DSS discovered Rainbolt's series of lies, it had no appropriate alternative except to terminate him.

In his brief, Rainbolt even acknowledges his motive in "misleading" his supervisor. Rainbolt argues that he had been placed in a "difficult" position; that he had already received the statement of charges concerning the home evaluation incident and "believed . . . Squires was attempting to make a case against him." Brief for appellee at 11. Rainbolt also admits that he "may have said that [the juvenile] had run away from the group home," brief for appellee at 8, even though he knew that he had never placed the juvenile in the group home.

I find the majority's decision particularly puzzling, given the fact that we have been critical of DSS in the past for failing to be truthful when giving information to foster parents. See, *Anderson/Couvillon v. State*, 248 Neb. 651, 538 N.W.2d 732 (1995); *Haselhorst v. State*, 240 Neb. 891, 485 N.W.2d 180 (1992). It appears that the majority opinion creates an inconsistency: admonishing DSS to be truthful and make full disclosure in the placement of juveniles, while allowing DSS employees who lie about that very topic to remain in the workplace. I would reverse the decision of the district court.

GERRARD, J., joins in this dissent.

VELMA BOYD, APPELLANT, V. DR. ANUP K. CHAKRABORTY AND DR. GILES S. HEDDERICH, APPELLEES.

550 N.W.2d 44

Filed July 12, 1996. No. S-94-863.

1. **Summary Judgment.** Summary judgment is to be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.
2. ____. 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. ____. 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.
4. **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.
5. **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.
6. ____: ____. After the moving party has shown facts entitling it to a 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.
7. **Malpractice: Physicians and Surgeons: Affidavits: Negligence: Summary Judgment.** An affidavit of a 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.
8. **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.
9. **Negligence: Expert Witnesses: Evidence: Presumptions.** One of the exceptions to the requirement of expert testimony is the situation where the evidence and the circumstances are such that the recognition of the alleged negligence may be presumed to be within the comprehension of laypersons.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed and remanded for further proceedings.

Michael A. England, of Wolfe, Anderson, Hurd, Luers & Ahl, for appellant.

Jeanelle R. Robson and James A. Snowden, of Knudsen, Berkheimer, Richardson & Endacott, for appellees.

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

WHITE, C.J.

The plaintiff-appellant, Velma Boyd, brought this medical malpractice action against the defendants-appellees, Drs. Anup K. Chakraborty and Giles S. Hedderich, alleging negligence

in their treatment of Boyd, including their alleged failure to inspect a catheter upon its removal from Boyd's chest and failure to remove a fragment of this catheter from Boyd's body after surgery. Because no expert testimony was presented by Boyd as to the standard of care in this case, the district court granted the appellees' motion for summary judgment. Boyd appeals.

Boyd assigns two errors: (1) The district court erred in holding that the proof of negligence in extracting a catheter from a patient requires expert testimony on grounds that it calls upon the specialized knowledge of the medical profession and is beyond the comprehension of lay jurors, and (2) the district court erred in holding that expert testimony was required due to possibilities that the catheter may have broken for reasons other than the doctors' negligence. We reverse, and remand for further proceedings.

As an appeal from a summary judgment, the factual record for purposes of this appeal is reflected in the appellees' affidavits in support of their motion for summary judgment and in Boyd's deposition submitted in opposition to the appellees' motion.

On May 18, 1992, Boyd suffered an episode of pneumothorax, in which her right lung collapsed. She was admitted to Bryan Memorial Hospital, where she came under the care of Chakraborty. Chakraborty attempted to inflate Boyd's lung by inserting an arrow pneumothorax catheter into the right side of her chest.

Boyd also came under the care of Hedderich. On May 21, Hedderich performed a surgical procedure on Boyd's right lung. At the time of this surgery, the pneumothorax catheter was removed. Also at the time of surgery, another larger catheter was placed in Boyd's side for purposes of draining fluid from the lung.

On August 13, Boyd was admitted to Lincoln General Hospital after complaining of stabbing pains in the right side of her chest. She had an x ray taken by one Dr. Raines. Raines told Boyd that she had a fragment of chest tube in her lung. Boyd therefore had another surgery on August 14 to have this fragment removed.

On April 21, 1993, Boyd filed a petition against the appellees in Lancaster County District Court asserting professional negligence. Boyd alleges that a 1-inch fragment of a catheter was left in her chest. Boyd alleges in her petition that the appellees were negligent in (1) failing to properly inspect the catheter upon removal, (2) failing to properly inspect the chest-tube insertion wound after removal, (3) failing to account for all hardware used in the catheterization, and (4) leaving a foreign body inside Boyd following treatment.

The appellees filed their answer on May 24. The appellees admitted that "the plaintiff came under the care of Dr. Hedderich who performed a surgical procedure on the plaintiff's right lung and that a second surgical procedure was performed on August 14, 1992 in which a small fragment of tubing was removed."

On April 22, 1994, the appellees moved for summary judgment. The appellees' affidavits in support of the motion both stated that the appellees complied with the generally recognized standard of care. In addition, Chakraborty's affidavit also stated that the fragment subsequently removed from Boyd's lung was not a fragment from any tubing that Chakraborty used when caring for Boyd.

Boyd testified in her deposition that she was not certain as to which tube it was that fractured inside her chest. She stated that she believed Chakraborty used two different tubes when attempting to inflate the lung. Specifically, she stated, "I know he put a tube in there, and then I think they tried to put a different one in there and it still didn't work . . . ." The following exchange also took place during Boyd's deposition:

> Q. . . . I'm trying to find out if you know whether the tube that this fragment came from was the one that Dr. Chakraborty used to inflate your lung or the one that Dr. Hedderich used for drainage from your operative site?
>
> A: I couldn't tell you which one it was.

Boyd did state, however, that she believed the tube fragment was probably from a larger tube than those used by Chakraborty.

At the hearing on the motion for summary judgment, the appellees' counsel argued that if there was an issue of negli-

gence, it was not attributable to Chakraborty. He noted that Chakraborty stated in his affidavit that the tube fragment was not from any tube that he used on Boyd. Second, appellees' counsel argued that expert testimony was required to rebut the appellees' statements that they complied with the standard of care. Boyd's counsel argued that a prima facie case of negligence is presented when a surgeon leaves instruments inside a patient's body.

On August 26, 1994, the district court issued an order sustaining the appellees' motion for summary judgment. The court concluded that expert testimony was "required to show that the defendant fell below the standard of care required by failing to inspect the pneumothorax catheter and chest tube insertion following removal of the instrument from the patient."

The district court found that this case did not fall within the class of cases regarding a doctor leaving a foreign object inside a patient's body. The court distinguished this case based on the fact that the catheter was actually removed, while only a portion was left in the body. Based on prior case law, the court concluded that expert testimony was required, because the breaking of the catheter could have resulted from a cause other than the appellees' negligence. The district court concluded:

> As stated by the plaintiff, it seems obvious that foreign objects placed into the body during surgery need to be removed; however, the fact that a portion of a foreign object remained does not establish that it was the negligent acts of the defendant which caused such to occur. It does not seem obvious that laymen would know the proper technique to be used by physicians when performing this procedure nor does it appear that a layperson would be familiar with the type of instrument in question or its likelihood to break.

Summary judgment is to be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Bogardi v. Bogardi*, 249 Neb. 154, 542 N.W.2d 417 (1996). Concerning this court's standard of review, summary judgment is proper only when the plead-

ings, 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. *Lockard v. Nebraska Pub. Power Dist.*, 249 Neb. 971, 546 N.W.2d 824 (1996).

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. *Kocsis v. Harrison*, 249 Neb. 274, 543 N.W.2d 164 (1996). 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. *Lockard v. Nebraska Pub. Power Dist., supra.*

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. *Kocsis v. Harrison, supra.* After the moving party has shown facts entitling it to a 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. *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996).

We must therefore determine whether, when viewing the evidence in a light most favorable to Boyd, there is a genuine issue of material fact as to whether the appellees met the requisite standard of care in their treatment of Boyd.

This court has held that an affidavit of a 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. *Wagner v. Pope*, 247 Neb. 951, 531 N.W.2d 234 (1995).

As noted above, both doctors stated in their affidavits that they complied with the standard of care. These statements are sufficient to present a prima facie case for summary judgment purposes. Therefore, the appellees' affidavits shifted the bur-

den to Boyd to produce evidence of a factual issue regarding whether the appellees met this standard of care.

Regarding the plaintiff's burden of proving that a defendant physician fell below the requisite standard of care, this court has consistently held that "[w]hether 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." *Medley v. Davis*, 247 Neb. 611, 618, 529 N.W.2d 58, 63 (1995).

However, this court has also recognized an exception to this general rule often referred to as the "common knowledge exception": "One of the exceptions to the requirement of expert testimony is the situation where the evidence and the circumstances are such that the recognition of the alleged negligence may be presumed to be within the comprehension of laymen." *Halligan v. Cotton*, 193 Neb. 331, 335-36, 227 N.W.2d 10, 13 (1975). This court has also acknowledged the potential applicability of this exception to cases involving a physician's failure to remove a foreign object from a patient's body. See *Swierczek v. Lynch*, 237 Neb. 469, 466 N.W.2d 512 (1991).

Boyd did not present any expert testimony in opposition to the appellees' statements that they met the standard of care. Rather, Boyd contends that no expert testimony is necessary to prove the appellees' failure to meet the standard of care in this case because the appellees' negligence falls within the common knowledge exception.

The appellees argue that expert testimony was required to establish the standard of care concerning the procedures of inserting and extracting the catheter. Specifically, they contend, "In cases involving a small fragment of material, the issues center on defective equipment, the proper use of force and appropriate technique and are therefore not within the knowledge of lay persons." Brief for appellees at 17. The district court, finding that the fracturing of the tube could have resulted from a cause other than the appellees' negligence, agreed with the appellees. We agree that expert testimony is required in establishing the standard of care for the procedure

of inserting and extracting the catheter when the allegations pertain to the negligence of the physician in fracturing the catheter.

However, whether the appellees acted negligently in leaving a fragment of the tube inside of Boyd represents a separate issue. See *Nixdorf v. Hicken*, 612 P.2d 348 (Utah 1980). Boyd is not alleging that the fracturing of the tube is a result of the appellees' negligence. Rather, Boyd contends, "the issue in this case is whether a jury of lay persons could know and understand the relatively elementary duty of Appellees *to extract the entire catheter.*" (Emphasis supplied.) Brief for appellant at 6.

In essence, Boyd contends that no expert testimony is required concerning whether the appellees fell below the appropriate standard of care by allegedly failing to inspect the tube upon removal and leaving a tube fragment in Boyd's lung, because this is within the common knowledge of laypersons. As stated previously, Boyd's allegations of negligence in her petition pertain only to the appellees' conduct after the removal of the tube, such as failing to inspect and leaving a tube fragment inside her body.

The district court and the appellees rely heavily on this court's decision in *Tady v. Warta*, 111 Neb. 521, 196 N.W. 901 (1924). In *Tady*, the defendant physician, in attempting to treat the plaintiff for sinus trouble, drove a sharp steel chisel by use of a small steel mallet through the antrum bone of the plaintiff. The point of the chisel broke off and became imbedded in the bone. The plaintiff alleged that the physician was negligent in using the chisel and in breaking the chisel. The plaintiff did not allege that the defendant was negligent in leaving the broken point of the chisel embedded in the bone. The court in *Tady* concluded that expert testimony was required.

The instant case differs from *Tady* in that it involves whether a physician should remove any foreign objects left inside a patient. It also involves the inspection of a catheter after it is removed from a person's body. This case does not involve the issue of whether a physician was negligent in fracturing a catheter.

In sum, this case involves the leaving of a foreign object, namely, a tube fragment, in a patient's body, which fragment should have been removed by an act understandable by the jury without technical evidence. The only skill required in regard to the alleged negligent conduct of the appellees in this case is to inspect the equipment used in the surgical procedure to make certain everything is intact and has not been left in the patient's body. This is within the realm of knowledge of laypersons. Therefore, we find that the common knowledge exception applies in this case.

When viewing the evidence in the light most favorable to Boyd and drawing all reasonable inferences in her favor, we conclude that the district court erred in granting the motion for summary judgment. The evidence indicates that a fragment of a tube was left in Boyd's chest after Chakraborty and Hedderich treated her. This is not in dispute. Therefore, there is a genuine issue of material fact regarding whether the appellees fell below the requisite standard of care by failing to remove this fragment after operating on Boyd. This inference of breach of duty confronts the appellees' medical opinions of no breach of duty. Justice thus requires a trial.

The appellees contend that, at the very least, Chakraborty should be entitled to summary judgment because his affidavit stated that the tube fragment was not from a tube that he used. We find, however, that an inference can be drawn from the evidence finding that Chakraborty used two different tubes in trying to inflate Boyd's lung, therefore possibly removing a tube at some point during his treatment of Boyd. Chakraborty never stated that he did not remove a tube from Boyd's body. Boyd testified in her deposition that she was not absolutely certain as to which tube fractured inside her chest, nor was she certain as to who removed this tube. We find that the foregoing is sufficient to create a genuine issue of material fact concerning whether Chakraborty's actions constitute negligence.

In conclusion, the district court erred in granting the appellees' motion for summary judgment. Therefore, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. BRIAN E. DODSON, APPELLANT.

550 N.W.2d 347

Filed July 12, 1996. No. S-94-1249.

1. **Pleas: Appeal and Error.** The withdrawal of a guilty plea is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion.
2. ____: ____. A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion.
3. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, or fairness of the judicial process.
4. **Pleas.** Before accepting a plea of guilty, a trial court must inform the defendant of (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront adverse witnesses, (4) the right to a jury trial, and (5) the privilege against self-incrimination. The court must examine the defendant in order to determine whether the defendant understands that information.
5. **Constitutional Law: Pleas: Waiver.** A guilty plea constitutes a waiver of three constitutional rights: the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination.
6. **Pleas: Right to Counsel.** A plea of guilty does not waive the constitutional right to counsel.
7. **Constitutional Law: Criminal Law: Right to Counsel.** The Sixth Amendment to the U.S. Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense. Nebraska Constitution art. I, § 11, provides that in all criminal prosecutions, an accused shall have the right to appear and defend in person or by counsel.
8. **Right to Counsel.** The right to counsel is not restricted to the actual trial on the merits.
9. **Criminal Law: Right to Counsel.** A person accused of a crime requires the guiding hand of counsel at every step in the proceedings against him.
10. **Constitutional Law: Criminal Law: Pleas.** A defendant's decision to plead guilty or nolo contendere to a criminal charge is a grave and personal judgment, which a defendant should not be allowed to enter without full comprehension of his constitutional rights.
11. **Criminal Law: Right to Counsel: Waiver.** An accused is entitled to be represented by counsel in all critical stages of a criminal proceeding against him, but the right to counsel may be waived, if such waiver is made intelligently and understandingly with the knowledge of an accused's right to counsel.
12. **Pleas.** A coerced guilty plea is not a plea that is made freely, voluntarily, and intelligently.

13. ____. A guilty plea admits all facts recited in open court by the State and all facts alleged in the information or complaint, including the fact that the offense was committed and the time and place of its commission.
14. ____. Before a trial court can accept a defendant's guilty plea, it must determine whether among other things, a factual basis for the plea exists.
15. ____. A guilty plea must be entered freely, intelligently, voluntarily, and understandingly to be accepted by the trial court. In finding that a guilty plea is made freely, intelligently, voluntarily, and understandingly, the court must find that the record establishes a factual basis for that plea.
16. ____. A factual basis for a plea of guilty may be established by inquiry of the prosecutor, interrogation of the defendant, or examination of the presentence report. The preferred procedure for ascertaining whether a factual basis exists to support a guilty plea is to inquire directly of the defendant.
17. **Criminal Law: Trial: Venue.** As a general rule, all criminal cases are to be tried in the county where the offense was committed.
18. **Criminal Law: Venue: Proof.** Proof of venue is essential in a criminal prosecution.
19. **Venue: Proof: Waiver.** In the absence of a defendant's waiver by requesting a change of venue, the State has the burden to prove proper venue beyond a reasonable doubt.

Petition for further review from the Nebraska Court of Appeals, HANNON, MILLER-LERMAN, and INBODY, Judges, on appeal thereto from the District Court for Douglas County ROBERT V. BURKHARD, Judge, on appeal thereto from the County Court for Douglas County, STEPHEN M. SWARTZ, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Julianne M. Dunn for appellant.

Herbert M. Fitle, Omaha City Attorney, and Martin J. Conboy III, Omaha City Prosecutor, and Richard L. Dunning for appellee.

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

FAHRNBRUCH, J.

Brian E. Dodson pled guilty in Douglas County Court to driving a vehicle while under the influence of alcohol (DUI) and to purposely or knowingly carrying a concealed weapon.

Dodson later moved to withdraw a guilty plea and vacate judgment, claiming that the plea was not knowingly and voluntarily entered. The county court denied Dodson's motion,

and the district court affirmed that judgment. On appeal, the Nebraska Court of Appeals affirmed the judgment of the district court. Dodson successfully petitioned for further review by this court.

We reverse the decisions of the lower courts and hold that Dodson did not knowingly and voluntarily waive counsel and, as a result, did not freely, intelligently, voluntarily, and understandingly plead guilty. We also hold that there was not an adequate factual basis presented by the State to support the charges made against Dodson.

ASSIGNMENTS OF ERROR

Dodson claims that the district court erred in affirming the denial of his motion to withdraw a guilty plea and in affirming his "conviction" and "sentence."

STANDARD OF REVIEW

The withdrawal of a guilty plea is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion. *State v. Spahnle*, 238 Neb. 265, 469 N.W.2d 780 (1991). A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion. *State v. Perez*, 235 Neb. 796, 457 N.W.2d 448 (1990).

FACTS

On August 19, 1994, at 2 a.m., police observed Dodson driving erratically. Upon being stopped, Dodson cooperated with police and submitted to an alcohol breath test. He scored .139 of 1 gram of alcohol per 210 liters of breath on the breath test which is over the statutory limit of .10. Dodson was arrested for DUI. During the arrest, an officer found a handgun under the seat of the automobile Dodson was driving.

Dodson was charged by a State complaint with DUI in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1993), a Class W misdemeanor, and by a city of Omaha complaint with purposely or knowingly carrying a concealed weapon in violation of Omaha Mun. Code § 20-192. The record reflects that Dodson was also charged with driving left of the centerline

and a vehicle light violation; both charges were ultimately dismissed at his arraignment.

Early in the afternoon of August 19, to an assembled group of defendants which included Dodson, the trial court explained a defendant's rights (1) to a presumption of innocence, (2) to a jury trial, (3) to confront one's accusers, (4) against self-incrimination, (5) to present witnesses, and (6) to counsel, and the court explained the State's burden of proof. Regarding the right to counsel, the court stated:

> [Y]ou have the right to a lawyer, either one hired by yourself, if you can afford to do that, or if you convince me that you can't afford your own lawyer, then I can appoint a lawyer from the Public Defender's Office to represent you, for whom you will not be charged anything. But you have to convince me that you're eligible for a public defender, which means you have to be able or willing to discuss your financial affairs with me this afternoon.

The court then explained how the defendants could plead. In pertinent part, the court stated: "If you plead guilty this afternoon, you give up all of those rights I just described, no trial, *no lawyer*, no rights." (Emphasis supplied.) The court further explained to the defendants that

> [i]f you plead not guilty, you will get a trial, but not until probably the latter part of September. *The problem that that creates that if you are unable to post the bond that I order you to post, that means you're going to sit in jail for a month or so until your trial date rolls around.* ***So keep that in mind.***

(Emphasis supplied.)

Later in the afternoon of August 19, the court proceeded to call each defendant before the bench for an individual arraignment. Dodson was arraigned without counsel. The trial court asked Dodson if he understood all of the rights the court had earlier described to the assembled defendants. Dodson answered that he understood and pled guilty to the charges brought against him. The court then said to Dodson: "*If you plead guilty, you give up all those rights I described*, no trial,

no lawyer, no rights. . . . Do you understand that?" (Emphasis supplied.) Dodson answered that he understood.

The State offered the following factual basis for the DUI and carrying a concealed weapon charges:

> He [Dodson] was stopped for driving erratically, Your Honor, August 19th, 30th and Fowler, about 2:00 this morning. The defendant was cooperative but obviously intoxicated. He test [sic] .139 — 139 on the breath test. There was a gun found — handgun that was found I *guess* under the seat that was his.

(Emphasis supplied.) No presentence report was prepared prior to sentencing.

Without any further questions to the State or to Dodson, the trial court accepted Dodson's guilty pleas. The trial court sentenced Dodson to concurrent prison terms of 30 days for DUI and 60 days for carrying a concealed weapon. Additionally, for the DUI conviction, the trial court suspended and revoked Dodson's motor vehicle operator's license for a period of 6 months to begin upon his discharge from jail and ordered him to pay a $200 fine. Dodson moved to set aside his guilty plea because it was not knowingly and voluntarily entered. The county court overruled Dodson's motion, and the district court affirmed.

ANALYSIS

In his motion to withdraw his guilty plea as well as his assigned errors on appeal, Dodson refers to a singular guilty plea. In fact, Dodson pled guilty to two separate complaints.

Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, or fairness of the judicial process. *State v. Clausen*, 247 Neb. 309, 527 N.W.2d 609 (1995).

Before accepting a plea of guilty, a trial court must inform the defendant of (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront adverse witnesses, (4) the right to a jury trial, and (5) the privilege

against self-incrimination. The court must examine the defendant in order to determine whether the defendant understands that information. See *State v. Biernacki*, 237 Neb. 215, 465 N.W.2d 732 (1991).

In explaining to Dodson his constitutional rights, the trial court stated, "If you plead guilty this afternoon, you give up all those rights I just described, no trial, ***no lawyer, no rights***." (Emphasis supplied.) Dodson was informed that he had a right to counsel, but if he pled guilty, he gave up his right to counsel. To instruct a criminal defendant, as the trial court did, that he has a right to counsel only if he or she pleads not guilty is contrary to the laws of Nebraska and the United States.

A guilty plea constitutes a waiver of three constitutional rights: the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. *Godinez v. Moran*, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993); *Parke v. Raley*, 506 U.S. 20, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992). See, also, *State v. Miles*, 202 Neb. 126, 274 N.W.2d 153 (1979). A plea of guilty does not waive the constitutional right to counsel. See *State v. Ninneman*, 179 Neb. 729, 140 N.W.2d 5 (1966), *cert. denied* 385 U.S. 838, 87 S. Ct. 85, 17 L. Ed. 2d 72. See, also, *Godinez v. Moran, supra* (distinguishing guilty plea from waiver of right to counsel in holding that both operate under same competency standard).

The Sixth Amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Nebraska Constitution art. I, § 11, provides that *in all criminal prosecutions, an accused shall have the right to appear and defend in person or by counsel.*

The right to counsel is not restricted to the actual trial on the merits. See *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932). A person accused of a crime requires the guiding hand of counsel at every step in the proceedings against him. *Coleman v. Alabama*, 399 U.S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970). See, also, *United States v.*

Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

A defendant's decision to plead guilty or nolo contendere to a criminal charge is a grave and personal judgment, which a defendant should not be allowed to enter without full comprehension of his constitutional rights. See *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). An accused is entitled to be represented by counsel in all critical stages of a criminal proceeding against him, but the right to counsel may be waived, if such waiver is made intelligently and understandingly with the knowledge of an accused's right to counsel. *State v. Jost*, 219 Neb. 162, 361 N.W.2d 526 (1985).

Dodson had the right to counsel before pleading guilty, and he retained his right to counsel after pleading guilty. The trial court instructed Dodson, appearing pro se, that he had a right to counsel, but that if he pled guilty, he did not have a right to counsel. The trial court's statements as to the nature of a defendant's right to counsel are an error of constitutional magnitude.

Furthermore, we note that the trial court told all of the defendants:

> If you plead not guilty, you will get a trial, but not until probably the latter part of September. *The problem that that creates that if you are unable to post the bond that I order you to post, that means you're going to sit in jail for a month or so until your trial date rolls around.* ***So keep that in mind.***

(Emphasis supplied.)

We disapprove the use of such statements by a trial judge at a defendant's arraignment. A defendant arraigned without counsel, such as Dodson, could well consider such statements as a coercive suggestion by the judge that the defendant plead guilty. A coerced guilty plea is not a plea that is made freely, voluntarily, and intelligently.

Because the trial court failed to accurately advise him of his constitutional rights, Dodson's guilty pleas were not entered freely, voluntarily, knowingly, and intelligently. Moreover, the trial court did not establish through questioning of Dodson that Dodson waived any of his rights freely, voluntarily, knowingly, and intelligently.

Generally, a guilty plea admits all facts recited in open court by the State and all facts alleged in the information or complaint, including the fact that the offense was committed and the time and place of its commission. See, *State v. Bargen*, 219 Neb. 416, 363 N.W.2d 393 (1985); *Marteney v. State*, 210 Neb. 172, 313 N.W.2d 449 (1981). However, before a trial court can accept a defendant's guilty plea, it must determine whether among other things, a factual basis for the plea exists. See, *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995); *State v. Irish, supra*. A guilty plea must be entered freely, intelligently, voluntarily, and understandingly to be accepted by the trial court. In finding that a guilty plea is made freely, intelligently, voluntarily, and understandingly, the court must find that the record establishes a factual basis for that plea. See *id*.

Determination of whether a factual basis exists for a guilty plea benefits a defendant and the criminal justice system alike. Such a determination ensures that a defendant actually committed the offense to which he pled guilty, provides a record of the conviction process which can minimize the necessity of overturning a conviction, and provides a court with a sound basis to evaluate a defendant's competency and willingness to plead guilty as well as the defendant's understanding of the charges. See *State v. Jost, supra*.

The dissenting opinion cites case law dating from 1907 to 1985 for the proposition that a guilty plea renders unnecessary proof of the facts alleged. The dissenting opinion appears to ignore our recent decisions. Since 1986, we have consistently followed our holding in *State v. Irish* that a guilty plea is not accepted until the trial court determines that a factual basis for the plea exists on the record. *State v. LeGrand, supra*; *State v. Johnson*, 242 Neb. 924, 497 N.W.2d 28 (1993); *State v. White*, 238 Neb. 840, 472 N.W.2d 720 (1991); *State v. Biernacki*, 237 Neb. 215, 465 N.W.2d 732 (1991); *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991); *State v. Ponec*, 236 Neb. 710, 463 N.W.2d 793 (1990); *State v. Carter*, 236 Neb. 656, 463 N.W.2d 332 (1990); *State v. Glover*, 236 Neb. 402, 461 N.W.2d 410 (1990); *State v. Walker*, 235 Neb. 85, 453 N.W.2d 482 (1990); *State v. Rhodes*, 233 Neb. 373, 445

N.W.2d 622 (1989); *State v. Kitt*, 232 Neb. 237, 440 N.W.2d 234 (1989); *State v. Wakeman*, 231 Neb. 66, 434 N.W.2d 549 (1989); *State v. Tully*, 226 Neb. 651, 413 N.W.2d 910 (1987); *State v. High*, 225 Neb. 690, 407 N.W.2d 776 (1987); *State v. Wiley*, 225 Neb. 55, 402 N.W.2d 311 (1987). The dissenting opinion states that *a voluntary and valid plea of guilty waives all defenses to the charge. However, before accepting a guilty plea, the court must determine that the plea is voluntary and must find a factual basis for that plea.* See *State v. LeGrand, supra.*

A factual basis for a plea of guilty may be established by inquiry of the prosecutor, interrogation of the defendant, or examination of the presentence report. *State v. Bargen*, 219 Neb. 416, 363 N.W.2d 393 (1985). The preferred procedure for ascertaining whether a factual basis exists to support a guilty plea is to inquire directly of the defendant. *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981). In the instant case, the report of the prosecutor omitted sufficient information to establish venue, the court had no other report before it, nor did the trial court examine Dodson.

As a general rule, all criminal cases are to be tried in the county where the offense was committed. Neb. Rev. Stat. § 29-1301 (Reissue 1995). Proof of venue is essential in a criminal prosecution. *State v. Vejvoda*, 231 Neb. 668, 438 N.W.2d 461 (1989). Moreover, in the absence of a defendant's waiver by requesting a change of venue, the State has the burden to prove proper venue beyond a reasonable doubt. See, *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992); *State v. Vejvoda, supra.*

In the instant case, the State referred only to 30th and Fowler Streets when it offered a factual basis for Dodson's guilty pleas. The record does not establish that either 30th Street or Fowler Street exists in Omaha or Douglas County. The mere existence of street names fails to establish venue. See *State v. Vejvoda, supra.* Therefore, the record fails to reflect that venue was established before the trial court accepted Dodson's guilty pleas.

As a result of the foregoing, no adequate factual basis exists in the record for the trial court's acceptance of Dodson's

guilty pleas. Thus, the trial court abused its discretion in accepting Dodson's guilty pleas.

The district court committed plain error by informing Dodson that he had a right to counsel only upon pleading not guilty, abused its discretion in accepting Dodson's guilty pleas, and abused its discretion in overruling Dodson's motion to withdraw his guilty pleas. As such, we need not address Dodson's claim that his sentences are excessive.

CONCLUSION

Because Dodson did not freely, voluntarily, knowingly, intelligently, and understandingly waive his right to counsel, we hold that he did not freely, voluntarily, knowingly, and intelligently plead guilty to the charges against him. Furthermore, the State did not present an adequate factual basis for the trial court to accept Dodson's guilty pleas and abused its discretion in accepting those pleas.

We reverse the Court of Appeals' affirmation of the district court's affirmation of the county court's judgment finding Dodson guilty of the two charges to which he pled guilty. We remand the cause to the district court with direction to remand the case to the Douglas County Court with direction to vacate Dodson's convictions and sentences and grant him a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., dissenting.

I respectfully disagree with the finding of the majority that Dodson was never informed that he had a right to counsel at the time of entering his guilty pleas.

If, as the majority states, Dodson was incorrectly informed by the court that he did not have a right to counsel unless he pled not guilty, how did this information prejudice Dodson? Dodson was advised that if he pled not guilty, a lawyer would be appointed for him. Had Dodson been advised that he could not have a lawyer prior to entering a plea, I would agree that he was prejudiced and should be entitled to a new trial. Instead, Dodson knowingly and voluntarily waived his right to counsel by entering a guilty plea to the charges.

The trial court told Dodson:

> Please be honest and don't be bashful when you get up here. If you don't understand any of the rights that I'm about to describe, or if you don't understand what's happening this afternoon to you and your case, ask a question, get my attention. I'll improve your understanding. In other words, I'll help you understand what you figure out what it is that you are going through this afternoon, help you understand your rights if you don't understand them the first time around. Okay?
>
> All right. Every defendant is presumed innocent, and that includes all of you, whatever you've been charged with, you are presumed to be innocent of those charges right now. That presumption will stay with you until you either go to trial and lose or until you enter a plea of guilty or no contest. If either of those things happens, then that presumption of innocence disappears. You will no longer be presumed to be innocent of what you've been charged with.

The trial court also explained Dodson's right to a trial, his rights at trial, and the presumption of innocence. Regarding the right to counsel, the court stated:

> Lastly, you have the right to a lawyer, either one hired by yourself, if you can afford to do that, or if you convince me that you can't afford your own lawyer, then I can appoint a lawyer from the Public Defender's Office to represent you, for whom you will not be charged anything. But you have to convince me that you're eligible for a public defender, which means you have to be able or willing to discuss your financial affairs with me this afternoon.

The court then proceeded to explain the different pleas:

> If you plead guilty, you're telling me you did it. You are admitting your guilt. You are telling me you committed the offenses that you're charged with. If you plead guilty this afternoon, you give up all of those rights I just described, no trial, no lawyer, no rights. You get convicted right here now this afternoon and you will face the penalties that I will have told you about as soon as you get up here in front of the bench. That's the guilty plea.

> Not guilty — when you plead not guilty, you are telling me, "No. I didn't do it Judge. I am not guilty. I want the State to be forced to prove me guilty at a trial," and keep in mind, you don't have to prove anything at trial. The burden is always on the State. You do not have to prove your innocence; the State has to prove your guilt. If you plead not guilty, you will get a trial, but not until probably the latter part of September. The problem that that creates that if you are unable to post the bond that I order you to post, that means you're going to sit in jail for a month or so until your trial date rolls around. So keep that in mind.

The following colloquy occurred between the trial judge and Dodson:

> THE COURT: Okay. With all your rights in mind, how do you want to plead to these charges?
>
> MR. DODSON: Guilty, sir.
>
> THE COURT: If you plead guilty, you give up all those rights I described, no trial, no lawyer, no rights. You'll get convicted and you face those penalties that I've just described. Do you understand that?
>
> MR. DODSON: Yes, sir.

The complaint filed against Dodson stated that

> on or about the 19th day of August, 1994, at or near 30th & FOWLER, in Douglas County [Dodson] did unlawfully operate or was in actual physical control of a motor vehicle while . . . under the influence of alcoholic liquor or . . . had a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his . . . breath.

When the court inquired as to the factual basis, the prosecutor stated that Dodson was stopped for driving erratically on August 19 at 30th and Fowler Streets. Dodson, who was obviously intoxicated, tested .139 on a breath test, and a handgun was found in the car under the seat. The court accepted the pleas and asked Dodson if he had anything to say. Dodson replied that he was carrying the weapon for protection.

Whether Dodson could have a lawyer after he pled guilty is clearly not the issue. The trial court's instruction to Dodson

that he had a right to counsel, but that if he pled guilty, he did not have a right to counsel, even if incorrect, clearly did not prejudice Dodson.

> "Since *Chapman* [*v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)], the Court has consistently made clear that it 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).

> By a plea of guilty, a defendant does not necessarily waive his constitutional right to counsel. Rice v. Olson, 324 U. S. 786, 65 S. Ct. 989, 89 L. Ed. 1367. However, any constitutional right or guarantee may be waived although the waiver must be an intelligent relinquishment or abandonment of a known right or privilege. Fay v. Noia, 372 U. S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837.

State v. Ninneman, 179 Neb. 729, 733, 140 N.W.2d 5, 8 (1966). Therefore, it is my opinion that Dodson knowingly and voluntarily waived his right to counsel.

The majority finds that venue was not established before the trial court accepted Dodson's guilty pleas. I disagree. *State v. Vejvoda*, 231 Neb. 668, 438 N.W.2d 461 (1989), relied upon by the majority to support its conclusion that venue must be proved by the prosecution, does not apply to Dodson. In *Vejvoda*, the defendant pled not guilty. Therefore, venue was a contested element of the complaint. Here, Dodson pled guilty. This distinction is crucial.

A guilty plea admits all facts recited in open court by the State and all facts alleged in the information or complaint. See, *State v. Bargen*, 219 Neb. 416, 363 N.W.2d 393 (1985); *State v. Jones*, 214 Neb. 145, 332 N.W.2d 702 (1983); *Marteney v. State*, 210 Neb. 172, 313 N.W.2d 449 (1981); *Clark v. State*, 150 Neb. 494, 34 N.W.2d 877 (1948). In *Clark*, we held:

> A plea of guilty to a criminal complaint admits that the offense was committed, the time and place of its commission, and the identity of the person committing it, as

> charged; it is an admission of record of the truth of the charges made; it renders unnecessary the proof of the facts alleged; and it supports a finding of guilt made thereon.

150 Neb. at 497, 34 N.W.2d at 879. See, also, *Leiby v. State*, 79 Neb. 485, 113 N.W. 125 (1907).

"A voluntary and valid plea of guilty embodies a waiver of all defenses to the charge—procedural, statutory, and constitutional—except for the defense that the information or complaint is insufficient to charge a criminal offense." *State v. Biernacki*, 237 Neb. 215, 222, 465 N.W.2d 732, 737 (1991). See *State v. Edwards*, 236 Neb. 445, 462 N.W.2d 93 (1990).

In *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), we cited *State v. Hyslop*, 189 Neb. 331, 202 N.W.2d 595 (1972), which suggested that by a defendant admitting he is in fact guilty of the crime charged, he has furnished a factual basis for accepting the plea. The factual basis given by the prosecutor was that Dodson was stopped at 30th and Fowler Streets for driving erratically. His breath tested .139. In my opinion, a factual basis existed for accepting the pleas, and I would affirm the convictions and sentences.

CONNOLLY and GERRARD, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. LEONARDO MARTINEZ, APPELLANT.

550 N.W.2d 655

Filed July 12, 1996. No. S-95-019.

1. **Indictments and Informations: Double Jeopardy.** An indictment shall advise the accused of the nature and cause of the accusation against him in order that he may meet the accusation and prepare for his trial and that, after judgment, he may be able to plead the record and judgment in bar of further prosecution for the same offense.
2. **Indictments and Informations: Time: Double Jeopardy.** Where an information provides a timeframe which has a distinct beginning and an equally clear

end within which the crimes are alleged to have been committed, it is sufficient to satisfy the requirements of the Sixth Amendment.

3. **Indictments and Informations: Double Jeopardy: Proof.** An indictment or information alone does not constitute a defendant's sole protection against double jeopardy. Rather, a defendant may allege and prove facts outside of the record in support of his plea of former adjudication.
4. **Indictments and Informations: Evidence: Convictions.** An information or indictment is not rendered invalid when the State presents evidence of several violations in its efforts to secure one conviction.
5. **Indictments and Informations: Sexual Assault: Minors: Time: Double Jeopardy.** The State may allege a timeframe for its allegations of sexual assault of a child in its first prosecution; as a quid pro quo to ensure that this liberty is not abused, the State must survive double jeopardy scrutiny if it attempts a second prosecution based upon the same transaction during the same timeframe.
6. **Indictments and Informations: Time: Double Jeopardy.** Unless the offense charged in a second prosecution is clearly separate and apart from the offense charged in the first prosecution, the timeframe alleged in the first prosecution acts as a blanket bar for subsequent prosecutions.
7. **Indictments and Informations: States: Evidence: Time.** If, at the time an information is filed, the State knows of all facts and all possible charges arising from one transaction or series of transactions within a timeframe, and if nothing prevents the State from filing all charges in one information, then there is no reason that the State need attempt a series of prosecutions of one charge at a time rather than prosecute all charges at once.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and MUES and INBODY, Judges, on appeal thereto from the District Court for Box Butte County, BRIAN SILVERMAN, Judge. Judgment of Court of Appeals affirmed.

Jon Placke, of Box Butte County Public Defender's Office, for appellant.

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

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

WHITE, C.J.

We agreed to the State's petition for further review to resolve the disagreement between two decisions of the Nebraska Court of Appeals. At issue are the Court of Appeals' decisions in *State v. Martinez*, 4 Neb. App. 192, 541 N.W.2d

406 (1995), and *State v. Quick*, 1 Neb. App. 756, 511 N.W.2d 168 (1993).

In the information against Martinez, it was alleged that a first degree sexual assault against Matthew P. occurred "between July 1, 1991 and June 18, 1994." In *Martinez*, the Court of Appeals relied on *Bartell v. United States*, 227 U.S. 427, 431, 33 S. Ct. 383, 57 L. Ed. 583 (1913), wherein the U.S. Supreme Court stated that an indictment

> shall advise the accused of the nature and cause of the accusation against him in order that he may meet the accusation and prepare for his trial and that, after judgment, he may be able to *plead the record and judgment in bar of further prosecution for the same offense.*

(Emphasis supplied.) See *Cowan v. State*, 140 Neb. 837, 2 N.W.2d 111 (1942). The Court of Appeals in *Martinez* held that an information must apprise a defendant with reasonable certainty of the charge against him so that he may prepare a defense to the prosecution and be able to plead the judgment as a bar to a later prosecution (citing *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984)).

The question, then, on which the decisions of the Court of Appeals differed was whether the information, as limited by the trial court, i.e., from July 1, 1991, to September 1, 1993, satisfied the *Bartell* standard. The *Quick* court held that the *Bartell* standard was not satisfied by a timeframe allegation; the *Martinez* court, however, held that where an information provides a timeframe which has a distinct beginning and an equally clear end within which the crimes are alleged to have been committed, it is sufficient to satisfy the requirements of the Sixth Amendment. We agree. As noted by the *Martinez* court, to hold otherwise would impose an impossible burden on a child sexual assault victim where there are allegations of multiple assaults over a lengthy timeframe. Any implication to the contrary in *State v. Quick, supra*, is disapproved.

In *State v. Piskorski, supra*, this court considered the claim that an information is unconstitutionally vague if it alleges a timeframe, rather than a specific date, during which a crime was committed. Like *Martinez* and *Quick*, *Piskorski* arose from one conviction based on several alleged commissions of

sexual assault; like the child victims in *Martinez* and *Quick*, the child victim in *Piskorski* could not specify the date on which the assault occurred. The State had alleged that the assault occurred between September 1 and December 25, 1982. At trial, the State proved one sexual assault within that period by relating the assault to a particular event, the presence of the child's mother during the assault. Proof of that event, if sufficient, would make it possible for Piskorski to subsequently prove, if necessary, which act had resulted in his conviction.

We found the information charging Piskorski to be constitutionally sufficient. An indictment or information alone does not constitute a defendant's sole protection against double jeopardy. *State v. Piskorski, supra*. Rather, a defendant may allege and prove facts outside of the record in support of his plea of former adjudication. *Id.* Indeed, the information, the instructions to the jury, and the record in Piskorski's case left no doubt that the act for which Piskorski was convicted was a specific act, although other violations not charged in the information might have occurred. Under *Piskorski*, an information or indictment is not rendered invalid when the State presents evidence of several violations in its efforts to secure one conviction.

The problems presented in *Piskorski*, *Quick*, and *Martinez* are endemic to child sexual assault cases. Because sexual assaults on minors are typically unwitnessed, and because such assaults can leave little or no physical evidence, a prosecutor is often resigned to basing the State's case on the testimony of the minor victim. Yet, young victims are often unsure of the date on which the assault or assaults occurred. A child who has been assaulted repeatedly may have no meaningful reference point of time or detail by which to distinguish one specific act from another. This is particularly true when a child has been assaulted on a regular basis and in a consistent manner. The more frequent and repetitive the assaults and the younger the victim, the more this problem is exacerbated, and the prosecutor's ability to prove specific acts through the victim's testimony decreases accordingly.

We cannot approve as law the holding of the *Quick* court that an information cannot allege a timeframe rather than a specific date in order to compensate for the vagaries of a child's memory. That result would effectively insulate the most vicious offenders—those who assault the youngest children the most times and who traumatize their victims the most severely. Such a policy is by every definition unconscionable, particularly in light of the fact that a timeframe allegation need not negate double jeopardy protection. Consistent with this court's opinion in *Piskorski*, the *Martinez* court noted correctly that a trial court in a subsequent prosecution may tailor double jeopardy protection to reflect the time period involved in the charge in the first prosecution.

The State may allege a timeframe for its allegations of sexual assault of a child in its first prosecution; as a quid pro quo to ensure that this liberty is not abused, the State must survive double jeopardy scrutiny if it attempts a second prosecution based upon the same transaction during the same timeframe. Unless the offense charged in the second prosecution is clearly separate and apart from the offense charged in the first prosecution, the timeframe alleged in the first prosecution acts as a "blanket bar" for subsequent prosecutions. This is the only viable means of balancing the profound tension between the constitutional rights of one accused of child molestation against the State's interest in protecting those victims who need the most protection.

It is preferable to allow the State to conduct one vigorous prosecution to protect a child rather than to bar any prosecution at all because of a child's natural mnemonic shortcomings. If, at the time the information is filed, the State knows of all facts and all possible charges arising from one transaction or series of transactions within a timeframe, and if nothing prevents the State from filing all charges in one information, then there is no reason why the State need attempt a series of prosecutions of one charge at a time rather than prosecute all charges at once.

In this case, the State alleged and tried two separate counts of first degree sexual assault and one count of sexual assault of a child. All three charges were brought as a result of one

investigation that included several interviews with Matthew and the concurrent prosecution of two codefendants, who were alleged to have sexually assaulted Matthew separate and apart from the assaults allegedly committed by Martinez. It is clear that the State has done its best to ascertain when the alleged assaults occurred in the interest of protecting the minor victim and speeding resolution of the charges. To correct the imbalance of rights created when, as in this case, the State exercises its right to a liberal timeframe allegation, the U.S. Constitution requires a proportionate increase in the defendant's protection against double jeopardy. Thus, our holding in this case ends the State's prosecution of Martinez for any acts committed within the timeframe it deemed necessary to prosecute the acts for which Martinez is now incarcerated.

We limit our review to the issues raised in this appeal and affirm the finding of the Court of Appeals that the information charging Martinez passed constitutional muster.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERIC L. ORDUNA, APPELLANT.

550 N.W.2d 356

Filed July 12, 1996. No. S-95-284.

1. **Judgments: Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
2. **Sentences: Prior Convictions: Appeal and Error.** A sentencing court's determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court's determination is clearly erroneous.
3. **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.
4. **Sentences.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.

5. **Sentences: Prior Convictions: Records: Right to Counsel: Waiver.** Challenges to prior plea-based convictions for enhancement proceedings may be made only for the failure of the face of the transcript to disclose whether the defendant had counsel or knowingly, understandingly, intelligently, and voluntarily waived counsel at the time the pleas were entered.
6. **Sentences: Prior Convictions: Records: Right to Counsel: Waiver: Proof.** In a proceeding for an enhanced penalty, the state has the burden to show that the record of a defendant's prior conviction, based on a plea of guilty, affirmatively demonstrates that the defendant was represented by counsel, or that the defendant, having been informed of the right to counsel, voluntarily, intelligently, and knowingly waived that right.
7. **Records: Waiver.** A checklist docket entry is sufficient to establish that a defendant has been advised of his rights and has waived them.
8. **Records.** A checklist or other such docket entry which is made by one authorized to make it imports verity, and unless contradicted, it stands as a true record of the event.
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. **Trial: Judges: Presumptions.** It is presumed in a bench trial that the judge was familiar with and applied the proper rules of law unless it clearly appears otherwise.
11. **Records.** A checklist which is used as a substitute for a formal, written journal entry must be prepared with as much care and certainty as any record of a court in order to import absolute verity.
12. **Sentences.** In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and INBODY, Judge, and WARREN, District Judge, Retired, on appeal thereto from the District Court for Douglas County, THEODORE L. CARLSON, Judge. Judgment of Court of Appeals affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stephen P. Kraft for appellant.

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

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

GERRARD, J.

In *State v. Orduna*, 95 NCA No. 50, case No. A-95-284 (not designated for permanent publication), the Nebraska Court of Appeals affirmed the conviction of appellant, Eric L. Orduna, for third-offense shoplifting, a Class IV felony. Neb. Rev. Stat. §§ 28-511.01 and 28-518(4) and (6) (Reissue 1995). Orduna was sentenced to 4 to 5 years' imprisonment, with credit for time served.

FACTUAL BACKGROUND

Orduna was arrested for shoplifting two sets of headphones from a Target Store in Omaha. The total value of the headphones was $64.98. Orduna had been convicted of shoplifting on at least two prior occasions. Consequently, the information filed alleged third-offense theft by shoplifting pursuant to §§ 28-511.01 and 28-518(6).

At a stipulated bench trial and enhancement hearing, the trial court admitted into evidence exhibits 2, 3, and 4, which are certified copies of Orduna's prior convictions for shoplifting from November 27, 1985; September 24, 1993; and October 5, 1993. Orduna objected to the use of exhibits 2 and 3, the certified copies of his November 27, 1985, and September 24, 1993, convictions. The basis of the objection was that neither exhibit affirmatively showed that Orduna made a knowing, voluntary, and intelligent waiver of his right to counsel. Orduna initially objected to exhibit 4, the conviction from October 5, 1993, but later withdrew this objection.

Exhibits 2 and 3 are standard form checklists used by judges of the Douglas County Court. In exhibit 2, concerning Orduna's November 27, 1985, court appearance, under the heading of "APPEARANCES," checkmarks appear next to the words "Defendant" and "Prosecutor," with the prosecutor's name written in the space provided. No checkmark appears next to the words "Defense Counsel," nor is there a name written in the space provided.

Under the heading "ARRAIGNMENT AND ADVISEMENT," checkmarks appear which indicate Orduna was arraigned on a charge of shoplifting and advised of this charge and the associated penalties. The form indicates Orduna was

advised of his privilege against self-incrimination, right to confront his accusers, and right to a trial, including a jury trial. The form indicates Orduna waived each right. Checkmarks appear next to the statements "Defendant advised of his right to counsel" and "Defendant waives his right to counsel." Checkmarks appear in the appropriate spaces to indicate that Orduna entered a plea of guilty, that this guilty plea was knowingly, understandingly, intelligently, and voluntarily entered, and that a factual basis exists for the plea. Checkmarks do not appear next to the statements on the checklist indicating that the court in fact accepted Orduna's guilty plea. However, the remainder of the checklist was completed and indicated that Orduna, on this occasion, was ordered to pay a fine of $35 and costs.

Exhibit 3, concerning Orduna's September 24, 1993, court appearance, is a different standard form checklist than the one used in exhibit 2. But, like exhibit 2, the checklist begins by reciting that Orduna was charged with shoplifting and indicating the appearances of Orduna and the prosecution and that Orduna was not represented by counsel. Under the heading "ARRAIGNMENT AND ADVISEMENT," a checkmark appears in the box next to the statement "Defendant advised of the nature of the above charges, all possible penalties, and each of the following rights: Counsel; Trial; Jury Trial; Confront Accusers; Subpoena Witnesses; Remain Silent; Request Transfer to Juvenile Court; Defendant's Presumption of Innocence; State's Burden of Proof Beyond Reasonable Doubt."

Below this statement, a checkmark appears in the box next to the statement "Defendant waived each of the above and foregoing rights." Immediately below this, a checkmark appears in the box next to the statement "Plea(s) entered knowingly, understandingly, intelligently, voluntarily, and a factual basis for plea(s) found; defendant advised of right to appeal conviction and sentence." Checkmarks appear in the appropriate boxes indicating defendant entered a plea of guilty and was found guilty. For this conviction, Orduna was sentenced to 120 days in jail.

The trial court found exhibits 2 and 3 could be used for enhancement purposes, as a "careful examination of these exhibits affirmatively show[s] that the waiver of counsel was done 'knowingly, intelligently and voluntarily.' " After noting for the record Orduna's lengthy criminal record and prior imprisonment, the trial court sentenced him to 4 to 5 years' incarceration. Section 28-518(6) provides that for any third or subsequent conviction of theft under $200, a person shall be guilty of a Class IV felony. The penalty for a Class IV felony is a maximum incarceration of 5 years, a $10,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1989).

COURT OF APPEALS DECISION

The Court of Appeals did not reach the issue of whether the trial court erred in finding that the certified copies of Orduna's prior shoplifting convictions evinced a competent waiver of his right to counsel. Instead, the Court of Appeals found that *Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994), controlled. In *Nichols*, the U.S. Supreme Court held that an uncounseled misdemeanor conviction, which was constitutionally valid because no term of imprisonment was imposed, is also valid for enhancement of a subsequent conviction.

Applying *Nichols*, the Court of Appeals found that even if Orduna's November 27, 1985, conviction was uncounseled, because he was not sentenced to prison, it was a valid conviction for the purposes of enhancement. Accordingly, Orduna's November 27, 1985, conviction and his counseled October 5, 1993, conviction may be used to bring Orduna within § 28-518(6).

In addition, the Court of Appeals found that Orduna's sentence was not excessive, because it was within the statutory maximum for a Class IV felony and was warranted by Orduna's lengthy criminal record.

SCOPE OF REVIEW

Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996); *State v. Sinsel*, 249 Neb. 369, 543

N.W.2d 457 (1996). See *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995).

A sentencing court's determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court's determination is clearly erroneous. *State v. Reimers*, 242 Neb. 704, 496 N.W.2d 518 (1993).

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Kunath*, 248 Neb. 1010, 540 N.W.2d 587 (1995); *State v. Ladig*, 248 Neb. 737, 539 N.W.2d 38 (1995). An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. See, *State v. Parmar*, 249 Neb. 462, 544 N.W.2d 102 (1996); *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

ASSIGNMENTS OF ERROR

Orduna asserts that the Court of Appeals erred in finding that his November 27, 1985, shoplifting conviction could be used to enhance his sentence and erred in not finding his sentence to be excessive.

Two issues are at the heart of the first assigned error: (1) whether the Court of Appeals could extend the holding of *Nichols v. U.S., supra*, to Nebraska law and find an uncounseled guilty plea to a misdemeanor in which no prison term was imposed valid for the purposes of enhancement and (2) whether the standard form checklists, offered as proof that Orduna was informed of and waived his right to counsel in those prior proceedings, fail to demonstrate that such waiver was made voluntarily, knowingly, and intelligently.

ANALYSIS

Enhancement Proceedings.

The Court of Appeals' decision in this matter was filed on December 19, 1995. Three days later, on December 22, we rendered our decision in *State v. LeGrand, supra*. In *LeGrand*, this court held that the Court of Appeals erred in questioning our holdings in *State v. Oliver*, 230 Neb. 864, 434 N.W.2d

293 (1989), and *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992). We concluded that the Court of Appeals' reliance on *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994), and *Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994), was misplaced because *Custis* does not impact this state's laws regarding the right of state defendants to collaterally attack prior state convictions being used for enhancement purposes. Orduna asserts that the right to counsel—the only right the guarantee of which may be attacked directly at an enhancement hearing—should not be afforded less protection by this court than those rights whose guarantee may be collaterally attacked.

However, based on the record before us, it is unnecessary to rely upon the holding in *Nichols v. United States, supra*, to resolve the instant case. For reasons hereinafter set forth, we conclude that Orduna's prior plea-based convictions for shoplifting were made pursuant to a competent waiver of counsel. It was error for the Court of Appeals to extend the holding in *Nichols* to this state's law when the issue, i.e., the validity of using uncounseled misdemeanor pleas in which no prison term was imposed for enhancement purposes, was neither raised in the district court nor mentioned in the parties' briefs on appeal. The U.S. Supreme Court noted in *Nichols*: "States may decide, based on their own constitutions or public policy, that counsel should be available for all indigent defendants charged with misdemeanors. Indeed, many if not a majority of States guarantee the right to counsel whenever imprisonment is authorized by statute, rather than actually imposed." 511 U.S. at 748-49. We leave for another day the question of whether the Nebraska Constitution allows the use of an uncounseled guilty plea to a misdemeanor in which no prison term was imposed for the purposes of enhancement.

As a prefatory matter, the State suggests in its brief and again at oral argument that Orduna's attack on his prior convictions is a collateral attack barred by the rule in *State v. Wiltshire, supra*. In *Wiltshire*, we sought to clarify *State v. Oliver, supra*, by reiterating, " 'Challenges to prior plea-based convictions for enhancement proceedings may only be made

for the failure of the record to disclose whether the defendant had or waived counsel at the time the pleas were entered.' " 241 Neb. at 826, 491 N.W.2d at 330.

In enhancement proceedings, argues the State, Orduna is allowed to contest only whether he in fact waived the right to counsel. Thus, because in this case Orduna is contesting whether the face of the transcript shows that his waiver of counsel was entered knowingly, understandingly, intelligently, and voluntarily, his claim constitutes a collateral attack on a prior judgment, which must be raised on direct appeal or in a separate proceeding.

We think this too parsimonious a reading of our past cases, including *Wiltshire*. In *Wiltshire*, we further explained the above-quoted proposition by stating: "In other words, at the enhancement proceeding only those objections dealing with uncounseled pleas may be raised." *Id.* Furthermore,

> [w]e have said that in order to prove a prior drunk driving conviction for enhancement purposes, the State need show only that at the time of the prior conviction the defendant had, or waived, counsel. [Citations omitted.] Implicit in that statement, however, is the requirement that the waiver be made knowingly, voluntarily, and intelligently.

State v. Anderson, 232 Neb. 349, 350, 440 N.W.2d 257, 258-59 (1989).

Accordingly, what may have been implicit is now explicit. We hold that challenges to prior plea-based convictions for enhancement proceedings may be made only for the failure of the face of the transcript to disclose whether the defendant had counsel or knowingly, understandingly, intelligently, and voluntarily waived counsel at the time the pleas were entered. In *State v. Crane*, 240 Neb. 32, 35, 480 N.W.2d 401, 403 (1992), this court stated:

> We have repeatedly held that, as a procedural matter, a defendant cannot collaterally attack a prior conviction in an enhancement proceeding and that challenging a prior plea-based conviction based on the lack of a *Boykin*-type colloquy constitutes a collateral attack. . . . We do, however, allow challenges to prior plea-based

> convictions offered for enhancement purposes based on the transcript's failure to disclose whether the defendant had or waived counsel at the time the pleas were entered. . . . *We do so because we do not regard such a challenge as a collateral attack on the former judgment.* . . . One could also challenge the constitutional validity of a prior conviction through a separate proceeding, such as an action for declaratory judgment.

(Citations omitted.) (Emphasis supplied.)

In a proceeding for an enhanced penalty, the state has the burden to show that the record of a defendant's prior conviction, based on a plea of guilty, affirmatively demonstrates that the defendant was represented by counsel, or that the defendant, having been informed of the right to counsel, voluntarily, intelligently, and knowingly waived that right. *State v. Reimers*, 242 Neb. 704, 496 N.W.2d 518 (1993); *State v. Nowicki*, 239 Neb. 130, 474 N.W.2d 478 (1991). Moreover, a checklist docket entry is sufficient to establish that a defendant has been advised of his rights and has waived them. *State v. Nowicki, supra.*

A checklist or other such docket entry which is made by one authorized to make it imports verity, and unless contradicted, it stands as a true record of the event. *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984). 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).

Orduna asserts that exhibits 2 and 3 do not evince a competent waiver of his right to counsel, because neither exhibit expressly states that Orduna's waiver of counsel was made knowingly, understandingly, intelligently, and voluntarily. We disagree. Instead, we conclude that exhibits 2 and 3 affirmatively demonstrate that Orduna was informed of the right to counsel and that he knowingly, understandingly, intelligently, and voluntarily waived that right.

With respect to Orduna's September 24, 1993, conviction, exhibit 3 affirmatively demonstrates that Orduna was not represented by counsel, but that he was advised of his right to counsel and waived his right. The record demonstrates that

Orduna entered a plea of guilty and that the court accepted his plea. There are no facts or circumstances in the record indicating that Orduna's plea was entered involuntarily or without sufficient understanding or knowledge of the plea's consequences. In fact, the record affirmatively demonstrates that the plea was entered knowingly, understandingly, intelligently, and voluntarily.

It is presumed in a bench trial that the judge was familiar with and applied the proper rules of law unless it clearly appears otherwise. *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995); *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994). Accordingly, if the trial court finds that a plea was entered knowingly, understandingly, intelligently, and voluntarily, then it is necessarily true that if the record reflects counsel was waived, this right was waived knowingly, understandingly, intelligently, and voluntarily.

This is so because logically, a plea cannot be legally sufficient unless those elements underlying the plea are also legally sufficient. Thus, in the instant case, when the trial court found Orduna's guilty plea legally sufficient, it likewise found his waiver of counsel legally sufficient.

Exhibit 2, however, presents a different problem. Exhibit 2 affirmatively demonstrates that Orduna appeared without counsel but was advised of his right to counsel and waived it. Furthermore, exhibit 2 affirmatively demonstrates that Orduna knowingly, understandingly, intelligently, and voluntarily entered a plea of guilty to the charge of shoplifting. However, the court failed to place checkmarks in the appropriate spaces indicating that the court in fact found Orduna guilty. Notwithstanding, exhibit 2 affirmatively demonstrates that Orduna was fined $35 pursuant to his plea of guilty. Moreover, this checklist is signed and properly dated by the county judge and bailiff.

A checklist which is used as a substitute for a formal, written journal entry must be prepared with as much care and certainty as any record of a court in order to import absolute verity. *State v. Nowicki*, 239 Neb. 130, 474 N.W.2d 478 (1991); *State v. Foster*, 224 Neb. 267, 398 N.W.2d 101 (1986).

In *State v. Foster, supra*, an exhibit consisting of a complaint, two checklist journal entries, and an order of probation was found insufficient for the purposes of enhancement. One problem with the *Foster* exhibit was that even though one checklist showed the defendant entered a plea of guilty, the trial court neglected to check the appropriate spaces indicating the court accepted the defendant's plea. Furthermore, in *Foster*, we concluded that the other items in the exhibit did not cure this defect and affirmatively demonstrate that the defendant's plea was in fact accepted by the court. In particular, the order of probation indicated that the trial court did in fact convict the defendant of second-offense drunk driving, but failed to satisfy the checklist deficiency because the relevant dates and pleas did not match. The first journal entry showed the defendant pleaded guilty on July 24, 1979, while the probation order showed the defendant pleaded not guilty on July 7. July 7 was 17 days prior to the date of the offense alleged in the complaint.

Foster is distinguishable from the instant case. Here, although the trial court failed to check the appropriate spaces on exhibit 2 indicating that the court had in fact accepted Orduna's guilty plea, the court cured this defect by completing the remainder of the checklist on the same date as the plea, affirmatively demonstrating that Orduna was sentenced for the particular crime charged. Obviously, if the court had not accepted Orduna's guilty plea, then it could not have ordered him to pay a fine for the shoplifting offense. Thus, like exhibit 3, exhibit 2 affirmatively demonstrates that Orduna's waiver of the right to counsel was made knowingly, understandingly, intelligently, and voluntarily.

Accordingly, either of the convictions from exhibit 2 or exhibit 3, along with the October 5, 1993, conviction set forth in exhibit 4, was properly utilized to enhance Orduna's offense to third-offense shoplifting. Orduna's first assignment of error is without merit.

Excessive Sentence.

Even though Orduna, in effect, was sentenced to 4 to 5 years' imprisonment for shoplifting $64.98 worth of head-

phones, his excessive sentence argument is without merit. In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Ladig*, 248 Neb. 737, 539 N.W.2d 38 (1995); *State v. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995). The trial court noted that Orduna's criminal record was five pages long and had begun 10 years prior to the instant conviction, when Orduna was 15 years old. The record shows that in addition to the prior shoplifting convictions used to enhance Orduna's sentence, Orduna has been convicted of trespass, carrying a concealed weapon, possession of a controlled substance with intent to deliver, and five other theft convictions and that his driver's license has been suspended 13 times. The trial court noted that Orduna's prior record demonstrated an utter disrespect for the law. The trial court considered all of the appropriate sentencing factors, and the sentence did not constitute an abuse of discretion. The sentence imposed on Orduna was well within the statutory limits.

CONCLUSION

Exhibits 2 and 3 affirmatively demonstrate Orduna's prior plea-based convictions for shoplifting were made pursuant to a competent waiver of counsel. It was proper for the trial court to utilize either of the convictions, along with the conviction set forth in exhibit 4, to enhance Orduna's offense to third-offense shoplifting. For all of the above reasons, the judgment of the Court of Appeals is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DARRIN MCHENRY, APPELLANT.

550 N.W.2d 364

Filed July 12, 1996. No. S-95-782.

1. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
2. **Trial: Juries.** Except when there is a showing that without sequestration a party's rights would be prejudiced, a party has no right to examine a potential juror out of the presence of all the other potential jurors.
3. **Venue: Appeal and Error.** A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof.
4. ____: ____. A trial court abuses its discretion in denying a motion to change venue where a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial.
5. **Constitutional Law: Double Jeopardy.** The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution prevents a second prosecution for the same offense after acquittal.
6. **Double Jeopardy: Homicide.** The principles underlying the double jeopardy protection clearly establish that acquittal of a felony in a previous trial prevents the use of the same felony as an underlying felony to support a felony murder prosecution in a retrial.
7. **Constitutional Law: Criminal Law: Convictions: Appeal and Error.** Even a constitutional error which was harmless beyond a reasonable doubt does not warrant the reversal of a criminal conviction.
8. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
9. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely attributable to the error.
10. **Trial: Testimony: Hearsay: Prior Statements.** Ordinarily, the testimony of a person taken in a prior trial is hearsay and is not admissible.
11. **Witnesses: Hearsay.** Neb. Rev. Stat. § 27-804(2)(a) (Reissue 1995) provides an exception to the hearsay rule if the declarant is unavailable as a witness.
12. **Trial: Witnesses.** The determination of whether a witness is unavailable is left to the discretion of the trial court.
13. **Trial: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial court are clearly untenable, unfairly depriving a liti-

gant of a substantial right, and denying a just result in matters submitted for disposition.

14. **Venue: Proof.** To warrant a change of venue, a defendant must show the existence of pervasive misleading pretrial publicity.
15. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
16. **Double Jeopardy.** The Double Jeopardy Clause precludes multiple punishment for the same offense imposed in a single proceeding.
17. **Double Jeopardy: Legislature.** The multiple punishment prong of the double jeopardy bar seeks to ensure that the total punishment does not exceed that authorized by the Legislature.
18. **Double Jeopardy: Legislature: Intent: Convictions.** A determination of whether two convictions in a single trial lead to multiple punishment depends upon whether the Legislature, when designating the criminal statutory scheme, intended that cumulative sentences be applied for conviction on both offenses.
19. **Double Jeopardy: Statutes: Legislature: Intent: Sentences.** If a statute clearly and affirmatively indicates that the Legislature intended that the defendant be punished cumulatively under both charges and the sentences for both charges are imposed in a single trial, the Double Jeopardy Clause is not offended.
20. **Double Jeopardy: Legislature: Homicide: Convictions: Sentences.** A conviction of felony murder and the underlying felony in the same proceeding is a species of impermissible multiple punishment if the Legislature did not designate that multiple sentences should be applied for conviction on both offenses.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed in part, and in part sentence vacated.

Richard A. Birch, of Nielsen & Birch, and Patrick B. Hays for appellant.

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

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

WRIGHT, J.

Darrin McHenry appeals his convictions of aiding and abetting first degree murder and aiding and abetting attempted robbery. We affirm in part, and in part vacate.

SCOPE OF REVIEW

In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996); *State v. Woods*, 249 Neb. 138, 542 N.W.2d 410 (1996); *State v. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995).

Except when there is a showing that without sequestration a party's rights would be prejudiced, a party has no right to examine a potential juror out of the presence of all the other potential jurors. *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995); *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993).

A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof. *State v. McHenry, supra*; *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993).

A trial court abuses its discretion in denying a motion to change venue where a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

FACTS

McHenry was arraigned in the district court for Lincoln County on August 4, 1993, and was charged in an amended information with four counts regarding his involvement in the death of Richard Sterkel—aiding and abetting first degree murder, aiding and abetting attempted robbery, first degree sexual assault, and aiding and abetting first degree sexual assault. On September 16, a jury convicted McHenry of the first three counts and acquitted him of aiding and abetting first degree sexual assault. On appeal, we set aside McHenry's convictions and remanded the cause for retrial. See *State v. McHenry, supra*. In McHenry's second jury trial, he was found guilty of aiding and abetting first degree murder and aiding and abetting attempted robbery, and found not guilty of first degree sexual assault. The district court sentenced McHenry to life imprisonment on aiding and abetting first degree murder and

to a concurrent sentence of $6^2/_3$ to 20 years on aiding and abetting attempted robbery. McHenry now appeals.

McHenry, Frank Ladig, Antonio Estrada, Nordell Moore, and others were living in an encampment near the American Legion Club in North Platte, Nebraska. As Sterkel was walking his bike by the campsite, McHenry invited him to join the group in some drinking.

During the time that Sterkel stayed with the group, the men drank heavily. After the group went swimming in the South Platte River, Sterkel noticed that his wallet was missing, and he announced this to the group. Ladig testified that he found the wallet in his shoes, returned it to Sterkel, and asked Sterkel to check to determine if the money was still there. Sterkel confirmed that the $52 was still in his wallet. Shortly thereafter, McHenry and Ladig argued about Sterkel's money. Ladig testified that McHenry told Ladig and Estrada that Sterkel's money was McHenry's and that they were to leave it alone. Estrada testified that Ladig later told him that he and McHenry had planned to rob Sterkel.

On July 28, 1992, it was raining and the group relocated underneath a nearby bridge. McHenry, Ladig, Sterkel, Moore, and Estrada were present. Ladig testified that McHenry suddenly stood up and announced, " 'Let's do it.' " McHenry looked at Estrada and asked him if he was ready, and Estrada also stood up. McHenry then hit Sterkel in the face with his fists. Estrada asked Ladig if he was going to join them in their actions against Sterkel, and Ladig agreed. Ladig and Estrada hit Sterkel a few times.

McHenry asked Sterkel for his wallet, and Sterkel told him that the wallet was hidden in the trees. McHenry ordered Sterkel to take him to it, and the group began prodding Sterkel along a path through the woods, hitting and kicking him.

Ladig testified that when Sterkel fell down, Estrada jumped on Sterkel and began to choke him. Ladig picked Sterkel up and forced him along the path. Sterkel fell a second time, and McHenry kicked Sterkel in the face and upper body. McHenry demanded, " 'Where's your wallet,' " and Sterkel replied that it was in the trees. Unable to find the wallet, McHenry returned and again began to kick and strike Sterkel. Ladig tes-

tified that during this time, he heard a sound "like [Sterkel] was choking on his blood or something."

Estrada testified that the kicking and beating continued until they arrived at the place where Sterkel had said his wallet and money were located. Still unable to find the wallet, McHenry and Ladig began to violently beat Sterkel. McHenry held Sterkel while Ladig pulled his clothes off and searched the clothes for the wallet. Not finding the wallet, Ladig and McHenry again beat Sterkel and burned him with cigarettes. Estrada testified that McHenry orally sodomized Sterkel and that Ladig stated he was going to anally sodomize Sterkel. Estrada then left and was joined 45 minutes later by Ladig. Estrada testified that when he returned to Sterkel's naked body, he could hear Sterkel "gurgling." Estrada placed a sheet over Sterkel's body and left.

Sterkel's body was discovered on July 30, 1992, near the North Platte American Legion Club. An autopsy indicated that the cause of death was manual strangulation, compression of the neck, and multiple blunt injuries to the head, neck, and chest.

ASSIGNMENTS OF ERROR

McHenry assigns the following errors: The district court erred in (1) giving jury instructions Nos. 3 and 4, (2) not permitting venirepersons to be sequestered or individually questioned regarding pretrial publicity on voir dire, (3) finding Ladig unavailable to testify and allowing his prior testimony to be read to the jury, (4) failing to properly instruct the jury on reasonable doubt, and (5) refusing to grant McHenry's motions for change of venue.

ANALYSIS

Felony Murder Jury Instructions

McHenry's first assigned error is that instructions Nos. 3 and 4 were erroneous. McHenry apparently intends to assign error to the use of jury instructions Nos. 2 and 3, not 3 and 4. Instructions Nos. 2 and 3 are instructions regarding felony murder and were the subject of objections at the instruction conference. To the extent that there is some separate objection

to instruction No. 4, it has not been preserved at trial for appeal, and it is not discussed as error in the brief.

Instructions Nos. 2 and 3 set out the felony murder theory. The pertinent portion of instruction No. 2 is as follows: "This is a criminal case in which the State of Nebraska has charged the defendant in Count I with, on or about July 28, 1992, knowingly or intentionally aiding another to attempt to perpetrate a robbery or commit a first degree sexual assault in which Richard Sterkel was killed." The relevant portion of instruction No. 3 reads:

> In order for the defendant to be found guilty of Count I, the State must prove the elements of felony murder beyond a reasonable doubt. The State must prove that:
>
> 1. The defendant aided another person, that is he hired, encouraged or helped another person in the attempted commission of a robbery, or in the commission of a first degree sexual assault;
>
> 2. That he did so knowingly or intentionally;
>
> 3. That he did so knowing that the other person intended to commit a robbery or that the other person intended to commit a first degree sexual assault;
>
> 4. That the robbery was attempted to be committed or the first degree sexual assault was actually committed;
>
> 5. That during the course of the attempted commission of the robbery or during the course of the commission of the first degree sexual assault the death of Richard Sterkel resulted.

At the instruction conference, McHenry's counsel objected to these instructions and also objected to the general use of aiding and abetting sexual assault as one of the underlying felonies which would provide the basis for a conviction for felony murder. As McHenry's counsel correctly pointed out, McHenry had previously been acquitted of aiding and abetting first degree sexual assault. McHenry's counsel argued that to submit such an instruction would permit the jury to pass on McHenry's guilt or innocence for aiding and abetting first degree sexual assault a second time and would therefore subject McHenry to jeopardy twice for the same crime. In spite of this proper objection, the district court overruled the objec-

tion to the instruction without explanation. McHenry raises this same argument on appeal.

The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution prevents a second prosecution for the same offense after acquittal. See *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996). McHenry was acquitted of aiding and abetting sexual assault in the first trial. The question is whether this acquittal of a felony in a previous trial prevents the use of the same felony as an underlying felony to support a felony murder prosecution in a retrial. Although this is a case of first impression in Nebraska, the principles underlying the double jeopardy protection clearly establish that acquittal of a felony in a previous trial prevents the use of the same felony as an underlying felony to support a felony murder prosecution in a retrial.

A similar double jeopardy issue was addressed by the U.S. Supreme Court in *Sanabria v. United States*, 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978). The defendant, along with several codefendants, was originally charged with operating a gambling business, which was a crime under 18 U.S.C. § 1955 (1976). One of the elements of this crime required that the prosecution prove that the defendant violated a state gambling statute. The prosecution presented evidence that the defendant was operating a "numbers gambling operation" and also put on evidence that the defendant was operating a betting operation on horse races. Only the horse racing betting operation was illegal under the particular Massachusetts statute the prosecution alleged the defendant had violated. At the end of the government's case in chief, defense counsel argued that the government had failed to prove the required element that the defendant violated a state gambling statute. The defendant pointed out that the statute the prosecutors used to meet this element did not prohibit numbers betting, but only horse betting. After the defendant rested, the trial judge granted the defendant's motion to exclude all evidence of numbers betting and then granted a motion to acquit the defendant of the federal gambling charge because of lack of evidence of the defendant's connection with the horse gambling aspect of the business.

The government appealed from the order which excluded the numbers-betting evidence and from the judgment acquitting the defendant, and sought a new trial on the portion of the indictment relating to the numbers betting. The U.S. Court of Appeals for the First Circuit agreed that the numbers-betting aspect of the charge could not be retried, but nevertheless vacated the acquittal as it applied to the numbers-betting theory.

On appeal, the U.S. Supreme Court reversed the vacation of the acquittal, noting that the acquittal on the horse-betting charge included a specific acquittal on the element that was necessary to prove the gambling operation charge under the numbers-betting theory. The Court emphasized that this acquittal was a controlling finding of fact on that particular element and that a retrial on a different charge which required proof of that element was prohibited by the double jeopardy bar. "[A] subsequent trial of petitioner for conducting the same illegal gambling business as that at issue in the first trial would subject him to a second trial on the 'same offense' of which he was acquitted." *Sanabria*, 437 U.S. at 74.

Sanabria has been applied in a case very similar to the case at bar. The defendant in *Wright v. State*, 307 Md. 552, 515 A.2d 1157 (1986), was originally charged and prosecuted for murder under two separate theories. He was charged with first degree murder under a first degree murder theory which required premeditation and deliberation and was also charged with murder under a felony murder theory with the underlying felony being attempted robbery. He was also charged in a separate count for the underlying attempted robbery. At the conclusion of the state's case, the court granted a motion for judgment of acquittal as to the attempted robbery on the grounds of insufficient evidence to support the conviction. The trial court denied the motion to acquit the defendant of first degree murder because it found that there was sufficient evidence to support the first degree murder charge, which was not based on the felony murder theory.

During the defendant's portion of the case, a codefendant presented evidence which bolstered the defendant's involvement in the attempted robbery. In view of this additional evi-

dence, the court permitted the murder charge to be submitted to the jury on a felony murder theory at the end of the defendant's case. The court stated that while double jeopardy principles prevented the court from reinstating the underlying felony charge of attempted robbery, the court was not barred from permitting the jury to consider the defendant's guilt regarding the underlying felony for the sole purpose of determining whether there was sufficient proof of an underlying felony to support the felony murder charge. The jury subsequently found the defendant guilty of felony murder.

On appeal, the Maryland Court of Appeals applied *Sanabria* and double jeopardy principles and reversed the defendant's conviction. The court held that the prior acquittal on the underlying felony was an absolute bar to the jury's subsequent consideration of the same underlying felony as a basis to support the felony murder theory. The court stated:

> [A]fter the prosecution's case, there was a judicial determination that the prosecution had failed to present sufficient evidence of an attempted robbery by the defendant Wright, and a verdict of acquittal with regard to the matter was entered. The defendant Wright was then required to run the gauntlet further on the question of whether he committed the attempted robbery, and he was subjected to a second resolution of the matter. There were two verdicts on the issue of whether he committed the attempted armed robbery, the first being the acquittal by the trial judge and the second being the conviction of felony murder by the jury.

Wright, 307 Md. at 574, 515 A.2d at 1168.

We find the analysis in *Wright* instructive for the issues before us. McHenry was originally charged with aiding and abetting first degree sexual assault. He was prosecuted on that charge and defended against it. A jury acquitted him. As a result, it was error for the district court to include a reference to this count as one of the possible underlying felonies supporting a felony murder conviction and thereby force McHenry to face determination of his guilt on that charge again. Thus, the use of instructions Nos. 2 and 3 was error.

This, however, does not end our inquiry. We must consider whether use of the erroneous instructions constituted reversible error or merely harmless error. Even a constitutional error which was harmless beyond a reasonable doubt does not warrant the reversal of a criminal conviction. *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996). In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *Id.*

Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely attributable to the error. *Id.*

From our review of these instructions, we find that the use of instructions Nos. 2 and 3 was harmless. These instructions presented the jury with two possible underlying felonies upon which to base its verdict of felony murder: (1) aiding and abetting attempted robbery and (2) aiding and abetting sexual assault. As previously stated, the inclusion of the latter was clearly erroneous. However, in an independent finding regarding count II, the jury convicted McHenry of aiding and abetting attempted robbery. Therefore, the jury found McHenry guilty of an underlying felony for which he was properly tried and the jury was properly instructed. That underlying felony provides a sufficient basis for the felony murder conviction. It also establishes that the jury verdict of felony murder was based upon the conviction for aiding and abetting robbery. Thus, the felony murder verdict rendered following McHenry's trial was not attributable to the erroneous instructions. See *White, supra*. Therefore, we find beyond a reasonable doubt that the erroneous instructions were harmless.

Questioning of Jury Panel

McHenry next argues that the district court erred in failing to sequester the potential jurors and to permit McHenry's counsel to individually question each potential juror regarding

pretrial publicity. The court refused to sequester the panel or permit the individual sequestered questioning, but permitted questions regarding pretrial publicity to be made to the panel as a whole. The court stated that if during voir dire it became apparent that such sequestration and individual questioning would be necessary to determine whether the potential jurors would be impartial, the court would then permit the jurors to be sequestered and permit individual questioning. McHenry alleges that the court should have permitted sequestration of the potential jurors for individual questioning and that because it did not, he was unable to determine the impact of pretrial publicity on each potential juror and therefore was denied his right to trial by an impartial jury.

The district court explained that if one of the potential jurors raised the issue of retrial, the court would intervene and explain to the panel that the fact that the current trial was a retrial was of no significance and that they as jurors would be required to ignore that fact and judge the case anew on the evidence presented. During the initial discussion of jury service, the court emphasized to the panel the nature of a jury trial and the duty of jurors to judge the evidence impartially. The court asked the members of the panel to speak out if any of them were concerned that they could not put aside pretrial publicity and determine the case solely on the evidence presented. There was no response from the panel, and after engaging in a few more questions, the court turned the voir dire over to counsel.

Subsequently, one of the potential jurors announced that he was not sure he could approach the case impartially in view of the fact that this was a retrial. The court interrupted the potential juror and addressed the panel as a whole. The court clarified that the issue on voir dire was not whether the potential jurors were aware of pretrial publicity regarding the alleged crime or the fact that the trial was a retrial, but whether the panel could put whatever knowledge they had regarding the case aside and judge the case impartially, considering only the evidence admitted at trial. After this admonition, the court permitted McHenry's counsel to further question the potential juror who had raised the issue of retrial. The potential juror

affirmed that he would be able to judge the case based only on the evidence presented at trial.

McHenry's counsel asked the members of the panel to raise their hands if any of them had heard any pretrial publicity about the case. Many of the jurors raised their hands. McHenry's counsel then questioned one of the jurors individually, surveying what publicity she had seen regarding the trial and whether she could be impartial. She indicated that she would try to be impartial but was not sure if she would be able to. She indicated that the fact that the case was a retrial would always be in the back of her mind. McHenry's counsel then requested sequestration of the jurors who indicated that they had had contact with pretrial publicity. Counsel stated that he could not further question the potential jurors without addressing specific news items. Counsel pointed out that unless he was able to question each potential juror individually, and sequestered from the venire, he would necessarily expose the other potential jurors to the same news items.

The court refused to sequester the panel and permit individual questioning, but indicated that it would permit counsel to go through the panel one by one with nonspecific questions about their contact with pretrial publicity surrounding the case. If any potential juror indicated that he or she had been exposed to pretrial information regarding the case, and it was apparent that the juror needed to be questioned privately, the court would permit private questioning. Barring such an incident, however, the court would not presume that individual sequestered voir dire was necessary.

The court then resumed voir dire with a lengthy admonition to the panel regarding impartiality and the importance of considering whether they could be impartial. The court reiterated that the potential jurors had to attempt to assess whether they could put aside any publicity that they may have heard and be willing to judge the case solely on the evidence presented. The court then asked the panel as a whole the following question: "Are there any of you who cannot put aside any information that you may have and decide the case on the evidence that comes into this court and this trial today? If so, please raise your hand." The record reflects that several hands were raised,

and thereafter, the court excused each person who raised his or her hand. The court then questioned the replacement jurors on the same matters.

Prior to the end of voir dire, McHenry's counsel again requested that he be able to question the potential jurors individually regarding the effect of pretrial publicity on their ability to consider the case impartially. Counsel admitted to the court that he could not specifically articulate how the individual questioning would aid the court in determining whether a potential juror should be excused. As before, the court stated that it would permit McHenry's counsel to ask the entire panel about specific news reports and then pursue further questioning about their ability to be impartial. However, the court refused to sequester the potential jurors so the questions could be answered individually. The court emphasized that the panel had been asked about whether they had been exposed to pretrial publicity and whether they could put this aside and judge the case based solely on the evidence. The members of the panel that remained had all indicated that they could be impartial. Thus, the court reasoned that sequestered individual questioning of the panel was not necessary to determine whether the members could be impartial.

The court also stated that it would instruct the potential jurors that if they had any specific concerns, they could contact the bailiff during the lunch break to express them. Subsequently, one member of the panel contacted the court after the lunch break regarding pretrial publicity, and that potential juror was questioned privately with both parties' counsel present. During questioning, the juror informed the court that she felt she had formed an opinion and did not believe that she could be impartial. She was excused for cause. Once the panel reconvened, the court again explained the irrelevance of the fact that the case was a retrial and once again asked the potential jurors whether any of them had concerns about whether they could be impartial. None of the members responded, and the parties were then requested to make their peremptory challenges.

Except when there is a showing that without sequestration a party's rights would be prejudiced, a party has no right to

examine a potential juror out of the presence of all the other potential jurors. *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995); *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993). McHenry's only colorable argument that sequestration and individual questioning were required to prevent prejudice to his trial is that McHenry would not be able to question each potential juror about pretrial publicity without thereby exposing the other potential jurors to the publicity. The same argument was raised by counsel in *State v. McHenry, supra*, in which we discussed *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990). In *Bradley*, the defendant argued that he was unable to ask "searching questions" required under the circumstances. However, the record in *Bradley* was replete with questioning regarding pretrial publicity and whether such publicity had caused anyone to form an opinion as to Bradley's guilt or innocence. We held that the district court's failure to sequester the jury panel did not unfairly prejudice the defendant. See, also, *State v. Thompson, supra*.

In the case at bar, we find that the circumstances of the voir dire do not demonstrate how McHenry was prejudiced. The prospective jurors were admonished by the court on numerous occasions concerning pretrial publicity and the irrelevance of the fact that the case was a retrial. The panel was questioned several times as to whether any of the members thought that they could determine McHenry's guilt based solely on the evidence presented at trial. The judge specifically instructed the panel that if any panel member had further concerns, he or she should contact the bailiff so that the court, along with the parties, could individually hear and address the concerns. In each case, when a panel member stated that he or she could not put aside pretrial publicity, the member was dismissed for cause. As in *Bradley*, McHenry has not shown how further indepth questioning of sequestered jurors would have revealed anything more than was ascertained during the jury selection. Therefore, McHenry has not established that his rights were prejudiced by the failure of the district court to sequester the panel to permit individual questioning.

DETERMINATION THAT LADIG WAS UNAVAILABLE TO TESTIFY

At trial, the State attempted to call Ladig as a witness against McHenry. Ladig refused to testify, and the district court declared him unavailable. As a result, the court permitted Ladig's testimony at McHenry's first trial to be read into evidence. McHenry argues that the district court erred in determining that Ladig was unavailable and in permitting his prior testimony to be admitted against McHenry.

Ordinarily, the testimony of a person taken in a prior trial is hearsay and is not admissible. See Neb. Rev. Stat. §§ 27-801 and 27-802 (Reissue 1995). However, Neb. Rev. Stat. § 27-804(2)(a) (Reissue 1995) provides an exception to the hearsay rule if the declarant is unavailable as a witness. In such a case, the prior testimony can be used in the trial. Section 27-804(2) provides:

> Subject to the provisions of section 27-403, the following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (a) Testimony given as a witness at another hearing of the same or a different proceeding . . . at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered . . . .

McHenry argues that a determination of unavailability based on § 27-804(1)(b) requires the court to first "order" the witness to testify prior to exercising its determination that the witness is unavailable.

The determination of whether a witness is unavailable is left to the discretion of the trial court. See *State v. Bothwell*, 218 Neb. 395, 355 N.W.2d 506 (1984). A judicial abuse of discretion exists when the reasons or rulings of a trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition. *State v. Parmar*, 249 Neb. 462, 544 N.W.2d 102 (1996); *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

We conclude from the record that the court did not abuse its discretion in concluding that Ladig was unavailable as a

witness despite the fact that the court did not directly order Ladig to testify. The court requested Ladig to testify on three separate occasions. Nevertheless, Ladig persistently refused. The court noted that the normal contempt remedies available to force Ladig to testify were meaningless in view of the fact that Ladig was already serving a lengthy sentence. The court asked Ladig if there was any physical safeguard or anything that the court could provide that would make him change his mind and provide testimony. Ladig replied that there was not. The court then reasoned that because Ladig had expressed his unwillingness to take the oath and testify, and as there was no sanction available that would compel Ladig's testimony, Ladig was unavailable. The jury was then called into the courtroom, and Ladig was called as a witness. The court again asked Ladig to raise his hand and be sworn, and he refused. The court then permitted Ladig's testimony from the prior trial to be read into evidence, and the jury was instructed that it should be given the same weight as if it were given by a live witness.

It is clear from the record that Ladig was intent on refusing to testify. The fact that the trial court's instruction to testify was not couched in the specific language of an "order" has little bearing on the reality of Ladig's refusal which is evident on the face of the record. The trial court's determination that Ladig was unavailable as a witness is not untenable, and therefore, no judicial abuse of discretion occurred.

Reasonable Doubt Jury Instruction

McHenry argues that the district court erred by giving instruction No. 6 defining reasonable doubt. The instruction provided:

> The defendant is presumed to be innocent of the charges contained in the information. This presumption remains with the defendant throughout the trial and is not overcome unless you are convinced beyond a reasonable doubt that the defendant is guilty.
>
> The fact that the State of Nebraska has charged the defendant in an information is not evidence, and the State has the burden of proving the guilt of the defendant

> beyond a reasonable doubt. This burden remains on the State throughout the trial. The defendant is not required to prove his innocence. The State is not required to prove guilt beyond all possible doubt or to a mathematical certainty. Nor is the State required to negate every conceivable circumstance of innocence.
>
> A reasonable doubt is a doubt formed upon reason. It is not a fanciful doubt, a whimsical doubt or a capricious doubt. Proof beyond a reasonable doubt requires proof so compelling as to convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs. However, if you are not satisfied of the defendant's guilt to that extent, then reasonable doubt exists and the defendant must be found not guilty.

In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996); *State v. Woods*, 249 Neb. 138, 542 N.W.2d 410 (1996). In *Victor v. Nebraska*, 511 U.S. 1, 6, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994), the U.S. Supreme Court explained that the standard for assessing the constitutionality of a reasonable doubt instruction is as follows:

> [T]he proper inquiry is not whether the instruction "could have" been applied in [an] unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it. [Citation omitted.] The constitutional question . . . is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard.

McHenry concedes that we have already validated this reasonable doubt instruction in *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995). Nevertheless, McHenry asks us to reconsider our holding in *State v. McHenry, supra*, which stated that the language quoted above was a permissible instruction on the definition of reasonable doubt. He argues that

the U.S. Supreme Court has approved a definition of reasonable doubt which defines reasonable doubt by using a "hesitation to act" standard. McHenry argues that the instruction used by the district court did not utilize the "hesitation to act" standard and that, therefore, the district court's instruction was reduced to a statement that a reasonable doubt is the opposite of fanciful, whimsical, or capricious doubts. McHenry points out that there are doubts which are fanciful, whimsical, or capricious, but still not reasonable. Thus, he argues, the use of this instruction did not properly define reasonable doubt and therefore violated his right to due process.

We find this assignment of error to be without merit. Here, the instruction did not use the exact words "hesitation to act." Instruction No. 6 as given substituted the term "reservation" for "hesitation." However, the U.S. Supreme Court stated in *Victor* that the Constitution does not require that any particular form of words be used in advising the jury of the State's burden of proof. The only issue is whether there is a reasonable likelihood that the jury understood the instruction to allow conviction based on proof to meet the reasonable doubt burden of proof set forth in *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The "hesitation to act" language cited by McHenry is significant only because the U.S. Supreme Court has repeatedly validated it as one proper method of defining reasonable doubt. The U.S. Supreme Court has never held that this language must be used to satisfy *Winship*.

We reaffirm our holding that the use of this instruction was not error. See *State v. McHenry, supra*.

VENUE

McHenry next argues that the district court erred in failing to grant his pretrial motions for a change of venue. A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof. *Id.*; *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993). A trial court abuses its discretion in denying a motion to change venue where a defendant establishes that local conditions and pretrial publicity make it impossible to secure a

fair trial. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

McHenry moved for a change of venue prior to trial, pursuant to Neb. Rev. Stat. § 29-1301 (Reissue 1995), which states:

> All criminal cases shall be tried in the county where the offense was committed, except as otherwise provided in section 25-412.03 or sections 29-1301.01 to 29-1301.03, or unless it shall appear to the court by affidavits that a fair and impartial trial cannot be had therein. In such case the court, upon motion of the defendant, shall transfer the proceeding to any other district or county in the state as determined by the court.

In *State v. McHenry, supra*, we reviewed the law regarding motions for change of venue due to pretrial publicity. We reviewed the factors a trial judge is to use to determine whether pretrial publicity in fact makes it impossible for a fair trial to be had at the present location of the trial.

> " '[M]ere jury exposure to news accounts of a crime does not presumptively deprive a criminal defendant of due process. Rather, to warrant a change of venue, a defendant must show the "existence of pervasive misleading pretrial publicity." [Citation omitted.] Indeed, in order for a defendant to successfully move for a change of venue based on pretrial publicity, he or she must show that the "publicity has made it impossible to secure a fair and impartial jury." [Citations omitted.] A number of factors must be evaluated in determining whether that burden has been met, including the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in the selection of the jury, the number of challenges exercised during the voir dire, the severity of the offenses charged, and the size of the area from which the venire was drawn. [Citations omitted.]

" ' . . . ' "

"[T]he law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinions and render a verdict based on evidence presented in court." [Citation omitted.]

State v. McHenry, 247 Neb. 167, 172-73, 525 N.W.2d 620, 625-26 (1995).

McHenry argues that the publicity which preceded his second trial made it impossible for him to receive a fair trial in Lincoln County. In particular, McHenry emphasizes that the pretrial publicity before the retrial was "inherently prejudicial," because it emphasized the fact that the second trial was a retrial and that McHenry had been convicted of several counts in the first trial.

The district court held a pretrial hearing on the motion for change of venue. At the hearing, McHenry presented a number of news accounts which appeared in Lincoln County news media regarding allegations against McHenry. Included were several items that were issued after this court reversed McHenry's convictions. We have reviewed the news items about the reversal of McHenry's original convictions and the retrial. There are a total of 10 newspaper articles which ran in the North Platte Telegraph following the reversal. There is also one video segment from a North Platte television station from this time period. The newspaper accounts generally include a short synopsis of the allegations against McHenry, a reference to McHenry's prior convictions, and an explanation of why this court reversed the convictions.

The most emotionally motivated articles are editorials criticizing this court for the reversal of McHenry's convictions and addressing the financial costs of retrial. Most of these accounts do not focus at length on the allegations against McHenry. The one television report which ran after the reversal includes the prosecutor's statement that he was "physically even upset" and "surprised and shocked" with the reversal, and his explanation of why he believed this court had ruled incorrectly.

Pretrial publicity regarding a retrial after a conviction may in some cases present more difficult venue issues than those of an initial trial, but a determination of whether a change in venue is necessary remains within the discretion of the trial court. The standard for establishing a change of venue remains the same:

> " '[T]o warrant a change of venue, a defendant must show the "existence of pervasive misleading pretrial publicity." [Citation omitted.] Indeed, in order for a defendant to successfully move for a change of venue based on pretrial publicity, he or she must show that the "publicity has made it impossible to secure a fair and impartial jury." [Citations omitted.]' "

McHenry, 247 Neb. at 172-73, 525 N.W.2d at 625.

The news accounts referenced above do not establish the existence of misleading pretrial publicity, let alone pervasively misleading publicity. McHenry has not shown that the publicity made it impossible to secure a fair and impartial jury. This assignment of error has no merit.

SENTENCING FOR FELONY MURDER AND UNDERLYING FELONY

Although not complained of at trial or on appeal, a double jeopardy problem remains. McHenry was sentenced for both felony murder and aiding and abetting attempted robbery. Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Perrine v. State*, 249 Neb. 518, 544 N.W.2d 364 (1996).

The Double Jeopardy Clause precludes multiple punishment for the same offense imposed in a single proceeding. *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). The multiple punishment prong of the double jeopardy bar seeks to ensure that "the total punishment did not exceed that authorized by the legislature." See *United States v. Halper*,

490 U.S. 435, 450, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989). See, also, *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996).

A determination of whether two convictions in a single trial lead to multiple punishment depends upon whether the legislature that designated the criminal statutory scheme intended that cumulative sentences be applied for conviction on both offenses. If the statute clearly and affirmatively indicates that the legislature intended that the defendant be punished cumulatively under both charges and the sentences for both charges are imposed in a single trial, the Double Jeopardy Clause is not offended. See *State v. Detweiler, supra*. A conviction of felony murder and the underlying felony in the same proceeding is a species of impermissible multiple punishment if the legislature did not designate that multiple sentences should be applied for conviction on both offenses. See *Jones v. Thomas*, 491 U.S. 376, 109 S. Ct. 2522, 105 L. Ed. 2d 322 (1989).

In the case at bar, there is no affirmative indication in either the felony murder statute or the robbery statute that the Legislature intended that a defendant should be punished independently for both felony murder and the underlying felony on which it relies. See Neb. Rev. Stat. §§ 28-303, 28-324, and 28-206 (Reissue 1995). As a result, McHenry's conviction and sentence for both felony murder and the underlying felony violates the Double Jeopardy Clause's proscription against multiple punishments for the same offense. The underlying felony merges into a felony murder conviction and cannot be punished separately, barring a clear indication by the Legislature that independent punishments were intended.

The U.S. Supreme Court has held that vacating the sentence for an underlying felony cures the double jeopardy violation at hand. See *Jones v. Thomas, supra*. As a result, we vacate the sentence for the underlying felony.

CONCLUSION

The district court's judgment of conviction of McHenry for first degree murder and for aiding and abetting attempted robbery is affirmed. The district court's sentence for first degree

bery is affirmed. The district court's sentence for first degree murder is affirmed. The district court's sentence for aiding and abetting attempted robbery is vacated.

AFFIRMED IN PART, AND IN PART SENTENCE VACATED.

STATE OF NEBRASKA, APPELLEE, V. THOMAS ALLAN MCBRIDE, APPELLANT.

550 N.W.2d 659

Filed July 19, 1996. No. S-95-1149.

1. **Venue: Appeal and Error.** A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof.
2. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
3. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
4. **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.
5. **Venue: Appeal and Error.** A trial court abuses its discretion in denying a motion to change venue where a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial.
6. **Venue: Jurors.** Venire examination provides the best opportunity to determine whether venue should be changed.
7. **Rules of Evidence: Other Acts.** The mere fact a criminal defendant has been charged with previous crimes is not legal evidence of other crimes, wrongs, or acts, under Neb. Evid. R. 404(2), let alone clear and convincing evidence that the accused committed the alleged crimes, wrongs, or acts under rule 404(3).
8. **Criminal Law: Intent: Words and Phrases.** Motive is defined as that which leads or tempts the mind to indulge in a criminal act.
9. **Homicide: Intent: Proof.** While proof of motive is not an element of first degree murder, any motive for the crime charged is certainly relevant to the State's proof of the intent element.
10. **Rules of Evidence: Judicial Notice.** Although Neb. Evid. R. 201 does not expressly require relevance for judicial notice, an irrelevant fact cannot be

validly classified as an adjudicative fact, the only type of fact noticeable under rule 201.

11. **Rules of Evidence: Judicial Notice: Trial.** A fact is adjudicative if the fact affects the determination of a controverted issue in litigation.
12. **Criminal Law: Judicial Notice.** Judicial notice should be sparingly used in a criminal case.
13. **Rules of Evidence: Hearsay.** In determining whether a statement is admissible under Neb. Evid. R. 804(2)(e), a court considers five factors: (1) the statement's trustworthiness, (2) materiality of the statement, (3) probative importance of the statement, (4) interests of justice, and (5) whether notice of the statement's prospective use was given to the opponent.
14. ____: ____. Under Neb. Evid. R. 804(2)(e), a court must make a preliminary inquiry (Neb. Evid. R. 104) to determine whether a declarant had personal knowledge (Neb. Evid. R. 602) regarding the subject matter of the statement that is sought to be introduced pursuant to the residual exception to the hearsay rule.
15. ____: ____. Although there are several factors to be considered in determining the trustworthiness of a statement under the residual hearsay exception, the absolute basic requirement is that the circumstances surrounding the making of the hearsay statement provide the guarantees of trustworthiness comparable to other hearsay exceptions in the Nebraska Evidence Rules.
16. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** Harmless error exists in a jury trial of a criminal case when the court makes an erroneous evidential ruling which, on review of the entire record, did not materially influence the jury in a verdict adverse to the defendant. If the evidence properly admitted at trial overwhelmingly establishes a defendant's guilt, any error in excluding admissible evidence is harmless error beyond a reasonable doubt.
17. **Homicide: Photographs.** Although it is true that the probative value of gruesome photographs should be weighed against the possible prejudicial effect before they are admitted, if a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if gruesome.
18. **Directed Verdict.** If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law.
19. **Homicide: Intent: Time.** The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.
20. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.

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

Arthur C. Toogood, Adams County Public Defender, for appellant.

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

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

CONNOLLY, J.

The appellant, Thomas Allan McBride, was convicted by a jury of first degree murder and use of a weapon to commit a felony. The district court for Adams County sentenced McBride to life in prison for the murder and a consecutive term of 19 to 20 years' imprisonment on the use of a weapon conviction. McBride appeals. We determine that all of McBride's assigned errors are without merit. As a result, we affirm.

I. BACKGROUND

McBride and Sharon Oster, the victim of this murder, had lived together off and on throughout the years that they had known each other. On February 6, 1994, almost a year prior to the day Oster was murdered, McBride allegedly assaulted and sexually assaulted Oster. Subsequently, McBride was charged, by an information filed March 16, with the crimes of first degree sexual assault, second degree assault, and use of a weapon in the commission of a felony.

On February 5, 1995, Oster took a taxi to visit her friend Connie Paulson at Paulson's apartment in Hastings, Nebraska. Paulson had known Oster and McBride for years. Paulson testified that Oster arrived unexpectedly at approximately 1 a.m. Paulson further testified that McBride came to her apartment earlier in the day (approximately 11 a.m.) on February 4 and that they went to a place called Ray's at approximately 2 p.m. McBride and Paulson left Ray's at approximately 5 p.m. and went to McBride's residence. They then went back to Paulson's apartment where they ate dinner, watched television, and drank some beer. According to Paulson, McBride did not become intoxicated.

At approximately 1 a.m., Oster arrived at Paulson's apartment. Paulson knew that there had been previous trouble between Oster and McBride. Paulson told Oster that McBride was there and that she did not want any trouble with either of them. Oster appeared uneasy, but stayed anyway. As Paulson showed Oster her new apartment, McBride stayed in the living room watching television. Approximately 45 minutes later, Oster and Paulson returned to the living room and sat down to watch television.

Having said nothing to Oster during the 15 minutes they all watched television, McBride suddenly leaped off of the sofa, landed on Oster's chair causing it to collapse, and began beating her. Paulson yelled at McBride, tried to pull him off of Oster, and noticed that Oster appeared to be semiconscious. She got between McBride and Oster and told him to leave, but McBride shoved her aside. McBride called Oster vulgar names and stated that "if he was going to prison, that [Oster] was going down too."

Paulson had been thrown off balance by McBride when he shoved her. When she regained her balance, McBride was beating Oster again. Suddenly he stopped and stepped back from Oster. As Paulson walked toward Oster, McBride said, " 'Well, don't worry about it,' " that he " 'did what I told her I was going to do,' " and " '[s]he's dead, so you don't have to worry about it . . . .' " As Paulson turned around toward McBride, she saw that McBride had a knife in his hand, and she saw blood on the knife.

Paulson hurried over to Oster to see if McBride's statements were accurate. Although Paulson saw no injuries on Oster's body or torso, she saw a slash to Oster's throat. Paulson stood stunned for a moment, moved behind the chair, and stated that she had to get an ambulance. McBride took a step toward her, asking if she was going to " 'nark' " on him too. Paulson fled, running upstairs to another apartment to use the phone. A couple of young men let her in to call the 911 emergency service. One of the men, Terrence Wickham, made the call to 911 while Paulson relayed information to him about the incident. Paulson testified that when she fled her apartment, Oster was fully clothed and sitting in the chair.

Wickham testified that after placing the 911 call, he went down to Paulson's apartment with the police. The police yelled for McBride to come out and told Wickham to stand back. Wickham and his friend, Brad Randolph, went around the outside of the building to watch the front door, where Wickham said he saw a couple of police officers. One officer looked in the window and stated that there was a body in the apartment. Wickham heard a couple of kicks to the door and a window break and witnessed a swarm of officers rush into the apartment. Wickham observed the officers attempting to control someone and a naked body lying on the floor, spread eagle.

Officer Walter Eley of the Hastings Police Department testified that he went to the door of Paulson's apartment, knocked, and told whoever was inside that the police were outside. Someone inside asked if he was sure they were the police, and Eley responded that they were the police. Although the voice said no more, Eley heard sounds like clothing rustling and then a chopping noise from inside the apartment. After gaining entry into the apartment, Eley checked on the victim in order to ascertain her condition. He stated that there was a lot of blood on and around her naked body and that she appeared dead.

Officer Michael Hartman was also at the murder scene. As Hartman stood in the doorway of the apartment, he saw McBride hiding behind the refrigerator in the kitchen with a couple of cans of beer and a knife in his hands. Hartman told him to get on the floor. McBride responded with a vulgarity. Hartman repeated his command for McBride to get on the floor. This time, McBride threw the beer cans and the knife toward the officer and started to move toward him. Hartman was hit in the face with something as he and McBride struggled. Hartman eventually subdued and handcuffed McBride. Hartman took McBride to a hospital where McBride's clothing was confiscated as evidence.

Dr. Blaine Roffman, the pathologist who performed the autopsy, testified regarding Oster's injuries and the cause of her death. After discussing a multitude of stab wounds to the major organs of her body, Roffman concluded that Oster's death was caused by a stab wound to the heart. He stated that

the initial examination of the exterior of the body showed that there were contusions and bruises on both sides of the victim's face, a blunt laceration along the right earlobe, and lacerations and bruises on both lips. Roffman noted that there were nine stab wounds to the chest and abdomen, and a large laceration around the neck that penetrated and severed the trachea and larynx. Upon examination of the interior of the body, Roffman noted there was a stab wound that penetrated both ventricles of the heart and 50 cubic centimeters of blood in the sac surrounding the heart. There was also a laceration to the upper lobe of the left lung and substantial blood in both of the pleural cavities. The liver and right kidney had been punctured three times. There was bleeding in the pancreas and kidney areas and three stab wounds in the transverse colon.

1. DEFENDANT AT HOSPITAL

David Nissen, a registered nurse at Mary Lanning Memorial Hospital, testified that he was on duty when police officers brought McBride in around 3 a.m on February 5, 1995. He stated that McBride, who was in street clothes, had a minor bloody nose and a few minor cuts and bruises. He also testified that McBride's hands were gloved in blood up to his wrists. He asked McBride what had happened, and McBride responded, " 'Done pissed me off, son bitch' " and " '[t]hat's all right, it was worth it.' " Nissen asked McBride how he had been injured and how he had come to have all the blood on his hands. After getting little response to his questions, Nissen asked McBride if he had taken any drugs or alcohol. McBride responded that he had " '[j]ust beer' " and had used " 'turkey.' " McBride then said that he " 'didn't get my Boy Scout female survival badge.' " Nissen said he did not know what to make of these statements, so he just wrote down what was said. Nissen noted that McBride did not appear to be intoxicated, but did appear to have been drinking.

2. RESIDUAL HEARSAY STATEMENTS

The State called a number of witnesses who testified that Oster had told them of threats that McBride had made against her in the last several months of her life. Nancy Ann

Ziegelbauer-Snider testified, first out of the presence of the jury, that in June 1994, she had talked to Oster, who told her that she was afraid McBride was going to kill her. Oster told Ziegelbauer-Snider that one day while she was walking to her job, McBride rode up to her on his motorcycle, pointed an imaginary gun at her, and pretended to shoot her with it.

McBride objected to the testimony as hearsay, but the trial court, having already been briefed on this issue, admitted the evidence under the residual hearsay rule. Ziegelbauer-Snider testified before the jury that in June 1994, Oster told her of the threat described earlier. Ziegelbauer-Snider stated that Oster left her job in Hastings because McBride knew where she worked and she was afraid.

Rita Rodgers also testified that she had talked with Oster about McBride's threat in November 1994. Oster told her that after this happened, she left her job and stayed a week in Superior, Nebraska, until she was calm enough to return to Hastings. Susan Pettit also talked to Oster about McBride's threats around Thanksgiving of 1994. Pettit described the same sort of simulated-gun threat that the other witnesses described.

Sharla Oster, the victim's daughter, testified that her mother told her about the threat that McBride had made against her. Tammy Jo Parkhurst, Oster's former boss, testified that Oster simply stopped reporting for work in June 1994 and never called or came back. Leslie Dana, Oster's direct supervisor, testified that around February 1994, Oster expressed fear that McBride would come into her place of employment and cause a problem. Tammy Booth, Oster's supervisor at her previous job, testified that Oster frequently requested to change shifts because she was afraid an ex-boyfriend would know her routine.

Robert Brophy, who had known McBride and Oster for many years, testified that he encountered McBride a few months before Oster's death. At that time, McBride told Brophy that he was on foot because he had sold his motorcycle for legal fees. Brophy stated that McBride appeared depressed about selling his motorcycle. During their conversation, McBride also mentioned that he had been kicked out of

the High Plains Drifters Motorcycle Club and that he had bought a knife. McBride further told Brophy that someday he was going to get even with Oster, or words to that effect.

3. Judicial Notice of Prior Charges

Finally, the trial court took judicial notice of its own court records, allowing the prosecution to inform the jury that McBride had charges of first degree sexual assault, second degree assault, and use of a weapon in the commission of a felony pending against him at the time of the murder and that Oster was the alleged victim. McBride objected to the jury receiving this information on the grounds that it was not relevant, that it was cumulative to evidence already offered, and that the prejudicial value substantially outweighed its probative value. After taking judicial notice, the court gave the jury the following limiting instruction:

> Now, ladies and gentlemen of the jury, there's a couple of things you need to know about what you just heard. I have taken judicial notice of that fact. You may but are not required to accept the fact as true.
>
> The second thing is that the county attorney has presented evidence of other crimes, wrongs, or acts. Now, you need to know first that — that the defendant was not convicted of those crimes, that they were pending; so he was presumed to be innocent of those crimes, but those crimes were pending at the time the victim was killed. Further, when you go to deliberate this case, I will give you a limiting instruction, and that is that the facts that I just took judicial notice of are not admissible to prove the character of the defendant or in order to show that he acted in conformity with that character. Those judicially noticed facts are, however, admissible for other purposes; such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
>
> The State is also going to argue that it is relevant to prove malice. So there's two things there I will give you a limiting instruction on what — at the end of this trial, and that limiting instruction goes to this evidence as to

what you can consider about it; and, secondly, it is a judicially noticed fact, which you may but are not required to accept as true.

At the end of trial, the court gave the following limiting instructions:

> During the trial I took judicial notice of the fact that the Defendant in Case Number 94121 in the District Court of Adams County had been charged with assault in the second degree, use of a firearm to commit a felony, and first degree sexual assault; that these events allegedly occurred on February 6, 1994; and that the alleged victim was Sharon A. Oster. The Court further took judicial notice that the aforementioned case against Thomas Allan McBride was pending on the day of Sharon Oster's death on February 5, 1995, and that prior to this trial the Defendant had not been convicted of these crimes. You may but are not required to accept those facts as true.
>
> . . . .
>
> Evidence that the Defendant was charged with other crimes against Sharon Oster has been received only to aid in your determination of whether he had a motive, opportunity, intent, preparation, plan, or malice to kill Sharon Oster. The evidence of these other alleged crimes is not to be considered by you to show that he acted in conformity to these other acts on this occasion. You may consider the evidence only for the limited purpose stated above and for no other.

McBride did not offer any evidence at the close of the State's case. McBride objected to the court's instruction on the definition of malice and its definition of sudden quarrel in the manslaughter instruction. He offered his own instructions on the definition of malice and sudden quarrel, both of which the court declined to give. The jury found McBride guilty of first degree murder and the use of a weapon in the commission of a felony.

II. ASSIGNMENTS OF ERROR

McBride alleges the district court erred in (1) failing to grant his motions for change of venue; (2) allowing the use of

evidence that he had been charged with other criminal offenses; (3) allowing hearsay evidence of alleged threats by him; (4) allowing, over objection, certain pictures of the deceased; (5) failing to grant his motion for a directed verdict of not guilty at the close of all evidence; (6) failing to grant his motion for new trial, because the verdict entered was not supported by sufficient evidence; (7) refusing instructions which were offered by him; and (8) abusing its discretion by imposing a sentence which was "excessive and disproportionate to the severity of the offense when considered with [his] background and prior record."

III. STANDARD OF REVIEW

A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof. *State v. McHenry, ante* p. 614, 550 N.W.2d 364 (1996); *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995); *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993).

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. *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994); *State v. Anderson*, 245 Neb. 237, 512 N.W.2d 367 (1994).

The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *State v. Eona*, 248 Neb. 318, 534 N.W.2d 323 (1995); *State v. Williams*, 247 Neb. 878, 530 N.W.2d 904 (1995).

Whether a trial court should have granted a motion for directed verdict at the close of the State's case is a question of law. Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court. *State v. Lynch*, 248 Neb. 234, 533 N.W.2d 905 (1995).

In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of dis-

cretion is shown, the trial court's determination will not be disturbed. *State v. Richter*, 240 Neb. 913, 485 N.W.2d 201 (1992); *State v. Jensen*, 238 Neb. 801, 472 N.W.2d 423 (1991).

In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Woods*, 249 Neb. 138, 542 N.W.2d 410 (1996); *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994).

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Kunath*, 248 Neb. 1010, 540 N.W.2d 587 (1995); *State v. Ladig*, 248 Neb. 737, 539 N.W.2d 38 (1995).

IV. ANALYSIS

1. VENUE

McBride first alleges that the district court erred in failing to grant his pretrial motion for a change of venue. More specifically, McBride argues that he could not receive a fair and impartial trial in Adams County because of an article that appeared on the front page of the Hastings Daily Tribune following the denial of the State's motion to consolidate this case with the other charges pending against him. In that article, published approximately 1 month before the jury selection process began, the Adams County Attorney stated that she "was not overly disappointed by the ruling . . . and intends to pursue the sexual assault case whether or not McBride is convicted of murder. Even with a life sentence for murder, another conviction of sexual assault probably would influence any possible parole . . . ."

In his affidavit, McBride asserts that the county attorney used this publicity to imply her belief to the prospective venire panel that he was guilty of the crimes charged, and thus, the court should have granted his motion for change of venue in order to ensure that the panel was not unfairly tainted.

Neb. Rev. Stat. § 29-1301 (Reissue 1995) states:

> All criminal cases shall be tried in the county where the offense was committed . . . unless it shall appear to the court by affidavits that a fair and impartial trial cannot be had therein. In such case the court, upon motion of the defendant, shall transfer the proceeding to any other district or county in the state as determined by the court.

See, also, *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995).

A trial court abuses its discretion in denying a motion to change venue where a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial. *State v. McHenry, ante* p. 614, 550 N.W.2d 364 (1996); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993). A number of factors must be evaluated in determining whether the defendant has met the burden of showing that pretrial publicity has made it impossible to secure a fair and impartial jury. Among them are:

> "the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in the selection of the jury, the number of challenges exercised during the voir dire, the severity of the offenses charged, and the size of the area from which the venire was drawn. . . ."

State v. Bowen, 244 Neb. 204, 208, 505 N.W.2d 682, 686 (1993).

Venire examination provides the best opportunity to determine whether venue should be changed. *Id.* In the instant case, a review of the jury selection process shows that there was no difficulty in selecting a jury from the pool of people called to serve. Defense counsel and the prosecution questioned the potential jurors about their exposure to pretrial publicity. Each side exercised all 12 peremptory challenges. No causal challenges were made. The selected jurors indicated

that they could be fair and impartial and render a verdict based on the evidence presented to them without being influenced by the newspaper accounts they had read. Furthermore, once peremptory challenges were exercised, no objection to the panel was made. As a result, we conclude the trial court did not abuse its discretion in overruling McBride's motion for change of venue because he failed to establish that a fair and impartial jury could not be selected in Adams County.

2. Pending Criminal Charges

McBride next alleges the district court erred in allowing the use of evidence that he had been charged with other criminal offenses. At trial, Officer Eley was the first witness called by the prosecution. Eley testified that on February 14, 1994, he took a report from Oster, and as a result, McBride became a criminal suspect. Eley further testified that he conducted an investigation and completed a report which he submitted to the county attorney.

The county attorney then asked the court to take judicial notice of the prior pending charges. Defense counsel called a sidebar conference, at which time he objected to the court taking judicial notice of the pending charges against McBride on the grounds that the charges were cumulative, that they were not relevant, and that their probative value was substantially outweighed by the danger of unfair prejudice. The court overruled the objections and took judicial notice of the following statement read by the county attorney in the presence of the jury:

> That filed with the Adams County District Court is a case entitled State of Nebraska versus Thomas Allan McBride, Case Number 94121; that within that case, the defendant herein, Thomas Allan McBride, is charged with assault in the second degree, use of a weapon to commit a felony, first degree sexual assault; that in — with regard to those charges, the alleged victim is Sharon Oster, and the events allegedly took place on February 6th, 1994; further, that said case against Thomas Allan McBride was pending on the day of Sharon Oster's death on February 5th, 1995.

(a) Not Evidence of Other Crimes, Wrongs, or Acts

As part of its limiting instructions, the court advised the jury:

> [T]he facts that I just took judicial notice of are not admissible to prove the character of the defendant or in order to show that he acted in conformity with that character. Those judicially noticed facts are, however, admissible for other purposes; such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

From this instruction, it is clear the court took judicial notice of the pending charges after determining the evidence was admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995). That section states:

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

(Emphasis supplied.)

> Although evidence of another crime may sometimes be admissible in a criminal prosecution, as where its purpose is to show motive, scheme, or intent, or a system of mutually dependent crimes, or it bears upon the question of identity of the accused or articles connected with the offense . . . *to be admissible, it must be legal evidence that the crime was committed, and the mere indictment furnishes no such evidence.*

(Emphasis supplied.) *Waters v. State*, 82 Ga. App. 608, 609-10, 61 S.E.2d 794, 796 (1950). See, also, *U.S. v. Flores Perez*, 849 F.2d 1 (1st Cir. 1988); *State v. Trainor*, 130 N.H. 371, 540 A.2d 1236 (1988).

Likewise, we determine the mere fact that the county attorney charged McBride with previous crimes is not "evidence of other crimes, wrongs, or acts," let alone clear and convincing evidence that McBride committed the alleged crimes, wrongs, or acts. See rule 404(3). As a result, we conclude the district court incorrectly applied rule 404(2) in determining whether

the previous criminal charges filed against McBride were admissible evidence.

Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *State v. Tlamka*, 244 Neb. 670, 508 N.W.2d 846 (1993). See *State v. Anderson*, 245 Neb. 237, 512 N.W.2d 367 (1994). As a result, we must next determine whether the record adequately demonstrates that the pending criminal charges filed against McBride were admissible evidence based on a different ground or reason.

(b) Relevance

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995). *State v. Lee*, 247 Neb. 83, 525 N.W.2d 179 (1994); *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). All relevant evidence normally is admissible. Evidence which is not relevant is not admissible. *State v. Fahlk, supra*; *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993). Because the exercise of judicial discretion is implicit in determinations of relevancy, the trial court's decision will not be reversed absent an abuse of discretion. *State v. Eona*, 248 Neb. 318, 534 N.W.2d 323 (1995); *State v. Williams*, 247 Neb. 878, 530 N.W.2d 904 (1995).

In the instant case, Paulson testified that as she tried to pull McBride off of Oster, he stated that "if he was going to prison, that [Oster] was going down too." Robert Brophy testified that he had known McBride and Oster for many years and that he encountered McBride a few months before Oster's death. At that time, McBride told Brophy that he was on foot because he had sold his motorcycle for legal fees. Brophy stated that McBride appeared pretty depressed about selling his motorcycle. McBride also mentioned to Brophy that he had been kicked out of the High Plains Drifters Motorcycle Club and that he had bought a knife. McBride further told Brophy

that someday he was going to get even with Oster, or words to that effect.

Motive is defined as that " ' "which leads or tempts the mind to indulge in a criminal act." ' " *State v. Bronson*, 242 Neb. 931, 940, 496 N.W.2d 882, 890 (1993). Accord *State v. Ruyle*, 234 Neb. 760, 452 N.W.2d 734 (1990). "While proof of motive is not an element of first degree murder, any motive for the crime charged is certainly relevant to the State's proof of the intent element." *State v. Bronson*, 242 Neb. at 940, 496 N.W.2d at 890.

McBride's express threats toward Oster, because of his anger over the possibility of going to jail and the expense of legal fees, make little sense to the jury if they are not made aware of the fact that criminal charges were pending against McBride at the time of the murder for allegedly assaulting and sexually assaulting Oster. The fact that these charges were pending against McBride, in combination with his statements, is evidence which the jury could find was the motive for McBride to murder Oster.

We determine motive to be relevant. As a result, we conclude the district court did not abuse its discretion in determining that the pending criminal charges were relevant evidence.

(c) Probative Value Versus Prejudicial Effect

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995). The district court overruled McBride's objections that the evidence was cumulative and unfairly prejudicial. A ruling pursuant to rule 403 for exclusion of relevant evidence will be upheld on appeal unless the ruling is an abuse of discretion. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994).

As for McBride's claim that evidence of the pending charges was cumulative, it is true that before this evidence was adduced, Officer Eley testified that he interviewed Oster, con-

ducted an investigation, and submitted a report to the county attorney in which McBride was a suspect. However, cumulative evidence means evidence tending to prove the same point of which other evidence has been offered. *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544 (1993). Evidence that McBride became a suspect after an interview, investigation, and report by a police officer is not materially the same as evidence that criminal charges were pending against McBride and did not tend to prove the same point. McBride did not face the possibility of jail or incur any legal fees until after the charges were actually filed. As a result, we conclude evidence that criminal charges were pending against McBride was not cumulative to any other evidence adduced at trial.

The pending criminal charges are clearly probative of motive. Any prejudice incurred in the admission of this evidence was cured by the court's detailed limiting instructions. As a result, we conclude the district court did not abuse its discretion in finding that the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice. See rule 403.

(d) Judicial Notice

Having determined that the pending charges were relevant and not prejudicial, the question remains whether the trial court erred in taking judicial notice of these charges. Neb. Evid. R. 201(1), Neb. Rev. Stat. § 27-201(1) (Reissue 1995), states that "[t]his rule governs only judicial notice of adjudicative facts." "Although [rule] 201 does not expressly require relevance for judicial notice, an irrelevant fact cannot be validly classified as an 'adjudicative fact,' the only type of fact noticeable under [rule] 201." *State v. Vejvoda*, 231 Neb. 668, 677, 438 N.W.2d 461, 468 (1989). "A fact is adjudicative if the fact affects the determination of a controverted issue in litigation . . . ." *Id.* at 675, 438 N.W.2d at 467.

The fact that McBride was charged with previous crimes against Oster is relevant to this case. We also determine that this fact affects the determination of motive—a controverted issue in this litigation. Motive is in controversy because McBride argued that he can only be convicted of manslaugh-

ter and not first or second degree murder. As stated, "While proof of motive is not an element of first degree murder, any motive for the crime charged is certainly relevant to the State's proof of the intent element." *State v. Bronson*, 242 Neb. 931, 940, 496 N.W.2d 882, 890 (1993). While intent is a material element of first and second degree murder, it is not a material element of manslaughter. See Neb. Rev. Stat. §§ 28-303, 28-304, and 28-305 (Reissue 1995). As a result, we conclude that the fact that McBride was charged with these previous crimes is an adjudicative fact.

Rule 201(2) pertains to judicial notice of adjudicative facts and states: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (a) generally known within the territorial jurisdiction of the trial court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

We conclude that the fact that McBride was charged with previous crimes in the Adams County District Court, the same court in which he was charged in the instant case, was a fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

However, we note that "judicial notice should be sparingly used in a criminal case." *State v. Vejvoda*, 231 Neb. at 683, 438 N.W.2d at 471. " ' "[T]aking evidence subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts . . . ." ' " *Id.* at 676, 438 N.W.2d at 467. In other words, " 'resort[ing] to judicial notice in criminal cases where the opposing party is prepared to introduce contrary evidence [is] highly undesirable.' " *Id.* at 682, 438 N.W.2d at 471.

In the instant case, other methods were available to have the prior filed charges admitted into evidence. However, we determine that McBride was given a full opportunity to introduce contrary evidence. He was given a full opportunity to cross-examine Officer Eley about his interview with Oster, the investigation he conducted, and the report he submitted to the county attorney. Furthermore, McBride was given a full opportunity to cross-examine Paulson and Brophy about the incriminating statements these witnesses testified McBride

made. As a result, we conclude the trial court did not err in taking judicial notice of the felony charges pending against McBride in which Oster was the alleged victim.

3. Residual Hearsay Exception

Next, McBride alleges the district court erred in allowing hearsay evidence of alleged threats by him. Nancy Ann Ziegelbauer-Snider, Rita Rodgers, Susan Pettit, and Sharla Oster all testified that Oster had told them of threats that McBride had made against her in the last several months of her life. More specifically, these witnesses testified that Oster described to them how McBride had ridden up to her on his motorcycle while she was walking to her job one day and pointed an imaginary gun at her, pretending to shoot her with it. At trial, McBride objected to the testimony as hearsay, but the district court admitted the testimony under the residual hearsay exception.

Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 1995); *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995). The testimony of these witnesses, as to what Oster told them McBride did, was clearly hearsay. Hearsay is not admissible except as provided by the rules of evidence or by other rules adopted by the statutes of the State of Nebraska. Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 1995); *State v. Neujahr, supra*.

The residual hearsay exceptions are delineated in Neb. Evid. R. 803(22), Neb. Rev. Stat. § 27-803(22) (Reissue 1995), and Neb. Evid. R. 804(2)(e), Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1995). The substance of these two evidence rules is identical except that unavailability of the declarant must be shown under rule 804(2)(e). These sections state:

> A statement not specifically covered by any of the [other exceptions to the hearsay rule] but having equivalent circumstantial guarantees of trustworthiness, [will be admissible,] if the court determines that (i) the statement is offered as evidence of a material fact, (ii) the statement is more probative on the point for which it is offered than

> any other evidence which the proponent can procure through reasonable efforts, and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 804(2)(e).

Rule 804(1) provides in pertinent part: "Unavailability as a witness includes situations in which the declarant . . . [i]s unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity." Because of Oster's unavailability as a witness, we will analyze the admissibility of her statements under rule 804(2)(e). While we have said that the residual hearsay exception is to be used rarely and only in exceptional circumstances, *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990), we have also ruled that where the declarant is dead, the specific exceptions of rule 804(2)(e) are applicable in determining the existence of equivalent circumstantial guarantees of trustworthiness. *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993); *State v. Beam*, 206 Neb. 248, 292 N.W.2d 302 (1980).

In determining whether a statement is admissible under rule 804(2)(e), a court considers five factors: (1) the statement's trustworthiness, (2) materiality of the statement, (3) probative importance of the statement, (4) interests of justice, and (5) whether notice of the statement's prospective use was given to the opponent. *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544 (1993).

In the instant case, the district court went through each element of the *Toney* test and admitted the testimony about the simulated-gun threat into evidence. An appellate court, reviewing a trial court's ruling on admissibility under rule 804(2)(e), will affirm the trial court's ruling unless the trial

court has abused its discretion concerning admissibility. *State v. Toney, supra.*

(a) Trustworthiness

Under rule 804(2)(e), a court must make a preliminary inquiry (Neb. Evid. R. 104, Neb. Rev. Stat. § 27-104 (Reissue 1995)) to determine whether a declarant had personal knowledge (Neb. Evid. R. 602, Neb. Rev. Stat. § 27-602 (Reissue 1995)) regarding the subject matter of the statement that is sought to be introduced pursuant to the residual exception to the hearsay rule. *State v. Toney, supra*; *State v. Jacob, supra.* Unlike the situation in *State v. Jacob*, where the deceased declarant lacked personal knowledge about the subject matter of her statements because she did not actually see the defendant shoot her, Oster's statements to the witnesses included the assertion that Oster personally witnessed McBride make the simulated-gun threat. As a result, we conclude that Oster had personal knowledge regarding the subject matter of the statements she made to the witnesses as required by rule 602.

In determining the trustworthiness of a statement under rule 804(2)(e), a court must examine the circumstances surrounding the declaration in issue and may compare the declaration to the closest hearsay exception as well as consider a variety of other factors affecting trustworthiness, such as

> the nature of a statement, that is, whether the statement is oral or written; whether a declarant had a motive to speak truthfully or untruthfully, which may involve an examination of the declarant's partiality and the relationship between the declarant and the witness; whether the statement was made under oath; whether the statement was spontaneous or in response to a leading question or questions; whether a declarant was subject to cross-examination when the statement was made; and whether a declarant has subsequently reaffirmed or recanted the statement.

State v. Toney, 243 Neb. at 245-46, 498 N.W.2d at 551. See *State v. Plant, supra.*

Although there are several factors to be considered in determining the trustworthiness of a statement under the residual

hearsay exception, the absolute basic requirement is that the circumstances surrounding the making of the hearsay statement provide the guarantees of trustworthiness comparable to other hearsay exceptions in the Nebraska Evidence Rules. *State v. Toney, supra*; *State v. Jacob, supra*.

In the instant case, the district court found the statements contained the requisite guarantee of trustworthiness for admissibility under the residual hearsay exception. The court found the nearest comparable hearsay exceptions to Oster's statements were "state of mind" and "excited utterance." We determine exited utterance to be the nearest hearsay exception.

The excited utterance exception excludes from the operation of the hearsay rule statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(1); *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993). The underlying theory of this exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. *State v. Jacob, supra*; *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990). For a statement to qualify as an excited utterance, the following criteria must be established:

> " '(1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event. . . . The key requirement is spontaneity, which "requires a showing the statements were made without time for conscious reflection." ' "

State v. Jacob, 242 Neb. at 186, 494 N.W.2d at 117.

Clearly, the feigned-gun threat would have been a startling event for Oster, and the record demonstrates her statements related to that event. Thus, our focus is on whether Oster had time to consciously reflect on her statements.

The cases of *State v. Smith*, 241 Neb. 311, 488 N.W.2d 33 (1992), and *State v. Castor*, 193 Neb. 86, 225 N.W.2d 420 (1975), set the outer boundaries of the excited utterance rule. In *State v. Castor*, this court held that a statement made 2 hours after an alleged rape was not spontaneous. Likewise, in

State v. Smith, this court held the statements of a sexual assault victim made after she had time to record the event in her diary did not qualify as an excited utterance, as there had been ample time for the victim to consciously reflect on the event.

In the instant case, Ziegelbauer-Snider testified that "in about June of 1994" Oster told her of the alleged threat and that Oster stated that the threat occurred in the "end of May, beginning of June." None of the other witnesses testified that Oster told them when McBride allegedly made this threat. All of the other witnesses were told of the alleged threat after Oster told Ziegelbauer-Snider of the alleged threat. Thus, based on Ziegelbauer-Snider's testimony, as long as 1 month could have passed between the time the threat was alleged to have occurred and the time when Oster told Ziegelbauer-Snider of the alleged threat.

Having considered all of the circumstances surrounding Oster's statements to these witnesses, we conclude that the statements lack spontaneity, that there was ample time for Oster to consciously reflect on this event, and that, thus, these hearsay statements do not provide the guarantees of trustworthiness comparable to the excited utterance exception, or any other hearsay exceptions, in the Nebraska Evidence Rules. See, *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544 (1993); *State v. Jacob, supra* (statements made within 1 day of event). As a result, we conclude the district court erred in finding that the statements contained the requisite guarantee of trustworthiness for admissibility under the residual hearsay exception prescribed in rule 804(2)(e) and abused its discretion in admitting these statements into evidence.

(b) Harmless Error

The erroneous admission of evidence in a criminal trial is not prejudicial if it can be said that the error was harmless beyond a reasonable doubt. *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995). Harmless error exists in a jury trial of a criminal case when the court makes an erroneous evidentiary ruling which, on review of the entire record, did not materially influence the jury in a verdict adverse to the defen-

dant. *State v. Vogel*, 247 Neb. 209, 526 N.W.2d 80 (1995). If the evidence properly admitted at trial overwhelmingly establishes a defendant's guilt, any error in excluding admissible evidence is harmless error beyond a reasonable doubt. *Id.*

In the instant case, no evidence was adduced that a "sudden quarrel" of any kind took place between McBride and Oster. McBride sat watching television with Oster for approximately 15 minutes before attacking her and made incriminating statements during and after the attack. An eyewitness testified to the murder, the police recovered the murder weapon and apprehended McBride at the scene of the murder, and McBride made statements that implicated himself as the perpetrator of the crime.

Thus, we determine that the evidence properly admitted at trial overwhelmingly establishes McBride's guilt beyond a reasonable doubt. As a result, we conclude the error in admitting this evidence did not materially influence the jury in reaching its verdict and was harmless beyond a reasonable doubt.

4. Photographs of Deceased

McBride further alleges the district court erred in allowing over objection certain pictures of the deceased. At trial, Dr. Blaine Roffman, the pathologist who performed the autopsy, testified on behalf of the State. During the course of Dr. Roffman's testimony, six photographs of Oster's body, taken at the time he performed the autopsy, were received into evidence.

The State then presented a diagram of the scene of the crime, complete with a legend to show where each item of evidence was found, where the body was located, and where each item of furniture was located. The district court then allowed the State to offer several pictures of Oster's body as it was found in the apartment. These photographs depict Oster's naked body lying on the floor of the crime scene beaten, bloody, and mutilated.

In objecting to the admission of these exhibits, McBride relies upon the principles stated in rule 403 as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prej-

udice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." More specifically, McBride argues that because the State had already established the cause of death, offered autopsy pictures of the injuries, and established the location of all evidence, the admission of the additional crime scene photographs of Oster's body had no further evidentiary value, but was solely for the purpose of inflaming the minds of the jury against McBride.

The admission of photographs of a gruesome nature rests largely within the discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993); *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1982). Although it is true that the probative value of gruesome photographs should be weighed against the possible prejudicial effect before they are admitted, if a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if gruesome. *State v. Rowe, supra*. In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, to show the nature and extent of wounds or injuries, and to establish malice or intent. *State v. White, supra*; *State v. Rowe, supra*.

The autopsy photographs were admitted into evidence to establish the manner in which the victim was killed. Dr. Roffman testified that it was his expert opinion that the cause of death was a "stab wound in the mid chest which penetrated the heart." However, the cause and time of death is ultimately an issue of fact for the jury to determine. Paulson testified that when she fled her apartment to seek help, Oster was still fully clothed, sitting in the chair, and that she only saw a slash to Oster's throat. However, officers testified that when they entered the apartment, Oster's body was lying on the floor naked and mutilated.

McBride argues that his decision to kill Oster was made while he was angry and did not have normal self-control, and thus he could only be convicted of manslaughter and not first

or second degree murder. However, as stated, the evidence reveals that Oster's body was in a much different position and condition than when Paulson fled the apartment. The jury could have reasonably concluded that Oster was alive when Paulson fled the apartment and that McBride formed the requisite premeditated malice and killed Oster subsequent to that time. As a result, the photographs are clearly probative of the cause and time of death and, thus, probative of the issue of premeditated malice.

Furthermore, these photographs are not cumulative evidence. As stated, cumulative evidence means evidence tending to prove the same point to which other evidence has been offered. *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544 (1993). The crime scene photographs were offered for a materially different reason (premeditated malice) than the autopsy photographs (expert opinion on manner of death) and thus did not tend to prove the same point for which the autopsy photographs were offered.

Thus, these photographs were not prejudicial to McBride. As this court has stated, "Gruesome crimes produce gruesome photographs." *State v. Ryan*, 226 Neb. 59, 81, 409 N.W.2d 579, 593 (1987). As a result, we conclude the district court did not abuse its discretion in admitting the crime scene photographs into evidence.

5. Motion for Directed Verdict

McBride next alleges the district court erred in failing to grant his motion for a directed verdict of not guilty at the close of all evidence. More specifically, McBride argues that because his decision to kill Oster was made while he was angry and did not have normal self-control, he can only be convicted of manslaughter and not first or second degree murder.

In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Hirsch*, 245 Neb. 31,

511 N.W.2d 69 (1994). If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law. *State v. Hirsch, supra.*

The crime of first degree murder requires proof that the defendant killed purposely and with deliberate and premeditated malice. § 28-303(1). The intent to kill may be inferred, sufficient to support a murder conviction, from the defendant's deliberate use of a deadly weapon in a manner likely to cause death. *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995). Deliberate means not suddenly, not rashly; but deliberation requires that the defendant considered the probable consequences of his or her act before doing the act. *Id.* One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification. *Id.* The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed. *Id.*

As stated, no evidence was adduced at trial whatsoever to indicate that a "sudden quarrel" of any kind took place between McBride and Oster. McBride sat watching television with Oster for approximately 15 minutes before attacking her and made incriminating statements during and after the attack. An eyewitness testified to the murder; the police recovered the murder weapon and apprehended McBride at the scene of the murder. McBride made statements that implicated himself as the perpetrator of the crime. We conclude that the properly admitted evidence overwhelmingly supports the jury's guilty verdict. As a result, McBride's assigned error is without merit.

6. Motion for New Trial

McBride further alleges the district court erred in failing to grant his motion for new trial because the verdict entered was not supported by sufficient evidence. For the reasons stated above, we conclude that there was overwhelming evidence to

support the jury's findings and that, thus, the trial court did not abuse its discretion in denying McBride's motion for new trial. See, *State v. Richter*, 240 Neb. 913, 485 N.W.2d 201 (1992); *State v. Jensen*, 238 Neb. 801, 472 N.W.2d 423 (1991).

7. Jury Instructions

McBride next alleges the district court erred in refusing instructions which were offered by him. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995). It is not error for a trial court to refuse to give a defendant's requested instruction where the substance of the requested instruction was covered in the instructions given. *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995).

One of the challenged instructions was instruction No. 11, which defined sudden quarrel. The court elected to give its own instruction rather than the one offered by McBride. McBride does not argue how he was prejudiced by the court's refusal to give his instruction and, thus, failed to meet his burden. See *State v. Derry, supra*. In any event, we determine that the substance of the requested instruction was covered in the instructions given.

The other contested instruction was instruction No. 10, which defined premeditation. The court once again elected to give its own instruction rather than the one offered by McBride. The definition of premeditation in McBride's proposed instruction is exactly that which is set forth in Neb. Rev. Stat. § 28-302(3) (Reissue 1995), while the district court's instruction adds the statement: "The time needed for premeditation may be so short as to be instantaneous provided that the intent to act is formed before the act and not simultaneous with the act." See *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995).

McBride argues that this additional statement confused and misled the jury because it blurred the distinctions between first degree murder, second degree murder, and manslaughter. However, the instructions clearly and correctly stated the material elements of each of these crimes. The additional statement in the instruction given by the court merely stated a correct proposition of the law and did not blur the distinctions among these crimes.

While we find that McBride's tendered instruction was a correct statement of the law and warranted by the evidence, we conclude that McBride was not prejudiced by the district court's refusal to give his instruction because its substance was covered in the instruction given. As a result, we conclude that McBride's assigned error is without merit.

8. SENTENCE

Finally, McBride alleges the district court abused its discretion by imposing a sentence which was "excessive and disproportionate to the severity of the offense when considered with his background and prior record." The district court sentenced McBride to life in prison for the murder and a consecutive term of 19 to 20 years' imprisonment on the use of a weapon conviction.

In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Ladig*, 248 Neb. 737, 539 N.W.2d 38 (1995); *State v. Derry, supra*. This crime was exceptionally brutal. McBride beat Oster, slit her throat, and mutilated her body. The sentences imposed were within statutory limits. As a result, we conclude the district court did not abuse its discretion.

V. CONCLUSION

We conclude all of McBride's assigned errors are without merit. As a result, we affirm.

AFFIRMED.

IN RE ESTATE OF ROLLO E. ACKERMAN, DECEASED. COUNTY OF LANCASTER, NEBRASKA, APPELLANT, V. KATHERINE G. POLICKY, APPELLEE.

550 N.W.2d 678

Filed July 26, 1996. No. S-93-983.

1. **Decedents' Estates: Taxation: Appeal and Error.** On appeal of an inheritance tax determination, an appellate court reviews the case for error appearing on the record.
2. **Decedents' Estates: Parent and Child: Taxation: Appeal and Error.** The factual findings made by the trial court in determining if an acknowledged parental relationship exists for purposes of Neb. Rev. Stat. § 77-2004 (Reissue 1990) shall not be disturbed on appeal unless they are clearly wrong.
3. **Decedents' Estates: Taxation: Statutes: Proof.** Statutes exempting property from inheritance tax should be strictly construed, and the burden is on the taxpayer to show that he or she clearly falls within the language of the statute.
4. **Decedents' Estates: Parent and Child: Taxation: Words and Phrases.** The language "any person to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent" in Neb. Rev. Stat. § 77-2004 (Reissue 1990) is not limited in application to blood relatives, and includes parties to whom the decedent stood "in loco parentis."
5. **Decedents' Estates: Parent and Child: Taxation.** In determining if the requisite acknowledged parental relationship exists for purposes of Neb. Rev. Stat. § 77-2004 (Reissue 1990), the following factors should guide the trial court: (1) reception of the child into the home and treatment of the child as a member of the family, (2) assumption of the responsibility for support beyond occasional gifts and financial aid, (3) exercise of parental authority and discipline, (4) relationship by blood or marriage, (5) advice and guidance to the child, (6) sharing of time and affection, and (7) existence of written documentation evincing the decedent's intent to act as parent.
6. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts.

Appeal from the District Court for Lancaster County, PAUL D. MERRITT, JR., Judge, on appeal thereto from the County Court for Lancaster County, DONALD R. GRANT, Judge. Judgment of District Court affirmed.

Gary E. Lacey, Lancaster County Attorney, and Michael E. Thew for appellant.

John C. Hurd, of Wolfe, Anderson, Hurd, Luers & Ahl, for appellee.

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

GERRARD, J.

The personal representative of the estate of Rollo E. Ackerman commenced this action to determine the inheritance tax due from Katherine G. Policky, a devisee under the will of Rollo Ackerman. The county court held that Policky should be taxed at the rate provided in Neb. Rev. Stat. § 77-2006 (Reissue 1990). On appeal, the district court reversed, finding that Policky should be taxed at the lower rate provided in Neb. Rev. Stat. § 77-2004 (Reissue 1990). We hold that the district court did not err in finding that Policky is a person to whom the deceased stood within the acknowledged relation of a parent during the last 10 years of his life, as provided in § 77-2004, and we affirm the judgment of the district court.

FACTUAL BACKGROUND

On February 2, 1992, Rollo E. Ackerman, a widower with no children, died in Lancaster County, Nebraska. Policky, the appellee herein, received $162,749.73 in nonprobate property from Rollo Ackerman's estate. In addition, Rollo Ackerman's will provided for a bequest of one-half of the residue of the estate, approximately $138,342.54, to Policky. Rollo Ackerman stated in his will that "I am giving this share to Katherine G. Policky to show my appreciation for all of the favors, assistance and help that she has given my wife and me over the years and to myself after my wife's death." Rollo Ackerman bequeathed the remaining one-half of the residue of the estate to Tyler Mundall, stating, "I consider Tyler to be like a son to me."

Upon petition by the personal representative of the estate, the county court determined the inheritance tax rate for all of the devisees except Policky, finding, among other things, that the inheritance of Mundall should be taxed pursuant to § 77-2004 as a person to whom Rollo Ackerman stood in the "acknowledged relation of a parent" for the 10 years preceding his death. The issue of the tax rate on the inheritance of Policky was taken under submission by the county court, and a trial was had thereon.

At trial, the testimony of Policky established the following: Policky grew up in Friend, Nebraska, and was living there with her mother when she first met Rollo Ackerman and his wife, Helen, in 1967, while on a visit to Lincoln, Nebraska. At that time, Policky was 16 years old, and her parents were divorced. Thereafter, Policky visited the Ackermans twice a month until graduation from high school. During these visits, Policky and the Ackermans were involved in various activities, such as going out to eat, working in barber and beauty shops owned by the Ackermans, or visiting the home of the Ackermans. Policky would often spend the night at the Ackermans' during these visits rather than returning home to Friend.

Following high school graduation in 1969, Policky entered the University of Nebraska at Lincoln as a full-time student. Policky had no further contact with her biological mother or father. Policky lived on campus during her first year at the university and in university-approved housing thereafter—she did not reside at the home of the Ackermans. Policky received no financial support from her family during this time and did not have any scholarships, grants, or loans. She worked part time in various locations as a cashier. The Ackermans paid for all of her schoolbooks and clothing, and for the majority of her meals or groceries. The Ackermans also paid whatever tuition and medical expenses Policky incurred which she could not cover from her part-time job income. In addition, Policky did not own a car while attending the university and would either borrow the Ackermans' car when necessary, or would be transported by them.

During the summer months, Policky would stay at the Ackerman home approximately half of each month and would work in the shops owned by the Ackermans, perform chores around their acreage, or ride horses kept on the Ackermans' land. During the school year, Policky would meet the Ackermans at their shop around noon, eat lunch with them, work in the shop until closing time at 6 p.m., and go to dinner with the Ackermans before returning home to her residence. Policky was not paid for her work in the shop. On Saturdays, Policky would follow the same schedule, except that

dinner would usually be followed by some sort of entertainment activity. On Sundays, Policky would eat breakfast with the Ackermans, go to church with them, have lunch, ride horses at their home or perform chores around the house, and return to her residence in the afternoon.

Policky spent her holidays at the Ackerman home and took vacations with them during the year, which vacations were paid for by the Ackermans. With regard to discipline, Policky testified that the Ackermans required her to check in with them as to her hours, insisted on meeting her boyfriends, and would generally tell her what she could and could not do.

Following graduation from the university in 1973, Policky continued to attend classes, but became employed by the university on a schoolyear basis. As a result, Policky was not as financially dependent on the Ackermans as before. However, the Ackermans continued to help her with paying for school expenses, purchasing vehicles, and obtaining insurance. Policky continued to vacation with the Ackermans, spend holidays with them, ride horses at their acreage, and help with household chores.

In 1978, Helen Ackerman died, and at that time Policky moved into the home next door to the Ackerman acreage, which home was owned by Rollo Ackerman. Policky remained in this house until 1981, when she moved to an apartment, and she eventually purchased her own home in Lincoln. Policky did not pay any rent while living next door to the Ackerman acreage, but cared for Rollo Ackerman on a daily basis when not at work, preparing meals for him and managing the household tasks. Policky continued to spend holidays and vacations with Rollo Ackerman. During the last months of his life, Rollo Ackerman was ill, and Policky took care of him, or made provisions for his care, on a daily basis.

At trial, testimony was also received from Nancy Bauers, Richard Egger, and Vicki Munden, who were all acquaintances of Rollo Ackerman. Each of these parties testified that in conversations with Rollo Ackerman, he referred to Policky and Mundall as "his kids." Furthermore, these parties often observed Policky performing chores around the Ackerman home.

In addition, various written documents were offered and received at trial in which Rollo Ackerman referred to Policky as his daughter, which documents included an insurance form dated February 15, 1991; two outpatient registration forms dated February 22, 1991, and August 23, 1991, respectively; and a durable power of attorney executed by Rollo Ackerman on October 4, 1991.

The county court issued an order on February 8, 1993, finding that the inheritance tax due from Policky should be computed pursuant to § 77-2006 rather than § 77-2004. The county court concluded that although the relationship between Rollo Ackerman and Policky was a very loving and close relationship, Rollo Ackerman did not view Policky as his "daughter" for purposes of § 77-2004. The court based this conclusion on the fact that Policky always maintained a residence separate from the Ackermans and that the will of Rollo Ackerman did not refer to Policky as his daughter, while it did refer to Mundall and Leroy Mares, two other devisees not related to Rollo Ackerman, as "sons." The trial court also found that the extensive work performed by Policky without pay implied a "quid pro quo" arrangement between the parties, rather than the relationship of a father and daughter.

The order of the county court was appealed by Policky. On appeal, the district court reversed, holding that the inheritance of Policky should be taxed pursuant to § 77-2004 as that of a person " 'to whom the decedent, for not less than ten years prior to his death stood in the acknowledged relation of a parent . . . .' " The district court found that the absence of residence in the Ackerman household did not bar Policky from establishing the necessary parental relationship and that the additional factors of assumption of responsibility for support, exercise of parental authority and discipline, provision of advice and guidance, and shared time and affection weighed in favor of such relationship. Furthermore, the district court found that although the will of Rollo Ackerman did not refer to Policky as his daughter, various documents received in evidence did so refer to her, and this acknowledged relationship was supported by the testimony of witnesses at trial. Based on these findings, the district court held that Policky had sus-

tained her burden of proof under § 77-2004 and reversed the judgment of the county court. The judgment of the district court was appealed by the county to the Nebraska Court of Appeals, and the matter was removed to this court on our own motion in order to regulate our caseload and that of the Court of Appeals.

ASSIGNMENTS OF ERROR

The county asserts that the district court erred in holding that Policky sustained her burden of proving she is a person to whom Rollo Ackerman stood in an acknowledged relation of a parent for at least 10 years prior to his death and in reversing the factual determinations of the trial court, which were supported by substantial evidence.

STANDARD OF REVIEW

The scope of review in an appeal of an inheritance tax determination is review for plain error appearing on the record. Neb. Rev. Stat. §§ 25-1911 (Reissue 1995) and 25-2733 (Reissue 1989). See, *In re Estate of Stanton*, 245 Neb. 942, 516 N.W.2d 586 (1994); *In re Estate of Detlefs*, 227 Neb. 531, 418 N.W.2d 571 (1988). Factual findings necessary in determining if the requisite acknowledged parent-child relationship of § 77-2004 exists should be reviewed for sufficient evidence and should not be disturbed on appeal unless clearly wrong. *In re Estate of Massie*, 218 Neb. 103, 353 N.W.2d 735 (1984), *overruled on other grounds, In re Estate of Price*, 223 Neb. 12, 388 N.W.2d 72 (1986).

ANALYSIS

Section 77-2004 provides that "any person to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent" shall receive an inheritance tax exemption of $10,000 and shall be taxed at the rate of 1 percent of the clear market value of the property thereafter. However, if a taxpayer does not fit within the ambit of § 77-2004 or within Neb. Rev. Stat. § 77-2005 (Reissue 1990), which section is not relevant to the present case, the taxpayer's inheritance is taxed pursuant to § 77-2006 at a progressive rate of 6 to 18 percent. Thus, a finding that § 77-2004 is

the applicable statutory section, as opposed to § 77-2006, results in a much lower inheritance tax rate on the legacy left to the taxpayer. In this case, the county asserts that the inheritance received by Policky should be taxed according to § 77-2006, while Policky claims that she should be taxed at the lower rate provided in § 77-2004.

In its first assignment of error, the county asserts that the district court erred in holding that Policky sustained her burden of proof under § 77-2004. Statutes exempting property from inheritance tax should be strictly construed, and the burden is on the taxpayer to show that he or she clearly falls within the language of the statute. See, *Todd v. County of Box Butte*, 169 Neb. 311, 99 N.W.2d 245 (1959); *In re Estate of Rudge*, 114 Neb. 335, 207 N.W. 520 (1926). Therefore, the burden of proof at the trial level was on Policky to establish that she was a person "to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent."

In order to determine whether the evidence establishes such a parental relation, it is necessary to analyze the scope of the statutory language. This language has been held to extend beyond blood relatives to persons standing "in loco parentis" with the taxpayer. See *In re Estate of Dowell*, 149 Neb. 599, 31 N.W.2d 745 (1948). In addition, residency in the testator's home is not required, and, in fact, an express requirement to this effect has been eliminated from the statute. See *Wondra v. Platte Valley State Bank & Trust Co.*, 194 Neb. 41, 230 N.W.2d 182 (1975). Also, compare § 77-2004 with its predecessor, § 77-2004 (Reissue 1986). However, this court has never delineated any other specific criteria to determine whether a person stands in loco parentis to a person within the context of § 77-2004.

In *In re Estate of Quinn*, 1 Neb. App. 1025, 510 N.W.2d 488 (1993), a case decided in the interim between the county court and district court decisions in the instant case, the Court of Appeals considered and discussed specific criteria in determining whether a person stands in loco parentis to another person within the context of § 77-2004. In *In re Estate of Quinn*, the Court of Appeals noted that the court in *Estate of*

Larson, 106 Cal. App. 3d 560, 166 Cal. Rptr. 868 (1980), interpreted the California statutory phrase "acknowledged relationship of a parent" to connote a status of in loco parentis, which refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formalities necessary to legal adoption. It should be noted that this definition is almost identical to Nebraska case law on the subject of in loco parentis. See, *Cornhusker Christian Ch. Home v. Dept. of Soc. Servs.*, 227 Neb. 94, 416 N.W.2d 551 (1987), *appeal dismissed* 488 U.S. 919, 109 S. Ct. 298, 102 L. Ed. 2d 317 (1988); *Austin v. Austin*, 147 Neb. 109, 22 N.W.2d 560 (1946). The Court of Appeals goes on to note that the *Estate of Larson* court stated that comparison of the California statutory phrase "acknowledged relationship of a parent" to the concept of in loco parentis might suggest to some that the relationship must be precisely the same as a biological parent and child. However, the *Estate of Larson* court held that the phrase is not so narrow in its meaning. Citing *Estate of Wilts*, 80 Cal. App. 3d 599, 145 Cal. Rptr. 759 (1978), the *Estate of Larson* court said, "The law recognizes that although a natural parent-child relationship may exist elsewhere, if the parties regard each other in all of the usual incidents and relationships of family life as parent and child, the benefits" of the inheritance tax statute flow. 106 Cal. App. 3d at 564, 166 Cal. Rptr. at 870.

The *Estate of Larson* court also reviewed several factors to determine if a person is to be acknowledged as a parent in a situation such as that before us. Those factors are as follows: reception of the child into the home and treatment of the child as a member of the family, assumption of the responsibility for support beyond occasional gifts and financial aid, exercise of parental authority in discipline, relationship by blood or marriage, advice and guidance to the child, and sharing of time and affection. It should be noted that the *Estate of Larson* court also addressed the question of whether total or exclusive financial support is required. Citing *In re Estate of Dowell, supra*, and cases from several other jurisdictions, the *Estate of*

Larson court held that a person may stand in loco parentis despite other sources of support for the child.

In *Austin v. Austin, supra*, we held that the assumption of the relationship of in loco parentis to a child is a question of intention, which may be shown by the acts and declarations of the person alleged to stand in such relationship. While that particular case did not deal with § 77-2004, it is useful, since it dealt with the concept of in loco parentis in the context of a case involving inheritance issues.

As we discussed in *In re Estate of Dowell*, 149 Neb. 599, 31 N.W.2d 745 (1948), this portion of § 77-2004 and other related provisions have been adopted from a similar statute of the State of New York. In determining the construction of these Nebraska provisions, we look to the construction placed upon their counterparts by the courts of the State of New York, in the absence of contrary intention being expressed by our Legislature. With this principle in mind, the Court of Appeals, in *In re Estate of Quinn*, 1 Neb. App. 1025, 510 N.W.2d 488 (1993), examined *Matter of Beach*, 154 N.Y. 242, 48 N.E. 516 (1897). The *Matter of Beach* court found that the phrase "any person" in a statute similar to § 77-2004 includes both minors and adults. The fact that a parent-child relationship may start when both parties are adults, or may begin when the child is a minor and continue after that child reaches adulthood, is not a bar to a claim made under the relevant statute. Our determination is not restricted, therefore, to an examination of only childhood years, but also adult years of a devisee.

We conclude that the specific criteria discussed by the Court of Appeals in *In re Estate of Quinn* (citing *Estate of Larson*, 106 Cal. App. 3d 560, 166 Cal. Rptr. 868 (1980), and *Matter of Beach, supra*) would be helpful to a trial court in determining when an "acknowledged relation of a parent" exists for purposes of § 77-2004. In addition to these criteria, however, we conclude that relevant written documentation evincing the decedent's intent, including, but not limited to, a will, should be considered by a trial court in making its determination of an acknowledged relation of a parent under § 77-2004. There is no single criterion or test in making such a determination. The trial court should consider all pertinent factors in arriving

at that legal conclusion. Any list of suggested criteria is not meant to be exhaustive, nor will every factor necessarily be present in each case; however, we conclude that the following factors serve as appropriate guideposts to the trial court in making a determination of an acknowledged relation of a parent under § 77-2004: (1) reception of the child into the home and treatment of the child as a member of the family, (2) assumption of the responsibility for support beyond occasional gifts and financial aid, (3) exercise of parental authority and discipline, (4) relationship by blood or marriage, (5) advice and guidance to the child, (6) sharing of time and affection, and (7) existence of written documentation evincing the decedent's intent to act as parent. The district court, which sat as an appellate court in this case, did consider these factors in reviewing the case for plain error appearing on the record.

Applying the criteria set forth above to the instant case, we conclude that the district court was correct in its determination that, as a matter of law, Policky is a person to whom Rollo Ackerman stood within the acknowledged relation of a parent within the last 10 years of his life. First, while it is true that Policky did not reside at the Ackerman home and therefore technically may not have been "received into the home" of Rollo Ackerman, the testimony of Policky and witnesses on her behalf clearly establishes that she was treated as a member of the Ackerman family. Policky spent the vast majority of her time with the Ackermans and was given responsibility and advice as would have been given a member of the family. Furthermore, given Policky's age and her status as a college student, it was not unusual that Policky would reside on her own. Under these circumstances, we conclude that it is appropriate that residency, or lack thereof, not be given undue weight by the trial court in making its determination.

Second, the record establishes that the Ackermans assumed responsibility for Policky's support beyond occasional gifts and financial aid. The testimony at trial revealed that the Ackermans paid for all of Policky's clothing and books and for a large portion of her meals and tuition. No support was received by Policky from her biological family. Given the limited income Policky earned from her part-time job as a cashier

while at the university, the Ackermans essentially supported her during that time. Even after Policky obtained a job at the university, the Ackermans continued to help pay for school expenses, vacations, vehicles, and insurance. This support was clearly beyond "occasional."

The county asserts that Policky failed to sustain her burden of proof on the issue of support since there is no indication that the Ackermans intended to be legally obligated for Policky's support or that they would have provided assistance to Policky absent her work in the shop. This argument misses the mark. Although the requisite "acknowledged relation of a parent" is similar to that of in loco parentis, there is no requirement of legal obligation for support. In fact, in the case of an adult, legal obligation for support would rarely, if ever, exist. Consistent with the reasoning in *Matter of Beach*, 154 N.Y. 242, 48 N.E. 516 (1897), we conclude that the fact that a taxpayer is an adult rather than a minor at the time the relationship with the testator commences should not prevent a finding of an acknowledged relation of a parent under § 77-2004. In light of this conclusion, "support," as meant in the criteria herein set forth, does not require a legal obligation for support of the taxpayer. Furthermore, although Policky worked in the Ackermans' shops and at their home on a regular basis, there was no express or written agreement of support in exchange for services, and the funds and amenities provided to Policky by the Ackermans would seem to far exceed what she would have made as a "salary" for such work. Therefore, the district court was correct in its determination that the county court erred when it concluded that the relationship between Rollo Ackerman and Policky amounted to nothing more than a "quid pro quo" relationship.

It is also evident that the Ackermans exercised parental authority and discipline over Policky. The testimony of Policky at trial established that the Ackermans insisted on meeting her boyfriends, monitored her hours, and told her what she could and could not do. The county asserts that such supervision is "a far cry from the exercise of parental authority and discipline." Brief for appellant at 22. However, this assertion appears to go more toward the level of discipline rather than

to whether parental discipline actually existed. Given Policky's age, it is not unusual that the level of discipline was slight. Such would be true of any parent-child relationship in which the child is a college student establishing his or her own independence. Furthermore, there was no evidence indicating that the Ackermans were not the primary source of discipline in Policky's life.

The county also asserts that the district court failed to consider the factor of relationship by blood or marriage in reaching its decision. In regard to this factor, the district court stated that "Nebraska does not require such a relationship and, thus, it is not a pertinent factor in this discussion." It is true that a relationship by blood or marriage is not required for purposes of § 77-2004. See *In re Estate of Dowell*, 149 Neb. 599, 31 N.W.2d 745 (1948). Given the law in Nebraska on this issue and the context of the instant case, we conclude that the district court's cursory treatment of this factor was warranted.

The remaining factors of advice and guidance and of sharing of time and affection were not disputed by the county and are clearly established in the record. Finally, although the language of the will does not refer to Policky as the "daughter" of Rollo Ackerman, the written documents admitted in evidence do so refer to her, and thereby negate the effect, if any, of the absence of explicit language in the will acknowledging the true nature of the relationship between Rollo Ackerman and Policky.

In its second assignment of error, the county asserts that the district court erred in reversing the factual determinations made by the county court, which were supported by substantial evidence of record. After reviewing the record, we conclude that this assignment of error is without merit. In reaching its decision, the county court relied almost exclusively on the language of the will and the fact that Policky maintained a residence separate from the Ackermans. However, as recognized by the district court, both of these factors have been determined to be not controlling under Nebraska law in regard to § 77-2004. See, *In re Estate of Stanton*, 245 Neb. 942, 516 N.W.2d 586 (1994); *Wondra v. Platte Valley State Bank & Trust Co.*, 194 Neb. 41, 230 N.W.2d 182 (1975). On ques-

tions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Kelley v. Benchmark Homes, Inc., ante* p. 367, 550 N.W.2d 640 (1996); *Scholl v. County of Boone, ante* p. 283, 549 N.W.2d 144 (1996). For the reasons set forth above, it is clear that the district court did not disturb the factual findings of the county court, but instead found that the facts supported a different conclusion of law with regard to the application of § 77-2004.

CONCLUSION

Accordingly, the judgment of the district court that the county court erred as a matter of law in finding that Policky failed to sustain her burden of proof under § 77-2004 is hereby affirmed.

AFFIRMED.

THOMAS J. BRUNING, APPELLANT, V. LAW OFFICES OF RONALD J. PALAGI, P.C., ET AL., APPELLEES.

551 N.W.2d 266

Filed July 26, 1996. No. S-94-417.

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. **Attorneys at Law.** An attorney impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.
4. **Attorney and Client: Malpractice: Negligence: Proof.** A client who has agreed to the settlement of an action is not barred from recovering against his

or her attorney for malpractice if the client can establish that the settlement agreement was the product of the attorney's negligence.

5. **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.
6. ____: ____. After the moving party has shown facts entitling it to a 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.
7. **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.
8. **Attorney and Client: Evidence: Judges.** It is the duty of the parties and their counsel to produce evidence on the issues before the court, and to place this duty on the trial judge would overstep the bounds of judicial propriety.
9. **Summary Judgment.** As a procedural equivalent to a trial, summary judgment is an extreme remedy which should be used sparingly because it may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion is directed.

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

Lee R. Terry, of Terry & Kratville, for appellant.

Steven H. Howard for appellee Law Offices of Ronald J. Palagi, P.C.

Dean F. Suing and David A. Castello, of Katskee, Henatsch & Suing, for appellee Scot Bonnesen.

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

GERRARD, J.

Thomas J. Bruning commenced this legal malpractice action, asserting that the defendants-appellees, Ronald J. Palagi, individually; Scot Bonnesen, individually; and the Law Offices of Ronald J. Palagi, P.C., were negligent in recommending a workers' compensation settlement without conducting an adequate investigation to properly evaluate the claim and, in fact, recommending that Bruning accept an inadequate settlement. The district court granted summary judgment in

favor of the defendants on grounds that Bruning's acceptance of a workers' compensation settlement and the execution of a release in connection therewith barred a subsequent professional negligence action against his attorneys. This appeal followed. We conclude that the professional negligence action is not barred by the settlement or release, and because there exist genuine issues of material fact as to whether the defendants acted in a negligent manner, we reverse, and remand for further proceedings.

FACTUAL BACKGROUND

At all pertinent times, Bruning was employed as a sod laborer for O'Dell Turf & Ties and had been in this position since graduation from high school in 1977. On June 11, 1990, Bruning was involved in a motor vehicle accident while riding as a passenger in his employer's sodding truck. Bruning received injuries to his head, neck, shoulder, and back, which injuries required hospitalization and treatments from a neurologist, an orthopedic surgeon, a plastic surgeon, and a chiropractor.

Workers' Compensation Claim and Settlement.

Sometime in the early part of July 1990, Bruning contacted the Law Offices of Ronald J. Palagi for representation on a workers' compensation claim against O'Dell Turf & Ties and its insurance carrier. Bruning testified by deposition that his initial meeting was with attorney Palagi. Bruning claims that he was not provided with a description of his rights under the Nebraska Workers' Compensation Act at the initial meeting. Later in July, attorney Bonnesen, an associate of Palagi, began meeting with Bruning and thereafter handled his claim through settlement.

In November 1990, Bruning was contacted by and visited with a nurse from Rehabilitation Professionals, Inc., who, along with Dr. Michael Morrison, an orthopedic surgeon who treated Bruning, recommended a functional capacity evaluation and a "work hardening" program. Bruning attempted unsuccessfully to complete the functional capacity evaluation and attended the work hardening program for 2 weeks before he quit the program. Bruning was again contacted by a nurse

from Rehabilitation Professionals in March 1991 about the possibility of further rehabilitation services. The nurse claimed that Bruning was not interested in rehabilitation services at that time and, in fact, told her that he "could find [his] own job." Bruning denies making such a statement.

As part of the preparation of this case, Bonnesen received a March 19, 1991, opinion letter from Dr. Edward Schima, a neurologist who treated Bruning, which (1) stated that Bruning suffered a 5-percent permanent physical impairment and (2) restricted Bruning from lifting more than 20 pounds or standing for more than 15 minutes without altering his position. Dr. Schima's letter further noted that Bruning could not flex his body more than 20 degrees and that he was not capable of stooping or bending.

The evidence is in conflict regarding the timing and nature of settlement negotiations. Bonnesen authored a letter to Bruning on April 10, 1991, which stated, in pertinent part, the following:

> This letter is to confirm that you have instructed me to settle your workers' compensation claim for . . . your injury for the total lump sum amount of $5,000. . . .
>
> You have been advised that this is a full, final, and complete settlement and you can make no further claims against the workers' compensation insurance carrier.
>
> This letter confirms that we have advised and you understand that pursuant to the Nebraska Workers' Compensation Laws you may be entitled to vocational rehabilitation. You do not desire vocational rehabilitation and are waiving any rights thereto by accepting this lump sum settlement.
>
> . . . .
>
> If this is not your understanding, please contact me immediately.

(Emphasis in original.) Bruning testified that he did not specifically recall receiving the April 10 letter, but that he did eventually authorize settlement based on counsel's advice and the understanding that this was "all he could get."

Bruning testified that he went to Bonnesen's office on May 10, 1991, to review and sign the lump-sum settlement docu-

ments. Bruning was advised that the 5-percent whole body impairment rating was multiplied by his weekly disability payment and the number of weeks left for payment on the workers' compensation schedule as a basis for the lump-sum settlement amount. Bruning also stated that Bonnesen mentioned a right to vocational rehabilitation, but there was no explanation of what those vocational rehabilitation rights might entail. In the settlement documents, in addition to the $5,000 lump-sum payment, Bruning acknowledged payment of $11,887.14 in medical expenses and $8,200.41 in temporary total disability payments. As part of completing the application for approval of the lump-sum settlement, Bruning filled out and signed a deposition by interrogatories. The interrogatories contained the following questions and responses that were originally answered "NO" in Bruning's handwriting:

> 22. Do you understand that if this settlement is approved by the above-mentioned court and the payment of $5,000.00 is made as ordered by the court, that it will be a full and final settlement of any and all claims which you now or may in the future have against the defendants by reason of said accident and injuries of 6/11/90?
>
> ANSWER: ~~NO~~ YES[.]
>
> 23. Do you understand that after this settlement is approved you will not be able to receive any further payments for compensation benefits, temporary or permanent disability, medical or hospital expense, damages or claims of any kind which you have by reason of the accident and injuries sustained by you on 6/11/90?
>
> ANSWER: ~~NO~~ YES[.]
>
> 24. Do you understand that this is true even though your condition may become worse in the future?
>
> ANSWER: ~~NO~~ YES[.]
>
> 25. Do you understand that if you should need further medical treatment in the future as a result of the injuries sustained on 6/11/90, you will have to pay for such medical treatment yourself?
>
> ANSWER: ~~NO~~ YES[.]

Bruning testified that he discussed the above interrogatories and his responses with Bonnesen. Bruning claimed that

Bonnesen told him that in order to have the settlement approved, he had to change the responses from "NO" to "YES." Without further explanation or inquiry, Bruning crossed out the "NO" responses and entered handwritten "YES" responses to the interrogatories.

Bonnesen also received a May 17, 1991, opinion letter from Dr. Morrison. Dr. Morrison opined that Bruning suffered a herniated lumbar disk as well as cervical and lumbar strain injuries which were all permanent in nature, resulting in a permanent impairment rating of 5 percent to the whole body. Additionally, Dr. Morrison restricted Bruning from lifting more than 30 pounds, walking more than 2 to 4 hours at a time, sitting for more than 2 hours at a time, squatting for more than 1 to 2 hours at a time, and crawling for more than 1 to 2 hours at a time. Based on these restrictions, Dr. Morrison stated that Bruning should not return to his former job as a sod laborer.

The application for approval of the final lump-sum settlement was submitted to the Workers' Compensation Court in May 1991, along with an accompanying release of claims and the deposition by interrogatories. The release purported to release "O'Dell Turf & Ties . . . and [its] officers, agents . . . and all persons, firms and other corporations of and from any and all actions . . . which . . . may arise in [Bruning's] favor on account of an alleged accident . . . ." Both the release and the application for the lump-sum settlement signed by Bruning expressly provided that Bruning knowingly waived his right to vocational rehabilitation and understood that, as a result of the settlement, he had no further remedy in regard to his injuries. The settlement was approved by the Workers' Compensation Court on June 6 and by the district court on June 28.

Professional Negligence Action and Summary Judgment.

Subsequently, Bruning incurred further medical expenses related to his injuries. On June 7, 1993, Bruning commenced this professional negligence action, asserting that the defendants were negligent in (1) obtaining a settlement that was inadequate, (2) settling without information necessary to prop-

erly evaluate the claim, (3) failing to secure the opinion of a vocational rehabilitation expert concerning earning capacity, and (4) failing to secure vocational rehabilitation for Bruning. In separate answers, Palagi and his law offices, as well as Bonnesen, defended on the basis of the release signed by Bruning, the statute of limitations for professional negligence actions, and that the damages, if any, were caused by third parties over whom the defendants had no control.

The parties obtained deposition testimony of Bruning's expert witness, Ronald Brown. At the time of his deposition, Brown was an attorney in private practice in Omaha, Nebraska, who had extensive experience in workers' compensation litigation. An affidavit received in evidence reveals that Brown has since been appointed to a judgeship on the Workers' Compensation Court.

Brown testified that prior to the date of the deposition, he interviewed Bruning, reviewed Bruning's entire file from the Workers' Compensation Court, and reviewed copies of documents from Palagi's office file. Brown testified in detail regarding the applicable standard of care in this workers' compensation case and the particulars, in his opinion, of the breach of the standard of care. Brown testified that the medical evidence revealed Bruning had a whole body injury as a result of the motor vehicle accident. Given the fact that both Drs. Schima and Morrison had assessed a 5-percent impairment of the whole body; placed several restrictions regarding lifting, bending, sitting, and stooping; and advised Bruning against returning to work as a sod laborer, it was Brown's opinion that the underlying case should not have been settled strictly on the basis of the whole body impairment rating.

Further, Brown noted that the medical records indicate that Bruning had a head injury of some degree as a result of the collision. There were indications in the medical records that Bruning experienced a loss of consciousness, that he had some memory difficulties, and that there was some "functional overlay" involved with his complaints. It was Brown's opinion that the indication of head injury or functional overlay should have been further evaluated and that after those inquiries were made, a vocational evaluation was in order to determine the

loss of earning capacity in this case. Brown's testimony will be discussed more extensively in the analysis portion of this opinion.

The defendants filed motions for summary judgment, asserting that there existed no genuine issue of material fact and that they were entitled to judgment as a matter of law. At the hearing on the motions for summary judgment, the defendants offered the deposition of Bruning; the deposition of Brown, Bruning's expert witness; the application for approval of the final lump-sum settlement; and the deposition by interrogatories.

In opposition, Bruning offered the medical report of Dr. Morrison, which opined that Bruning could not return to work as a sod laborer, and joined in offering the Brown and Bruning depositions. The motions for summary judgment were taken under advisement, and on April 12, 1994, the district court entered judgment in favor of the defendants and dismissed Bruning's petition.

ASSIGNMENT OF ERROR

Bruning asserts that the district court erred in finding that no genuine issue of material fact exists and that the defendants are entitled to judgment as a matter of law.

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. *Hand v. Starr, ante* p. 377, 550 N.W.2d 646 (1996). 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. *Boyd v. Chakraborty, ante* p. 575, 550 N.W.2d 44 (1996); *Kocsis v. Harrison*, 249 Neb. 274, 543 N.W.2d 164 (1996).

ANALYSIS

An attorney " ' " 'impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake. . . .' " [Citations omitted.]' " *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 460-61, 466 N.W.2d 499, 507 (1991) (quoting *Stansbery v. Schroeder*, 226 Neb. 492, 412 N.W.2d 447 (1987)).

The defendants contend that they were entitled to judgment as a matter of law because the execution of the release and settlement by Bruning in the underlying workers' compensation action bars the present professional negligence action for inadequate settlement. However, in the recent case of *McWhirt v. Heavey, ante* p. 536, 550 N.W.2d 327 (1996), we held that a client who has agreed to the settlement of an action is not barred from recovering against his or her attorney for malpractice if the client can establish that the settlement agreement was the product of the attorney's negligence. Thus, the issue in this case is not whether the release and settlement in the underlying workers' compensation case bars the present action. We must decide if genuine issues of material fact exist in determining whether the settlement agreement was the product of attorney negligence. With that in mind, we analyze the evidence in a light most favorable to Bruning, as the law requires.

The defendants first assert that by virtue of the settlement, Bruning was aware that he waived all rights to vocational rehabilitation and additional compensation and that Bruning should be bound by these terms. While Bruning may have signed settlement documents that purport to waive vocational rehabilitation rights and additional compensation, the question that begs to be answered is whether Bruning was ever adequately advised of the nature of those rights and the potential compensation that he was waiving.

The defendants claim the written documents reveal that Bruning was advised of his rights to vocational rehabilitation and that Bruning was offered the services of a rehabilitation nurse. In his deposition, Brown testified that Bruning had been offered, and accepted, a functional capacity evaluation.

However, Brown testified that he told Bruning " 'a functional capacity evaluation and evaluation by a vocational counselor or evaluator are two different things.' " Bruning told Brown that no one had talked to him about the concept of loss of earning capacity prior to entering into the settlement. Brown also testified that he did not see in the correspondence file that there were letters or proposals to the insurance carrier indicating that the claim should be settled on the basis of permanent total disability or loss of earning capacity.

The defendants next assert that Bruning insisted upon a lump-sum settlement after being advised of his rights under the Nebraska Workers' Compensation Act. In this context, Brown was asked about the standard of care for settlement of workers' compensation cases, and the following colloquy occurred:

> Q. What is the standard of care for a plaintiff's attorney in a workers' compensation claim where the claimant insists upon accepting the settlement proposal from the defendants?
>
> A. If the claimant insists that he wants the money, then I think you have to sit down with your client and explain the alternatives to him.
>
> [If] Bruning told me . . . at the time he settled the claim, he was not working, and he could not work . . . or . . . perform any type of employment in which he had prior training or experience, and in that case I think that you have to tell him that he may have a claim for permanent total disability.
>
> He may be entitled to receive some kind of job training that would enable him to return to sedentary to light duty employment, and it may only pay $5 an hour, but all the same, he may be entitled to that additional training that is going to permit him to return to work within the physical restrictions that the doctor has recommended.
>
> And if he still insists, knowing those things, the other factor you have to talk to him about is future medical and advise him that if the doctors are discussing with him that there is a good chance that future medical treatment

may be necessary, that it may be to his advantage to take the money on a weekly basis in order to leave the med pay open.

. . . .

Q. What if he swears under oath that he understands all those things?

A. If he swears under oath that he understood all those things and that . . . he was counseled in that manner, then I think that you're obligated to settle his claim.

Q. Isn't that what he did when he signed the lump sum settlement application?

A. He . . . told me that he didn't understand it, okay, and I would agree with you. If he said that he went through that lump sum settlement agreement and he fully understood what it meant and he signed it, it's a verified application, then he has entered into a full and final settlement of all claims regarding his job-related injury.

And believe me, if Tom Bruning had told me that he fully understood that application *and that he had been counseled in the manner we just discussed*, I wouldn't be sitting here.

(Emphasis supplied.)

Brown also testified that he could not think of one instance in which he counseled a client to accept a lump-sum settlement when the client was neither employed nor involved in a vocational rehabilitation program at the time of the settlement. Both Bonnesen and Bruning signed and submitted for court approval an application for a lump-sum settlement which stated, "[P]laintiff feels capable of returning to work for which he has previous experience or training . . . ." Bonnesen knew that Bruning was not involved in a vocational rehabilitation program. Bonnesen also knew that Bruning's physician advised him not to return to the only job for which he has previous experience or training, i.e., sod laborer. Bruning testified that he was not able to return to work at the time of the settlement, but he signed the application in order to receive the settlement money.

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. *Boyd v. Chakraborty, ante* p. 575, 550 N.W.2d 44 (1996). After the moving party has shown facts entitling it to a 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. *Id.*; *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996).

We conclude that Bruning presented expert testimony that at least establishes an issue of material fact regarding the standard of care that lawyers of ordinary skill and capacity exercise in like circumstances and whether there has been a breach of the standard of care in this case. Brown testified that, in his opinion, the standard of care had been breached in that (1) the functional overlay problem should have been investigated, and a vocational evaluation should have been performed to determine loss of earning capacity; (2) the case should have been evaluated and presented as a permanent total disability claim; (3) prior to considering settlement, Bruning should have been fully advised of his right to receive the type of vocational training that might permit him to return to employment within the doctors' physical restrictions; and (4) prior to considering settlement, Bruning should have been advised of his right to payment for future medical treatments and the advantage of leaving the medical pay provision open if future medical treatment was likely. 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. *Boyd v. Chakraborty, supra*; *Kocsis v. Harrison*, 249 Neb. 274, 543 N.W.2d 164 (1996).

While this court continues to support the implementation of policies and procedures that encourage fair and amicable pretrial settlements, we declined in *McWhirt v. Heavey, ante* p. 536, 550 N.W.2d 327 (1996), to adopt a rule that insulates an attorney from exposure to malpractice claims arising from his or her negligence in settled cases if the attorney's conduct has damaged the client. In coming to that conclusion, we recognized that litigants rely heavily on the professional advice of

counsel when they decide whether to accept or reject offers of settlement, and we insist that lawyers of our state advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks. *Id.* (citing *Grayson v. Wofsey, Rosen, Kweskin*, 231 Conn. 168, 646 A.2d 195 (1994)).

Finally, the defendants assert that a court-approved settlement agreement cannot form the basis for a legal malpractice claim. However, we conclude that no different result is required, because the lump-sum settlement agreement was approved by the Workers' Compensation Court and, subsequently, a district court. At the time that this action arose, Neb. Rev. Stat. § 48-139 (Reissue 1988) provided that a workers' compensation lump-sum settlement was to be approved by both the compensation court and a district court judge. If both the compensation court and the district court judge found that such settlement was made in conformity with the compensation schedule and for the best interests of the employee or his or her dependents under all the circumstances, the district court was to enter an order approving same. However, in determining whether the proposed settlement meets the statutory requirement of being "for the best interests of the employee," the district court judge had discretion to request the production of evidence on such issue, but had no affirmative duty to make such a request.

In *McWhirt v. Heavey, ante* at 547, 550 N.W.2d at 335, this court stated: " 'It is the duty of the parties and their counsel to produce evidence on the issues before the court, and to place this duty on the trial judge would overstep the bounds of judicial propriety.' " (Quoting *Buker v. Buker*, 205 Neb. 571, 288 N.W.2d 732 (1980).) This is particularly true when the parties misrepresent a factor that is crucial to both the compensation court's and the district court's approval of a lump-sum settlement agreement, i.e., Bruning is capable of returning to work for which he has previous experience or training. Neither the district court's nor the compensation court's general inquiry pursuant to § 48-139 shall serve as a substitute for the diligent investigation and preparation for which counsel is responsible. See *McWhirt v. Heavey, supra.*

As a procedural equivalent to a trial, summary judgment is an extreme remedy which should be used sparingly because it may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion is directed. *Oliver v. Clark*, 248 Neb. 631, 537 N.W.2d 635 (1995). Having determined that there are genuine issues of material fact regarding the standard of care and whether there has been a breach in the standard of care in this case, we conclude that the district court erred in granting the defendants' motions for summary judgment.

CONCLUSION

The judgment of the district court is thus reversed, and the cause remanded to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ANN GERMAN, TEMPORARY GUARDIAN FOR ELIZABETH D. PITTMAN, APPELLANT AND CROSS-APPELLEE, V. KEITH SWANSON, APPELLEE AND CROSS-APPELLANT.

553 N.W.2d 724

Filed July 26, 1996. No. S-94-521.

1. **Directed Verdict: Evidence: Appeal and Error.** When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.
2. **Verdicts: Appeal and Error.** Where a party has sustained the burden and expense of trial and has succeeded in securing a verdict on the facts in issue, that party has the right to keep the benefit of the verdict unless there is prejudicial error in the proceedings by which it was secured.
3. **Motor Vehicles: Negligence.** Under the range of vision rule, a motorist is deemed negligent as a matter of law if he or she operates a motor vehicle in such a manner as to be unable to stop or turn aside without colliding with an object in the motorist's path within his or her range of vision.

4. **Pedestrians: Highways: Negligence.** When a pedestrian crosses a street between intersections without looking at all, or looks straight ahead without glancing to either side, or is in a position where he or she cannot see and proceeds regardless of that fact, the situation ordinarily presents a question of fact for the fact finder.
5. **Pedestrians: Motor Vehicles: Negligence: Juries.** Where a pedestrian looks but does not see an approaching automobile, or sees it and misjudges its speed or distance from him, or for some other reason concludes that he could avoid injury to himself, a jury question is usually presented.
6. **Verdicts: Juries: Appeal and Error.** A jury verdict will not be set aside unless clearly wrong; it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.

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

John F. Thomas and Aaron A. Clark, of McGrath, North, Mullin & Kratz, P.C., for appellant.

Terry K. Gutierrez, of Schmid, Mooney & Frederick, P.C., for appellee.

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

PER CURIAM.

This is an appeal from a jury verdict in a personal injury action. Ann German, temporary guardian for Elizabeth D. Pittman, alleged at trial that Keith Swanson was negligent in striking Pittman, a pedestrian, with his automobile. The jury returned a verdict for Swanson. German appeals and Swanson cross-appeals, each claiming that the trial court should have directed a verdict in his or her favor. We affirm.

Pittman was struck by Swanson's vehicle on the afternoon of January 24, 1991, as she crossed Farnam Street in the middle of the block between Turner Boulevard and 30th Street in Omaha. At that location, Farnam Street is a westbound one-way street with four lanes of traffic and one parking lane. The sky was clear and the streets were dry on that afternoon. Pittman was wearing a white coat and rust-colored shoes. She was walking to a convenience store located across the street from the Twin Towers apartment building where she resided. She was not in a crosswalk.

In her deposition, which was read at trial in lieu of her live testimony, Pittman testified that she looked for traffic to a distance of two blocks away before she began crossing. Specifically, Pittman stated, "I looked down there and saw no cars, but I wanted to get out of the way before some did come." From that point, she looked straight ahead as she crossed and did not look again in the direction of traffic until the moment she was struck by Swanson's car.

Swanson stated at trial that he did not see Pittman until she was in the lane immediately to the right of Swanson's vehicle. He testified that he did not recall why he failed to see Pittman step from the curb and walk across three lanes of traffic before she stepped in front of his vehicle. Swanson further testified that he did not brake when a car beside him braked, because he had not seen Pittman at that time. Swanson stated that he could not recall whether there was a car to his right blocking his vision in such a way as to keep him from seeing Pittman in time to stop. In a portion of his deposition, which was read at trial, Swanson stated that he had a clear field of vision ahead of him as he traveled down Farnam Street; he did not see Pittman step from the curb and begin crossing because he "wasn't really concerned looking at the very far right lane."

The car beside Swanson was an unmarked police cruiser driven by Sgt. Glenn Steimer of the Omaha Police Division. Steimer watched Pittman step from the curb and walk across Farnam Street. He applied his brakes to slow down when he reached a point about 30 yards from Pittman's path. While he was braking, Steimer saw Swanson's vehicle, which was traveling in the lane to the left of Steimer, continue forward and pass Steimer's vehicle. Steimer saw Pittman look up when Swanson's vehicle was about 5 feet from her, then watched as Swanson hit his brakes and struck Pittman. Steimer did not see Pittman look for westbound traffic before that moment. Steimer stated that Pittman did not suddenly jump out into his lane of traffic and that she had been in plain view on Farnam Street for "however long it takes for her to step from the curb and walk across three lanes of traffic."

After the close of all evidence, each party moved for a directed verdict; the trial court overruled both motions and

submitted to the jury the issues of Swanson's negligence and Pittman's contributory negligence. The jury returned a verdict in favor of Swanson.

German assigns as error the failure of the trial court to direct a verdict on liability against Swanson. On cross-appeal, Swanson assigns error to the failure of the trial court to direct a verdict against German by finding Pittman contributorily negligent as a matter of law.

When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *Hoeft v. Five Points Bank*, 248 Neb. 772, 539 N.W.2d 637 (1995). Where a party has sustained the burden and expense of trial and has succeeded in securing a verdict on the facts in issue, that party has the right to keep the benefit of the verdict unless there is prejudicial error in the proceedings by which it was secured. *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993).

Under the "range of vision" rule, a motorist is deemed negligent as a matter of law if he or she operates a motor vehicle in such a manner as to be unable to stop or turn aside without colliding with an object in the motorist's path within his or her range of vision. *Nickell v. Russell*, 247 Neb. 112, 525 N.W.2d 203 (1995). Therefore, German argues that she was entitled to a directed verdict because Pittman was walking within Swanson's range of vision at the moment that Swanson struck Pittman. However, German misconstrues the range of vision rule. As its name suggests, the range of vision rule applies when the motorist either should have seen or saw the person or object and failed to stop in time to avoid collision. See *id.* We have recognized an exception to the range of vision rule when the person or object is not discernible, precluding the motorist from seeing the person or object in time to stop. See, *id.*; *Edgerton v. Lawry*, 235 Neb. 100, 453 N.W.2d 743 (1990). Reasonable minds could have properly concluded from the evidence that Steimer's vehicle obstructed Swanson's view, resulting in Swanson's not having sufficient time to avoid

striking Pittman. Thus, the range of vision rule would not apply to the facts of this case.

When a pedestrian crosses a street between intersections without looking at all, or looks straight ahead without glancing to either side, or is in a position where he or she cannot see and proceeds regardless of that fact, the situation ordinarily presents a question of fact for the court. See *Gerhardt v. McChesney*, 210 Neb. 351, 314 N.W.2d 258 (1982). Where a pedestrian looks but does not see an approaching automobile, or sees it and misjudges its speed or distance from him, or for some other reason concludes that he could avoid injury to himself, a jury question is usually presented. *Id.* The jury was instructed on contributory negligence and was given the opportunity to render its verdict in light of that instruction and in light of the evidence presented. The jury returned a verdict in favor of Swanson.

A jury verdict will not be set aside unless clearly wrong; it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996). The jury's verdict in this case is supported by the evidence, which indicated that Pittman failed to look for traffic again after she stepped from the curb and proceeded across Farnam Street and that Swanson's view of her may have been blocked by Steimer's vehicle. Accordingly, we affirm the decision of the lower court.

AFFIRMED.

WHITE, C.J., dissenting.

In finding that a pedestrian bears alone the burden for her safety while crossing the street, even if she is clearly visible to motorists, the majority transforms the "range of vision" rule into a "fair game" rule. While Pittman undoubtedly was contributorily negligent, she is entitled to a fair consideration of the degree of her negligence without the presence of nonissues clouding the jury's judgment.

Under the range of vision rule, a motorist is deemed negligent as a matter of law if he or she operates a motor vehicle in such a manner as to be unable to stop or turn aside without colliding with an object in the motorist's path within his

or her range of vision. *Nickell v. Russell*, 247 Neb. 112, 525 N.W.2d 203 (1995). We have found exceptions to the range of vision rule where the motorist could not have seen the struck object or person. An exception to the range of vision rule exists when a motorist, otherwise exercising reasonable care, does not see an object sufficiently in advance to avoid a collision because the object is relatively indiscernible because its color is similar to the surface of the street or highway, and it is thereby indistinguishable from the surface. See *id.* The applicability of this exception turns on the objective visibility of the object, rather than on the reasonableness (or unreasonableness) of the motorist's conduct. See *Bartosh v. Schlautman*, 181 Neb. 130, 147 N.W.2d 492 (1966).

We have often found this exception applicable or declined to apply the range of vision rule at all for collisions occurring at night, because the motorist's range of vision is necessarily truncated. Where the object struck in such collisions is human, the greater onus is on the pedestrian to look out for his or her own safety at night. In *Hrabik v. Gottsch*, 198 Neb. 86, 251 N.W.2d 672 (1977), we affirmed an order sustaining a motion to dismiss in favor of a motorist in a nighttime collision that occurred when a pedestrian was crossing an unlit roadway, where the evidence was uncontroverted that the pedestrian had not looked for vehicles before stepping into the path of the motorist. Similarly, in *Hennings v. Schufeldt*, 222 Neb. 416, 384 N.W.2d 274 (1986), we affirmed an order directing a verdict for a motorcyclist who had struck an elderly pedestrian on a dark and rainy night, where it was clear that the pedestrian had failed to keep any sort of a lookout for his safety. See, also, *Heeney v. Churchill*, 154 Neb. 848, 50 N.W.2d 72 (1951) (rejecting range of vision rule on grounds that motorist could not have seen pedestrian, where pedestrian wore dark clothing and collision occurred at night).

This exception does not apply in this case. Swanson was driving in daylight and clear weather, and Pittman was not wearing clothing that would camouflage her against the road surface. Pittman did not suddenly dart out from between parked cars, but, rather, walked across several lanes of traffic before Swanson struck her in the lane farthest from her depar-

ture point. Swanson did not indicate that his range of vision was truncated or blocked by any obstruction. Although Swanson's trial counsel argues that Steimer's vehicle must have blocked Swanson's view of the street, Swanson himself remembers no obstructions to his vision at all. Although Swanson stated that his normal practice when driving is to scan the road in front of him, he also stated that he does not know why he failed to see Pittman before he struck her.

Whether Pittman should not have been in Swanson's lane of traffic at that time simply is not germane to the range of vision rule. The range of vision rule does not ask whether the driver actually saw an object before colliding with it; such an interpretation negates the rule altogether, allowing any motorist to escape liability as a matter of law merely by stating that he or she did not see the unfortunate object. Rather, the range of vision rule asks only whether the driver *could* have seen an object in time to avoid colliding with it. See *Prime Inc. v. Younglove Constr. Co.*, 227 Neb. 423, 418 N.W.2d 539 (1988). As the record contains no evidence at all that Swanson could not have seen Pittman in time to stop or swerve away, the only reasonable conclusion is that Swanson was negligent as a matter of law. The majority should have found that German deserved a directed verdict on the issue of Swanson's negligence.

The majority states that no error resulted from the failure of the trial court to direct a verdict on liability, because Pittman was contributorily negligent. This assertion overlooks the fact that the jury was instructed to consider not only whether Pittman was so negligent as to preclude recovery, but also whether the questions of duty, breach, causation, and harm were proved as to Swanson's negligence in the first place. The jury returned a general verdict and did not answer any special interrogatories as to whether its verdict turned on a failure to find negligence or on a finding of gross contributory negligence. Nor did the verdict form ask whether, if the jury found Pittman contributorily negligent, such contributory negligence was slight or gross. If the jury's verdict turned on a finding that Swanson was not negligent—that is, a finding

contrary to the range of vision rule of law—then prejudice did indeed result from the failure to direct a verdict.

A party's right to a fair trial may be substantially impaired by jury instructions that contain inconsistencies or confuse or mislead the jury. *Hamernick v. Essex Dodge Ltd.*, 247 Neb. 392, 527 N.W.2d 196 (1995). Thus, a trial court must eliminate all matters not in dispute and submit to the jury only the controverted questions of fact upon which the verdict must depend. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994). It is more than mere probability that an instruction on a matter not an issue in the litigation distracts a jury in its effort to answer legitimate, factual questions raised during trial. *Id.* Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is generally prejudicial and results in a new trial. *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994); *Vredeveld v. Clark*, 244 Neb. 46, 504 N.W.2d 292 (1993).

Under a proper reading of the range of vision rule, Swanson's negligence was not a jury issue. The trial court should not have allowed it to interfere with the jury's consideration of the real issues in this case. I cannot assent to the majority's acceptance of this error.

LANPHIER, J., joins in this dissent.

IN RE INTEREST OF REX JAYCOX, A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, DEPARTMENT OF SOCIAL SERVICES, APPELLANT, V. REX JAYCOX, APPELLEE.

551 N.W.2d 9

Filed July 26, 1996. No. S-94-531.

1. **Statutes: Judgments: Appeal and Error.** A matter controlled by statute presents a question of law. With respect to a question of law, an appellate court is

obligated to reach an independent conclusion irrespective of the determination made by the court below.

2. **Statutes.** In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
3. **Statutes: Legislature: Intent: Appeal and Error.** In discerning the meaning of a statute, an appellate court determines and gives 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: Presumptions: Legislature: Intent.** In construing a statute, it is presumed that the Legislature intended a sensible, rather than an absurd, result.

Appeal from the District Court for Thayer County, ORVILLE L. COADY, Judge, on appeal thereto from the County Court for Thayer County, J. PATRICK MCARDLE, Judge. Judgment of District Court affirmed.

Don Stenberg, Attorney General; Royce N. Harper; Lisa Swinton, Special Assistant Attorney General; and Beth Tallon, Special Assistant Attorney General, for appellant.

Joseph H. Murray, of Germer, Murray & Johnson, for appellee.

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

FAHRNBRUCH, J.

The State of Nebraska, Department of Social Services (DSS), appeals a court order directing it to account to a minor child in its custody for $1,000 of the Social Security benefits he received as a result of the death of one of his parents.

We affirm the determinations by the Thayer County Court and the district court for Thayer County, which both held that under Neb. Rev. Stat. § 43-907 (Reissue 1993) the minor, Rex Jaycox, is entitled to $1,000 of the Social Security benefits DSS received on the minor's behalf. Except for the $1,000, DSS is entitled to retain the balance of Social Security funds it received on Jaycox's behalf as partial reimbursement for the cost to the State of Jaycox's care.

DSS originally filed this appeal in the Nebraska Court of Appeals. We removed the case from that court's docket to our

docket pursuant to our power to regulate the caseloads of the lower courts.

ASSIGNMENT OF ERROR

Restated and summarized, DSS claims the district court erred in affirming the county court's determination that Jaycox is entitled to $1,000 of the Social Security benefits received on his behalf and that only the sum of the benefits exceeding $1,000 may be used by DSS as partial reimbursement for Jaycox's care.

STANDARD OF REVIEW

As a matter controlled by statute, this case presents a question of law. With respect to a question of law, an appellate court is obligated to reach an independent conclusion irrespective of the determination made by the court below. *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996).

FACTS

In January 1992, Jaycox, at age 15, was placed in the custody of DSS after an accident in which one of his parents was killed and the other parent received injuries which left that parent a quadriplegic. On May 25, 1993, Jaycox's guardian ad litem filed a motion in the Thayer County Court for an order requiring DSS to comply with § 43-907. Section 43-907 provides that assets over and above a maximum of $1,000 and current income shall be available for reimbursement to the State for the cost of the care of a child who is in the custody of the State. Section 43-907 further requires DSS to maintain detailed records showing all receipts, investments, and expenditures of assets owned by children under its charge. Jaycox's guardian ad litem alleged that Jaycox is entitled to and receives a monthly check from the Social Security Administration which is paid directly to DSS. DSS retains in its entirety each monthly Social Security check and has allowed Jaycox to have none of his Social Security benefits.

It is undisputed that DSS receives $503 in monthly Social Security benefits on Jaycox's behalf. DSS uses Jaycox's Social Security benefits, in their entirety, as partial reimbursement for the cost of Jaycox's care.

The record reflects that on March 26, 1992, DSS placed Jaycox with the Christian Heritage Children's Home (Home) in Hickman, Nebraska. At the time of trial, DSS was paying the Home $2,200 per month to care for Jaycox. Offered and received in evidence is the Home's clothing record for Jaycox from his placement on March 26, 1992, up to August 16, 1993. The record reflects that the Home spends an average of $15.15 per month on clothes for Jaycox. The clothing inventory for Jaycox on the date of his placement at the Home reflects that Jaycox had one pair of cowboy boots and one pair of tennis shoes. The record reflects that as of August 16, the Home had not purchased a pair of shoes for Jaycox. The clothing inventory also reflects that Jaycox entered the Home with one T-shirt. As of August 16, the Home had purchased for Jaycox only one additional T-shirt.

The Thayer County Court found that pursuant to § 43-907, Jaycox was entitled to have assets in the maximum amount of $1,000 and that assets and current income over $1,000 are available for reimbursement to the State for the cost of Jaycox's care. The court further found that the Social Security payments received by the State on behalf of Jaycox are assets of Jaycox up to a total of $1,000 and any amount over that sum can be utilized by the State as reimbursement for his care. The county court ordered DSS to retain Jaycox's Social Security benefits up to a total of $1,000 and deposit that sum for Jaycox pursuant to § 43-907. On appeal, the district court affirmed the county court's judgment.

ANALYSIS

DSS contends that it is entitled to use the entire amount of Jaycox's Social Security benefits because § 43-907 does not require that a ward of the State retain current income up to $1,000. DSS further contends that Jaycox's Social Security benefits constitute current income and that no part thereof is available to Jaycox.

In its entirety, § 43-907 provides as follows:

> Unless a guardian shall have been appointed by a court of competent jurisdiction, the Director of Social Services shall take custody of and exercise general control over

> assets owned by children under his or her charge. Children owning assets shall at all times pay for personal items. *Assets over and above a maximum of one thousand dollars and current income shall be available for reimbursement to the state for the cost of care. Assets may be deposited in a checking account, invested in United States bonds, or deposited in a savings account insured by the United States Government. All income received from the investment or deposit of assets shall be credited to the individual child whose assets were invested or deposited. The Director of Social Services shall make and maintain detailed records showing all receipts, investments, and expenditures of assets owned by children under his or her charge.*

(Emphasis supplied.)

In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996). In discerning the meaning of a statute, an appellate court determines and gives 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 Interest of Todd T.*, 249 Neb. 738, 545 N.W.2d 711 (1996). In construing a statute, it is presumed that the Legislature intended a sensible, rather than an absurd, result. *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990).

The plain meaning of § 43-907 is that children in DSS' custody have the right to their personal assets and income up to $1,000 in value. The State, according to the plain meaning of § 43-907, may apply the child's assets and income in excess of $1,000 to the cost of that child's care. It is clear that § 43-907 serves to allow a child in DSS' custody to have claim to $1,000 of his or her money so that the child can use it as he or she desires and also to allow a child an opportunity to leave DSS' custody without being impoverished. The $1,000 ceiling appears to be necessary. Without such a ceiling, the

State would not receive federal funding for the child's care. See 45 C.F.R. § 233.20 (1995).

In this litigation, DSS seeks an interpretation of § 43-907 that distinguishes assets from income so that only assets up to $1,000 can be retained for the child. As stated earlier, we will not construe a statute to reach an absurd result. To suggest that the State can take the child's income away when the total of that income is less than $1,000 clearly and directly defeats the purpose of the statute, which is to allow a child in the custody of DSS to keep up to $1,000 of his or her own money. We hold that § 43-907 requires that assets and income over and above $1,000 shall be available for reimbursement to the State for cost of the care of a minor child in DSS' custody.

It is irrelevant whether Social Security benefits are assets or income. The monthly Social Security benefit of $503 is paid to DSS on Jaycox's behalf. While Jaycox is in the custody of DSS, the State shall handle Jaycox's monthly Social Security benefits pursuant to § 43-907, as interpreted in this opinion.

CONCLUSION

We affirm the order of the district court affirming the county court's finding that Jaycox is entitled to up to a total of $1,000 of his Social Security benefits. Jaycox's Social Security benefits above $1,000 shall remain available for reimbursement to the State for the cost of his care. Jaycox is entitled to an accounting of the $1,000 DSS failed to keep for him, together with interest thereon.

AFFIRMED.

IN RE ESTATE OF HELEN D. DISNEY, DECEASED. GRACE LUTHERAN CHURCH, APPELLANT, V. RUTHMARIE VAWTER AND NORWEST BANK, NEBRASKA, N.A., COPERSONAL REPRESENTATIVES OF THE ESTATE OF CARROLL T. DISNEY, DECEASED.

550 N.W.2d 919

Filed July 26, 1996. No. S-94-829.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Decedents' Estates: Undue Influence: Appeal and Error.** Proceedings to determine legal competency and alleged undue influence in a probate context sound in law, and the findings of the trier of fact will not be disturbed unless clearly wrong.
3. **Decedents' Estates: Waiver.** The right of election of a surviving spouse may be waived, wholly or partially, by a written contract, agreement, or waiver signed by the surviving spouse.
4. **Trial: Witnesses.** In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony.
5. **Appeal and Error.** It is not the province of an appellate court to weigh or resolve conflicts in the evidence, the credibility of witnesses, or the weight to be given to their testimony.
6. **Decedents' Estates: Wills: Mental Competency: Proof.** The burden of proof is on the party who alleges the mental incapacity of a surviving spouse who takes an elective share and renounces the will to prove by a preponderance of evidence that the surviving spouse was not mentally competent at the time the surviving spouse executed the instrument.
7. ____: ____: ____: ____. In order to invalidate the taking of an elective share, it is necessary to prove such a degree of mental weakness as renders the surviving spouse incapable of understanding and protecting his or her own interests at the time he or she executed the instrument.
8. **Decedents' Estates: Wills: Undue Influence: Proof.** Upon an allegation that a surviving spouse decided to take an elective share and renounce the will of the decedent as a result of undue influence, the proponent of the allegation has the burden to prove by a preponderance of evidence (1) that the surviving spouse, at the time of executing the instrument, was subject to such influence; (2) that the opportunity to exercise existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence.

Appeal from the District Court for Douglas County, JAMES A. BUCKLEY, Judge, on appeal thereto from the County Court for Douglas County, LYN V. FERER, Judge. Judgment of District Court affirmed.

Jeffrey D. Toberer, Karen M. Shuler, and Raymond E. Walden, of Kennedy, Holland, DeLacy & Svoboda, for appellant.

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

FAHRNBRUCH, J.

Carroll T. Disney, surviving spouse of Helen D. Disney (decedent), petitioned the Douglas County Court for his elective share of the decedent's augmented estate. Grace Lutheran Church (Grace Lutheran), a named beneficiary in the decedent's will, objected to Disney's election to receive 50 percent of the decedent's augmented estate. It claimed that (1) Disney was incompetent to make such election and (2) he was unduly influenced by his daughters.

The county court found that Disney's election was valid. The district court for Douglas County affirmed the county court's decision. Grace Lutheran appealed to the Nebraska Court of Appeals. We removed the appeal to this court's docket pursuant to our power to regulate the caseloads of the lower courts.

We affirm the judgment of the district court.

ASSIGNMENTS OF ERROR

Restated, Grace Lutheran claims that the district court erred in (1) reviewing for error appearing on the record rather than conducting a de novo review, (2) failing to accept Disney's sworn testimony as an effective waiver of his right to an elective share, (3) finding that Disney was legally competent to execute the petition for elective share, (4) finding that the petition for elective share was not a product of undue influence, and (5) failing to set aside the conditional petition for elective share as violative of Neb. Rev. Stat. § 30-2315 (Reissue 1995).

STANDARD OF REVIEW

An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of*

Soule, 248 Neb. 878, 540 N.W.2d 118 (1995); *In re Estate of Hannan*, 246 Neb. 828, 523 N.W.2d 672 (1994).

Grace Lutheran contends that the standard of review of an appeal of an equity action should be de novo on the record. Grace Lutheran is wrong in contending that this litigation involves an equity action. Proceedings to determine legal competency and alleged undue influence in a probate context sound in law, and the findings of the trier of fact will not be disturbed unless clearly wrong. See, *Peterson v. Peterson*, 230 Neb. 479, 432 N.W.2d 231 (1988) (undue influence in probate context is matter of law, not equity); *In re Guardianship and Conservatorship of Sim*, 225 Neb. 181, 403 N.W.2d 721 (1987) (findings of legal incapacity reviewed for error appearing on record). *In re Estate of Carman*, 213 Neb. 98, 327 N.W.2d 611 (1982), holds that a challenge to a spouse's statutory election to take against a will of a deceased spouse is to be reviewed by this court de novo on the record. However, *In re Estate of Carman* was decided under a statute that no longer exists. See 1981 Neb. Laws, L.B. 42 § 27.

FACTS

The record reflects that the decedent and Disney were married October 24, 1964. The decedent died March 24, 1993, leaving no children surviving her. Disney was the father of two daughters by a previous marriage.

Disney was 94 years old at the time of the decedent's death. The decedent's estate was valued at $2,571,997.86, not including property held in joint tenancy with Disney. According to the decedent's will, approximately $2,400,000 was to be distributed to a trust. The decedent's will provided that during the remainder of his life, Disney would receive an annual income from the trust of approximately $100,000 per year. Upon Disney's death, the trust was to provide for various beneficiaries, including Grace Lutheran. Upon the trustee's death, resignation, or incapacity, the residue of the trust would be distributed to Grace Lutheran.

On May 11, 1993, Disney, in writing, renounced his rights and interest in the decedent's will, and in the writing, he elected to take 50 percent of the decedent's augmented estate

pursuant to Neb. Rev. Stat. § 30-2317 (Reissue 1995). Grace Lutheran objected to Disney's election. It alleged that when he decided to take his elective share, Disney was incapacitated and/or incompetent and unable to elect against the decedent's will and that he was unduly influenced by his daughters, Lois Vawter and Carolee Roberts.

After exercising his statutory right to elect to receive 50 percent of the decedent's augmented estate, Disney later executed a durable power of attorney appointing Vawter, Roberts, and Norwest Bank, Nebraska, N.A. (Norwest) as his attorneys in fact. Vawter, Roberts, and Norwest, pursuant to the durable power of attorney, filed a conditional petition for elective share on behalf of Disney. The conditional petition alleged that in the event the county court should find that Disney lacked the capacity to make a valid and legal election of his share of the decedent's augmented estate, the attorneys in fact elected, on Disney's behalf, to take 50 percent of the decedent's augmented estate. Grace Lutheran objected to the conditional petition on the ground that only Disney could petition for his elective share.

The record reflects that approximately 1 month after the decedent's will was filed for probate, John Respeliers, the attorney representing the decedent's personal representative, met with Disney twice, in the presence of one of Disney's children, to inform Disney of his right to an elective share of the decedent's augmented estate and the need to contact an attorney of Disney's choice if he should make such an election.

At the hearing on Disney's petition for his elective share and the conditional petition, Disney's counsel informed the county court, prior to Disney's testimony, that Disney was getting very tired while waiting to be called to testify. Once called, Disney testified that he was at the hearing because he was trying to "get some money — a part of the share." During his testimony, Disney stated that he had not filed a petition for an elective share and did not ask an attorney to file papers to take any amount other than what the decedent's will provided. At one point, the court asked Disney if he asked for more money from the decedent's estate, to which Disney responded, "No."

Jay Vankat, the attorney who advised Disney as to the elective share and prepared and submitted the petition for Disney's elective share, testified that Disney read and understood the decedent's will at the time he executed his petition for his elective share. Vankat testified that at the time Disney executed the petition, Disney informed him that he wanted to make the election to receive one-half of the decedent's estate directly. Vankat testified that Disney was competent at the time of his election. Vankat also testified that he did not observe any undue influence exercised on Disney by his daughters regarding Disney's election.

On September 19, 1993, Nancy Willcockson, a clinical psychologist, conducted a clinical interview and testing of Disney at the request of Grace Lutheran. At the hearing, Willcockson testified that Disney fell within the moderate-severity range of dementia. Willcockson diagnosed Disney as suffering from senile dementia of the Alzheimer's type. According to Willcockson, Disney's degenerative dementia predates July 1990. Willcockson acknowledged that individuals suffering from senile dementia of the Alzheimer's type perform worse in stressful and tiring situations. At trial, Willcockson was questioned as follows:

> Q- . . . Doctor, do you have an opinion that you can state within a reasonable degree of scientific certainty as to whether or not Mr. Disney has the capacity to understand what he has done regarding his wife's will and his election to take against the will? Do you have such an opinion, yes or no?
>
> A- Yes.
>
> Q- And what's that opinion?
>
> A- I believe that Mr. Disney does not have the capacity to understand the election against the will.

On August 31, 1993, John C. Goldner, a neurologist, examined Disney at the request of Disney's lawyer. At trial, Goldner testified that people who have dementia, even advanced stages of dementia, have periods of clarity where they recognize and comprehend things, while at other times they do not. Goldner also testified that Disney was capable of making decisions on his own and understanding what was

going on around him. Goldner further testified that Disney could make an intelligent decision as to whether he wanted more or less money.

The records of Thomas Connolly, Disney's treating physician, reflect that Connolly diagnosed Disney as suffering mild cerebral degeneration in December 1991 and in August 1992. In July 1993, Connolly again diagnosed Disney's cerebral degeneration but also noted that Disney was "competent to understand he does have need for the money in [the decedent's] estate and appreciates this and understands it well."

Vawter, Disney's daughter, testified that when Disney was told of his right to an elective share, he informed her that he felt that Grace Lutheran had received enough money from the decedent.

In substance, the county court found that (1) Disney did not waive his elective right to take 50 percent of the decedent's estate during the hearing, because there was no written waiver, and he was "clearly tired" during the questioning; (2) Disney's election to receive 50 percent of the decedent's estate was valid; and (3) Disney was not subjected to undue influence.

The county court did not address the conditional petition for elective share, because it found Disney's personal election was valid.

Upon appeal, the district court reviewed the county court record for error. The district court found that the record supported the findings of the county court, and it affirmed that court's judgment. On July 25, 1994, less than 1 month before the district court order, Disney died. This action was revived by the copersonal representatives of Disney's estate.

ANALYSIS

Grace Lutheran contends that Disney, in his sworn testimony, waived his right to an elective share. The right of election of a surviving spouse may be waived, wholly or partially, *by a written contract, agreement, or waiver signed by the surviving spouse*. See Neb. Rev. Stat. § 30-2316 (Reissue 1995). As noted by the trial court, the record does not reflect any written or signed waiver of a right to an elective share on the part of Disney.

At the hearing, Disney testified that he did not file a petition for elective share. The record, however, reflects that he did. Furthermore, the trial court did not put great weight on Disney's testimony because he was "clearly tired." This finding is supported by Willcockson's testimony that someone with Disney's symptoms of dementia does not perform well under stressful and tiring situations. In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony. *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988). It is not the province of an appellate court to weigh or resolve conflicts in the evidence, the credibility of witnesses, or the weight to be given to their testimony. *In re Estate of Odineal*, 220 Neb. 168, 368 N.W.2d 800 (1985).

Grace Lutheran also contends that the record does not support the court's finding that Disney was legally competent. The burden of proof is on the party who alleges the mental incapacity of a surviving spouse who takes an elective share and renounces the will to prove by a preponderance of evidence that the surviving spouse was not mentally competent *at the time the surviving spouse executed the instrument.* See *In re Estate of Bergren*, 154 Neb. 289, 47 N.W.2d 582 (1951). In order to invalidate the taking of an elective share, it is necessary to prove such a degree of mental weakness as renders the surviving spouse incapable of understanding and protecting his or her own interests at the time he or she executed the instrument. See *id.*

The record reflects that although Disney suffered from a degenerative dementia, the attorney who advised Disney and who prepared and submitted the petition for Disney's elective share testified that Disney was mentally competent at the time he made his election. Disney's treating physician noted 2 months after Disney filed his petition for his elective share that Disney was mentally competent to understand his need for money from his wife's estate. There is sufficient evidence in the record to support the finding of the county court that Disney was mentally competent at the time he exercised his statutory right, in writing, to take his statutory share of the decedent's augmented estate.

In summary, there was conflicting evidence in the record as to Disney's mental capacity to make an election. The trial court accepted as more credible the testimony that Disney was competent to make such an election. It is not the province of this court to weigh or resolve conflicts in the evidence, the credibility of witnesses, or the weight to be given their testimony. *In re Estate of Odineal, supra.*

Grace Lutheran claims that the record does not support the county court's finding that Disney's decision was not the product of undue influence. Upon an allegation that a surviving spouse decided to take an elective share and renounce the will of the decedent as a result of undue influence, the proponent of the allegation has the burden to prove by a preponderance of evidence (1) that the surviving spouse, at the time of executing the instrument, was subject to such influence; (2) that the opportunity to exercise existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. See *In re Estate of Bergren, supra.* The record reflects only that Disney was accompanied by at least one member of his family when he was advised of his right to an elective share and decided to exercise such election. Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence; there must be a solid foundation of established facts on which to rest the inference of its existence. *In re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994). The county court was not clearly wrong in finding that Disney's petition for elective share was not the product of undue influence. Grace Lutheran's assignment of error in regard to undue influence has no merit.

We need not address Grace Lutheran's claim that the conditional petition for Disney's elective share should be set aside, because we affirm the decision of the county court that Disney's petition for his elective share of the augmented estate was valid.

CONCLUSION

The record supports the findings of the county court that Disney was mentally competent and not unduly influenced at

the time he, in writing, elected to take his statutory share of the decedent's augmented estate.

We affirm the district court's affirmation of the county court's findings and judgment.

AFFIRMED.

WHITE, C.J., not participating.

MARY REAVIS, APPELLEE AND CROSS-APPELLANT, V. JAMES SLOMINSKI, D.D.S., APPELLANT AND CROSS-APPELLEE.
551 N.W.2d 528

Filed August 9, 1996. No. S-94-288.

1. **Torts: Battery: Assault: Intent: Words and Phrases.** Battery and assault are separate torts resulting from a defendant's intentional actions directed toward another; a battery requires an actual infliction of an unconsented injury upon or unconsented contact with another. In contrast, the intentional tort of assault is a wrongful offer or attempt with force or threats, made in a menacing manner, with intent to inflict bodily injury upon another with present apparent ability to give effect to the attempt, without requiring that the one assaulted be subjected to any actual physical injury or contact.
2. **Directed Verdict: Evidence: Appeal and Error.** When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.
3. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not by judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence.
4. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
5. **Torts: Liability.** Except in the case of persons whom the law protects for reasons of policy, such as those who are mentally immature or otherwise incompetent, no one suffers a legal wrong as the result of an act to which, unaffected by fraud, mistake, or duress, he freely consents or to which he manifests appar-

ent consent, as expressed in the ancient legal maxim "volenti non fit injuria," meaning that no wrong is done to one who consents.

6. **Torts: Words and Phrases.** Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.
7. **Torts: Intent: Words and Phrases.** If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.
8. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
9. ____. The party against whom a verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.
10. **Torts: Liability.** To avoid liability, consent must be effective; consent is ineffective if the person lacks capacity to consent to the conduct.
11. ____: ____. One who has reached the age of majority can give an effective consent to all kinds of conduct, unless the defendant knows or has reason to know of some kind of abnormality, temporary or permanent, of the consenting person.
12. **Criminal Law: Sexual Assault: Torts.** Nebraska criminal law, pursuant to Neb. Rev. Stat. §§ 28-319 and 28-320 (Reissue 1995), provides that an abnormality on the part of a person consenting to a sexual act deprives such consent of effectiveness when the consenting person lacks an ability to resist or an understanding of the nature of sexual relations; this analysis is equally applicable in tort law.
13. **Trial: Appeal and Error.** Generally, an appellate court will dispose of a case on the theories which were presented to the trial court.
14. **Trial: Directed Verdict: Expert Witnesses.** Triers of fact are not required to take opinions of experts as binding upon them. Determining the weight that should be given expert testimony is uniquely the province of the fact finder, and where there is evidence from an expert, a directed verdict should not be granted.
15. **Evidence.** According to Neb. Rev. Stat. § 27-104(2) (Reissue 1995), when the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
16. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
17. **Jury Instructions: Appeal and Error.** Jury instructions are generally subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects substantial rights of the complaining party.
18. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law,

(2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.

19. **Jury Instructions: Appeal and Error.** It is not error to refuse to give a requested instruction if the substance of the request is in the instructions actually given.
20. **Jury Instructions.** The proper method of presenting a case to a jury in its instructions is by a clear and concise statement by the trial court of the issues which find support in the evidence.
21. **Jury Instructions: Pleadings: Evidence.** Where an instruction is properly requested upon some special feature of the case presented by the pleading and the evidence, it should be given, unless covered by other instructions.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Reversed and remanded for a new trial.

Michael J. Mooney and Susan E. Norris, of Gross & Welch, P.C., for appellant.

Thom K. Cope, of Bailey, Polsky, Cope, Knapp & Nelson, for appellee.

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

LANPHIER, J.

Alleging she was sexually assaulted, Mary Reavis filed a civil action against the alleged attacker, James Slominski, D.D.S. The petition stated two causes of action—one for the tort of sexual assault and one for the tort of intentional infliction of emotional distress. Slominski denied those allegations and further alleged that any contact with Reavis was consensual. Trial before a jury commenced in the district court for Richardson County on January 12, 1994. At the close of Reavis' case, Slominski's motion for a directed verdict was overruled. At the close of all the evidence, Slominski renewed his motion for a directed verdict, which was again overruled. The jury returned a verdict in favor of Reavis on the sexual assault cause of action and in favor of Slominski on the intentional infliction of emotional distress cause of action. Slominski timely appealed, and Reavis cross-appealed.

In his appeal, Slominski asserts that the district court erred in refusing to direct a verdict in his favor, in admitting certain

evidence, in instructing the jury as it did regarding consent, in refusing to instruct the jury regarding capacity to consent and economic duress, and in failing to set aside the verdicts as inconsistent. In her cross-appeal, Reavis asserts that the district court erroneously instructed the jury on the elements of the tort of intentional infliction of emotional distress. A majority of this court concurs that the district court properly refused to grant Slominski's motions for a directed verdict. A majority also concurs that the jury's verdict regarding the sexual assault claim must be reversed and that that matter be remanded for a new trial.

I. BACKGROUND

Reavis was employed by Slominski as a receptionist in his dental clinic located in Falls City, Nebraska. Reavis alleges that Slominski sexually assaulted her on December 31, 1991, after a New Year's Eve office party.

Reavis first worked for Slominski at his dental clinic from 1969 to 1975 as a chair-side assistant, with one brief absence. Reavis testified that there were many occasions during the early 1970's when Slominski fondled her. Reavis stated that she felt that she could not say anything to him because she needed to work. When she did ask Slominski to stop touching her, he would laugh and say, " 'You know you like it.' "

Reavis married her husband, Frank, in February 1972. Reavis testified that Slominski continued to touch her. Although Slominski never told Reavis that he would fire her if she objected, Reavis stated that Slominski said she would lose her job and her marriage if she told anyone.

In or around 1973, Slominski and Reavis began to engage in sexual intercourse. Although Reavis said no, she claims she felt that she had no choice but to engage in relations. Reavis admitted that Slominski never physically forced her to have sex with him. Reavis testified that she could not quit her job because she needed the money to support her family. However, Reavis admitted that there were times when she was able to successfully refuse Slominski's advances.

In 1975, Reavis' husband obtained employment in Lincoln, and Reavis left Slominski's employment. The Reavises

returned to Falls City in 1978, and Reavis worked for another dentist.

In the summer of 1988, Reavis was unemployed and Slominski offered her a job. Reavis testified that she told Slominski that before she would accept the position, he had to promise to leave her alone. Reavis testified that Slominski did not try to engage in sexual intercourse with her from 1988 until December 31, 1991. However, Reavis stated that Slominski touched her several times during that time period. As before, Reavis said she did not quit because her family needed the money.

On December 31, 1991, the employees of the dental clinic had an office party. The party began about 1 p.m. Reavis and Slominski each admit that they became somewhat intoxicated. Reavis testified that after the party began to wind down around 5 p.m., she and another employee, Kathy Foster, cleaned up the clinic. Foster left, and Reavis and Slominski were alone in the clinic. Reavis testified that she was in the lab clocking out when she heard Slominski lock the back door.

Reavis said that Slominski came into the lab and began kissing her. Reavis testified that she pushed Slominski away and told him no. Slominski laughed and said, " 'You know you want it.' " Reavis said, " 'Oh, hell,' " and then walked down the hall toward Slominski's office and "threw [her] sweater off." Reavis testified that she felt there was nothing she could do because Slominski would just laugh at her. In the office, Reavis admonished Slominski and said, " 'You know you should not be doing this.' " Reavis felt that if she did not comply, she would lose her job. She said that she numbed her mind and body during the sexual intercourse, but that the physical contact was hurting her "very bad."

While Reavis and Slominski were engaged in sexual conduct, Foster came back into the dental clinic. Foster noticed an article of clothing in the hall and said, " 'I hope the two of you are having fun in there.' " Reavis asked Slominski if Foster had seen them, and Slominski said yes. Reavis and Slominski got dressed and left the dental clinic.

After Reavis left the dental clinic, she went home. A short time later, Reavis went to a restaurant where she held a sec-

ond job. Although she was not scheduled to work, Reavis met some of the people she worked with and had some champagne. Reavis did not tell any of her friends about the events of the afternoon and did not report the sexual contact to the police.

That evening, Reavis was unable to sleep. She woke her husband and told him that " 'Dr. Slominski had sex with me.' " Her husband was very upset. During the next several days, the couple sought counseling with their pastor, but Reavis remained quite distraught. During the night of January 3, Reavis attempted suicide by ingesting sleeping pills.

Reavis was hospitalized for several weeks in January and was still under medical care at the time of the trial. As a result of the alleged sexual assault, Reavis states that she has suffered damages due to her inability to work. Reavis alleges that she required hospitalization and counseling as a result of the emotional distress proximately caused by Slominski's wrongful conduct.

Reavis further alleges that Slominski acted intentionally and with reckless disregard of her emotional suffering by his conduct on New Year's Eve. Reavis asserts that Slominski's conduct was outrageous in character and so extreme in degree that it should be regarded as atrocious and intolerable in a civilized community. Reavis states that Slominski's conduct proximately caused her extreme emotional distress resulting in damages.

By his answer, Slominski denied Reavis' allegations. Slominski alleged that Reavis encouraged and promoted a private meeting after the New Year's Eve party and that Reavis initiated consensual sexual contact. Slominski testified that Reavis called him back into the office as he was leaving the party and initiated the sexual contact. When Reavis began to disrobe, Slominski assumed that she wanted sexual contact. Slominski stated that his relationship with Reavis during the early 1970's was an affair involving two consenting adults.

II. ASSIGNMENTS OF ERROR

Slominski asserts that the district court erred in failing to grant his motions for a directed verdict, in receiving evidence that Reavis was abused as a child over relevance objections, in giving erroneous jury instructions, in receiving an exhibit

without proper foundation, and in failing to set aside the jury verdicts as inconsistent.

In her cross-appeal, Reavis asserts that the district court erred in failing to give her proposed jury instruction on sexual assault as being applicable to intentional infliction of emotional distress.

III. ANALYSIS

1. Overview

In order to succeed on her theory of recovery regarding sexual assault, Reavis was required to prove that Slominski had sexual contact with her without her consent and that he acted with intent to inflict physical injury or contact upon her which resulted in physical injury proximately causing some damage. Reavis was also required to prove the nature and extent of her alleged damages.

Reavis' cause of action for sexual assault is technically a cause of action for battery.

> Battery and assault are separate torts resulting from a defendant's intentional actions directed toward another. . . . A battery requires "an actual infliction" of an unconsented injury upon or unconsented contact with another. . . . In contrast, we have characterized the intentional tort of assault as a " 'wrongful offer or attempt with force or threats, made in a menacing manner, with intent to inflict bodily injury upon another with present apparent ability to give effect to the attempt,' " without requiring that the one assaulted be subjected to any actual physical injury or contact.

(Citation omitted.) *Bergman v. Anderson*, 226 Neb. 333, 336, 411 N.W.2d 336, 339 (1987).

A review of the record indicates that Reavis' trial strategy contained two theories. Reavis attempted to prove that her actions did not constitute consent to sexual contact with Slominski on December 31. Alternatively, Reavis attempted to establish that if such actions did amount to consent, such consent was not effective because she lacked mental capacity and that any consent was coerced, in part, by her fear that she would lose her job.

By his answer and arguments, Slominski concedes that he did have sexual contact with Reavis. However, Slominski argues that the contact was between two consenting adults. Slominski asserts that Reavis failed to prove that she did not consent to the sexual contact on December 31 and that she gave apparent consent to the contact. Slominski states that he had no knowledge of Reavis' alleged incapacity and that therefore her consent was effective. Slominski concludes that the court erred by failing to direct a verdict in his favor.

Second, Slominski asserts that the trial court failed to correctly instruct the jury regarding capacity to consent and economic duress. Slominski tendered two jury instructions regarding capacity and duress which were directed to the effectiveness of consent.

In her cross-appeal, Reavis asserts that the district court erred in failing to give her requested instruction for intentional infliction of emotional distress.

2. Directed Verdict—Issue of Consent

(a) Standard of Review

When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *Hoeft v. Five Points Bank*, 248 Neb. 772, 539 N.W.2d 637 (1995); *Richardson v. Ames Avenue Corp.*, 247 Neb. 128, 525 N.W.2d 212 (1995); *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994).

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not by judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. *Walpus v. Milwaukee Elec. Tool Corp.*, 248 Neb. 145, 532 N.W.2d 316 (1995); *McDonald v. Miller*, 246 Neb. 144, 518 N.W.2d 80 (1994); *McDermott v. Platte Cty. Ag. Socy.*, 245 Neb. 698, 515 N.W.2d 121 (1994). The admissibility of evi-

dence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *Walpus v. Milwaukee Elec. Tool Corp., supra*; *McDermott v. Platte Cty. Ag. Socy., supra*.

(b) Actual or Apparent Consent

"In tort law, consent ordinarily bars recovery for intentional interferences with person or property." *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 718, 508 N.W.2d 907, 911 (1993).

> Except in the case of persons whom the law protects for reasons of policy, such as those who are mentally immature or otherwise incompetent (see Comment *b*), no one suffers a legal wrong as the result of an act to which, unaffected by fraud, mistake or duress, he freely consents or to which he manifests apparent consent. (See § 892). This principle is expressed in the ancient legal maxim, *volenti non fit injuria*, meaning that no wrong is done to one who consents.

Restatement (Second) of Torts § 892 A, comment *a*. at 364 (1979).

Section 892 of the Restatement states:

> (1) Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.
>
> (2) If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.

One can consent to a personal invasion such as sexual contact even if such contact is immoral or harmful to one's own interests. " 'Consent avoids recovery simply because it destroys the wrongfulness of the conduct as between the consenting parties . . . .' " *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. at 719, 508 N.W.2d at 911 (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 18 (5th ed. 1984)). If one says yes to sexual contact, no matter how distasteful or wrong, the contact cannot constitute a sexual battery because, by definition, battery involves contact without consent.

If Reavis did not consent on December 31, then Slominski was guilty of sexual assault. If Reavis gave actual or apparent consent to the sexual contact, then, as a matter of law, Slominski may have been entitled to a directed verdict on that theory of recovery. However, as discussed in the following section, if Reavis suffered from some incompetency or abnormality on December 31 which rendered her actual or apparent consent ineffective, then Reavis may be within the category of "persons whom the law protects for reasons of policy, such as those who are mentally immature or otherwise incompetent."

A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Nickell v. Russell*, 247 Neb. 112, 525 N.W.2d 203 (1995); *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994); *Kozeny v. Miller*, 243 Neb. 402, 499 N.W.2d 75 (1993).

The party against whom a verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Nickell v. Russell, supra*; *Lindsay Mfg. Co. v. Universal Surety Co., supra*.

Giving Reavis the benefit of all of the inferences which can reasonably be drawn from the evidence, there is some evidence which will sustain a finding that Reavis did not give actual consent or apparent consent to the sexual contact. Reavis initially said no, and her subsequent conduct can be considered ambiguous. The fact that Reavis began disrobing does not necessarily indicate that she consented to the sexual contact if the prior events indicated that she felt that she had no other choice but submission at that time. Reavis' comment to the effect of "what the hell" could be read either as a surrender or as consent, grudgingly or otherwise. The testimony was in conflict.

(c) Effective Consent

Assuming arguendo that Reavis did consent to the sexual contact, the next question is whether the consent was effective. Reavis introduced evidence in an effort to establish that if she did consent to sexual contact on December 31, such consent was not effective. Much of that evidence focused on the effect of certain childhood abuse on Reavis' ability to refuse unwanted sexual contact as an adult.

Slominski asserts that

> [t]he admission of evidence of plaintiff's abuse as a child constituted prejudicial error . . . because it allowed the jury to speculate that the plaintiff Mary Reavis did not have the capacity to consent. Since there was no evidence that Slominski had any knowledge of her supposed incapacity, such evidence was completely irrelevant . . . .

Brief for appellant at 20. Slominski concludes that as a matter of law, if he had no knowledge of Reavis' supposed incapacity, her apparent consent to the sexual contact was effective consent and that therefore, the district court erred by failing to grant a verdict in his favor.

"To avoid liability, consent must be effective." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 18 at 114 (5th ed. 1984). Consent is ineffective if the person lacks capacity to consent to the conduct. *Id.*; Restatement (Second) of Torts § 892 A(2)(a) (1979). "Generally . . . one who has reached the age of majority can give an effective consent to all kinds of conduct unless the defendant knows or has reason to know of some kind of abnormality, temporary or permanent, of the consenting person." Keeton et al., *supra*, § 18 at 114. Note that there are two aspects to the effectiveness of consent: abnormality on the part of the alleged victim and knowledge on the part of the alleged attacker.

In Nebraska, any person who subjects another person to sexual intercourse or sexual contact who knew or should have known that the victim was physically or mentally incapable of resisting or appraising the nature of his or her conduct is guilty of sexual assault. Neb. Rev. Stat. §§ 28-319(1) and 28-320(1) (Reissue 1989). The lack of the victim's consent is not an element of the crime of sexual assault when the victim

is incapable of resisting or of appraising the nature of his or her conduct. *Id.*; *In re Interest of J.M.*, 223 Neb. 609, 391 N.W.2d 146 (1986).

In criminal law, the issue of the extent and degree of abnormality required to render a victim's consent ineffective has been hotly debated. See, e.g., Annot., Rape or Similar Offense Based on Intercourse With Woman Who Is Allegedly Mentally Deficient, 31 A.L.R.3d 1227 (1970); *State v. Olivio*, 123 N.J. 550, 589 A.2d 597 (1991); *State v. Sullivan*, 298 N.W.2d 267 (Iowa 1980). Some jurisdictions follow an expansive interpretation and hold that unless one understands both the physical elements of sex and the moral quality of the conduct, then one is not capable of giving effective consent to sexual contact. *State v. Olivio, supra.* Other jurisdictions are less protective of the mentally disturbed or handicapped and construe the effectiveness of consent based upon an understanding of its physiology alone. It would appear that issue of effective consent to sexual contact is generally only raised when the victim suffers from an extreme mental handicap or deficiency.

However, Nebraska criminal law also recognizes that an otherwise competent person can be sexually assaulted if the person is physically or mentally incapable of resisting. See §§ 28-319 and 28-320.

Nebraska criminal law is consistent with the legal test for effective consent which examines whether an adult cannot give effective consent because the person suffers from a temporary or permanent abnormality. Sections 28-319 and 28-320 provide that the abnormality may be an inability to resist or the lack of understanding of the nature of sexual relations. This analysis is equally applicable in tort law.

Reavis does not assert that she suffered from an abnormality rendering her incapable of understanding the physical or moral elements of sexual relations. Rather, Reavis asserts that she suffered from an abnormality rendering her incapable of resisting unwanted sexual relations on December 31.

Although it is questionable whether Reavis' allegations of her incapacity are sufficient to place Reavis within the category of mentally incompetent persons whom the law protects

for reasons of policy, Slominski did not raise this issue at trial or in this appeal. Slominski objects to the admissibility of evidence regarding Reavis' alleged incapacity to consent for the sole reason that she failed to prove that he had any knowledge of such incapacity.

Slominski's narrowly phrased argument is addressed as it was posited in this appeal and as it was argued at trial. Generally, an appellate court will dispose of a case on the theories which were presented to the trial court. *Sunrise Country Manor v. Neb. Dept. of Soc. Servs.*, 246 Neb. 726, 523 N.W.2d 499 (1994); *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994). Restated, Slominski argues that Reavis had to prove that Slominski knew she lacked the capacity to consent in order for the evidence regarding her childhood abuse to be relevant and admissible.

Reavis testified to her childhood fear of her father's discipline and several instances of sexual abuse by relatives. Reavis also testified that she was afraid to say no to Slominski because she needed the job. Allegedly, both of these factors undermined Reavis' ability to refuse unwanted sexual contact with Slominski.

Dr. Wesley Sime, a clinical psychologist, was hired as an expert witness to testify on Reavis' behalf. Dr. Sime testified that an adult who was abused as a child may fear protesting too vigorously. In Dr. Sime's opinion, Reavis' ability to withhold consent on December 31 was compromised by the circumstances of her isolation and the locked door. In that situation, Reavis would have difficulty saying no and enforcing her refusal.

Dr. Y. Scott Moore, Reavis' treating psychiatrist, testified that Reavis'

> history of early sexual harassment places her in the category of victim to start with. Following that, she turns into a person, as is usual with more (sic) sexually abused young girls, who has pretty low self-esteem, who has difficulty seeing any worth, who is quite dependent, has difficulty saying no and meaning it, and has a tendency to view assaults as her due because she is damaged goods to begin with.

Therefore, there was some evidence that Reavis may have lacked the capacity to give effective consent on December 31, creating a question for the jury. "Triers of fact are not required to take opinions of experts as binding upon them." *Vredeveld v. Clark*, 244 Neb. 46, 51, 504 N.W.2d 292, 296 (1993). Accord *Keystone Ranch Co. v. Central Neb. Pub. Power & Irr. Dist.*, 237 Neb. 188, 465 N.W.2d 472 (1991). Determining the weight that should be given expert testimony is uniquely the province of the fact finder, and where there is evidence from an expert, a directed verdict should not be granted. *Vredeveld v. Clark, supra*; *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990).

Slominski testified that he had no knowledge of Reavis' childhood abuse and that, therefore, he had no hint that Reavis was emotionally disturbed in any manner. Slominski claims that, therefore, the evidence regarding her alleged incapacity was inadmissible. However, the issue is whether Slominski knew, *or had reason to know*, that Reavis had an abnormal inability to refuse unwanted sexual contact. Lack of knowledge of the *cause* of such abnormal inability does not negate knowledge of the abnormality itself. If Slominski knew that he could engage in sexual contact with Reavis against her will, then Reavis could not have given effective consent. Such knowledge could be based on the fact that he had repeatedly been able to engage in sexual contact in the past despite her requests that he not touch her.

It is true that relevancy of Reavis' evidence regarding her incapacity hinged on proof that Slominski knew or had reason to know of the incapacity. However, as in many cases,

> only one fact can be proven at a time or by a given witness . . . .
>
> . . . [T]he everyday method of handling the situation when the adversary objects to the relevancy or the competency of the offered fact is to permit it to come in conditionally, upon the assurance, express or implied, of the offering counsel that she will "connect up" the tendered evidence by proving, in the later progress of his case, the missing facts. Federal and Revised Uniform Rules of

> Evidence 104(b) and 611(a) give the court this same authority.

1 McCormick on Evidence § 58 at 233 (John W. Strong 4th ed. 1992).

"When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Neb. Rev. Stat. § 27-104(2) (Reissue 1995). The burden is on the objecting party to object if the offering counsel fails to connect up, and this is generally done with a motion to strike. 1 McCormick on Evidence, *supra*.

The district court did not abuse its discretion by overruling Slominski's relevance objections at the time the testimony was adduced. Upon request, the court should have admitted the testimony conditionally and should have granted a motion to strike if the court concluded that Reavis failed to prove Slominski knew or should have known of her alleged incapacity. Slominski pursued neither of these options. Failure to make a timely objection waives the right to assert prejudicial error on appeal. *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993).

(d) Resolution

Giving Reavis the benefit of every controverted fact and every inference which can reasonably be drawn from the evidence, there is some evidence which will sustain a finding for her and the court properly refused to direct a verdict in favor of Slominski.

3. Jury Instructions

Slominski asserts that the district court erred in instructing the jury on consent and refusing to give his proposed instructions with regard to capacity and duress.

(a) Standard of Review

Jury instructions are generally subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects substantial rights of the com-

plaining party. *Bunnell v. Burlington Northern RR. Co.*, 247 Neb. 743, 530 N.W.2d 230 (1995); *Plambeck v. Union Pacific RR. Co.*, 232 Neb. 590, 441 N.W.2d 614 (1989).

(b) Analysis

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *Klawitter v. Lampert*, 248 Neb. 231, 533 N.W.2d 896 (1995); *Sindelar v. Canada Transport, Inc.*, 246 Neb. 559, 520 N.W.2d 203 (1994); *Burns v. Metz*, 245 Neb. 428, 513 N.W.2d 505 (1994).

The district court gave the following instructions, in pertinent part:

> INSTRUCTION NO. 2
> I. PLAINTIFF CLAIMS
> A. ISSUES
>
> This case involves an incident which occurred December 31, 1991. It is alleged by plaintiff that the defendant on this date had sexual contact with plaintiff without her consent and as a result of this contact, plaintiff seeks damages in two causes of action.
>
> B. FIRST CAUSE OF ACTION
> ASSAULT - BURDEN OF PROOF
>
> In order to prove the claim of sexual assault, the plaintiff must establish by the greater weight of the evidence all of the following propositions:
>
> 1. The defendant sexually assaulted the plaintiff on December 31, 1991, without her consent.
>
> 2. The defendant acted with the intent to inflict physical injury or contact upon her.
>
> 3. The defendant's act resulted in physical injury.
>
> 4. The defendant's act was the proximate cause of some damage.
>
> 5. The nature and extent of that damage.

C. EFFECT OF FINDINGS

> If the plaintiff has not met this burden of proof, then you must find for the defendant on this cause of action.
>
> If the plaintiff has met this burden of proof, then you must find for the plaintiff on this cause of action.

The district court's instruction No. 11 stated:

> Consent is willingness in fact or conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.
>
> If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.
>
> A manifestation of consent, upon which the defendant may reasonably rely, will be equally effective even though there is no willingness in fact. The defendant is entitled to rely upon what any reasonable person would understand from the plaintiff's conduct.

Slominski's proposed instruction regarding consent was substantially similar to the given instruction. However, the last sentence of Slominski's proposed instruction stated, "Silence and inaction may manifest consent where a reasonable person would speak if he or she objected." It is not error to refuse to give a requested instruction if the substance of the request is in the instructions actually given. *Scharmann v. Dayton Hudson Corp.*, 247 Neb. 304, 526 N.W.2d 436 (1995); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). Slominski was not prejudiced by the court's failure to include this last sentence in the instruction it gave to the jury.

Slominski's instruction regarding the meaning of consent also contained this example: "A, a young man, is alone with B, a girl, in the moonlight. A proposes to kiss B. Although inwardly objecting, B says nothing and neither resists nor protests by any word or gesture. A kisses B. A is not liable to B."

The district court properly refused to give the hypothetical example to the jury. "The proper method of presenting a case to a jury in its instructions is by a clear and concise statement by the trial court of the issues which find support in the evidence." *Wilson v. Misko*, 244 Neb. 526, 541, 508 N.W.2d

238, 249 (1993). The hypothetical example would not instruct the jury on the law, but instead would apply the law to a strikingly similar fact pattern.

What is more problematic is the district court's refusal to give Slominski's proposed instructions regarding the issue of effective consent. The jury was instructed regarding apparent consent only, but Reavis presented a substantial amount of evidence in an attempt to convince the jury that if it concluded that she had given apparent consent to Slominski, then such consent was not effective. Reavis attempted to prove that her consent was not effective due to her lack of capacity and because any consent arose out of her fear that she would lose her job. Having admitted the evidence regarding effective consent, the court's refusal to properly instruct the jury constitutes reversible error.

The district court rejected Slominski's proposed instruction No. 3, which stated:

> One who has reached the age of majority can give an effective consent to all kinds of conduct unless the defendant knows of some kind of abnormality, temporary or permanent, on the part of the consenting person. The abnormality must substantially impair the plaintiff's capacity to understand and weigh the harm and risks of harm against the benefits flowing from the proposed conduct, and the abnormality must reduce her capacity to consent below the level of the average person. The defendant must have knowledge of the abnormality at the time of the alleged act.

Jury instruction No. 3 reflects the position of the Restatement (Second) of Torts § 892 A(2)(a) and comment *b.* (1979), and the views found in W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 18 (5th ed. 1984).

Slominski also tendered instruction No. 4, which stated, "A threat of economic duress such as the threat of a future loss of employment is not sufficient to invalidate the consent given." The district court also refused to give this instruction.

"Consent is not effective if it is given under duress." The Restatement, *supra*, § 892 B(3) at 370. See, also, Keeton et al., *supra*, § 18.

> Duress is constraint of another's will by which he is compelled to give consent when he is not in reality willing to do so. Persuasion amounting to a form of constraint can take various forms and many of them, commonly encountered in daily life, are without legal effect and are not normally characterized as duress. . . .
>
> . . . The cases to date in which duress has been found to render the consent ineffective have involved those forms of duress that are quite drastic in their nature and that clearly and immediately amount to an overpowering of the will.

The Restatement, *supra*, § 892 B, comment *j*. at 375.

Reavis repeatedly testified that she was reluctant to refuse Slominski's advances because she needed to work. Although Slominski never explicitly threatened to fire Reavis if she did not submit, Reavis feared that she would lose her job. Reavis also offered expert testimony attempting to establish that she lacked capacity to consent to sexual relations with Slominski.

Where an instruction is properly requested upon some special feature of the case presented by the pleading and the evidence, it should be given, unless covered by other instructions. *Pospisil v. Acton*, 118 Neb. 200, 224 N.W. 11 (1929). Slominski was entitled to have the jury instructed regarding how to evaluate Reavis' alleged incapacity and her fear of job loss as to the effectiveness of her consent.

Given the theories of this case, the jury would have benefited from being instructed to reach its decision using a step-by-step analysis. First, the jury should have been instructed to consider whether Reavis refused Slominski's sexual advances on December 31. If the jury concluded that Reavis gave real or apparent consent to the contact, then the jury should have been instructed to consider whether Reavis' consent was effective.

(c) Resolution

Slominski's tendered instructions correctly stated the law applicable to this case and were warranted by the evidence. The district court's refusal to give Slominski's proposed jury instructions regarding capacity and duress constitutes prejudi-

cial error requiring remand to that court for a new trial on the sexual assault claim.

Because we reverse for this reason, it is not necessary to reach Slominski's remaining assignments of error.

4. Cross-Appeal

In her cross-appeal, Reavis asserts that the district court erred in failing to give her proposed instruction on sexual assault as being applicable to intentional infliction of emotional distress claims.

Reavis' proposed jury instruction stated: "Should you find from a preponderance of the evidence presented that the actions of the Defendant on December 31, 1991, constituted a non-consensual sexual assault, you may find that the assault constitutes an intentional infliction of emotional distress . . . ."

Reavis' argument is based, in part, upon *Mindt v. Shavers*, 214 Neb. 786, 337 N.W.2d 97 (1983). In *Mindt v. Shavers*, we stated that the very nature of the tort of sexual assault is uniquely appropriate for a suit based upon a theory of intentional infliction of emotional distress.

The burden of proof upon the plaintiff in a cause of action for intentional infliction of emotional distress is to prove:

> " '(1) [t]hat there has been intentional or reckless conduct; (2) [t]hat the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community; and (3) [t]hat the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.' "

Schieffer v. Catholic Archdiocese of Omaha, 244 Neb. 715, 718, 508 N.W.2d 907, 910 (1993) (quoting *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993)).

Reavis' tendered jury instruction is not a correct statement of the law. In order to find that Slominski had acted intentionally to inflict emotional distress upon Reavis, the jury would have had to make two additional findings beyond concluding that a sexual assault had taken place. The jury would

also have had to conclude that Slominski's conduct was outrageous and that such conduct caused severe emotional distress. Therefore, Reavis' assignment of error is without merit.

IV. CONCLUSION

In summary, in this appeal, Slominski asserts that the district court erred in failing to grant his motions for a directed verdict because Reavis consented to the sexual contact. However, there was some evidence which could sustain a finding that Reavis did not give actual or apparent consent to the sexual contact. The district court properly refused to direct a verdict.

Second, there is the issue of effective consent. If Reavis did consent to the sexual contact with Slominski, the question is whether Reavis suffered from some abnormality which rendered her consent ineffective. The district court properly admitted evidence attempting to prove that Reavis could not give effective consent because she lacked the capacity to resist unwanted sexual relations on December 31. Having admitted such evidence, the district court erred by failing to instruct the jury regarding how incapacity and duress may or may not deprive Reavis' alleged consent of its effectiveness. Accordingly, the jury's verdict regarding the sexual assault claim is reversed, and that matter is remanded for a new trial.

One of the accompanying dissents recasts the posture of this case at trial and on appeal. As stated above, it is our oft-repeated rule that an appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Kropf v. Kropf*, 248 Neb. 614, 538 N.W.2d 496 (1995); *Ashland State Bank v. Elkhorn Racquetball, Inc.*, 246 Neb. 411, 520 N.W.2d 189 (1994); *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994). We will dispose of a case on theories which were presented to the trial court. *Sunrise Country Manor v. Neb. Dept. of Soc. Servs.*, 246 Neb. 726, 523 N.W.2d 499 (1994); *Long v. Hacker*; 246 Neb. 547, 520 N.W.2d 195 (1994). Moreover, appellate review is limited to those errors specifically assigned in the appeal to the district court and again assigned as error in an appeal to a higher

appellate court. *In re Estate of Soule*, 248 Neb. 878, 540 N.W.2d 118 (1995).

The theory posited by the dissent in question to exclude the expert testimony regarding Reavis' alleged incapacity rests upon the assertion that the legal test for capacity to consent to sexual intercourse is whether one understands and appreciates the nature of the act of sexual intercourse, its character, and the probable or natural consequences which may attend it. That dissent states that since Reavis is a woman possessing "substantial sexual experience" and has borne four children, she understands and appreciates the nature of sexual intercourse. Therefore, the dissent concludes that the expert opinion testimony stating that childhood abuse rendered Reavis incapable of resisting unwanted sexual contact was inadmissible because such testimony does not relate to the legal test for capacity.

That theory is narrower than the general rule stated in this opinion. The legal test for incapacity encompasses more than an inability to understand the nature of sexual relations and their consequences. The legal test is that one can give effective consent to all kinds of conduct unless the defendant knows or has reason to know of *some kind of abnormality*, temporary or permanent, of the consenting person. There are two types of abnormalities that render a victim's consent to sexual relations ineffective. If the victim cannot resist *or* is incapable of understanding the nature of the conduct, the victim's consent is ineffective.

Reavis consistently argued that she was unable to refuse Slominski's advances. Although the dissent focuses on abnormalities rendering victims incapable of understanding sexual relations, Reavis never argued that she was included within that class of victims. Neither did Slominski argue that at trial or on appeal.

Therefore, the dissent not only recasts the theories presented to the trial court but supplements the legal arguments made to this court in Slominski's briefs. This is contrary to our normal procedure against reviewing errors which were not assigned and argued in the brief.

The dissent would narrow the type of abnormality contemplated by the law of consent to abnormalities leading to a lack of understanding of sexual relations or their consequences. For example, a victim rendered unable to resist due to drugs, alcohol, or ill health might not have any recourse in civil law under the dissent's view if the defendant were able to prove that the victim "consented" under that narrow definition.

The dissent appears to urge that a sexual assault of a "substantially sexually experienced woman" requires the use of physical force. Although this is made in support of the dissent's limited view of effective consent, the reasoning harkens back to a time when "unchaste women" and "errant young girls" had difficulty pressing sexual assault complaints absent strong evidence of the use of force. See, *Frank v. State*, 150 Neb. 745, 35 N.W.2d 816 (1949); *Redmon v. State*, 150 Neb. 62, 33 N.W.2d 349 (1948). "Unchaste women" were viewed as possessing psychic complexes which were " 'multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offences [sic] by men.' " *Redmon*, 150 Neb. at 65, 33 N.W.2d at 351. Use of evidence of a victim's past sexual behavior is now appropriately limited. Neb. Rev. Stat. §§ 27-404 and 28-321 (Reissue 1995).

A victim is no longer required to " 'resist to the utmost with the most vehement exercise of every physical means or faculty naturally within her power to prevent carnal knowledge, and she must persist in such resistance as long as she has the power to do so until the offense is consummated.' " *Prokop v. State*, 148 Neb. 582, 587, 28 N.W.2d 200, 203 (1947).

REVERSED AND REMANDED FOR A NEW TRIAL.

CONNOLLY, J., concurring.

While I concur in the result reached by the plurality opinion, I disagree with the reasoning touching on the consent issue.

Reavis claims that her consent was ineffectual because she was abused as a child, more than 20 years before the alleged

incident in the instant case. Reavis offered the testimony of Drs. Moore and Sime to show that the abuse she suffered as a child made her incapable of giving consent in the instant case. As the plurality characterizes Dr. Sime's testimony, it was as a result of her childhood sexual abuse that Reavis would have difficulty saying no and enforcing her refusal. Dr. Moore testified that she had difficulty saying no and meaning it.

While the testimony of Drs. Sime and Moore may support a conclusion that Reavis suffered some type of dysfunction as a result of her abuse, it does not support a conclusion that she lacked the legal capacity to consent. On the issue of legal capacity, in their treatise on the law of torts, Prosser and Keeton say "[t]he abnormality [suffered by the consenting person] *must substantially impair the plaintiff's capacity to understand and weigh the harm and risks of harm against the benefits flowing from the proposed conduct*, and must reduce that capacity below the level of the average person." (Emphasis supplied.) W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 18 at 114-15 (5th ed. 1984). Drs. Sime and Moore did not testify that Reavis' prior sexual abuse impaired her ability to understand the consequences of sexual intercourse or that it impaired her ability to weigh the harm and risks of harm of engaging in sexual intercourse against the benefits—they merely testified that she cannot say no.

Thus, the abuse that Reavis suffered as a child is not relevant to the issue of whether she consented on the afternoon of December 31, 1991. Therefore, the district court erred in receiving the testimony of Drs. Sime and Moore on the issue of Reavis' alleged lack of legal capacity to consent to sexual intercourse.

GERRARD, J., joins in this concurrence.

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

I agree that Slominski is entitled to a new trial for the reasons set forth in the concurrence of Justice Connolly. The testimony of Drs. Sime and Moore does not support a claim that Reavis' dysfunction from her childhood abuse rose to the level that substantially impaired her capacity to give "effective con-

sent" under the circumstances. Thus, the abuse that Reavis suffered as a child is not relevant unless the resultant dysfunction from the abuse substantially impaired Reavis' capacity "to understand and weigh the harm and risks of harm against the benefits flowing from the proposed [sexual contact]." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 18 at 115 (5th ed. 1984). Since the expert testimony did not link the childhood abuse to a lack of capacity on Reavis' part to render "effective consent," the district court erred in receiving testimony regarding the abuse that Reavis suffered as a child for the purpose for which it was offered.

However, I write separately to express my views regarding the two jury instructions tacitly approved by the plurality in the event of a retrial. Slominski's proposed instruction No. 3 states:

> One who has reached the age of majority can give an effective consent to all kinds of conduct unless the defendant knows of some kind of abnormality, temporary or permanent, on the part of the consenting person. The abnormality must substantially impair the plaintiff's capacity to understand and weigh the harm and risks of harm against the benefits flowing from the proposed conduct, and the abnormality must reduce her capacity to consent below the level of the average person. The defendant must have knowledge of the abnormality at the time of the alleged act.

While this instruction correctly reflects the position of the Restatement (Second) of Torts § 892 A(2)(a), comment *b*. (1979), it is to be given only in the event that Reavis adduces relevant evidence that her consent, whether actual or apparent, was not "effective" because of some kind of abnormality on her part.

Slominski's tendered instruction No. 4 is also aimed at the effectiveness of one's consent. "Consent is not effective if it is given under duress." The Restatement, *supra*, § 892 B(3) at 370. See, also, W. Page Keeton et al., *supra*, § 18. Proposed instruction No. 4 states, "A threat of economic duress such as the threat of a future loss of employment is not sufficient to invalidate the consent given." I dissent from that portion of the

plurality opinion that approves Slominski's tendered instruction No. 4, because I am not willing to perpetuate the fiction that the threat from an employer of loss of future employment is *never* sufficient to invalidate apparent consent to sexual contact by an employee.

This case is a classic example of those cases in Nebraska wherein an employee is without recourse to file a claim of sexual harassment under title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1988), or the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. § 48-1101 et seq. (Reissue 1993), because the employer does not employ the requisite 15 or more employees to be considered "an employer" under either act. See, 42 U.S.C. § 2000e(b); § 48-1102(2). Therefore, the employee who alleges that the employer is making unwanted physical contact of a sexual nature is left with a claim for civil battery or, in some instances, intentional infliction of emotional distress. The Catch-22 is readily apparent as illustrated by the facts of this case.

Employee claims battery—unwanted physical touching of the employee by employer. Employer claims that the physical contact was consensual—stating to her, "You know you want it." Employee claims that if she did not comply with employer's sexual requests, she would not have a job. Employer claims he did not specifically threaten to fire employee, although employee stated that employer said employee would lose her job and her marriage if she told anyone. Regardless of the nature or extent of the threat, employer requests that the jury be instructed to ignore the threat of a future loss of employment. The employer urges that such a threat, whether direct or indirect, does not invalidate employee's apparent consent to the employer's demand for sex.

Although the plurality's approval of proposed instruction No. 4 is supported to some degree by cases from other jurisdictions and the Restatement, *supra*, § 892 B, comment *j*., the circumstances of this case are different, and the realities of the workplace call for further analysis. The plurality's analysis does not take into account society's increasing intolerance of workplace harassment or the growing recognition of the cen-

trality of work in a person's life and the fact that "[f]or most employees, their job is the most valuable thing they possess . . . ." Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 Va. L. Rev. 481, 532 (1976). See *Foley v. Polaroid Corp.*, 400 Mass. 82, 508 N.E.2d 72 (1987) (Liacos, J., concurring in part and dissenting in part).

The U.S. Supreme Court has stated that "[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41, 36 S. Ct. 7, 60 L. Ed. 131 (1915).

As Justice Douglas put it, "it does a man little good to stay alive and free and propertied, if he cannot work." *Barsky v. Board of Regents*, 347 U.S. 442, 473, 74 S. Ct. 650, 98 L. Ed. 829 (1954) (Douglas, J., dissenting). Justice Douglas wrote:

> The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on *Politics*, "A man has a right to be employed, to be trusted, to be loved, to be revered." . . . To work means to eat. It also means to live. . . . The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man.

347 U.S. at 472 (Douglas, J., dissenting).

It is difficult to overstate the importance of the employment relationship as a focus of security and standing in our society.

> The growing recognition of the centrality of work in a person's life, together with an awareness of the severe economic consequences resulting from arbitrary treatment in the employment relationship, supports [the] assertion that employer control over the job means that "the substance of life is in another man's hands."

J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 Stan. L. Rev. 335, 339 (1974). In my view, the threat of physical force is oftentimes no more sig-

nificant than the threat of losing one's employment or career as an invalidation of the alleged consent to sexual contact for purposes of this tort.

In the instant case, Reavis' employment options were extremely limited in Falls City, Nebraska. Reavis stated that she could not quit her job because she needed the money to support her family, and this was a high-paying job in Falls City. Reavis repeatedly testified that she was reluctant to refuse Slominski's advances because she needed to work. To approve Slominski's proposed instruction No. 4, in light of the facts of this case, would fly in the face of the public policy of this state. See Nebraska Fair Employment Practice Act, § 48-1101. Given the employment policy of this state, it is difficult to reconcile the position of one of the dissents that the facts of this case could possibly constitute sexual harassment, but not sexual assault.

Under the circumstances, the district court's instruction No. 11, derived from the Restatement (Second) of Torts § 892 (1979), is an accurate and complete statement of the law of consent. Instruction No. 11 states:

> Consent is willingness in fact or conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.
>
> If words or conduct are *reasonably understood by another* to be intended as consent, they constitute apparent consent and are as effective as consent in fact.
>
> A manifestation of consent, *upon which the defendant may reasonably rely*, will be equally effective even though there is no willingness in fact. The defendant is entitled to rely upon what any reasonable person would understand from the plaintiff's conduct.

(Emphasis supplied.)

This instruction describes both actual consent and apparent consent, and distributes the risk equally between two adults that have engaged in sexual contact. Party A, claiming lack of consent, is always subjected to the risk that a jury will find his or her conduct was reasonably understood by party B to be consent to sexual contact. Party B, claiming that party A consented to sexual contact, is likewise at risk that a jury will find that it was not *reasonable* for him or her to assume that party

A's conduct constituted actual or apparent consent. In other words, given the context of a significant history of sexual advances by party B, threats of employment discharge, and various forms of rejection by party A, a jury may or may not find party B's assumption of consent to sex by party A to be *reasonable* under the circumstances. Therefore, a correct application of the law allows the fact finder to determine whether there is (1) no liability because of sexual contact between two *consenting* adults, or (2) liability on the part of an individual who fails to comprehend the meaning of the word "no."

Accordingly, while I agree that Reavis' claim for civil battery should be remanded for a new trial, I do not join the plurality's tacit approval of an instruction stating that the threat of losing one's employment may never invalidate any alleged consent given under these circumstances. This is particularly so when the alleged consent is deemed to be ambiguous or equivocal. In sex at the workplace scenarios, a threat of loss of employment is rarely made without the accompanying litany of sexual overtures and unwanted touchings. A jury is most capable of making a determination of the effectiveness of a party's alleged consent when properly instructed and allowed to consider all relevant factors in their proper context.

WHITE, C.J., joins in this concurrence and dissent.

CAPORALE, J., dissenting.

I must respectfully dissent. However, in doing so, I wish to begin by noting my agreement with the plurality on several points.

Although the plurality does not deal separately with the district court's overruling of the motion for directed verdict made by the defendant-appellant and cross-appellee, James Slominski, D.D.S., at the close of the evidence presented by the plaintiff-appellee and cross-appellant, Mary Reavis, I agree that Slominski cannot successfully predicate error on that ruling, for by adducing evidence after the ruling, he waived any error such ruling may have created. See *Farmers and Merchants Bank v. Grams, ante* p. 191, 548 N.W.2d 764 (1996). I agree, too, that the theory of recovery at issue is one for battery, not assault, and that the Restatement (Second) of

Torts § 892 (1979) accurately states the law of consent in Nebraska. I also agree that consent can be rendered ineffective if the person consenting lacks the legal capacity to do so or if the person was coerced into consenting. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 18 (5th ed. 1984).

Having reviewed all of that, I recall that Slominski does not deny that he engaged in sexual intercourse with Reavis, but, rather, contends that the contact was consensual. Although, so far as the record shows, Reavis did not file a reply denying that assertion, she presented, and the trial court received, evidence attempting to prove that she did not consent to sexual contact with Slominski or, as an alternative, that any consent she gave was not effective because she either lacked the legal capacity to consent to sexual intercourse or was coerced by Slominski into consenting.

In support of her claim that she lacked the legal capacity to consent to sexual intercourse, Reavis introduced the testimony of Dr. Wesley Sime, a counseling psychologist, as follows:

> Q . . . Can you explain why — why [Reavis'] childhood experiences could hamper her in the ability to say no to . . . Slominski?
>
> . . . .
>
> A When you've been abused as a child in a way where you cannot escape, so to speak, and where there's a circumstance where if you protest too vigorously, if you fight back, you get punished or hurt more so, then it makes it difficult for a person as an adult to take the risk of making a huge and a — a — a outlandish kind of a cry out.
>
> . . . .
>
> Q . . . And based on all that and your experience, do you have an opinion with a reasonable degree of psychological certainty, whether or not . . . Reavis could consent to . . . Slominski's sexual advances?
>
> . . . .
>
> A My opinion is that consent is — consists of a yes or no. It consists of an attempt or a gesture to express one's feelings about a situation. And that in this situation her

ability to consent and carry out the consent or not consent was compromised by the circumstances.

. . . .

Q And can you be more specific about what circumstances prevented [Reavis] from — from enforcing the no that she told him?

. . . .

Q . . . The question is you understand that [Reavis] said no to . . . Slominski at least twice, according to her testimony, on the 31st. Correct?

A That's correct.

Q What prevented her from crying out for help or from enforcing the no?

. . . .

A Well, there's probably at least two variables here. Number one is she was isolated in an area with him. The door was locked, which was an implied threat. And secondarily, the fact that she has suffered previous trauma in association with the crying out experience or making a — making a huge appeal, would make it difficult for a person to make that a public kind of a[n] appeal.

. . . .

Q And you've heard testimony where [Reavis] has said to . . . Slominski I was able to say no at some times.

A Yes.

Q And other times I was not.

A Yes.

Q What's the difference?

A It's a situational refusal. In other words, it's — it's easier to say no when there are other people at least in the vicinity where it would be difficult to carry out something that is kind of questionable of nature. When you're isolated, that's a situationally difficult situation to refuse and to enforce a refusal.

In further support of her claim of incapacity, Reavis also presented the testimony of Dr. Y. Scott Moore, her treating psychiatrist. Moore testified to the following:

Q Based on your examination of . . . Reavis, your review of the hospital records, your experience, your

> training, do you have an opinion with any degree — with a degree of reasonable . . . . A reasonable degree of medical certainty, whether or not . . . Reavis could have consented to have sex with her boss on December 31, 1991?
>
> . . . .
>
> [A] Yes.
>
> Q What is that opinion?
>
> . . . .
>
> [A] Yes, I believe that . . . Reavis was in the same position then that she'd always been in which she had the inability to refuse him. I think she felt that her job depended upon having sex with him, and that she had no recourse.

Slominski countered by testifying that he had no knowledge of Reavis' abusive childhood and that he did not know that she was in any way mentally disturbed. He argues that the district court thus erred in admitting the evidence regarding Reavis' alleged lack of capacity to consent to sexual intercourse and that the error prejudiced him.

The most that Sime's and Moore's testimony shows is that due to Reavis' abusive childhood, she might fear protesting too vigorously; that because she was isolated and the door was locked, she would have difficulty saying no and enforcing her refusal; and that she felt unable to refuse Slominski because she felt her job depended on having sex with him.

As I understand it, the test for legal capacity depends upon the state of one's knowledge, not upon the exercise of one's will. Like many other tests, it merely requires one to understand and appreciate the nature and consequences of the act at issue. Therefore, one has testamentary capacity if one understands the nature of one's act in making a will or codicil thereto, knows the nature and extent of one's property, knows and understands the proposed disposition of one's property, and knows the natural object of one's bounty. *In re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994); *In re Estate of Peterson*, 232 Neb. 105, 439 N.W.2d 516 (1989). Similarly, one has the legal capacity to marry if one has sufficient capacity to understand the nature of the marital contract and the

obligations and responsibilities it creates. *Edmunds v. Edwards*, 205 Neb. 255, 287 N.W.2d 420 (1980); *Fischer v. Adams*, 151 Neb. 512, 38 N.W.2d 337 (1949).

Although we have not heretofore addressed the issue of capacity to consent with respect to sexual intercourse, other jurisdictions have concluded that one has such capacity if one understands and appreciates the nature of the act of sexual intercourse, its character, and the probable or natural consequences which may attend it. *State v. Johnson*, 155 Ariz. 23, 745 P.2d 81 (1987); *Salsman v. Com.*, 565 S.W.2d 638 (Ky. App. 1978); *Stephenson v. State*, 35 Ala. App. 379, 48 So. 2d 255 (1950), *cert. denied* 254 Ala. 313, 48 So. 2d 259; *People v. Boggs*, 107 Cal. App. 492, 290 P. 618 (1930); *People v. Blunt*, 65 Ill. App. 2d 268, 212 N.E.2d 719 (1965). See, also, Annot., Rape or Similar Offense Based on Intercourse With Woman Who Is Allegedly Mentally Deficient, 31 A.L.R.3d 1227 (1970). Therefore, the proper inquiry in this case is whether Reavis' "mental disorder was an impairment of such a degree that it precluded the victim from understanding the act of intercourse and its possible consequences." *Johnson*, 155 Ariz. at 26, 745 P.2d at 84.

The evidence in this case falls far short of the test. There is absolutely no evidence that Reavis did not understand and appreciate the nature of the act of sexual intercourse, its character, and the probable or natural consequences which may attend it. By all accounts, Reavis was a mature woman who had substantial sexual experience. Not only was she married and the mother of four children, she had previously engaged in a sexual relationship with Slominski. Moreover, there is no evidence that Reavis was in any way subnormal in intelligence or deficient in her ability to understand things. In fact, the evidence at trial shows quite the opposite. It shows that Reavis was a very capable employee who was instrumental in introducing new business practices to improve the profitability of her workplace.

In sum, there is no factual foundation for the opinion evidence that Reavis lacked the capacity to consent, because the facts relied upon by the witnesses in reaching that conclusion do not relate to the applicable legal test. See, *Priest v.*

McConnell, 219 Neb. 328, 363 N.W.2d 173 (1985) (factual basis lacking for opinion that witness had confabulated); *Dawson v. Papio Nat. Resources Dist.*, 206 Neb. 225, 292 N.W.2d 42 (1980) (opinions based on unproven assumption inadmissible). Moreover, admission of the opinion evidence was prejudicial, for it permitted the jury to improperly speculate that Reavis lacked the legal capacity to consent to sexual intercourse.

The plurality's view that this dissent recasts the posture of this case and supplements the arguments made in Slominski's brief overlooks that Slominski's brief explicitly argues "it was completely irrelevant whether Reavis' capacity to give consent was hampered somehow by her prior abuse as a child when she verbally and by her actions consented to have sex with Slominski." Brief for appellant at 22. No matter how inartfully the issue may have been raised at trial by Slominski, the question of the proper legal standard to govern claims of incapacity to consent to sexual intercourse was before the trial court and is before this court. With regard to such questions of law, we have an obligation to come to an independent conclusion. *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994); *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994).

It appears that the reason the plurality believes this dissent recasts the posture of this case is that the plurality understands Slominski to have raised the issue of incapacity only as it relates to Reavis' failure to prove that Slominski had any knowledge of her alleged incapacity. But I respectfully submit that the issue of Slominski's knowledge of Reavis' incapacity is intimately related to the legal standard for capacity to consent.

The general rule is that "one who has reached the age of majority can give an effective consent to all kinds of conduct unless the defendant knows or has reason to know of some kind of abnormality, temporary or permanent, of the consenting person." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 18 at 114 (5th ed. 1984). The type of abnormality which is contemplated as negating consent is that which renders one mentally incapable of giving consent. Thus, in

determining whether one gave effective consent to sexual intercourse, the inquiry is twofold: First, did the person understand and appreciate the nature of the act of sexual intercourse, its character, and the probable or natural consequences which may attend it? If the person did not, we then must ask whether the defendant had real or constructive knowledge of the victim's incapacity. If the defendant was ignorant of the victim's incapacity, then no liability attaches.

Thus, in a case of otherwise effective consent, liability can be avoided upon proof that the victim had the capacity to consent or upon proof that the defendant was ignorant of the victim's incapacity.

In a related matter, I cannot agree with the plurality's conclusion that the "relevancy of Reavis' evidence regarding her incapacity hinged on proof that Slominski knew or had reason to know of the incapacity." This is simply not so. As noted earlier, evidence of incapacity is relevant in its own right to the issue of effectiveness of consent and is not dependent on a showing that the defendant had knowledge of the victim's incapacity. Once it is understood that the two issues are interrelated but separate, it becomes apparent that the plurality has erred in applying the rules governing the conditional admittance of evidence. Those rules apply only "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact . . . ." Neb. Rev. Stat. § 27-104(2) (Reissue 1995). See, also, 1 McCormick on Evidence § 58 (John W. Strong 4th ed. 1992). That condition does not obtain here, since evidence concerning capacity is relevant in its own right and not dependent on the fulfillment of a condition.

As a result of applying the wrong evidentiary rule, the plurality chastises Slominski for not seeking a conditional admittance of Reavis' proffered evidence and failing to move to strike it. The plurality then reasons that Slominski has waived his right to assert prejudicial error on appeal because he failed to make a timely objection. But I am aware of no rule of evidence in our adversarial system which requires an advocate to request that an opponent's evidence be admitted conditionally; it is the proponent of the proffered evidence who must seek the conditional admittance of that evidence. Nor can it be

maintained that Slominski was under an obligation to move to strike the evidence, since, as explained previously, the rules for the conditional admittance of evidence do not apply here. I must also disagree with the plurality's determination that Slominski did not preserve this issue on appeal. By raising a timely objection to Reavis' evidence of incapacity, Slominski did all that was required to preserve the issue.

Having set out the appropriate legal standard for determining capacity to consent and identifying the crux of my disagreement with the plurality on the issues in this case, I now turn to comment on the substantive legal standard adopted by the plurality and its analysis.

The plurality imports into the realm of tort law the legal concepts contained within our criminal sexual assault statutes. Neb. Rev. Stat. §§ 28-319 and 28-320 (Reissue 1995). This, I respectfully suggest, is imprudent.

Under both §§ 28-319 and 28-320, sexual assault can be proved without the consent of the victim if the perpetrator "knew or should have known that the victim was physically or mentally incapable of resisting or appraising the nature of his or her conduct." This phrase embodies both the concept of duress and the concept of incapacity. Given the complexity of these issues, it seems most unwise to confuse the legal concepts by adopting a unified standard. As the plurality itself notes, the jury in this case would have benefited by being instructed to reach its decision through a step-by-step analysis.

The plurality rightly points out that its concept of capacity to consent is much broader than the one other jurisdictions have adopted. Under the plurality's analysis, one lacks the capacity to consent if one is "physically and mentally incapable of resisting." But this deprives capacity of its legal meaning. For example, consider the case of a person who is sexually assaulted and is physically incapable of resisting. This person's consent is ineffective not because she or he lacks the capacity to consent, but, rather, because the use or threat of force vitiates any consent that she or he might give. The other half of the formulation relates to those "mentally incapable of resisting." This is essentially a standard which relies upon the exercise of one's will. Such standards are commonly criticized

on the basis that they lead to mistakes because, as noted by a respected panel of psychiatrists speaking for the American Psychiatric Association, "[t]he line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk." Insanity Defense Work Group, American Psychiatric Association Statement on the Insanity Defense, 140 Am. J. Psychiatry 681, 685 (1983). The problem is not that mental health professionals do not know where to locate an appropriate cutoff point in the strength of impulses, or in this case the mental capability to resist; rather, the problem is that mental health professionals have no good way to gauge the strength of such internal impulses at all. Because of the difficulties of proof, I would not adopt a standard relying on the exercise of will as the law governing the capacity to consent.

Be that as it may, the analysis made herein regarding the evidence of capacity in this case is correct even under the exercise of will test adopted by the plurality. The expert testimony that Reavis felt unable to refuse Slominski because she felt her job depended on having sex with him is cited by the plurality as having undermined Reavis' capacity to consent and as a form of duress. But this type of testimony is irrelevant to both capacity and duress. It is a well-settled proposition of law that economic duress such as a threat of loss of employment is not sufficient to invalidate consent. See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 18 (5th ed. 1984). See, also, *Foley v. Polaroid Corp.*, 400 Mass. 82, 508 N.E.2d 72 (1987) (threats of discharge from employment not sufficient to invalidate consent that contradicts false imprisonment); *Faniel v. Chesapeake & Potomac Telephone Co.*, 404 A.2d 147 (D.C. App. 1979) (fear of losing one's job, although powerful incentive, does not render involuntary the behavior induced). Thus, although Reavis' fear of losing her job might have been a powerful incentive, it did not affect her capacity to consent or constitute a form of duress as a matter of law. Whether such a fear would be sufficient to support a claim of sexual harassment under title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1988), or the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. § 48-1101 et seq.

(Reissue 1993), is a different question; but this is not such a case.

Other expert testimony that the circumstances of being isolated and behind a locked door compromised Reavis' ability to withhold consent does not show that Reavis was incapable of consenting or resisting. It is therefore irrelevant to the issue of capacity. As an implied threat, it more properly belongs in the category of duress or coercion.

This leaves only the testimony that Reavis might fear protesting too vigorously because of her abusive childhood. That testimony, even when construed in the light most favorable to Reavis, falls far short of showing that Reavis was "mentally incapable of resisting." The most it shows is that because of her abusive childhood, it would be more difficult for Reavis to protest vigorously. There are simply no facts in evidence which would support an opinion that Reavis was "mentally incapable of resisting."

Because the facts relied upon by the witnesses in reaching that conclusion do not relate to the plurality's legal test, I have to conclude that there is no factual foundation for the opinion evidence that Reavis lacked the capacity to consent.

Having reviewed the law of consent, I move on to the question of whether the facts are such that as a matter of law, Reavis effectively consented to having sexual relations with Slominski. In this regard, the plurality correctly observes that a trial court may properly direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds could draw but one conclusion therefrom. *Nickell v. Russell*, 247 Neb. 112, 525 N.W.2d 203 (1995); *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994); *Kozeny v. Miller*, 243 Neb. 402, 499 N.W.2d 75 (1993). Moreover, the party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Nickell, supra*; *Lindsay Mfg. Co., supra*.

Under the record with which we are presented, there is no triable issue of fact on the matter of consent. How can one's disrobing and one's willing participation in sexual intercourse be considered an ambiguous indication of consent to have intercourse? The plurality has no answer, except to say that "disrobing does not necessarily indicate that [Reavis] consented to the sexual contact if the prior events indicated that she felt that she had no other choice but submission at that time." While I recognize that there could be an issue regarding whether Reavis was coerced by Slominski, that does not render Reavis' conduct an ambiguous indication of her consent.

Coercion, as noted previously, goes to the effectiveness of consent. So the ultimate question becomes whether Slominski forced Reavis to engage in sexual intercourse with him.

Reavis admitted that Slominski never physically forced her to have sex with him, and a review of the record reveals no evidence that Slominski ever threatened Reavis with physical force. Nonetheless, Reavis claims that she felt that she had no other choice but to engage in sexual intercourse with Slominski because she feared losing her job and needed the money.

As a consequence, there is no issue of fact for the jury to decide, not because Reavis was "unchaste" or "errant," and was not subjected to physical force, but because, as noted in *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 718, 508 N.W.2d 907, 911 (1993), it is a fundamental principle of common law that " 'to one who is willing, no wrong is done.' " The district court clearly erred in not sustaining the motion for a directed verdict Slominski made at the close of all the evidence.

Accordingly, I would reverse the judgment of the district court and remand the cause for dismissal.

FAHRNBRUCH, J., joins in this dissent.

WRIGHT, J., dissenting.

I dissent. The issue in this case is whether Slominski had sexual intercourse with Reavis without her consent. The evidence was based upon the testimony of two medical doctors regarding whether Reavis lacked the legal capacity to consent

to the sexual intercourse. One doctor said that Reavis' ability to consent was "compromised by the circumstances." The rest of his testimony was equivocal, but he stated that it was easier for Reavis to refuse when there were other people around. The other doctor stated that Reavis "felt that her job depended upon having sex with [Slominski] and that she had no recourse." In my opinion, there was no basis for submitting the issue of lack of capacity to consent to the jury. A threat of loss of employment did not impair Reavis' ability to say no.

I also cannot accept the plurality's position that Slominski could have known that Reavis could not effectively give consent, because Slominski had repeatedly been able to engage in sexual contact in the past, despite Reavis' requests that he not touch her. Reavis admitted that she had previously been able to successfully refuse Slominski's advances.

In my opinion, there was a valid consent to the sexual intercourse, and the district court should have directed a verdict in favor of Slominski at the close of all of the evidence.

ROGER W. HEINS, APPELLANT, V. WEBSTER COUNTY, NEBRASKA, DOING BUSINESS AS WEBSTER COUNTY HOSPITAL, APPELLEE.

552 N.W.2d 51

Filed August 23, 1996. No. S-94-713.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Negligence: Invitor-Invitee: Licensee.** The distinction between invitees and licensees is eliminated: we now require a standard of reasonable care for all lawful visitors.
3. **Negligence.** Among the factors to be considered in evaluating whether a landowner or occupier has exercised reasonable care for the protection of lawful visitors will be (1) the foreseeability or possibility of harm; (2) the purpose for which the entrant entered the premises; (3) the time, manner, and circumstances under which the entrant entered the premises; (4) the use to which the

premises are put or are expected to be put; (5) the reasonableness of the inspection, repair, or warning; (6) the opportunity and ease of repair or correction or giving of the warning; and (7) the burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection.

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

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

Daniel L. Lindstrom and Jeffrey H. Jacobsen, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellee.

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

CONNOLLY, J.

The question presented is whether this court should abolish the common-law classifications of licensee and invitee and require a duty of reasonable care to all nontrespassers.

Roger W. Heins sued Webster County, Nebraska, doing business as Webster County Hospital, to recover for an injury to his back that he sustained when he fell upon the front entrance steps to the hospital. The district court for Webster County entered judgment in favor of the county, finding that because Heins was merely a licensee, the only duty that the county owed him was to refrain from willful or wanton negligence. Heins appeals, arguing that this court should reverse the decision of the district court and abolish the common-law classifications of licensee and invitee in favor of requiring a duty of reasonable care to all nontrespassers. We conclude that abolishing the distinction between invitee and licensee and requiring a duty of reasonable care to all lawful entrants is a more reasonable method of determining fault and is more responsive to the needs of present-day society. We therefore reverse the judgment of the district court.

FACTUAL BACKGROUND

Webster County experienced a heavy snowfall on October 31, 1991. On November 5, snow accumulation in Red Cloud,

Nebraska, remained substantial. On that date, Heins traveled from his home in Sutton, Nebraska, to Red Cloud in order to visit his physician. While in Red Cloud, Heins, accompanied by his wife, Ruth, and daughter Jill, visited the Webster County Hospital. The evidence is disputed concerning the nature of this trip. Webster County claims that Heins was merely paying a social visit to his daughter Julie Heins, who was the director of nursing for the hospital. Heins claims that his visit was not only social, but also to coordinate plans for him to play Santa Claus for the hospital staff during the upcoming Christmas season. During their visit with Julie, Roger, Ruth, and Jill made plans to have lunch with Julie and a friend at a local restaurant.

While Roger, Ruth, and Jill were exiting the hospital through the main entrance, Roger fell. At trial, Roger testified that he held the front entrance door open for his wife and daughter and then started to step out onto the landing himself. At this point, Heins testified, he slipped and "went down into a pretzel, you might say, and I was hanging on to the door, and my behind hit the landing." Both Jill and Heins claim to have seen a patch of ice on the landing after Heins fell, and attribute the cause of his fall to the ice.

Heins brought this action under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 through 13-926 (Reissue 1991 & Cum. Supp. 1994), claiming that Webster County was negligent (1) in failing to properly inspect the above-described entrance prior to inviting the public to use the entrance, (2) in failing to warn Heins of the existence of a dangerous condition, (3) in allowing the ice and snow to accumulate, and (4) in failing to remove the ice and snow.

Following a bench trial, the district court found that Heins "went to the Webster County Hospital to visit his daughter who was an employee of the hospital." Furthermore, the court concluded that Heins was a licensee at the time of his fall and that the county did not act willfully or wantonly or fail to warn of known hidden dangers unobservable by Heins. Thus, the court entered judgment in favor of Webster County. Heins appeals.

ASSIGNMENTS OF ERROR

Summarized, Heins assigns that the district court erred in not generally holding the hospital to a duty of reasonable care to Heins. In the alternative, he argues the hospital should be held to a duty of reasonable care for one of the following reasons: (1) he was a public invitee, (2) he was a social guest on the hospital premises, or (3) hospital personnel knew he was on the premises.

STANDARD OF REVIEW

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Nelson v. Metropolitan Utilities Dist.*, 249 Neb. 956, 547 N.W.2d 133 (1996); *Whitten v. Malcolm*, 249 Neb. 48, 541 N.W.2d 45 (1995); *Lee Sapp Leasing v. Catholic Archbishop of Omaha*, 248 Neb. 829, 540 N.W.2d 101 (1995).

ANALYSIS

This appeal questions the continued validity of the common-law classifications of licensee, invitee, and trespasser for the purposes of determining the duty of a landowner in premises liability cases. We begin by noting that this appeal presents our first consideration of this issue. In *Buchanan v. Prickett & Son, Inc.*, 203 Neb. 684, 279 N.W.2d 855 (1979), a case involving the "fireman's rule," we declined to abrogate the policy of defining the extent of the duty of care by the use of the classifications. However, *Buchanan* did not raise the issue of whether we should retain the classifications, and we recognized that under the facts in *Buchanan* a reconsideration of the classifications was unnecessary.

Present Nebraska Law

Under present law, in order to ascertain the duty owed by landowners to entrants upon their land, courts have classified entrants as either licensees, invitees, or trespassers. Landowners owe invitees the duty of reasonable care to keep the premises safe for the use of the invitee. *Neff v. Clark*, 219 Neb. 521, 363 N.W.2d 925 (1985). An invitee is a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of

the owner or occupant or for their mutual advantage. *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996). However, we have limited the duty that a landowner owes to a licensee. A licensee has been defined as a person who is privileged to enter or remain upon the premises of another by virtue of the possessor's express or implied consent, but who is not a business visitor. *Id.* An owner or occupant of premises owes only the duty to refrain from injuring a licensee by willful or wanton negligence or designed injury, or to warn him, as a licensee, of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee, who is required to exercise ordinary care. *Blackbird v. SDB Investments*, 249 Neb. 13, 541 N.W.2d 25 (1995). A business visitor is considered an invitee, and thereby receives a higher degree of care, reasonable care, ostensibly because he or she conveys some benefit upon the landowner. See *Roan v. Bruckner*, 180 Neb. 399, 143 N.W.2d 108 (1966). If Heins was a licensee at the time of his injury, the hospital owed him the limited duty owed to a licensee. Therefore, under existing Nebraska law, the trial court correctly found for the hospital based on its finding that Heins was a licensee.

However, Heins calls into question the continued usefulness of the licensee and invitee classifications. In fact, a number of jurisdictions have decided that the common-law classifications have outlived their usefulness, and have either partially or completely abandoned the common-law classifications.

Overview of Other Jurisdictions

In 1957, England statutorily abolished the common-law distinction between licensees and invitees and imposed upon the occupier a "common duty of care" toward all persons who lawfully enter the premises. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 62 (5th ed. 1984). Shortly thereafter, in 1959, the U.S. Supreme Court decided that the classifications would not apply in admiralty law, stating that the classifications created a "semantic morass." See, *Kermarec v. Compagnie Generale*, 358 U.S. 625, 631, 79 S. Ct. 406, 3 L. Ed. 2d 550 (1959); Keeton et al., *supra*. In 1968, the

Supreme Court of California decided the landmark case *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), which abolished the traditional duty classification scheme for licensees, invitees, and trespassers and replaced it with ordinary negligence principles.

A number of jurisdictions have followed California in abandoning all classifications, including that of trespasser. The jurisdictions that have followed California are: Hawaii (*Pickard v. City & County*, 51 Haw. 134, 452 P.2d 445 (1969)); Colorado (*Mile High Fence v. Radovich*, 175 Colo. 537, 489 P.2d 308 (1971)); *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97 (D.C. Cir. 1972), *cert. denied* 412 U.S. 939, 93 S. Ct. 2774, 37 L. Ed. 2d 399 (1973); Rhode Island (*Mariorenzi v. Joseph DiPonte, Inc.*, 114 R.I. 294, 333 A.2d 127 (1975)) (but see *Tantimonico v. Allendale Mut. Ins. Co.*, 637 A.2d 1056 (R.I. 1994) (restoring status category of trespasser)); New York (*Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976)); New Hampshire (*Ouellette v. Blanchard*, 116 N.H. 552, 364 A.2d 631 (1976)); Louisiana (*Cates v. Beauregard Electric Cooperative, Inc.*, 328 So. 2d 367 (La. 1976), *cert. denied* 429 U.S. 833, 97 S. Ct. 97, 50 L. Ed. 2d 98); Alaska (*Webb v. City and Borough of Sitka*, 561 P.2d 731 (Alaska 1977)); Illinois (*Keller v. Mols*, 129 Ill. App. 3d 208, 472 N.E.2d 161 (1984) (only with regard to child entrants)); Montana (*Limberhand v. Big Ditch Co.*, 218 Mont. 132, 706 P.2d 491 (1985) (construing Montana statute to require duty of ordinary care to all)); and Nevada (*Moody v. Manny's Auto Repair*, 110 Nev. 320, 871 P.2d 935 (1994)).

A number of states have abolished the distinctions between licensees and invitees but retained limited duties to trespassers. Prosser and Keeton explain the rationale for retaining a separate rule for trespassers thus: "[I]n a civilization based on private ownership, it is considered a socially desirable policy to allow a person to use his own land in his own way, without the burden of watching for and protecting those who come there without permission or right." Keeton et al., *supra*, § 58 at 395. Furthermore, "invitees and licensees enter another's lands under color of right, [but] a trespasser has no basis for claiming extended protection. There remains the possibility

that the abandonment of the status of trespasser would place an unfair burden on a landowner who has no reason to expect a trespasser's presence." *Poulin v. Colby College*, 402 A.2d 846, 851 n.5 (Me. 1979).

The states that have abandoned the classifications with regard to licensees and invitees but retained them with regard to trespassers are: Minnesota (*Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639 (1972)); Massachusetts (*Mounsey v. Ellard*, 363 Mass. 693, 297 N.E.2d 43 (1973)) (see, also, *Schofield v. Merrill*, 386 Mass. 244, 435 N.E.2d 339 (1982) (trespasser exclusion reaffirmed by vote of 4 to 3)); Wisconsin (*Antoniewicz v. Reszczynski*, 70 Wis. 2d 836, 236 N.W.2d 1 (1975)); North Dakota (*O'Leary v. Coenen*, 251 N.W.2d 746 (N.D. 1977)); Maine (*Poulin v. Colby College, supra*); Oregon (*Ragnone v. Portland School Dist. No. 1J*, 291 Or. 617, 633 P.2d 1287 (1981)); Tennessee (*Hudson v. Gaitan*, 675 S.W.2d 699 (Tenn. 1984)); Wyoming (*Clarke v. Beckwith*, 858 P.2d 293 (Wyo. 1993)); Kansas (*Jones v. Hansen*, 254 Kan. 499, 867 P.2d 303 (1994)); and New Mexico (*Ford v. Bd. of County Com'rs*, 118 N.M. 134, 879 P.2d 766 (1994)).

Many states have altered the common-law categories without abrogating them altogether. Missouri and Kentucky apply a duty of reasonable care once the presence of a visitor is known. While this approach does not expressly abrogate the common-law classifications, once a landowner or occupier knows of the presence of a licensee or trespasser, the landowner owes him or her the same duty of care that he owes to an invitee. Therefore, this approach is similar to the California rule and may have developed from the "discovered trespasser rule," which provides that an occupier must exercise reasonable care for a trespasser's safety once his or her presence is known. See Keeton et al., *supra*, § 58.

Other states have passed legislation altering the common-law categories. Connecticut was the first state to do so by providing that the landowner owed the same duty of care to social guests as he owed to invitees. See, Joseph A. Page, The Law of Premises Liability (2d ed. 1988); Conn. Gen. Stat. Ann. § 52-557a (West 1991). Other states have given the social guest the status of an invitee. See, *Burrell v. Meads*,

569 N.E.2d 637 (Ind. 1991); *Ferguson v. Bretton*, 375 A.2d 225 (Me. 1977). Illinois eliminated the classifications by statute in 1984. See Ill. Ann. Stat. ch. 740, para. 130/2 (Smith-Hurd 1993).

However, the majority of states have retained the common-law distinctions. Thirty-six states and the District of Columbia have reconsidered the common-law classification scheme. Of the 37 jurisdictions reconsidering, 23 have abolished either some or all of the categories. Fourteen states have expressly retained the categories. Another 14 jurisdictions have simply continued to apply the common-law classifications without specifically addressing their continuing validity. We have been among the states continuing to follow the distinctions without specifically rejecting them.

Policy Reasons For and Against Abolishing Classifications

A number of policy reasons have been asserted for either abandoning or retaining the common-law classifications. Among the jurisdictions retaining the categories, most find value in the predictability of the common law. Some courts rejecting change have reasoned that replacement of a stable and established system of loss allocation results in the establishment of a system devoid of standards for liability. See, *Jones v. Hansen, supra*; Annot., 22 A.L.R.4th 294 (1983). It also has been suggested that the harshness of the common-law rules has been ameliorated by the judicial grafting of exceptions and that creation of subclassifications ameliorated the distinctions between active and passive negligence. *Jones v. Hansen, supra*. These states have concluded that abandoning the established system of liability in favor of a standard of reasonable care would decrease predictability and ensure that each case would be decided on its facts. Therefore, these states claim that landowners would be less able to guard against risks. Before Kansas joined those states abolishing the invitee-licensee distinction, the Kansas Supreme Court argued that to adopt one standard of care would lower the standard of care that is now owed to invitees and produce inconsistent, unpredictable rules of law. See *Gerchberg v. Loney*, 223 Kan. 446,

576 P.2d 593 (1978). Furthermore, the *Gerchberg* court opined that to abolish the classifications would give unbridled discretion to the jury.

The most common reason asserted for abandoning the categories is that an entrant's status should not determine the duty that the landowner owes to him or her. As the California Supreme Court stated in *Rowland v. Christian*, 69 Cal. 2d 108, 118, 443 P.2d 561, 568, 70 Cal. Rptr. 94, 104 (1968):

> A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.

In abolishing the invitee-licensee distinction, the Massachusetts Supreme Judicial Court recognized:

> It no longer makes any sense to predicate the landowner's duty solely on the status of the injured party as either a licensee or invitee. Perhaps, in a rural society with sparse land settlements and large estates, it would have been unduly burdensome to obligate the owner to inspect and maintain distant holdings for a class of entrants who were using the property "for their own convenience" . . . but the special immunity which the licensee rule affords landowners cannot be justified in an urban industrial society.

Mounsey v. Ellard, 363 Mass. 693, 706, 297 N.E.2d 43, 51 (1973).

Another justification for abandoning the classifications is to eliminate the complex and unpredictable state of the law necessitated by the harsh nature of the common-law rules. See

O'Leary v. Coenen, 251 N.W.2d 746 (N.D. 1977). As the U.S. Supreme Court proclaimed,

> courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict.

Kermarec v. Compagnie Generale, 358 U.S. 625, 630-31, 79 S. Ct. 406, 3 L. Ed. 2d 550 (1959). The Court recognized that the "distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism." 358 U.S. at 630. Referring to the judicial interpretation of the common-law distinctions as a "semantic morass," the Court declined to adopt them into admiralty law. 358 U.S. at 631.

Those states abandoning the distinctions argue that instead of the entrant's status, the foreseeability of the injury should be the controlling factor in determining the liability of the landowner. See, *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976); *Mariorenzi v. Joseph Di Ponte, Inc.*, 114 R.I. 294, 333 A.2d 127 (1975). Many jurisdictions that have abandoned the common-law classifications as determinants of liability have found that they remain relevant in determining the foreseeability of the harm under ordinary negligence principles. See, *O'Leary v. Coenen, supra*; *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639 (1972).

Application of the Law to Heins

The present case illustrates the frustration inherent in the classification scheme. In many instances, recovery by an entrant has become largely a matter of chance, dependent upon the pigeonhole in which the law has put him, e.g., "trespasser," "licensee," or "invitee." *Ford v. Bd. of County Com'rs*, 118 N.M. 134, 879 P.2d 766 (1994); *Peterson v. Balach, supra*. When he was injured, Heins was exiting a county hospital, using the main entrance to the hospital, over

the lunch hour. If Heins had been on the hospital premises to visit a patient or purchase a soft drink from a vending machine, he could have been classified as an invitee. See, e.g., *Syas v. Nebraska Methodist Hospital Foundation*, 209 Neb. 201, 307 N.W.2d 112 (1981). However, he came to visit his daughter and was denied recovery as a matter of law.

Thus, Heins was denied the possibility of recovering under present law, merely because on this trip to the hospital he happened to be a licensee rather than an invitee. In the instant case, the hospital would undergo no additional burden in exercising reasonable care for a social visitor such as Heins, because it had the duty to exercise reasonable care for its invitees. A patient visitor could have used the same front entrance at which Heins fell and would have been able to maintain a negligence action; however, Heins has been denied the opportunity to recover merely because of his status at the time of the fall.

Modern commercial society creates relationships between persons not contemplated by the traditional classifications. See *Kermarec v. Compagnie Generale, supra*. Yet we have continued to pigeonhole individuals as licensees or invitees as a convenient way to ascertain the duty owed by the landowner. For instance, in *Presho v. J. M. McDonald Co.*, 181 Neb. 840, 151 N.W.2d 451 (1967), a customer of a retail store was injured when she entered a back room of the store with the permission of the store manager, in order to retrieve an empty box. We held the customer to be a licensee rather than an invitee because "[s]he was on an errand personal to herself, not in any way connected with the business of the defendant." 181 Neb. at 843-44, 151 N.W.2d at 454. We recognized that while she was in the store proper, she was an invitee. However, we found her to be a licensee when she entered the back room, despite the fact that the ladies' restroom was located in this back room area and was used by customers to the store.

The common-law status classifications should not be able to shield those who would otherwise be held to a standard of reasonable care but for the arbitrary classification of the visitor as a licensee. We find no merit in the argument that the duty of reasonable care is difficult for a fact finder to understand

or apply, because it has been used successfully with regard to invitees and is the standard used in almost all other tort actions.

We conclude that we should eliminate the distinction between licensees and invitees by requiring a standard of reasonable care for all lawful visitors. We retain a separate classification for trespassers because we conclude that one should not owe a duty to exercise reasonable care to those not lawfully on one's property. Adopting this rule places the focus where it should be, on the foreseeability of the injury, rather than on allowing the duty in a particular case to be determined by the status of the person who enters upon the property.

Our holding does not mean that owners and occupiers of land are now insurers of their premises, nor do we intend for them to undergo burdens in maintaining such premises. We impose upon owners and occupiers only the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors. Among the factors to be considered in evaluating whether a landowner or occupier has exercised reasonable care for the protection of lawful visitors will be (1) the foreseeability or possibility of harm; (2) the purpose for which the entrant entered the premises; (3) the time, manner, and circumstances under which the entrant entered the premises; (4) the use to which the premises are put or are expected to be put; (5) the reasonableness of the inspection, repair, or warning; (6) the opportunity and ease of repair or correction or giving of the warning; and (7) the burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection.

Although we have set forth some of the factors to be considered in determining whether a landowner or occupier has exercised reasonable care for the protection of lawful visitors, it is for the fact finder to determine, on the facts of each individual case, whether or not such factors establish a breach of the duty of reasonable care.

CONCLUSION

We determine that the invitee-licensee distinction should be abandoned and the new rule applied in the instant case.

Considering that other litigants may have relied on our previous rule and incurred time and expense in prosecuting or defending their claims, we conclude, with the exception of the instant case, that the rule announced today shall be applied only to all causes of action arising after this date. We reverse, and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

FAHRNBRUCH, J., dissenting.

I respectfully dissent from the majority opinion.

The majority opinion states that modern society does not contemplate such traditional classifications as invitee and licensee. However, the same majority opinion states that the majority of states have retained the common-law distinctions of invitee and licensee.

In Nebraska, we have had no problem in assigning liabilities based upon invitee and licensee status, as witnessed by the recent unanimous opinions *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996), and *Blackbird v. SDB Investments*, 249 Neb. 13, 541 N.W.2d 25 (1995).

The majority opinion dismantles longstanding common law by eliminating the concept of licensee, thereby forcing a landowner to treat a person who is allowed to enter or remain upon premises with the same standard of care as a person who is invited onto the premises for the mutual benefit of both landowner and invitee.

Under the majority opinion, a landowner owes a duty of reasonable care to an individual who becomes injured by conducting activities on the premises without the landowner's express permission or knowledge. From this moment on, public and private institutions, as well as residential homeowners, must be especially aware of unknown, uninvited individuals who take advantage of their land and facilities.

In *McCurry v. Young Men's Christian Assn.*, 210 Neb. 278, 313 N.W.2d 689 (1981), an individual brought an action against a Young Men's Christian Association (YMCA) as a result of an injury which arose from a fall while the individual was playing basketball on an outdoor asphalt playground owned by the YMCA. The plaintiff was not a member of the

YMCA and had not obtained any express permission to use the playground. This court held that the plaintiff was a licensee and affirmed the trial court's directed verdict in favor of the YMCA. Under the majority's opinion, YMCA's and like institutions will be subject to lawsuits which hold them to a duty to treat such uninvited users of their facilities with the same standard of care as the paying members of the institution.

This court should not enact public policy which, in effect, socializes the use of privately owned property to the extent that the landowner owes the same duty to all, except trespassers, who enter the owner's land. It is not the function of the court to create a liability where the law creates none. *Acton v. Wymore School Dist. No. 114*, 172 Neb. 609, 111 N.W.2d 368 (1961).

Under the majority's opinion, a homeowner would have potential liability for any number of not only uninvited but unwanted solicitors or visitors coming to the homeowner's door.

CAPORALE, J., joins in this dissent.

DENISE A. GUZMAN, APPELLANT, V. JAMES BARTH, APPELLEE.
552 N.W.2d 299

Filed August 30, 1996. No. S-94-598.

1. **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.
2. **Trespass: Words and Phrases.** A trespasser is a person who enters or remains upon premises in possession of another without the express or implied consent of the possessor.
3. **Animals: Liability: Notice.** Under common law, the owner of a dog was not liable for injury caused by it unless the dog was vicious and the owner had notice of the fact that the dog was vicious.

4. **Statutes: Intent.** It is a recognized rule of construction that statutes which effect a change in the common law or take away a common-law right should be strictly construed, and a construction which restricts or removes a common-law right should not be adopted unless the plain words of the act compel it.
5. ____: ____. In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
6. **Actions: Torts: Animals.** Neb. Rev. Stat. § 54-601 (Reissue 1993) does not abrogate the common-law tort action for injuries caused by dogbites.

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

Thomas A. Gleason for appellant.

John R. Brogan, of Brogan & Brogan, for appellee.

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

WRIGHT, J.

Denise A. Guzman appeals the district court's sustaining of a demurrer to her amended petition for damages as a result of being bitten by a dog owned by James Barth on Barth's property.

SCOPE OF REVIEW

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. *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995); *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995); *Dalition v. Langemeier*, 246 Neb. 993, 524 N.W.2d 336 (1994).

FACTS

Guzman's amended petition alleges that on May 15, 1993, she was driving a motor vehicle on Interstate 80, traveling with her elderly grandmother who was disabled. Guzman's vehicle became inoperable because of a mechanical break-

down, and she began walking to the nearest visible residence to seek emergency assistance.

As Guzman neared the fence surrounding Barth's residence, Barth's dog ran through an open gate and without warning violently bit her right leg. Guzman alleged that the sole proximate cause of her injuries was Barth's negligence in (1) failing to keep the dog chained when Barth knew of its dangerous and vicious tendencies; (2) failing to keep the dog confined to an area where it could not cause harm to others when Barth knew of its dangerous and vicious tendencies; (3) leaving the gate open, allowing the dog which Barth knew was dangerous to people to run loose; and (4) failing to provide any warning to Guzman of the dangerous dog. Guzman alleged that pursuant to Neb. Rev. Stat. § 54-601 (Reissue 1993), Barth was liable for any and all damages that occurred as a result of the dogbite.

Barth demurred to the amended petition, alleging that Guzman failed to state a claim upon which relief could be granted because Guzman failed to allege any facts which established that Guzman was not a trespasser. The demurrer was sustained, and Guzman timely appealed.

ASSIGNMENT OF ERROR

Guzman alleges that the district court erred in holding that the amended petition failed to state a cause of action.

ANALYSIS

The issue in this case is whether § 54-601 abrogated the common-law right of action for a dogbite. Section 54-601 provides:

> Dogs are hereby declared to be personal property for all intents and purposes, and the owner or owners of any dog or dogs shall be liable for any and all damages that may accrue (1) to any person, other than a trespasser, by reason of having been bitten by any such dog or dogs and (2) to any person, firm, or corporation by reason of such dog or dogs killing, wounding, injuring, worrying, or chasing any person or persons or any sheep or other domestic animals belonging to such person, firm, or cor-

poration. Such damage may be recovered in any court having jurisdiction of the amount claimed.

For purposes of this opinion, we treat Guzman as a trespasser. There was no allegation that the injury did not occur on Barth's property, and Guzman has not alleged that she had actual or implied consent to be on Barth's property when the dogbite occurred. In *Kenney v. Barna*, 215 Neb. 863, 341 N.W.2d 901 (1983), we defined a trespasser as a person who enters or remains upon premises in possession of another without the express or implied consent of the possessor.

Guzman argues that we should adopt the doctrine of "private necessity" set forth in the Restatement (Second) of Torts § 197 (1965). Under this doctrine, one is privileged to enter on the land of another if the entry is necessary to prevent serious harm to the actor, his or her land or chattels, or third persons. *Id.* Consideration of this doctrine is not necessary for our decision in this case.

The issue is whether § 54-601 abrogated the common-law cause of action for dogbites. Under common law, the owner of a dog was not liable for injury caused by it unless the dog was vicious and the owner had notice of the fact that the dog was vicious. See, *Netusil v. Novak*, 120 Neb. 751, 235 N.W. 335 (1931); *Herbert v. Katzberg*, 104 Neb. 395, 177 N.W. 650 (1920); *Warrick v. Farley*, 95 Neb. 565, 145 N.W. 1020 (1914). In order to recover, the plaintiff first had to prove that the dog owner had knowledge of the dog's vicious tendencies. If the plaintiff proved that the owner knew or had reason to know that the dog had such a tendency, the dogbite was actionable and the dog owner was liable for the injuries caused by the dog. See *Netusil v. Novak, supra.*

Section 54-601 removed the "scienter" requirement with respect to nontrespassers. Nontrespassers are no longer required to prove that the dog owner had knowledge of the dog's vicious tendency or that the dog had previously bitten anyone in order to maintain the action against the owner. See, *Paulsen v. Courtney*, 202 Neb. 791, 277 N.W.2d 233 (1979); *Donner v. Plymate*, 193 Neb. 647, 228 N.W.2d 612 (1975). In *Paulsen*, we stated:

> At common law, in the absence of negligence, the owner of a dog was not liable for injuries caused by the dog, unless the animal had a propensity for viciousness and the owner had knowledge of the same. [Citations omitted.] This common law was abrogated by our Legislature when they adopted the provisions of section 54-601 . . . . It is, however, a recognized rule of construction that statutes which effect a change in the common law or take away a common law right should be strictly construed, and a construction which restricts or removes a common law right should not be adopted unless the plain words of the act compel it. [Citation omitted.] On that basis, the provisions of section 54-601 . . . must be construed strictly by the court.

202 Neb. at 794, 277 N.W.2d at 235.

In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *In re Interest of Lisa O.*, 248 Neb. 865, 540 N.W.2d 109 (1995); *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994). In addition, this court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993).

We hold that § 54-601 does not abrogate the common-law tort action for injuries caused by dogbites. The common law that was abrogated by the adoption of § 54-601 was the requirement of knowledge by the owner of the propensity for viciousness of the dog. Therefore, only a trespasser is still required to prove the dog owner's knowledge of the animal's propensity for viciousness. In *Paulsen*, we explained that the purpose of § 54-601 was to expand the liability of dog owners by removing the common-law requirement that the plaintiff prove that the dog owner had knowledge of the dog's vicious tendency. We do not find that it was the intent of the Legislature to immunize the owners of vicious dogs against any and all claims that might be advanced by a trespasser.

While § 54-601 exempts a dog owner from strict liability for injuries to a trespasser caused by the owner's dog, it does not cut off the common-law tort remedy available to a trespasser for a dogbite. A trespasser may still allege a common-law cause of action against the dog's owner. In doing so, the trespasser must prove that the owner had knowledge of the dog's vicious propensities. See *Netusil v. Novak*, 120 Neb. 751, 235 N.W. 335 (1931).

CONCLUSION

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. *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995). In the case at bar, Guzman has pled that Barth's dog bit her, causing her injury, and that Barth knew that his dog was dangerous and vicious. These allegations are sufficient to maintain a cause of action against Barth, and therefore, the district court erred in sustaining the demurrer.

The judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CAPORALE, J., participating on briefs.

ANDERZHON/ARCHITECTS, INC., APPELLEE, V. 57 OXBOW II PARTNERSHIP AND MICHAEL KRILL, APPELLANTS.

553 N.W.2d 157

Filed September 27, 1996. No. S-94-575.

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. **Attorney and Client: Actions.** Except as provided in Neb. Rev. Stat. § 7-101.01 (Reissue 1991), relating to certified law students, no person shall practice as an attorney or counselor at law, or commence, conduct, or defend any action or proceeding to which he is not a party, by using or subscribing his own name.
4. ____: ____. Proceedings in a suit by a person not entitled to practice law are a nullity, and the suit may be dismissed.
5. **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.
6. ____: ____: ____. Lower courts are divested of subject matter jurisdiction over a particular case when an appeal of that case is perfected.
7. **Evidence.** The practice of considering exhibits that have not been offered into evidence at a hearing is condemned and prohibited, because such practice denies an opposing litigant of the opportunity to object to exhibits submitted to a court before a ruling is made.
8. **Summary Judgment: Affidavits.** Neb. Rev. Stat. § 25-1332 (Reissue 1995), in regard to motions for summary judgment, provides that after a motion for summary judgment has been filed, the adverse party prior to the day of the hearing may serve opposing affidavits.
9. **Contracts.** When parties reduce an agreement to a writing, which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Michael Krill, pro se.

Gregory C. Scaglione and, on brief, Richard J. Gilloon for appellee.

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

FAHRNBRUCH, J.

In this litigation, Anderzhon/Architects, Inc. (Anderzhon), seeks payment from the defendants, 57 Oxbow II Partnership (Oxbow) and Michael Krill, for services Anderzhon rendered

to Oxbow and Krill pursuant to the terms of a standard, written form agreement, B141 of the American Institute of Architects, which was executed by all the parties.

The district court for Douglas County sustained Anderzhon's motion for summary judgment and awarded Anderzhon judgment in the amount of $10,296.34.

Oxbow and Krill filed an appeal to the Nebraska Court of Appeals. We removed the appeal to this court's docket pursuant to our power to regulate the caseloads of the appellate courts.

The record reflects no dispute as to any material fact. We affirm the trial court's decision that Anderzhon is entitled to summary judgment against Krill as a matter of law.

We dismiss the appeal as it pertains to Oxbow because, at the time of filing the notice of appeal and thereafter through argument in this court, Oxbow was represented by an individual not authorized to practice law in this state.

ASSIGNMENT OF ERROR

Restated and summarized, Krill claims that the district court erred in sustaining Anderzhon's summary judgment motion after finding there was no written agreement between the parties fixing a design cost limitation for the project set forth in the written contract between Krill and Anderzhon.

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. *Schiffern v. Niobrara Valley Electric, ante* p. 1, 547 N.W.2d 478 (1996).

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. *Lockard v. Nebraska Pub. Power Dist.*, 249 Neb. 971, 546 N.W.2d 824 (1996).

FACTS

It must be noted from the outset that at all times material to these facts, Krill represented or purported to represent Oxbow as its attorney. We take judicial notice that Krill was licensed to practice law in this state at the time Anderzhon filed this lawsuit and Oxbow filed its answer.

In its district court petition, Anderzhon alleged that it entered into a written contract with Oxbow and Krill in which Anderzhon agreed to prepare documents for the design and construction of a residential apartment complex in Sioux Falls, South Dakota. Anderzhon alleged that it completed the documents and that Oxbow and Krill refused to pay the contractually agreed amount of $16,062.68. The first cause of action in the petition was against Oxbow, and the second cause of action was against Krill.

Oxbow and Krill answered with an affirmative defense, alleging that Anderzhon was required to design an apartment project that could be built within a certain budget and that as designed, the project could not be built within that budget.

Anderzhon moved for summary judgment in the district court for Douglas County and at the February 11, 1994, summary judgment hearing offered three exhibits, which were received in evidence: (1) a photocopy of the original contract, (2) Anderzhon's affidavit, and (3) Oxbow and Krill's answers to Anderzhon's interrogatories and answers to the request for admissions. Oxbow and Krill offered no evidence in opposition to the motion for summary judgment at the hearing. The record reflects that no affidavits in opposition to Anderzhon's summary judgment motion were admitted into evidence prior to the court's ruling on Anderzhon's summary judgment motion.

The summary judgment record further reflects that Anderzhon entered into a contract with Oxbow and Krill, Oxbow's general partner, on December 28, 1989. Anderzhon agreed to provide architectural services for Oxbow for a total basic compensation of $17,500. As to cost considerations, § 5.2.2 of the contract states in relevant part: "*No fixed limit of Construction Cost shall be established as a condition of this Agreement by the furnishing, proposal or establishment of a*

Project budget, unless such fixed limit has been agreed upon in writing and signed by the parties hereto." (Emphasis supplied.)

The summary judgment record reflects that Anderzhon fully performed the work called for in the contract. Oxbow and Krill anticipated that the construction costs of the project would be approximately $27,000 to $30,000 per unit. However, the record fails to reflect that any written agreement regarding cost considerations was signed by the parties to the contract. The plans designed by Anderzhon put the costs of construction at approximately $39,000 to $43,000 per unit.

The summary judgment record reflects that Oxbow and Krill, at the time summary judgment was entered, still owed Anderzhon a balance of $10,296.34 for services Anderzhon rendered pursuant to the December 28, 1989, agreement.

On May 10, 1994, the trial court sustained Anderzhon's motion for summary judgment. The trial court found that (1) Anderzhon fully performed under the contract and was entitled to payment, (2) there was no written term in the contract establishing a construction budget constraint, and (3) the contract provided that no fixed limit of construction costs could be established as a condition of the contract unless agreed to in writing and signed by the parties. On June 9, 1994, Oxbow and Krill purportedly appealed from the trial court's order.

On February 28, 1995, after the case was pending on appeal before this court, Oxbow and Krill moved to amend the bill of exceptions to include an affidavit of John Hoelzel, a general partner in Oxbow. The trial court on February 28 ordered that "the Affidavit of John H. Hoelzel be received in evidence (as it was indeed considered by the Court in ruling on the Summary Judgment motion herein) and made part of the Amended Bill of Exceptions in this case."

ANALYSIS

Initially, we take judicial notice that since April 13, 1993, Krill has been an inactive member of the Nebraska State Bar Association and not authorized to practice law in this state.

Neb. Rev. Stat. § 7-101 (Reissue 1991) provides:

> Except as provided in section 7-101.01 [relating to certified law students], no person shall practice as an attorney or counselor at law, or commence, conduct or defend any action or proceeding to which he is not a party, either by using or subscribing his own name, or the name of any other person, or by drawing pleadings or other papers to be signed and filed by a party, in any court of record of this state, unless he has been previously admitted to the bar by order of the Supreme Court of this state. No such paper shall be received or filed in any action or proceeding unless the same bears the endorsement of some admitted attorney, or is drawn, signed, and presented by a party to the action or proceeding. It is hereby made the duty of the judges of such courts to enforce this prohibition. Any person who shall violate any of the provisions of this section shall be guilty of a Class III misdemeanor, but this section shall not apply to persons admitted to the bar under preexisting laws.

Krill violated § 7-101 when he represented Oxbow in a legal capacity at all times following April 13, 1993, which includes the date of the summary judgment hearing, the date Krill sent to the trial court an affidavit in opposition to Anderzhon's summary judgment motion, the date he filed Oxbow's appeal, and the date he appeared before this court on behalf of Oxbow. Proceedings in a suit by a person not entitled to practice law are a nullity, and the suit may be dismissed. *Niklaus v. Abel Construction Co.*, 164 Neb. 842, 83 N.W.2d 904 (1957). As a result, this appeal, as it pertains to Oxbow, must be dismissed.

As to Krill's appeal, the trial court lacked jurisdiction on February 28, 1995, to receive into evidence Hoelzel's affidavit, because Krill had already filed his appeal from the trial court's order sustaining Anderzhon's summary judgment.

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. *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995). We have uniformly held that lower courts are divested of subject matter jurisdiction over a particular

case when an appeal of that case is perfected. *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995). In the instant case, the trial court received and entered into evidence Hoelzel's affidavit after Krill perfected his appeal to the Court of Appeals. As such, the trial court lacked jurisdiction to receive that evidence into the record.

The practice of considering exhibits that have not been offered into evidence at a hearing is condemned and prohibited, because such practice denies an opposing litigant of the opportunity to object to exhibits submitted to a court before a ruling is made.

Neb. Rev. Stat. § 25-1332 (Reissue 1995), in regard to motions for summary judgment, provides that after a motion for summary judgment has been filed, the adverse party *prior to the day* of the hearing may serve opposing affidavits. Because Hoelzel's affidavit was not timely or properly offered or properly received into evidence when the trial court had jurisdiction, it could not be considered by the trial court and cannot be considered on appeal.

A review of the record properly before this court reveals that the evidence submitted in support of Anderzhon's motion for summary judgment was uncontroverted. Anderzhon performed as it agreed in the contract. At the time of the hearing on Anderzhon's summary judgment motion, the balance of the compensation due Anderzhon for its services was $10,296.34. 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 was uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion. *Washa v. Miller*, 249 Neb. 941, 546 N.W.2d 813 (1996); *Keefe v. Glasford's Enter.*, 248 Neb. 64, 532 N.W.2d 626 (1995). The record reflects that Krill did not timely offer any evidence in opposition to Anderzhon's motion for summary judgment.

Krill contends that the agreement with Anderzhon was not integrated and that therefore parol evidence regarding budget considerations should be added to the terms of the contract. When parties reduce an agreement to a writing, which in view of its completeness and specificity reasonably appears to be a

complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression. *Leo A. Daly Co. v. Omaha-Douglas Public Bldg. Comm.*, 212 Neb. 533, 324 N.W.2d 252 (1982). Section 5.2.2 of the contract specifies that construction costs are not a condition of the agreement unless such a condition is made by the parties in writing. The record fails to reflect that the parties made such a writing. The record properly before this court reflects that Anderzhon and Krill intended the contract to be a final expression of the terms it contains with regard to project budget limitations. Accordingly, the trial court did not err in sustaining Anderzhon's motion for summary judgment.

CONCLUSION

We affirm the trial court's granting summary judgment against Krill, since there is no genuine issue of material fact in the case at bar. Anderzhon performed services pursuant to a contract, and Krill owes Anderzhon the agreed upon compensation for those services. Oxbow's appeal was a nullity because it was represented by an individual not authorized to practice law in Nebraska.

AFFIRMED.

MITCHELL D. CRIDER, A MINOR, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, BRENDA L. CRIDER, AND MARVIN CRIDER AND BRENDA L. CRIDER, HUSBAND AND WIFE, APPELLANTS, V. BAYARD CITY SCHOOLS ET AL., APPELLEES.

553 N.W.2d 147

Filed September 27, 1996. No. S-94-606.

1. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled,

together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.

2. **Judgments: Demurrer: Appeal and Error.** An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken.
3. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, a petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled.
4. **Special Education.** The education of handicapped children is governed by both federal and state legislation.
5. **Federal Acts: Special Education: States.** The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. (1994), is a funding statute under which the federal government supplies financial assistance to the states for the education of disabled students. Under 20 U.S.C. § 1400(c), the act requires that states that accept federal funds must provide disabled children with a "free appropriate public education."
6. **Schools and School Districts: Special Education.** A "free appropriate public education" requires that each handicapped child be provided with personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction, which instruction and services must be provided at public expense, must meet the state's educational standards, must approximate the grade levels used in the state's regular education, and must comport with the child's individualized educational program.
7. ____: ____. School districts must provide not only a "free appropriate public education," but also the necessary related support services for achieving that goal. Those services have been statutorily defined to include physical therapy.
8. **Administrative Law: Judicial Notice.** It is a well-settled rule in Nebraska that state courts can take judicial notice of general rules and regulations established and published by federal agencies under authority of law.
9. **Schools and School Districts: Special Education.** Special education programs and support services may be provided by contracting with an approved service provider; however, responsibility for compliance with state and federal regulations remains with the resident school district.
10. ____: ____. The resident school district shall monitor the progress of those children for whom it has contracted for related services.
11. **Schools and School Districts: Special Education: Due Process.** School districts must provide a copy of the procedures for complaints and due process hearings to parents of students for whom they have contracted for related services.
12. **Schools and School Districts: Special Education: Notice.** The resident school district is required to provide notice to the parents of a child with a disability before the school district proposes to change the educational placement or the provision of a free appropriate education to the child.
13. **Schools and School Districts: Special Education.** A school district, educational service unit, or human service center does not have a duty derived from

common law to monitor the care of a physical therapy patient or to report any proposed changes in care to the patient's parents.

14. **Schools and School Districts: Special Education: Health Care Providers.** A school district, educational service unit, or human service center is entitled to rely upon the competence of a professional therapist, licensed, paid, and supplied by a hospital or similar entity, to properly treat patients under its care.
15. **Actions: Administrative Law: Special Education: Damages: Proof.** Even in circumstances where the relief sought in a civil action is not available in an Individuals with Disabilities Act or Special Education Act administrative proceeding (e.g., where monetary damages are sought), the burden of pleading and proving that administrative remedies would be futile falls upon the party seeking to avoid them.
16. **Health Care Providers: Negligence.** Once a hospital agrees to provide medical services to a patient, that hospital and its licensed professional employees owe a duty to a patient to exercise that degree of care, skill, and diligence generally used by hospitals in the community or hospitals located in similar communities.
17. **Schools and School Districts: Negligence: Liability.** A school district may be liable in permitting negligent conduct to occur on its premises when the school district knew, or reasonably should have known, that the negligent conduct on its premises presented an unreasonable risk of harm to those entrusted to the school.
18. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that an amendment will correct the defect.

Appeal from the District Court for Morrill County: BRIAN SILVERMAN, Judge. Reversed.

David J. Cullan, of David J. Cullan & Associates, and Rebecca Maser Peterson for appellants.

James R. Hancock, of Hancock & Denton, P.C., for appellee Bayard City Schools.

Bruce A. Smith, of DeMars, Gordon, Olson, Recknor & Shively, for appellee Educational Service Unit No. 12.

Robert V. Roach and Thomas H. Cellilli III, of Hansen, Engles & Locher, P.C., for appellee Region 1 Office of Human Development.

Rodney M. Confer and James A. Snowden, of Knudsen, Berkheimer, Richardson & Endacott, for appellee Regional West Medical Center.

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

PER CURIAM.

Mitchell D. Crider, a minor and special education student, by and through his mother and next friend, Brenda L. Crider, and Marvin Crider and Brenda L. Crider, husband and wife, the appellants, in an action in the Morrill County District Court, alleged that Regional West Medical Center and three educational entities, the appellees, failed to provide agreed-upon physical therapy mandated by law, resulting in severe injuries to Mitchell Crider. It was further alleged that this failure occurred without the knowledge of the parents. The petition alleged causes of action under common law and under Nebraska's Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1991). Following the filing of the appellants' second amended petition, the district court sustained the appellees' demurrers, in part on the basis that the appellants did not exhaust the administrative remedies provided under federal and state law. The appellants filed an appeal of that judgment with the Nebraska Court of Appeals.

The appellants alleged in their appeal that the trial court erred by holding that (1) special education students have no cause of action for personal injuries and damages suffered as a result of medical malpractice, medical abandonment, or other negligence; (2) the appellants must exhaust administrative remedies under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. (1994) (IDEA), and Nebraska's Special Education Act, Neb. Rev. Stat. § 79-3301 et seq. (Reissue 1994) (SEA), prior to filing a cause of action alleging negligence; and (3) IDEA and SEA provide the exclusive remedies to the appellants under the circumstances alleged in the petition. We removed the case to our docket pursuant to our power to regulate the caseloads of the lower courts. We reverse.

BACKGROUND—FACTS PLED

The appellants filed a second amended petition on February 25, 1994. Under the rules relating to review of demurrers, all

well-pled facts are taken as true. With that in mind, we recite the following facts alleged.

Bayard City Schools, District No. 21 (Bayard Schools); Educational Service Unit No. 12 (ESU #12); and Region 1 Office of Human Development (Region 1), which operates the Child Development Center (CDC), are political subdivisions organized and existing under the laws of the State of Nebraska.

Regional West Medical Center (Regional West) is a private, nonprofit corporation and the operator of a medical facility and hospital licensed and regulated by the State of Nebraska.

This action against Bayard Schools, ESU #12, and Region 1 was commenced pursuant to the Political Subdivisions Tort Claims Act.

Regional West is not qualified or covered under the Nebraska Hospital-Medical Liability Act.

Mitchell Crider was found to be a "handicapped child" within the meaning of SEA and thus was entitled to receive special education and related services from Bayard Schools and ESU #12.

Bayard Schools and ESU #12 were "servic[ing] agencies" within the meaning of SEA and were obligated to provide, fund, supervise, and direct special education programs for handicapped children such as Mitchell Crider who resided within the geographical boundaries of Bayard Schools and ESU #12.

CDC, which was operated by Region 1, when providing services to the appellants, was a "service provider" and had been provisionally approved by the State Department of Education to provide special education contractual services.

Regional West, when providing medical care and treatment to Mitchell Crider, was a "service provider" and had been provisionally approved by the State Department of Education to provide "related services" to children such as Mitchell Crider.

Due to the lack of services available within Bayard Schools or ESU #12, special education contractual services were obtained for Mitchell Crider by agreements between Bayard Schools, ESU #12, and Region 1. The services were provided at CDC.

Due to the lack of related services available within Bayard Schools or ESU #12 or from the CDC staff, related services were obtained for Mitchell Crider by agreements with Regional West. Such services, including physical therapy, were to be provided for Mitchell Crider at CDC, and Regional West undertook to provide the physical therapy to him.

The appellants state that they were informed by the appellees and believe that written contracts between Bayard Schools and Regional West provided for rehabilitation services, including physical therapy, to handicapped children, including Mitchell Crider.

The appellants also allege that they were informed and believe that some portions of the alleged agreements between the appellees as to special education contractual services and related services, including physical therapy, which the appellees undertook to provide to Mitchell Crider, may have been reduced to written memorandums while some may have been strictly oral. Any such written memorandums are alleged to be in the possession of one or more of the appellees.

Regional West allegedly failed to provide physical therapy to Mitchell Crider from January 22, 1991, to and after August 15, 1991, although it had been determined by and for the appellees that physical therapy was necessary and appropriate. The physical therapy was discontinued without notice to Marvin and Brenda Crider from and after January 22, 1991, to and including September 19, 1991. The failure to provide physical therapy was not made known to Marvin and Brenda Crider until examination and testing at the Chadron Cerebral Palsy Clinic on August 10, 1991, revealed that both of Mitchell Crider's hips had dislocated due to the development of severe contractures from the lack of adequate physical therapy.

Mitchell Crider is a minor. He was born prematurely and suffers from microcephaly with shunted hydrocephalus, cerebral palsy, a seizure disorder, failure to thrive, and gastroesophageal reflux. He is nonambulatory and non-weight-bearing. At all times, Mitchell Crider was unable to understand or communicate that physical therapy was not being provided, that severe hip contractures were developing, or that his hips were dislocating.

For their cause of action, the appellants allege that the appellees either knew or should have known that physical therapy was not being provided to Mitchell Crider as had been agreed and undertaken; that Marvin and Brenda Crider were not aware of the discontinuance of physical therapy; that Marvin and Brenda Crider relied on Bayard Schools, ESU #12, and the staff at CDC as professional educators to provide, fund, supervise, and direct the provision of all rehabilitation services at CDC and to tell them of any changes or interruptions of such services; and that Marvin and Brenda Crider would have objected to such discontinuance of physical therapy and would have attempted to have services provided by Regional West or some other appropriate medical provider.

The appellants claim that because Marvin and Brenda Crider were not informed by the appellees that Mitchell Crider was not receiving physical therapy as had been agreed and undertaken, they were not given an opportunity to intervene or to seek provision elsewhere for such service by Regional West or any other appropriate medical provider.

The appellants further claim that the failure of Regional West to provide physical therapy without notice to Marvin and Brenda Crider constitutes medical abandonment of Mitchell Crider and that such failure was a proximate cause of his bilateral hip dislocation and the resultant injury and damages suffered by the appellants.

The appellants urge that Regional West was negligent (1) in failing to continue to provide reasonable, prudent, and proper care by failing to provide physical therapy as it had agreed and undertaken to provide; (2) in failing to employ sufficient qualified employees with which to provide physical therapy services to Mitchell Crider; (3) in failing to advise Marvin and Brenda Crider that physical therapy had been discontinued or was not being provided, when Regional West knew or should have known that such services were necessary for a person in Mitchell Crider's condition; (4) in failing to properly observe and report Mitchell Crider's condition; and (5) in negligently abandoning Mitchell Crider.

The appellants further allege that Region 1/CDC, Bayard Schools, and ESU #12 were negligent (1) in failing to prop-

erly supervise and monitor the performance of the agreements by Regional West to provide physical therapy to Mitchell Crider to see that such physical therapy was provided as had been agreed and undertaken at CDC; (2) in failing to advise Marvin and Brenda Crider that physical therapy had been discontinued or was not being provided, when the named appellees knew or should have known that such services were necessary for a person in Mitchell Crider's condition; and (3) in negligently abandoning Mitchell Crider.

The appellants further claim that as a result of the appellees' negligence, Mitchell Crider has suffered personal injury, disability, and disfigurement. They claim general and special damages including, but not limited to, doctor, nursing, medical, institutional, educational, and other costs and expenses to be incurred in the future which are made necessary by reason of the injury and disability. The appellants also claim that Mitchell Crider's injuries permanently deprive him of the ability to support himself or to provide for the extraordinary costs and expenses incurred.

The appellants allege that as a result of the appellees' negligence, Marvin and Brenda Crider have incurred medical and hospital expenses for Mitchell Crider to date and also claim expenses reasonably certain to be incurred in the future because of the above injuries suffered by Mitchell Crider. They allege that they have further suffered the loss of the services of Mitchell Crider.

In sustaining the appellees' demurrers, the trial court stated that the appellants failed to allege that they had exhausted the administrative remedies provided by IDEA and SEA, that IDEA and SEA provide the exclusive remedies under the circumstances alleged in the petition, and that the damages sought by the appellants are not allowable under IDEA or SEA. The court also found that further amendment of the petition would not cure the failure to state a cause of action.

ASSIGNMENTS OF ERROR

The appellants assign that the district court erred by holding that (1) special education students have no cause of action for personal injuries and damages suffered as a result of med-

ical malpractice, medical abandonment, or other negligence; (2) the appellants must exhaust administrative remedies under IDEA and SEA prior to filing a cause of action alleging negligence; and (3) IDEA and SEA provide the exclusive remedies to the appellants under the circumstances alleged in the petition.

STANDARD OF REVIEW

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *Talbot v. Douglas County*, 249 Neb. 620, 544 N.W.2d 839 (1996); *Vowers & Sons, Inc. v. Strasheim*, 248 Neb. 699, 538 N.W.2d 756 (1995); *Seevers v. Potter*, 248 Neb. 621, 537 N.W.2d 505 (1995).

An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken. *Fox v. Metromail of Delaware*, 249 Neb. 610, 544 N.W.2d 833 (1996); *Gallion v. Woytassek*, 244 Neb. 15, 504 N.W.2d 76 (1993).

In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled. *Talbot, supra*; *Carlson v. Metz*, 248 Neb. 139, 532 N.W.2d 631 (1995); *S.I. v. Cutler*, 246 Neb. 739, 523 N.W.2d 242 (1994).

ANALYSIS

We previously addressed issues of special education in the case *Williams v. Gering Pub. Schools*, 236 Neb. 722, 463 N.W.2d 799 (1990). In *Williams*, we stated:

> The education of handicapped children is governed by both federal and state legislation. As this court noted in *Adams Central School Dist. v. Deist*, 214 Neb. 307, 334 N.W.2d 775 (1983), *supp. op.* 215 Neb. 284, 338 N.W.2d 591, *cert. denied* 464 U.S. 893, 104 S. Ct. 239, 78 L. Ed. 2d 230, [IDEA] represents the federal body of law. The care and education of handicapped children are also provided for at the state level pursuant to [SEA].

> . . . As we noted in [*Deist, supra*], the act is a funding statute under which the federal government supplies financial assistance to the states for the education of handicapped children. By accepting federal funds, the state implicitly agrees to meet certain criteria and requirements. The act requires each state that accepts these funds to provide all handicapped children with a "free appropriate public education." 214 Neb. at 314, 334 N.W.2d at 780; 20 U.S.C. § 1412(1).

236 Neb. at 730, 463 N.W.2d at 805.

Title 20 U.S.C. § 1415(f) states, in relevant part:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 . . . or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section [setting forth administrative procedures] shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

If the appellees failed to satisfy the statutory requirements of either IDEA or SEA, the appellants must exhaust their administrative remedies prior to filing suit in court. See 20 U.S.C. § 1415.

IDEA is a funding statute under which the federal government supplies financial assistance to the states for the education of disabled students. IDEA requires that states that accept federal funds must provide disabled children with a "free appropriate public education." 20 U.S.C. § 1400(c).

In *Adams Central School Dist. v. Deist*, 215 Neb. 284, 286, 338 N.W.2d 591, 592 (1983), we stated:

> "A free appropriate public education requires that each handicapped child be provided with personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction, which instruction and services must be provided at public expense, must meet the state's educational standards,

> must approximate the grade levels used in the state's regular education, and must comport with the child's individualized educational program."

SEA states that school districts must provide not only a free appropriate public education, but also the necessary related support services for achieving that goal. Those services have been statutorily defined to include physical therapy. Neb. Rev. Stat. § 79-3310 states, in relevant part, "Related services shall mean . . . physical and occupational therapy . . . ."

SEA provides that the school districts may contract with other entities to provide such physical therapy services. Neb. Rev. Stat. § 79-3321 states, "The special education programs may be provided by any school district, by contracting with another school district or servicing agency . . . ."

The determination of whether IDEA or SEA provides the exclusive remedy or whether the appellants must first exhaust their administrative remedies for certain claims under IDEA or SEA, turns on which claims are encompassed within the provision of a "free appropriate public education" guaranteed by the acts. The appellants contend that the relief they are seeking, damages for Mitchell Crider's injuries resulting from the alleged negligence of the appellees, is outside of the scope of IDEA, and their theories of recovery are based on common-law negligence rather than special education law. The appellees assert that IDEA and SEA provide the exclusive remedy under the circumstances alleged in the second amended petition and that the damages sought by the appellants are not allowable under IDEA or SEA. Neither the contentions of the appellants nor those of the appellees are entirely correct.

In Nebraska, the board of education of every school district is charged with the duty to "provide or contract for special education programs and transportation for all resident children who would benefit from such programs." Neb. Rev. Stat. § 79-3320. It is a well-settled rule in Nebraska that state courts can take judicial notice of general rules and regulations established and published by federal agencies under authority of law. *Raben v. Dittenber*, 230 Neb. 822, 434 N.W.2d 11 (1989); *Bohy v. Abbott*, 154 Neb. 139, 47 N.W.2d 95 (1951);

Keyser v. Allen, 149 Neb. 449, 31 N.W.2d 309 (1948); *Powell v. Anderson*, 147 Neb. 872, 25 N.W.2d 401 (1946). Under authority of law, federal agencies have established and published general regulations specifying the duties of educators of disabled children. These regulations are codified at title 34 of the Code of Federal Regulations.

The regulations provide that special education programs and support services may be provided by contracting with an approved service provider, see C.F.R. §§ 300.301 and 300.360(b); however, responsibility for compliance with state and federal regulations remains with the resident school district, see 34 C.F.R. § 300.600. In addition, the regulations specify that the resident school district shall monitor the progress of those children for whom it has contracted for related services. See 34 C.F.R. § 300.402.

The regulations also direct school districts to provide a copy of the procedures for complaints and due process hearings to parents like Marvin and Brenda Crider. See 34 C.F.R. §§ 300.504 through 300.510. Furthermore, the resident school district is required to provide notice to the parents of a child with a disability before the school district proposes to change the educational placement of or the provision of a free appropriate public education to the child. See 34 C.F.R. §§ 300.504 through 300.509.

A school district, educational service unit, or human service center does not have a duty derived from common law to monitor the care of a physical therapy patient or to report any proposed changes in care to the patient's parents. As we stated in *Greening v. School Dist. of Millard*, 223 Neb. 729, 393 N.W.2d 51 (1986), these agencies are entitled to rely upon the competence of a professional therapist, licensed, paid, and supplied by an entity such as Regional West, to properly treat patients under their care. The duty of Bayard Schools, ESU #12, and Region 1/CDC to monitor physical therapy services and notify the student/patient's parents of proposed changes in services is derived solely from the mandates of IDEA and SEA. To the extent that the appellants maintain that Bayard Schools, ESU #12, and Region 1/CDC's (1) failure to monitor or supervise Regional West's provision of physical therapy

services or (2) failure to notify Marvin and Brenda Crider that physical therapy had been discontinued or of a proposed change in physical therapy services was a proximate cause of the injuries to Mitchell Crider, those claims are directly within the purview of IDEA and SEA.

Therefore, the district court does not have jurisdiction to entertain a claim against Bayard Schools, ESU #12, or Region 1/CDC based on a failure to monitor Regional West's provision of physical therapy services or a failure to notify Marvin and Brenda Crider of a proposed or actual discontinuance of the services unless the appellants have alleged either (1) exhaustion of IDEA or SEA remedies or (2) that exhaustion of such remedies would be futile. See, § 1415(f); *Hayes v. Unified School Dist. No. 377*, 877 F.2d 809 (10th Cir. 1989). See, also, e.g., *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995) (aggrieved parent or disabled child is not barred from seeking monetary damages under IDEA, citing *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992)); *Lester H. by Octavia P. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990) (exhaustion requirement of IDEA does not require exhaustion where relief sought is unavailable in administrative proceeding, such as where monetary damages are sought). Thus, even in circumstances where the relief sought in a civil action is not available in an IDEA or SEA administrative proceeding (e.g., where monetary damages are sought), the burden of pleading and proving that administrative remedies would be futile falls upon the party seeking to avoid them. See *Matula, supra*. The appellants failed to make such an allegation in their second amended petition.

The appellants' claims of abandonment are derived from two separate sources of duty owed to Mitchell Crider. Regional West had a duty, outside of the purview of IDEA and SEA, to use reasonable care in the provision of physical therapy services once it undertook to provide those services to Mitchell Crider. The appellants' allegations that Regional West failed to provide reasonable and proper physical therapy services and negligently failed to notify Marvin and Brenda Crider that the physical therapy had been discontinued are sufficient to state a cause of action for common-law medical mal-

practice or medical abandonment. The duty owed to a patient and the type of remedy available to an aggrieved patient are not affected by the fact that Mitchell Crider was referred to Regional West by a school district or educational service unit. Once a hospital agrees to provide medical services to a patient, that hospital and its licensed professional employees owe a duty to a patient to exercise that degree of care, skill, and diligence generally used by hospitals in the community or hospitals located in similar communities. See *Miles v. Box Butte County*, 241 Neb. 588, 489 N.W.2d 829 (1992).

The appellants further allege that Bayard Schools, ESU #12, and Region 1/CDC negligently abandoned their student by not informing Marvin and Brenda Crider of the discontinuance of physical therapy services when these appellees knew, or should have known, that the physical therapy was not being provided. In *Greening v. School Dist. of Millard*, 223 Neb. 729, 393 N.W.2d 51 (1986), we recognized the legal principle that a school district may be liable in permitting negligent conduct to occur on its premises when the school district knew, or reasonably should have known, that the negligent conduct on its premises presented an unreasonable risk of harm to those entrusted to the school. See Restatement (Second) of Agency § 213(d) at 458 (1958) (person conducting activity through servants or other agents is subject to liability for "permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control"). In the instant case, however, there are no allegations that these appellees' supervisory personnel were aware of the specific physical therapy program being administered to Mitchell Crider or knew of the potential dangers inherent in the continuance or discontinuance of such a program. See *Greening, supra*. Absent allegations of a legally cognizable breach of duty, the appellants failed to state a cause of action against Bayard Schools, ESU #12, and Region 1/CDC of abandonment of their student.

CONCLUSION

The appellants' second amended petition states a cause of action against Regional West. However, based on the forego-

ing reasons, the district court was correct in determining that the appellants failed to state a cause of action against Bayard Schools, ESU #12, and Region 1/CDC. Notwithstanding, when a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that an amendment will correct the defect. *Pilot Investment Group v. Hofarth, ante* p. 475, 550 N.W.2d 27 (1996); *Fox v. Metromail of Delaware*, 249 Neb. 610, 544 N.W.2d 833 (1996). We are not able to determine at this stage of the pleadings that an amendment would not correct the defect, and the appellants should therefore be granted leave to amend their petition in a manner not inconsistent with this opinion. Accordingly, the district court's decision is hereby reversed.

REVERSED.

FRANK NESTOR LATENSER AND RUTH M. LATENSER, APPELLEES, V. THE INTERCESSORS OF THE LAMB, INC., APPELLANT.

553 N.W.2d 458

Filed September 27, 1996. No. S-94-854.

1. **Injunction: Equity.** An action for injunction sounds in equity.
2. **Equity: Appeal and Error.** In equity actions, an appellate court reviews the factual findings de novo on the record and reaches a conclusion independent of the findings of the trial court.
3. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of the appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
4. ____. Matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts.
5. **Injunction: Motions to Vacate.** When the circumstances and situation of the parties have changed so that it would be just and equitable to vacate or modify

a permanent injunction, the court which granted the injunction may vacate or modify it upon motion.

6. **Restrictive Covenants: Intent.** Restrictive covenants are to be construed so as to give effect to the intentions of the parties at the time they agreed to the covenants.
7. **Restrictive Covenants.** The law disfavors covenants that restrict the use of land.
8. **Injunction: Proof.** The burden is on the party seeking modification of a permanent injunction to show a change in circumstance or situation sufficient to warrant such modification.
9. **Restrictive Covenants.** If the language of a covenant is unambiguous, the covenant shall be enforced according to its plain language and shall not be subject to rules of interpretation or construction.

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

Monte Taylor, of Taylor, Connolly & Kluver, for appellant.

H. Daniel Smith, of Sherrets Smith & Gardner, for appellees.

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

GERRARD, J.

The Intercessors of the Lamb, Inc. (Intercessors), appeals from a district court order denying its motion for modification of an injunction. The injunction was imposed due to the Intercessors' use of its property in violation of certain restrictive covenants. On the motion to modify the injunction, the district court found that no significant change had occurred since imposition of the injunction which would warrant modification. We reverse, and remand with directions to vacate the injunction previously entered, as we find a significant change in circumstances has occurred such that the Intercessors is now in compliance with the restrictive covenants.

FACTUAL BACKGROUND

The Intercessors is a Catholic religious order formed as a nonprofit corporation holding tax-exempt status. The organization was founded by Sister Nadine Brown, and its mission is intercessory prayer—i.e., to teach people how to listen and

discern the will of God and to pray according to that will. In 1987, the order began the process of securing formal status as a canonical organization within the Roman Catholic Church.

Sister Nadine described the Intercessors as a mixed group of Christians, including priests, laity, and religious hermits, dedicated to prayer. At the time of the hearing on the motion to modify the injunction, the group consisted of four sisters, five brothers, and a priest, all devoted to the full-time work of the organization, and between 30 and 40 laity from several parishes in and around Omaha who participated in weekly meetings on the Intercessors' property.

Parcel A, the property at issue in the instant case, was purchased by the Intercessors in 1985. Parcel A consists of 7 1/2 acres of land in the Ponca Hills area of Omaha on which is located a large house, known as the big house. Prior to the purchase of parcel A, the Intercessors acquired another plot of land, parcel F, consisting of 11 1/2 acres on which is located a house known as the round house. Between the big house and the round house is parcel D, an undeveloped 5-acre tract also owned by the Intercessors. Parcels F and D are not at issue in this case.

Four of the brothers, the priest, and three sisters reside in the big house. Sister Nadine resides in the round house, and one brother lives in the garage associated with the round house. The big house contains a chapel which can accommodate as many as 50 worshipers. Prior to the issuance of the injunction, the big house was used to conduct seminars and workshops concerning prayer. These events usually involved between 20 and 30 participants. Prior to the injunction, the lay members of the Intercessors held their weekly meeting at the big house. At present, this group now meets in the round house.

Parcel A is subject to restrictive covenants which limit its use to, in pertinent part, a single-family dwelling, a church, or accessory building and uses customarily incident to an approved use. However, the covenants do not define what constitutes a single-family dwelling or a church, or the meaning of uses customarily incident to an approved use.

In 1991, the Intercessors announced plans to build a chapel on its undeveloped tract, parcel D. The appellees, Frank Nestor Latenser and Ruth M. Latenser, are adjoining landowners to parcel D. The Latensers sought to enjoin the Intercessors from constructing its chapel by filing suit in the district court. Among the causes of action brought was one alleging that the use of parcel A was in violation of the restrictive covenants. Both parties filed motions for partial summary judgment with respect to this cause of action.

In August 1992, the district court granted summary judgment in favor of the Latensers, finding that the property was not being used as a church or single-family dwelling within the meaning of the covenants. Accordingly, the district court issued an injunction prohibiting such use of the property by the Intercessors. An appeal was taken from this order; however, due to an incomplete bill of exceptions, we affirmed the judgment of the district court as the only issue before us was whether the pleadings were sufficient to support the judgment. *Latenser v. Intercessors of the Lamb, Inc.*, 245 Neb. 337, 513 N.W.2d 281 (1994).

On September 29, 1992, the Intercessors became an officially recognized organization within the Catholic Church. In May 1994, the Intercessors filed a motion to modify the original injunction. In this motion, the Intercessors assert that the dominant consideration of the district court for issuance of the injunction was that the Intercessors was not a church within the meaning of the restrictive covenants. Thus, reasons the Intercessors, official acceptance into the Catholic Church is a significant change in a controlling fact, and that the organization now qualifies as a "church" within the meaning of the restrictive covenants warrants dissolution of the injunction. The district court denied the motion to modify on August 12, 1994, finding no change in the use of the property in question. In the words of the district court, "[T]he paramount factor is not the organization of the user, but the use to which the property is put that determines whether the use is consonant with the covenants."

ASSIGNMENTS OF ERROR

The Intercessors assigns that the district court erred in (1) finding there was no change in a controlling fact upon which the earlier injunction was based, (2) ruling that the Intercessors is not a church within the meaning of the restrictive covenants, and (3) failing to strictly construe the restrictive covenants at issue against any limitations on use.

STANDARD OF REVIEW

An action for injunction sounds in equity. *Ben Simon's, Inc. v. Lincoln Joint-Venture*, 248 Neb. 465, 535 N.W.2d 712 (1995); *University Place-Lincoln Assocs. v. Nelsen*, 247 Neb. 761, 530 N.W.2d 241 (1995). In equity actions, an appellate court reviews the factual findings de novo on the record and reaches a conclusion independent of the findings of the trial court. *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996); *Ben Simon's, Inc. v. Lincoln Joint-Venture, supra*.

ANALYSIS

Important to our analysis is the posture of the matter before us. Under the law-of-the-case doctrine, the holdings of the appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. *Pendleton v. Pendleton*, 247 Neb. 66, 525 N.W.2d 22 (1994); *Wicker v. Vogel*, 246 Neb. 601, 521 N.W.2d 907 (1994). As a result, matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts. *Pendleton v. Pendleton, supra*; *McKinstry v. County of Cass*, 241 Neb. 444, 488 N.W.2d 552 (1992). However, when the circumstances and situation of the parties have changed so that it would be just and equitable to vacate or modify a permanent injunction, the court which granted the injunction may vacate or modify it upon motion. *Wasserburger v. Coffee*, 201 Neb. 416, 267 N.W.2d 760 (1978).

Accordingly, we express no view concerning the propriety of the issuance of the injunction by the district court. Instead, the law-of-the-case doctrine requires that we presume the ini-

tial injunction to be proper; thus, we confine our analysis to whether there has been a change in circumstances of the parties such that modification of the injunction is now warranted. Therefore, the issue before us devolves into whether there has been a change of circumstances such that the use of parcel A by the Intercessors constitutes that of a church or that of an accessory building or a use customarily incident to a church within the meaning of the restrictive covenants.

Restrictive covenants are to be construed so as to give effect to the intentions of the parties at the time they agreed to the covenants. *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610 (1994). On the other hand, the law disfavors covenants that restrict the use of land. *Boyles v. Hausmann, supra*; *Egan v. Catholic Bishop*, 219 Neb. 365, 363 N.W.2d 380 (1985); *Knudtson v. Trainor*, 216 Neb. 653, 345 N.W.2d 4 (1984).

In its order issuing the injunction, the district court provided the parties a very thorough explanation of its reasoning. The court found that in 1952, when the covenants were drafted, the intent of the drafter was to limit the residential use of the neighborhood to only single-family dwellings. Those other uses permitted by the covenants were ones which did not include permanent residents and thus did not interfere with the drafter's original intent. Continuing, the court recognized that the Intercessors was a religious organization; however, a religious organization is not necessarily a church. Instead, the court found that the Intercessors was a religious organization connected in some loose manner to the Catholic Church and that the big house on parcel A was being used as a facility to house unrelated persons who were learning to become members of the Intercessors' organization. Thus, the court concluded that the use was not a residential use intended by the drafter of the covenants.

The court identified 10 factual findings which allowed it to conclude that the Intercessors and its use of the big house were not within those uses permitted by the covenants. Those findings were that (1) the Intercessors did not have rules, regulations, or discipline; (2) there was no priest assigned to the Intercessors; (3) there was no regular public mass or worship on the grounds; (4) for the most part, the residents attended

their own parishes for mass; (5) the grounds are not open to the public for mass and other related church activities on a regular basis; (6) the Intercessors has no parish lines or jurisdictional limits; (7) the Intercessors' name does not include the word "church"; (8) the Internal Revenue Service recognizes the Intercessors as an educational organization and not as a church; (9) the Catholic Church does not ordain females as priests; and (10) the Intercessors does not have any official recognition within the hierarchical governmental structure of the Catholic Church.

The burden is on the party seeking modification of a permanent injunction to show a change in circumstance or situation sufficient to warrant such modification. See *Wasserburger v. Coffee*, 201 Neb. 416, 267 N.W.2d 760 (1978). We conclude that the Intercessors has met this burden.

At the hearing on the motion to modify the injunction, Sister Nadine testified that unlike before, the Intercessors now has a full-time priest residing on its premises. In addition, this has allowed the Intercessors to now schedule and conduct mass on a daily basis. Sister Nadine testified that even when the priest is not in town, there are many priests from the community who fill in for him and conduct mass when needed. Accordingly, the district court's original findings that no priest was assigned to the group, that no regular worship was conducted on the grounds, and that the residents must attend mass elsewhere have been obviated.

Sister Nadine testified that the Intercessors' door is always open to the public. However, since its mission is contemplative prayer, in order to keep noise to a minimum, the big house is not a public facility where anyone may come and go as he or she pleases. Instead, Catholics as well as non-Catholics may call for appointments and are welcome to use the facilities on that basis. Thus, the district court's original finding that the Intercessors' facility is not open to the public is now moot.

Finally, Sister Nadine testified that the Intercessors is now officially recognized as an organization within the Catholic Church. A letter dated September 29, 1992, from the

Archbishop of Omaha was received in evidence. The letter recites in part:

> With this letter, I hereby canonically establish the Association of Hermit Intercessors of the Lamb. In accord with Canon 305, this Community is hereby officially established, and remains subject to the vigilance of the Archdiocesan Bishop who is given this responsibility in the 1983 Code of Canon Law.

In addition, Sister Nadine testified that part of this recognition process included having statutes drafted by a canon lawyer and approved by the Church. In his letter officially recognizing the Intercessors, the archbishop expressly approved the statutes. Thus, the district court's original findings that the Intercessors is not governed by specific rules or regulations and that the group is not recognized by the Catholic Church are also moot.

Accordingly, we conclude that a substantial change of circumstance and situation of the parties has occurred sufficient to warrant modification of the injunction. Thus, the only question remaining is whether this change of circumstances now allows the Intercessors' use to be considered that of a church or a use incident to a church within the meaning of the covenants.

The restrictive covenants at issue do not define the word "church" or what constitutes a use incident to a church. However, we find this to be of no moment, as the covenant at issue is unambiguous. If the language of a covenant is unambiguous, the covenant shall be enforced according to its plain language and shall not be subject to rules of interpretation or construction. *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610 (1994). The plain, ordinary, and popular meaning of the word "church" would indicate a building where Christians gather to worship God. " ' "But if the obvious must be supported by authority or judicial precedent, we find that they are of the same view." ' " *Knudtson v. Trainor*, 216 Neb. 653, 656, 345 N.W.2d 4, 6 (1984).

A church is "a building set apart for public esp. Christian worship." Webster's Third New International Dictionary, Unabridged 404 (1993). Citing other authorities, this court has

found the plain, ordinary, and popular meaning of the word "church" includes a building in which people assemble for the worship of God and for the administration of such offices and services as pertain to that worship, a building consecrated to the honor of God and religion, and a place where persons regularly assemble for worship. *Calvary Baptist Church v. Coonrad*, 163 Neb. 25, 77 N.W.2d 821 (1956). Obviously, a building consecrated to the honor of a religion would likewise include buildings in which people assemble for non-Christian worship, such as a mosque, a synagogue, or a temple.

Further support is found in more recent cases from other jurisdictions. The Supreme Court of Hawaii found the use of a two-story residence and smaller buildings on the premises qualified as a church within the meaning of a zoning ordinance, when the use of the buildings included daily religious ceremonies, prayers, lectures, and a public feast held each Sunday. *Marsland v. International Society for Krishna Consciousness*, 66 Haw. 119, 657 P.2d 1035 (1983).

In *Daughters of St. Paul, Inc. v. Zoning Board of Appeals*, 17 Conn. App. 53, 549 A.2d 1076 (1988), construction of a convent and chapel in conjunction with a religious book and audiovisual center was held to constitute a use as a church within the meaning of the applicable zoning restriction. The court reasoned that a chapel open to the public during the weekdays and on Saturday, used by the nuns for prayer on a daily basis and for mass on Sunday, compelled the conclusion that the convent and chapel constitute a church. Moreover, this conclusion was not compromised by the existence of the book and audiovisual center, as the dominant use of the facility remained in support of the Roman Catholic faith.

We conclude that the use by the Intercessors, as a recognized organization within the Catholic Church having a priest assigned to it living on its grounds and holding daily religious services open to the public, is, under any definition, a use consistent with the plain, ordinary, and popular meaning of a church or use incident to a church.

JUDGMENT

Accordingly, we hold that the Intercessors has demonstrated the existence of a substantial change of circumstances which warrants modification of the injunction. The use of parcel A as it stands today qualifies as that of a church or as a use incidental thereto within the meaning of the restrictive covenants at issue. Thus, the Intercessors is no longer in violation of the restrictive covenants. Therefore, the order of the district court denying the motion to modify the injunction is reversed, and this matter is remanded with directions to vacate the injunction previously imposed therein.

REVERSED AND REMANDED WITH DIRECTIONS.

MARITTA J. YOUNG, APPELLANT, V. ERIKSEN CONSTRUCTION COMPANY AND FIRST NATIONAL BANK OF YORK, APPELLEES.

553 N.W.2d 143

Filed September 27, 1996. No. S-94-880.

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. **Licensee: Words and Phrases.** A licensee is a person who is privileged to enter or remain upon the premises of another by virtue of the possessor's express or implied consent, but who is not a business visitor.
4. **Invitor-Invitee: Words and Phrases.** An invitee is a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant for their mutual advantage.

5. **Licensee: Invitor-Invitee: Words and Phrases.** The distinction between licensees and invitees rests on the purpose for which the invitation was extended. If it is an invitation for the personal pleasure, convenience, or benefit of the person enjoying the privilege, the person receiving it is a licensee. But if the invitation relates to the business of the one who gives it or for the mutual advantage of a business nature for both parties, the party receiving the invitation is an invitee.
6. **Licensee: Negligence.** An owner or occupant of a premises owes only the duty to refrain from injuring a licensee by willful or wanton negligence or designed injury, or to warn him or her as a licensee of a hidden danger or peril known to the owner or occupant but unknown or unobservable by the licensee, who is required to exercise ordinary care.

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

Michael J. Murphy, of Angle, Murphy, Valentino & Campbell, P.C., for appellant.

Robert W. Wagoner for appellee First National Bank of York.

Jeanelle R. Robson and Douglas J. Peterson, of Knudsen, Berkheimer, Richardson & Endacott, for appellee Eriksen Construction Company.

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

GERRARD, J.

The district court granted summary judgment in favor of defendants-appellees Eriksen Construction Company (Eriksen) and First National Bank of York and dismissed plaintiff-appellant Maritta J. Young's premises liability action. The district court found Young to be a licensee and also found that neither defendant breached the applicable duty owed to a licensee such as Young. Young filed a motion for new trial, and the motion was overruled. Young appeals. Concluding that no question of material fact exists, we now affirm the judgment of the district court.

FACTUAL BACKGROUND

On April 3, 1992, at approximately 1 a.m., Young concluded her shift at the Chances "R" Restaurant in York,

Nebraska. Although Young normally walked home from work, that night she accepted the offer of a ride home from Byron Schmoker, a fellow employee. Schmoker's car was parked in a parking lot owned by First National Bank. Young and Schmoker exited the front of the restaurant and proceeded down the alley adjacent to First National Bank's parking lot. It was common for the restaurant employees to park in the bank's parking lot, since its use was limited exclusively to the bank's customers only during the hours that the bank was open for business.

At this time, First National Bank had entered into a contract with Eriksen for certain renovations to its facility. Eriksen utilized a portion of the bank's parking lot for a staging area. In this area, Eriksen stored construction materials and equipment. While traversing the parking lot with Schmoker, Young fell when she tripped over the tines of a forklift owned by Eriksen and stored in the staging area. Both Young and Schmoker testified that they saw the body of the forklift, but not the actual tines protruding from the forklift. Young sustained a broken left wrist and a contusion to her right wrist as a result of the fall.

Young filed a negligence action against Eriksen and First National Bank, in which she alleged that both defendants failed to provide sufficient lighting or adequate warning of the dangers presented by the construction equipment. The defendants answered, denying any negligence on their part and claiming that Young was contributorily negligent for her failure to use proper and ordinary care.

Both defendants filed motions for summary judgment, which, after a hearing, were sustained. In its order, the district court found Young to be a licensee as a matter of law and also found that there was no evidence either defendant acted willfully or wantonly or failed to warn Young of a hidden danger known to it.

SCOPE 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 mate-

rial 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. *Bruning v. Law Offices of Ronald J. Palagi, ante* p. 677, 551 N.W.2d 266 (1996); *Hand v. Starr, ante* p. 377, 550 N.W.2d 646 (1996). 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. *Bruning v. Law Offices of Ronald J. Palagi, supra*; *Boyd v. Chakraborty, ante* p. 575, 550 N.W.2d 44 (1996).

ASSIGNMENTS OF ERROR

Young assigns that the district court erred in granting the defendants' motions for summary judgment because there exist genuine issues of material fact as to which defendant was in control of the parking lot at the time of the accident, whether there were adequate warning devices in place, and whether Young was a business invitee. In addition, Young asserts that even if as a matter of law she is merely a licensee, the defendants breached their duty to warn her of a hidden danger.

ANALYSIS

We begin our analysis by noting that *Heins v. Webster County, ante* p. 750, 552 N.W.2d 51 (1996), abrogated the classifications of invitee and licensee in favor of a standard of reasonable care for all those lawfully on the premises of another. However, our rule in *Heins* is prospective in application and thus without effect in the instant case.

Status as Licensee.

The district court found, as a matter of law, that Young was a licensee. A licensee is a person who is privileged to enter or remain upon the premises of another by virtue of the possessor's express or implied consent, but who is not a business visitor. *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996); *Blackbird v. SDB Investments*, 249 Neb. 13, 541 N.W.2d 25 (1995). An invitee, on the other hand, is a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the

business of the owner or occupant for their mutual advantage. *McIntosh v. Omaha Public Schools, supra*; *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994).

The distinction between licensees and invitees rests on the purpose for which the invitation was extended. If it is an invitation for the personal pleasure, convenience, or benefit of the person enjoying the privilege, the person receiving it is a licensee. But if the invitation relates to the business of the one who gives it or for the mutual advantage of a business nature for both parties, the party receiving the invitation is an invitee. *Palmtag v. Gartner Constr. Co., supra*. See, also, *McIntosh v. Omaha Public Schools, supra*.

Viewing the evidence in a light most favorable to Young and giving her the benefit of all reasonable inferences, we conclude that the district court did not err in finding, as a matter of law, that Young was a licensee. The record reveals that First National Bank explicitly limited the use of its parking lot to its customers during business hours. There is no evidence in the record that the bank closed or limited the use of its parking lot in any manner outside of the bank's business hours. Instead, Schmoker testified that he always parked in the bank's parking lot, that he was never told not to park in the lot, and that other employees of the Chances "R" Restaurant likewise parked in the bank's lot. Thus, at the very least, there was an implied invitation for persons such as Young to use the bank's parking lot after the bank's business hours.

However, consent that a person may be on another's premises does not by itself make such person an invitee. The evidence in the instant case allows only one conclusion, that persons such as Young and Schmoker were on the bank's premises solely for their own benefit and convenience. Schmoker parked in the bank's parking lot for his benefit. Young accompanied Schmoker to his car for her benefit. There was no evidence indicating that the use of the bank's parking lot by Schmoker effected a benefit to the bank or, for that matter, a mutual advantage of a business nature. Accordingly, the district court did not err in concluding, as a matter of law, that Young's status in this matter was that of a licensee.

Duty Owed to Licensee.

An owner or occupant of a premises owes only the duty to refrain from injuring a licensee by willful or wanton negligence or designed injury, or to warn him or her as a licensee of a hidden danger or peril known to the owner or occupant but unknown or unobservable by the licensee, who is required to exercise ordinary care. *Blackbird v. SDB Investments, supra.*

> "In order for an action to be willful or wanton, the evidence must prove that a defendant had *actual* knowledge that a danger existed and that the defendant *intentionally* failed to act to prevent harm which was reasonably likely to result. . . .
>
> "To constitute willful negligence the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith. Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury."

(Emphasis in original.) *Blackbird v. SDB Investments*, 249 Neb. 13, 19, 541 N.W.2d 25, 30 (1995) (quoting *Guenther v. Allgire*, 228 Neb. 425, 422 N.W.2d 782 (1988)).

Construing the evidence in a light most favorable to Young, we conclude the district court did not err in finding that the defendants did not breach their applicable duty of care. The condition of the bank's parking lot with respect to Eriksen's staging area did not involve such reckless disregard of security and right as to imply bad faith, nor could Eriksen's use of the area give rise to a finding of reckless indifference to the consequences and with consciousness that its act or omission would probably cause serious injury.

The bank's parking lot was sufficiently illuminated in the staging area so that Young could see a concrete island, a trailer, Schmoker's car, and the body of the forklift at issue. Nothing in the record indicates that the tines of the forklift were concealed or that Young's view was obstructed in any fashion. Although the defendants were required to warn a licensee such as Young of hazards known to them, this duty

refers only to hazards unobservable by the licensee. See *Blackbird v. SDB Investments, supra*. Young, as a licensee, had an obligation to exercise ordinary care while in the bank's parking lot. See *id.* Even when construing the evidence in a light most favorable to Young, we are drawn to the conclusion that Young failed to reasonably observe the forklift's tines—which were neither concealed nor obstructed from view—after seeing the body of the forklift.

As a result, we conclude that the district court did not err in granting summary judgment for the defendants on Young's allegations of failing to provide sufficient lighting or adequate warning of the dangers presented by the construction equipment in the bank's parking lot.

CONCLUSION

There is no genuine issue of material fact (1) that Young was a licensee, since her presence on the bank's premises was to her benefit alone, and (2) that neither defendant acted with willful or wanton negligence toward a licensee such as Young based on the evidence in the instant case. Accordingly, we affirm the district court's order granting the defendants' motions for summary judgment.

AFFIRMED.

FAHRNBRUCH, J., concurring in the result.

I concur in the result, but reiterate the views stated in my dissent in *Heins v. Webster County, ante* p. 750, 552 N.W.2d 51 (1996), that the distinction between an invitee and licensee should not be abolished.

CAPORALE, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. CAREY DEAN MOORE, APPELLANT.

553 N.W.2d 120

Filed September 27, 1996. No. S-95-485.

1. **Constitutional Law: Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** A death sentence tainted by the improper application of an aggravating factor may be constitutionally cured by the Nebraska Supreme Court's reweighing the aggravating and mitigating circumstances involved.
2. **Words and Phrases.** The word "apparent" means readily perceptible.
3. **Homicide: Aggravating and Mitigating Circumstances.** Aggravating circumstance Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1995), reading, "[t]he murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence," contains two separate disjunctive components which may operate together or independently of one another.
4. ____: ____. Exceptional depravity under Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1995) exists when it is shown beyond a reasonable doubt that the following circumstances, either separately or collectively, exist: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; (5) helplessness of the victim, or (6) cold, calculated planning of the victim's death as exemplified by experimentation with the method of causing the death or by the purposeful selection of a particular victim on the basis of specific characteristics.
5. **Statutes: Courts.** In the absence of clear precedent, a trial court confronting a statute for the first time must apply the statute in accordance with its own understanding of it.
6. **Due Process: Criminal Law: Statutes.** Due process requirements prevent the retroactive application of statutory construction which either makes conduct criminal that was innocent when done, aggravates a crime, or makes the crime greater than it was when committed.
7. **Due Process: Statutes.** The construction of a statute may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendant.
8. **Constitutional Law: Sentences: Death Penalty.** There are two phases to a constitutional capital sentencing process: the determination that the defendant is death eligible and the creation of an individualized sentence for the defendant.
9. **Words and Phrases.** The word "approach" means coming or being near in quality or character.
10. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Proof.** Aggravating circumstances must be proved beyond a reasonable doubt.
11. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances.** There is no burden of proof with respect to mitigating circumstances.
12. ____: ____: ____. The determination of whether mitigating circumstances approach or exceed the weight of aggravating circumstances is not a numerical

process, but, rather, involves the reasoned judgment of the sentencing authority.

13. **Sentences: Death Penalty.** A capital sentencing authority need not be instructed on how to weigh any particular fact in the capital sentencing decision.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, WILLIAM B. RIST, and DARVID D. QUIST, Judges. Affirmed.

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

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

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

PER CURIAM.

This matter comes to us under the automatic appeal provisions of Neb. Rev. Stat. § 29-2525 (Reissue 1995) from the resentence of death for each of two first degree murders imposed upon the defendant-appellant, Carey Dean Moore, on April 21, 1995, by a three-judge resentencing panel of the district court. We affirm each sentence.

BACKGROUND

The events surrounding the murders which have resulted in the resentences at issue are set forth in this court's opinion of January 29, 1982, affirming on direct appeal the original sentences of death imposed by a sentencing panel of the district court on June 20, 1980. *State v. Moore*, 210 Neb. 457, 461-62, 316 N.W.2d 33, 36-37 (1982), *cert. denied* 456 U.S. 984, 102 S. Ct. 2260, 72 L. Ed. 2d 864, as follows:

> About August 20, 1979, [Moore] purchased the handgun with which the murders were committed. He acquired the gun by purchasing it from a cabdriver who had pawned the gun. [Moore] and the seller went together to the pawnshop where the gun was redeemed, [Moore] furnishing the money for the redemption and paying the seller an additional $50. The gun was then test-fired.

We now quote from the findings made by the sentencing panel in its order, which findings are fully supported by uncontroverted evidence: "[Moore's] own statements, in his confession to Officers O'Donnell and Thompson while in custody at Charles City, Iowa, indicate that these crimes had been in the planning stage for at least a day or two before the [Reuel Eugene] Van Ness[, Jr.,] homicide. Apparently on the evening prior to the Van Ness murder, [Moore] had called a number of cabs from a telephone booth somewhere on Farnam Street in the downtown Omaha area to see how quickly each would respond to his call. [Moore] then hid somewhere in the vicinity to await each cab's arrival, at which time he checked the cab to determine whether the driver would be a suitable victim, i.e., not too young, since [Moore] stated that it was easier for him to shoot an older man rather than a younger man nearer his own age. On the evening of the Van Ness homicide, [Moore's] plan was to call one cab at a time from the Smoke Pit restaurant, and, if the driver who responded 'wasn't too old,' [Moore] would just not identify himself as the fare for which the cab had been summoned. When . . . Van Ness arrived at the Smoke Pit on August 22, 1979, [Moore] determined that this was the driver who would be robbed and shot because 'he wasn't too young'.

"A similar pattern of events unfolded on August 26, 1979. [Moore] went to the Greyhound Bus depot at 18th and Farnam Streets in Omaha that evening, and, when he saw a lone cab with an older driver [Maynard D. Helgeland] parked at the taxi stand outside the depot, he got into the cab and directed the driver to take him to the Benson area. According to [Moore], this particular cab and driver were selected both because there were no other cabs at the taxi stand at the time, thus decreasing the chances of [Moore's] being identified, and because the driver was an older man. [Moore] then stated that, as previously discussed, he had planned ahead of time to rob and shoot the driver of whichever cab he selected." In his confessions [Moore] stated that he killed each of

the victims in order that the victim would not be able to identify him as the robber.

Moore thereafter, on June 29, 1982, filed a motion for postconviction relief, which the district court denied on May 6, 1983, and which denial we affirmed on June 8, 1984. *State v. Moore*, 217 Neb. 609, 350 N.W.2d 14 (1984).

As a consequence, on November 14, 1984, Moore sought relief through a petition for a writ of habeas corpus filed in the U.S. District Court for the District of Nebraska. That court granted Moore relief by an order dated September 20, 1988. *Moore v. Clarke*, No. CV84-L-754 (D. Neb. Sept. 20, 1988). The State of Nebraska, the plaintiff-appellee in the instant proceeding, then appealed the *Clarke* decision to the U.S. Court of Appeals for the Eighth Circuit, which, on May 25, 1990, affirmed the grant of habeas corpus relief, holding unconstitutionally vague, both on its face and as interpreted by this court, the italicized exceptional depravity component of aggravating circumstance Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1995), that is, that the "murder was especially heinous, atrocious, cruel, or *manifested exceptional depravity by ordinary standards of morality and intelligence*." (Emphasis supplied.) *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), *cert. denied* 504 U.S. 930, 112 S. Ct. 1995, 118 L. Ed. 2d 591 (1992).

The U.S. District Court thereafter, on July 1, 1992, issued an order directing that Moore's sentences be reduced to life imprisonment unless the State initiated resentencing proceedings within 60 days. On July 23, the State filed in this court a motion asking that we redefine the exceptional depravity component of aggravating circumstance § 29-2523(1)(d) so as to satisfy the federal courts' constitutional objections, apply such redefinition to the circumstances of the case, reweigh all the aggravating and mitigating circumstances, and determine appropriate sentences. We noted that although we were of the view that this court possessed the authority to resentence Moore, the Eighth Circuit thought otherwise; we therefore concluded that notwithstanding that we were not bound by the Eighth Circuit's view, the interests of judicial economy would be better served by remanding the cause to the district court.

We thus did so on July 9, 1993. *State v. Moore*, 243 Neb. 679, 502 N.W.2d 227 (1993).

APPELLATE CLAIMS

Moore claims, in reorganized order, that the resentences cannot stand because (1) the proceedings at which they were imposed were untimely, (2) the resentencing panel applied the unconstitutional aggravating circumstance § 29-2523(1)(b), (3) the resentencing panel impermissibly formulated and applied a definition of the "exceptional depravity" component of aggravating circumstance § 29-2523(1)(d), (4) the death penalty is applied inconsistently, (5) objective sentencing standards are lacking, (6) the resentencing panel improperly considered Moore's custodial statements, (7) there exists no meaningful proportionality review, and (8) the resentencing panel failed to make appropriate findings.

TIMELINESS OF PROCEEDINGS

The first appellate claim asserts that Moore "should be summarily sentenced to life imprisonment because the state failed to comply with the order of the eighth circuit court of appeals which required commencement of sentencing hearing within 60 days."

As noted previously, the order in question was actually issued by the U.S. District Court for the District of Nebraska, not the Eighth Circuit. But there is no question that the order required that Moore's death sentences be reduced to life imprisonment unless the State initiated capital resentencing proceedings within 60 days.

The State filed its motion for resentencing with this court well within the 60-day period. Nonetheless, Moore, relying on *Reeves v. Hopkins*, 871 F. Supp. 1182 (D. Neb. 1994), argues that as the district court is the only state court with resentencing authority, we lacked constitutional or statutory authority to reweigh the aggravating and mitigating circumstances and resentence him, and, thus, the motion the State filed with us was a nullity.

Based on the holding in *Rust v. Hopkins*, 984 F.2d 1486 (8th Cir. 1993), *cert. denied* 508 U.S. 967, 113 S. Ct. 2950, 124 L. Ed. 2d 697, the federal district court in *Reeves* con-

cluded that Nebraska law provides for a two-tiered sentencing process in death penalty cases and that defendants have a federally protected liberty interest in such a procedure. However, as a federal decision interpreting Nebraska law, *Reeves* is simply not controlling. This court is the final arbiter of Nebraska law, not the federal courts.

In addition, the federal district court's decision in *Reeves v. Hopkins*, 871 F. Supp. 1182 (D. Neb. 1994), was recently reversed in part in *Reeves v. Hopkins*, 76 F.3d 1424 (8th Cir. 1996). In that case, the Eighth Circuit ruled that in *Reeves v. Hopkins*, 871 F. Supp. 1182 (D. Neb. 1994), the federal district court exceeded its authority when it decided to reject this court's interpretation of Nebraska law concerning our authority to reweigh the aggravating and mitigating circumstances. The Eighth Circuit also ruled that the federal district court had misinterpreted *Rust, supra*, noting that *Rust* concerned a very limited and unique situation wherein a death sentence had been imposed under a wrong and too lenient burden of proof. *Rust* held that this court's attempt to cure that grave error by applying the "beyond a reasonable doubt" burden on direct appeal violated due process because Rust was entitled to have a three-judge panel find the relevant facts and impose his sentence in the first instance. In *Reeves v. Hopkins*, 76 F.3d 1424 (8th Cir. 1996), the Eighth Circuit drew a distinction between cases in which the proceedings were entirely void, such as in *Rust*, and those involving a nonvoiding error, such as the improper consideration of an invalid aggravating circumstance, writing that

> "[a state] appellate court is fully competent to 'cure' some sentencing deficiencies in capital cases." *Rust*, 984 F.2d at 1493. We explained that *Clemons* applied to minor errors such as "improper consideration of an invalid aggravating circumstance," but not to entirely void sentencings requiring completely new factfindings. *Id.* at 1493-95. Nowhere in *Rust* did we intimate that Nebraska could not, consistent with due process, reweigh aggravating and mitigating circumstances to cure "minor" sentencing errors such as those in issue in *Clemons*. Nor did we intimate, as indeed in view of

> *Clemons* we could not, that such reweighing would amount to a deprivation of a defendant's right to appeal his sentence. As we have stated in other cases, whether the Nebraska Supreme Court will engage, or has the authority to engage, in reweighing in circumstances similar to those presented in *Clemons* is a question of state law which only it can decide. *See Moore v. Clarke*, 951 F.2d 895, 897 (8th Cir.1991), *cert. denied*, 504 U.S. 930, 112 S.Ct. 1995, 118 L.Ed.2d 591 (1992); *Harper v. Grammer*, 895 F.2d 473, 480 (8th Cir.1990).

76 F.3d at 1428-29. Therefore, for nonvoiding errors such as the improper consideration of an invalid aggravating circumstance, there is no federal bar to appellate reweighing. In such a situation, the question is one of state law.

As permitted by federal law, *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), under Nebraska law, a death sentence tainted by the improper application of an aggravating factor may be constitutionally cured by our reweighing the aggravating and mitigating circumstances involved. *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991), *cert. denied* 506 U.S. 837, 113 S. Ct. 114, 121 L. Ed. 2d 71 (1992). See, also, *State v. Moore*, 243 Neb. 679, 502 N.W.2d 227 (1993).

Consequently, it was entirely proper for the State to petition this court to intervene and reweigh the aggravating and mitigating circumstances in this case. The fact that we chose not to exercise that power does not mean that the State did not initiate resentencing proceedings within the 60 days ordered by the U.S. District Court.

That being so, the first appellate claim fails.

AGGRAVATING CIRCUMSTANCE § 29-2523(1)(b)

The second appellate claim is that "Nebraska Revised Statute 29-2523(1)(b) is unconstitutionally vague and overbroad and violates the 5th 8th and 14th Amendments to the U.S. Constitution and Article I Sections 3 and 9 of the Nebraska Constitution."

Two distinct assertions are encompassed within this claim. First, Moore argues that this aggravating circumstance is

vague and violates the requirement that all aggravating circumstances be proved beyond a reasonable doubt. Second, he asserts that this aggravating circumstance is overbroad in that it describes the vast majority of felony murders in which the victim is killed while the defendant is perpetrating or attempting to perpetrate a felony on the victim.

Vagueness.

Moore contends that the word "apparent" in aggravating circumstance § 29-2523(1)(b), reading, "[t]he murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime," is vague and thus subject to arbitrary and capricious application. This claim has been addressed by this court previously in *State v. Reeves*, 234 Neb. 711, 754, 453 N.W.2d 359, 386 (1990), and found to be without merit:

> Appellant contends "apparent" is vague. We agree with the court's analysis of this circumstance in *Holtan v. Black*, No. CV84-L-393, slip op. at 20 (D. Neb. Nov. 5, 1986), that "apparent" means "readily perceptible," and therefore "the provision cannot be applied in speculative situations or where a strained construction is necessary to fulfill it." This aggravating circumstance is not constitutionally infirm.

We can discern no reason to reconsider *Reeves*.

In a variant of that argument, Moore urges that use of the word "apparent" in aggravating circumstance § 29-2523(1)(b) lowers the State's burden of proof. He contends that this aggravating circumstance requires the State to show only that the killing was done "apparently" to conceal the commission of a crime or the identity of the perpetrator, a burden of proof less than the beyond-a-reasonable-doubt standard required by *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *cert. denied* 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158. He maintains that the application of this lower burden of proof violates due process and constitutes reversible error under *Rust v. Hopkins*, 984 F.2d 1486 (8th Cir. 1993), *cert. denied* 508 U.S. 967, 113 S. Ct. 2950, 124 L. Ed. 2d 697.

Moore confuses the substance of what must be proved with the placement of the burden to prove it. As we indicated in *Reeves, supra*, apparent means readily perceptible. "Apparent" qualifies aggravating circumstance § 29-2523(1)(b) to the extent that the provision cannot be applied in speculative situations or where a strained construction is necessary to fulfill it. Consequently, the substance of what must be proved to establish this aggravating circumstance is that the murder was committed in a readily perceptible effort to conceal the commission of a crime or to conceal the identity of the perpetrator of a crime. It is the State which must shoulder the burden of proving the existence of aggravating circumstance § 29-2523(1)(b) beyond a reasonable doubt. There is no constitutional infirmity in such an arrangement.

Overbreadth.

Next, Moore argues that the second component of aggravating circumstance § 29-2523(1)(b), the commission of a murder in an effort to conceal the identity of the perpetrator of a crime, is overbroad. Moore maintains that there are two lines of authority applying this aspect of aggravating circumstance § 29-2523(1)(b) in felony murder cases. Under the first line of cases, exemplified in Moore's mind by *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977), and *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), *cert. denied* 469 U.S. 1028, 105 S. Ct. 447, 83 L. Ed. 2d 372, aggravating circumstance § 29-2523(1)(b) was found to exist when the defendant killed someone other than the victim of the underlying felony to hide the defendant's identity. In contrast, under the second line of cases, exemplified in Moore's view by *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), and *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979), *cert. denied* 446 U.S. 988, 100 S. Ct. 2974, 64 L. Ed. 2d 846 (1980), the aggravating circumstance was found to exist when the defendant killed the victim of the underlying felony. Moore contends that this second line of cases is overbroad and would include virtually every felony murder case. He argues that only the first line of cases is valid and that aggravating cir-

cumstance § 29-2523(1)(b) should be construed to reach only murders which were committed to hide the defendant's involvement in some crime unrelated to the killing for which the defendant is being sentenced. Moore further argues that since there is no evidence that he was attempting to conceal his identity as the perpetrator of any unrelated crime, this aggravating circumstance should not apply.

Moore's argument fails. There is but one line of cases in which the common thread is that the record supports a finding beyond a reasonable doubt that "[t]he murder was committed in an apparent effort . . . to conceal the identity of the perpetrator of a crime." The fact that some of these murders were committed to silence the victim of the underlying felony, *Joubert, supra*, *Otey, supra,* and others, to escape detection for an unrelated crime, *Rust, supra*, and *Reeves, supra*, is legally irrelevant.

In addition, Moore is wrong in contending that nearly every felony murder would fall within this aggravating circumstance. As we have noted in *State v. Hunt*, 220 Neb. 707, 725, 371 N.W.2d 708, 720-21 (1985), "Certainly, any killing has the effect of rendering the victim incapable of identifying the perpetrator; that truism, however, does not satisfy the requirement that the murder be committed 'to conceal the identity of the perpetrator.' " It is clear, then, that to establish this aggravating circumstance, the State must prove beyond a reasonable doubt more than that a murder was committed. The State must prove not only that the perpetrator had an intent to kill, but also that the perpetrator had a specific motive for that killing, i.e., the concealment of his or her involvement in a crime. The reach of this aggravating circumstance is even further circumscribed by the requirement that the murder be committed in an apparent effort to conceal the identity of the perpetrator. This qualifies the aggravating circumstance to the extent that it cannot be applied in speculative situations or where a strained construction is necessary to fulfill it. Based on the foregoing, it is evident that not all or even most felony murders will fall within the purview of this aggravating circumstance, but within only a narrow subclass.

Resolution.

As a consequence, there is no merit to this appellate claim.

AGGRAVATING CIRCUMSTANCE § 29-2523(1)(d)

Moore's third appellate claim is that the "sentencing panel committed reversible error by applying an unconstitutionally vague statutory aggravating circumstance section 29-2523 (1)(d) and by fashioning their [sic] own new definition of the aggravating circumstance in an ex post facto manner thereby depriving [Moore] of notice of the elements of the aggravating circumstance and further depriving him of the opportunity to respond and present evidence to rebut the facts necessary to establish the presence of the newly defined aggravating circumstance."

Moore argues that as no constitutionally valid construction of exceptional depravity existed for the resentencing panel to apply, it erred in relying upon that component of aggravating circumstance § 29-2523(1)(d). He also challenges the authority of the panel to formulate its own definition of exceptional depravity, asserts that the panel's definition of exceptional depravity is unconstitutionally vague and overbroad, and finally, urges that by applying its definition in an ex post facto manner, the panel deprived him of notice of the elements of that component of aggravating circumstance § 29-2523(1)(d) and of an opportunity to respond and present evidence to rebut the facts necessary to establish the newly defined aggravating circumstance.

Existence of Definition.

We deal first with Moore's argument that there was at the time of his resentencing no constitutionally viable definition of exceptional depravity available to the resentencing panel.

Aggravating circumstance § 29-2523(1)(d) contains two separate disjunctive components which may operate together or independently of one another. *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995). The second component of this aggravating circumstance exists if a murder "manifest[s] exceptional depravity by ordinary standards of morality and intelligence." § 29-2523(1)(d). We have said that this pertains to " 'the state of mind of the actor' " and "may be proved by or inferred

from the defendant's conduct at or near the time of the offense." *State v. Palmer*, 224 Neb. 282, 319, 399 N.W.2d 706, 731 (1986), *cert. denied* 484 U.S. 872, 108 S. Ct. 206, 98 L. Ed. 2d 157 (1987).

In order to guide the sentencing authority in applying this aggravating circumstance, we have construed exceptional depravity to mean "so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life . . . ." *State v. Harper*, 208 Neb. 568, 579, 304 N.W.2d 663, 669 (1981), *cert. denied* 454 U.S. 882, 102 S. Ct. 368, 70 L. Ed. 2d 194. Accord, *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977), *cert. denied* 439 U.S. 882, 99 S. Ct. 220, 58 L. Ed. 2d 194 (1978); *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. See, *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), *cert. denied* 456 U.S. 984, 102 S. Ct. 2260, 72 L. Ed. 2d 864; *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), *cert. denied sub nom.* 434 U.S. 912, 98 S. Ct. 313, 54 L. Ed. 2d 198; *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977). We have also emphasized that the use of the word "exceptional" confines this aggravating circumstance to only those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence. *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *cert. denied* 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158.

In an effort to provide additional guidance regarding this aggravating circumstance, we adopted in *Palmer* a five-factor test which could be used to determine whether a murder demonstrated exceptional depravity, writing:

> Therefore, for the purpose of [applying] § 29-2523(1)(d) as an aggravating circumstance in determining whether the death penalty may be imposed, we hold that "exceptional depravity" in a murder exists when it is shown, beyond a reasonable doubt, that the following circumstances, either separately or collectively, exist in reference to a first degree murder: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of

> the victim; (4) senselessness of the crime; or (5) helplessness of the victim.

224 Neb. at 320, 399 N.W.2d at 731-32. We also observed that one or more of the five factors were present in the following death penalty cases where exceptional depravity was found to exist: *Holtan, supra*; *Simants, supra*; *Peery, supra*; *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979), *cert. denied* 446 U.S. 988, 100 S. Ct. 2974, 64 L. Ed. 2d 846 (1980); *Harper, supra*; *Moore, supra*; *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), *cert. denied* 469 U.S. 1028, 105 S. Ct. 447, 83 L. Ed. 2d 372. However, our language in *Palmer* should not be read as an abandonment of our previous definition of exceptional depravity. Indeed, on the very same day as *Palmer*, we decided *State v. Joubert*, 224 Neb. 411, 432, 399 N.W.2d 237, 251 (1986), *cert. denied* 484 U.S. 905, 108 S. Ct. 247, 98 L. Ed. 2d 205 (1987), a case where the "coldly planned," that is to say "coldly calculated," element of exceptional depravity was applied in addition to the *Palmer* factors.

While we have maintained that both the *Palmer* factors and the "coldly calculated" language from previous decisions provided sufficient guidance to the sentencing authority, the federal courts have not always agreed. The U.S. District Court for the District of Nebraska granted Moore habeas corpus relief on the ground that the exceptional depravity component of aggravating circumstance § 29-2523(1)(d) was unconstitutionally vague both on its face and as construed. *Moore v. Clarke*, No. CV84-L-754 (D. Neb. Sept. 20, 1988). On appeal, the Eighth Circuit affirmed, disapproving both the "coldly calculated" language and the *Palmer* factors. *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), *cert. denied* 504 U.S. 930, 112 S. Ct. 1995, 118 L. Ed. 2d 591 (1992). However, the comments of the Eighth Circuit regarding the constitutional viability of the *Palmer* factors were dicta and in any event cannot be considered authoritative in light of the subsequent opinion it issued in denying the State a rehearing in *Moore v. Clarke*, 951 F.2d 895 (8th Cir. 1991), *cert. denied* 504 U.S. 930, 112 S. Ct. 1995, 118 L. Ed. 2d 591 (1992). Noting the U.S. Supreme Court's intervening opinions in *Walton v.*

Arizona, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), and *Lewis v. Jeffers*, 497 U.S. 764, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990), the second opinion reaffirmed the limited grant of habeas corpus relief to Moore on the basis that the "coldly calculated" language was unconstitutionally vague. Significantly, though, the Eighth Circuit this time refused to comment on the constitutionality of the *Palmer* factors; it merely noted that the narrower *Palmer* definitions had not been applied in Moore's case. The Eighth Circuit, citing to both *Walton v. Arizona, supra*, and *Moore v. Clarke*, 951 F.2d 895 (8th Cir. 1991), *cert. denied* 504 U.S. 930, 112 S. Ct. 1995, 118 L. Ed. 2d 591 (1992), has since concluded that *Palmer*'s narrower construction of exceptional depravity is clearly constitutional. *Joubert v. Hopkins*, 75 F.3d 1232 (8th Cir. 1996).

Accordingly, we have no trouble concluding, as indeed we have always maintained, that the *Palmer* construction of the exceptional depravity component of aggravating circumstance § 29-2523(1)(d) is constitutional. See, *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995); *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989), *cert. denied* 498 U.S. 881, 111 S. Ct. 216, 112 L. Ed. 2d 176 (1990); *State v. Joubert, supra*; *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). It therefore cannot be said that at the time of Moore's resentencing, there existed no constitutionally viable definition of exceptional depravity. The resentencing panel could have applied the *Palmer* factors.

Resentencing Panel's Authority.

Notwithstanding the constitutional viability of the *Palmer* factors, given this court's refusal in *State v. Moore*, 243 Neb. 679, 502 N.W.2d 227 (1993), to resentence Moore; the Eighth Circuit's criticism in *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), *cert. denied* 504 U.S. 930, 112 S. Ct. 1995, 118 L. Ed. 2d 591 (1992), of our efforts to read the legislative language in a constitutional fashion in *Palmer*; and the fact that *Joubert v. Hopkins* had not yet been decided, the resentencing panel concluded that there was in place no constitutionally viable

interpretation of the exceptional depravity component of aggravating circumstance § 29-2523(1)(d). The panel then undertook to establish in a comprehensive manner appropriate limiting conditions for that component. In crafting its definitions, the resentencing panel took the basic factors of exceptional depravity as described in *Palmer*, combined them with our pre-*Palmer* definitions, and then narrowed them in order to provide the historically comprehensive definition that the Eighth Circuit had found to be lacking in *Moore v. Clarke, supra*. It is this effort that Moore now challenges.

Although the resentencing panel's view that there was no constitutionally viable interpretation of exceptional depravity was mistaken, it was, given the confusing state of precedent on the issue, nevertheless within its authority to define the exceptional depravity component in such a way as to ensure that Moore received sentences that were consistent with constitutional requirements. Obviously, in the absence of clear precedent, a trial court confronting a statute for the first time must apply the statute in accordance with its own understanding of it. See, e.g., *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994); *In re Estate of Holt*, 246 Neb. 50, 516 N.W.2d 608 (1994); *State v. Stein*, 241 Neb. 225, 486 N.W.2d 921 (1992).

Constitutionality of Resentencing Panel's Definition.

That brings us to Moore's contention that the resentencing panel's definition of the exceptional depravity component of aggravating circumstance § 29-2523(1)(d) is unconstitutionally vague and overbroad.

According to the resentencing panel, exceptional depravity could be proved if any one or more of the four definitions the panel had developed were found to apply. Three of these definitions were simply narrower versions of the first three *Palmer* factors: (1) the killer's infliction of prolonged or significant physical violence, such as sexual abuse, on the victim after the victim's death or loss of consciousness; (2) the killer's mutilation or dismemberment of the victim's body after death; and (3) the apparent relishing of the murder by the killer. However, the fourth definition developed by the panel

was not based on *Palmer*, but on the "coldly calculated" language that the Eighth Circuit had disapproved. This fourth definition read:

> the killer's **cold, calculated planning** of the victim's death, as exemplified by **experimentation** with the **method** of **causing** the victim's **death** or by the **purposeful selection** of a particular **victim** on the basis of **specific characteristics** such as race, gender, creed, sexual orientation, disability, or age. See, e.g. State v. Harper, 208 Neb. 568, 573-574, 304 N.W.2d 663, 667, cert. denied, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981); id. at 576, 304 N.W.2d at 668 (experimentation with method of death, poison, by administration to family pets); State v. Moore, 210 Neb. at 461-462, 316 N.W.2d at 36-37; id. at 471, 316 N.W.2d at 41 (selection of victim based on particular characteristics). This element is based on the Nebraska Supreme Court's interpretation of "exceptional depravity" in the two cases cited as examples, and is intended to require more than merely the premeditation necessary to support a conviction for first-degree murder.

To resolve the question before us, we need only concern ourselves with this fourth definition inasmuch as it was the only one the resentencing panel found to be present. The requirement of that definition, that there be "cold, calculated planning of the victim's death," is merely a narrowing of our previous articulations of exceptional depravity found in *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981), *cert. denied* 454 U.S. 882, 102 S. Ct. 368, 70 L. Ed. 2d 194, and *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), *cert. denied* 456 U.S. 984, 102 S. Ct. 2260, 72 L. Ed. 2d 864. Under the panel's definition, this aspect of exceptional depravity is restricted to just two situations: (1) where the defendant experimented with the method of causing the victim's death or (2) where the defendant purposefully selected a particular victim on the basis of specific characteristics such as race, gender, creed, sexual orientation, disability, or age. This definition is clearly narrower and more specific than the "so coldly calculated as to indicate a state of mind totally and senselessly

bereft of any regard for human life" language relied upon by Moore's original sentencing panel. Consequently, the resentencing panel's definition is not vague. It provides sufficient guidance to the sentencing authority "so as to minimize the risk of wholly arbitrary and capricious action," *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), and constitutes a " 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not,' " 428 U.S. at 188, quoting *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

Neither is the resentencing panel's definition overbroad, as alleged by Moore. By requiring more than the premeditation necessary to support a first degree murder conviction, this aspect of the exceptional depravity component of aggravating circumstance § 29-2523(1)(d) is clearly restricted to a subclass of those defendants convicted of first degree murder. Moore's claim that the panel's definition was vague and overbroad is therefore without merit.

We find the resentencing panel's reformulation of the "cold, calculated planning" aspect of exceptional depravity to be sound and hereby adopt it. Thus, the exceptional depravity component of aggravating circumstance § 29-2523(1)(d) may be proved either by demonstrating the existence of one or more of the factors identified in *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), or by demonstrating "the killer's cold, calculated planning of the victim's death," as exemplified by experimentation with the method of causing the death or by the purposeful selection of a particular victim on the basis of specific characteristics.

Ex Post Facto Application.

That brings us to Moore's assertion that by formulating its definition of exceptional depravity in an ex post facto manner, the resentencing panel deprived him of notice of the elements involved and of an opportunity to respond and present evidence to rebut the facts necessary to establish the newly defined aggravating circumstance. In reliance on *Bouie v. City*

of Columbia, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964), Moore urges that the panel's definition of exceptional depravity cannot be applied to him.

In *Bouie*, the petitioners, "sit-in" demonstrators who refused to leave the premises after a request, were convicted under a criminal trespass statute providing that " '[e]very entry upon . . . lands of another . . . after notice . . . prohibiting such entry, shall be a misdemeanor . . . .' " 378 U.S. at 349 n.1. The South Carolina Supreme Court, in affirming the petitioners' convictions, construed the statute to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave. The petitioners appealed, asserting that the retroactive application of an expanded interpretation of South Carolina's criminal trespass statute "violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits." *Id.* at 350. The U.S. Supreme Court agreed and held that "[w]hen a[n] . . . unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." *Id.* at 354-55. The *Bouie* Court further held that this prohibition applies not only when a judicial construction makes an action " 'which was innocent when done, criminal,' " but also when a judicial construction " 'aggravates a crime, or makes it greater than it was, when committed.' " (Emphasis omitted.) *Id.* at 353, quoting *Calder v. Bull*, 3 U.S. 386, 1 L. Ed. 648 (1798).

But as we saw earlier, the resentencing panel's definition did not expand the statutory reach of the exceptional depravity component of aggravating circumstance § 29-2523(1)(d). Rather, the panel's definition represented a further narrowing of our construction of the "cold, calculated planning" aspect of exceptional depravity. Thus, *Bouie* simply does not apply here.

Moore further urges, however, that the resentencing panel was required by due process to redefine exceptional depravity

prior to the evidentiary hearing so as to provide him with notice and a fair opportunity to rebut the evidence presented by the State to establish this newly defined aggravating circumstance. He argues that he could not reasonably be expected to speculate as to the meaning of exceptional depravity and that he had the right to proceed on the assumption that the aggravating circumstance was unconstitutionally vague and therefore void for the purposes of the resentencing hearing.

However, an examination of the record of the resentencing proceedings makes clear that the reason the resentencing panel did not inform Moore of its new construction of exceptional depravity prior to the evidentiary hearing is that the definition itself was an issue in the proceedings.

Moore and the State each presented arguments addressing the applicability of the exceptional depravity component of aggravating circumstance § 29-2523(1)(d) in light of the Eighth Circuit's opinion in *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), *cert. denied* 504 U.S. 930, 112 S. Ct. 1995, 118 L. Ed. 2d 591 (1992). While Moore argued that the exceptional depravity component was constitutionally invalid and therefore could not be applied in this case, the State argued that the *Palmer* factors were constitutionally valid and should be applied.

It cannot be maintained that it was constitutionally impermissible for the resentencing panel to apply to Moore its narrowed construction of aggravating circumstance § 29-2523(1)(d). The U.S. Supreme Court has long held that a statute, as construed, " 'may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendan[t].' " *Osborne v. Ohio*, 495 U.S. 103, 115, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990), citing *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965).

The fundamental question is what threshold notice is actually required by the 14th Amendment in a sentencing phase of a capital case. Moore's case should be considered in two parts: (1) What is the level of notice regarding the exceptional depravity prong of aggravating circumstance § 29-2523(1)(d) required under the 14th Amendment, and (2) did the notice

given to Moore comply with that requirement. We suggest the following analysis:

In *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), the Court distinguished between vagueness for purposes of determining whether a defendant had notice of issues to be litigated and vagueness for purposes of the Eighth Amendment. Although the standards for vagueness in the 8th Amendment are fairly stringent, the threshold for vagueness under the 14th Amendment is much lower: "Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk." 486 U.S. at 361.

The 14th Amendment notice requirement must ensure (1) that the language of the statute and previous constructions of it in existence at the time of the crime provided reasonable notice to a person of ordinary intelligence of the scope of criminal behavior reached by the statute and (2) that any new construction of the statute which occurs after the crime does not increase the scope of behavior considered under the particular aggravating circumstance. See, *Maynard, supra*; *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); *Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).

Prior to Moore's hearing, a person of ordinary intelligence in Moore's situation would have been aware of the following information regarding the exceptional depravity prong of aggravating circumstance § 29-2523(1)(d): (1) the language of the statute; (2) our pre-*Palmer* constructions of exceptional depravity; (3) the factors stated in *Palmer*; (4) our statement in *State v. Joubert*, 224 Neb. 411, 432, 399 N.W.2d 237, 251 (1986), that exceptional depravity was also demonstrated by the fact that the murders in that case were "coldly planned as part of a repetitive program of self-gratification, involving immature victims selected on the basis of their availability at a time when the likelihood of detection was slight"; (5) the previous holding in *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), *cert. denied* 456 U.S. 984, 102 S. Ct. 2260, 72 L. Ed. 2d 864 (the victims were selected on the basis of certain

characteristics, including age); and (6) U.S. Supreme Court holdings affirming the factors annunciated in *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983), *cert. denied* 461 U.S. 971, 103 S. Ct. 2444, 77 L. Ed. 2d 1327, and followed in *Palmer*, which were held to be constitutional; *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990); *Lewis v. Jeffers*, 497 U.S. 764, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990); *Arave v. Creech*, 507 U.S. 463, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1993).

All of this information bears upon the exceptional depravity prong of aggravating circumstance § 29-2523(1)(d) and was available to Moore prior to his resentencing hearing. Therefore, based on the above, Moore cannot reasonably argue in view of the information above stated that he could not anticipate that his conduct at issue in this case might be at risk of being considered to be an aggravating circumstance under a narrowing reformation of that aggravating circumstance. A person of ordinary intelligence should be held to be on notice that this behavior might be addressed under aggravating circumstance § 29-2523(1)(d) when this court has previously upheld the application of the exceptional depravity aggravating circumstance to the facts of Moore's case itself. See *Moore, supra*.

The second factor of the notice requirement is to protect the defendant against the possibility that the sentencing panel will, after the behavior has been committed, construe the statute in such a way as to reach that behavior despite the fact that the new construction is unforeseeable and reaches a larger set of conduct than the statute reached as previously construed.

Here, the resentencing panel's reformation of aggravating circumstance § 29-2523(1)(d) after Moore's hearing met the second part of the notice requirement because the reformulation was clearly foreseeable for the same reasons stated above regarding the language of the aggravating circumstance and the previous constructions of it. The panel's reformulation of the aggravating circumstance after the resentencing did not expand the range of conduct that Moore was on notice to be prepared to discuss under aggravating circumstance § 29-2523(1)(d). The panel reformulated the "cold, calculated planning" lan-

guage. As the panel noted, these two factors, experimentation with the cause of death and the purposeful selection of the victim, were selected out of previous cases in which exceptional depravity had been found, citing *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981), *cert. denied* 454 U.S. 882, 102 S. Ct. 368, 70 L. Ed. 2d 194 (experimentation with method of death, poison), and *Moore, supra* (selection of victim based on characteristics, including age).

Thus, the resentencing panel's reformulation of the aggravating circumstance was accomplished by isolating the previous applications of the exceptional depravity prong of aggravating circumstance § 29-2523(1)(d). This is by definition a narrowing of the information which Moore had regarding this aggravating circumstance prior to the resentencing hearing. As such, it was neither unforeseeable nor did it expand the reach of that aggravating circumstance beyond information that Moore was on notice to prepare for concerning such aggravating circumstance.

Indeed, Moore received even greater notice than constitutionally required. He knew from the Eighth Circuit's opinion in *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), *cert. denied* 504 U.S. 930, 112 S. Ct. 1995, 118 L. Ed. 2d 591 (1992), that the scope of the exceptional depravity component of aggravating circumstance § 29-2523(1)(d) would be an issue in the resentencing proceedings. Thus, he could hardly have been surprised when the resentencing panel further narrowed the definitions of exceptional depravity precisely along the lines suggested by the federal courts.

Neither is there any merit in Moore's contention that he had a right to presume that the exceptional depravity component was unconstitutionally vague and therefore void; he certainly should have expected that the resentencing panel would seek to apply the applicable aggravating and mitigating circumstances specified by the Legislature in a manner which met constitutional requirements.

We therefore conclude that because Moore received sufficient notice and an opportunity to present evidence at the resentencing hearing, there was no violation of due process.

Resolution.

For the foregoing reasons, Moore's third appellate claim is without merit.

INCONSISTENT APPLICATION OF DEATH PENALTY

The fourth appellate claim avers that the "death penalty in Nebraska is applied in an uneven, inconsistent, arbitrary and capricious fashion in violation of the due process clause of the state and federal constitutions and further violates both constitutions as it's [sic] application constitutes cruel and unusual punishment."

He argues that the death penalty is inconsistently applied in that the interpretation of the role of the prosecutor and the effect of the prosecutor's decision to present or not present evidence of aggravating circumstances vary from county to county. He illustrates this contention by evidence he claims demonstrates that the Douglas County prosecutor has a different understanding of the obligation to present evidence of aggravating circumstances than does the Lancaster County prosecutor.

Albeit in different form, we have previously considered and rejected this claim. In *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *cert. denied* 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158, the petitioner argued, among other things, that the discretion exercised by the prosecutor in the Nebraska sentencing scheme resulted in a substantial risk that the death penalty would be applied in an arbitrary and capricious manner. We rejected that claim, citing the U.S. Supreme Court's decision in *Gregg v. Georgia*, 428 U.S. 153, 199, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), which stated:

> The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman*, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates

> the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

Clearly, the focus of *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), and its progeny has been on suitably directing and limiting the discretion of the sentencing body which actually imposes the sentence in a given case. In the absence of a showing of purposeful discretion based on an unjustifiable standard such as race, religion, or other arbitrary classification, assertions that prosecutorial discretion results in the arbitrary and capricious application of the death penalty simply do not present cognizable constitutional issues. See, *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987); *State v. Miller*, 216 Neb. 72, 341 N.W.2d 915 (1983).

Accordingly, Moore's fourth appellate claim is likewise without merit.

OBJECTIVE STANDARDS

The fifth appellate claim avers that the "Nebraska death penalty scheme violates the Eighth Amendment prohibition against cruel and unusual punishment in that it fails to channel the sentencer[']s discretion by objective standards and sets forth two inconsistent standards of proof as a predicate to imposition of the death penalty."

Claimed Conflicts.

Moore first directs our attention to Neb. Rev. Stat. § 29-2519 (Reissue 1995), which, in relevant part, states that "the death penalty . . . shall only be imposed in those instances when the aggravating circumstances existing in connection with the crime outweigh the mitigating circumstances . . . ." Moore maintains that this provision conflicts with Neb. Rev. Stat. § 29-2522 (Reissue 1995), which states:

> 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 . . . .

The specific conflict alleged by Moore is that these two statutes set out inconsistent standards for imposing the death penalty. According to Moore, under § 29-2519, the death penalty may be imposed on the mere showing that the aggravating circumstances outweigh the mitigating circumstances, whereas, under § 29-2522, the death penalty may not be imposed when the mitigating circumstances approach or exceed the weight given to the aggravating circumstances. Moore also argues that the term "approach" contained in § 29-2522 is vague and contends that as a result of these infirmities, the Nebraska death penalty scheme fails to properly channel the sentencer's discretion by objective standards, a circumstance which results in the arbitrary and capricious application of the death penalty in violation of the Eighth Amendment.

There is no conflict between the two statutes. First of all, the language at issue in § 29-2519 is merely prefatory language indicating the Legislature's general desires with respect to this legislation. Second, when read in context, § 29-2519 makes clear that the standards articulated in Neb. Rev. Stat. §§ 29-2520 to 29-2524 (Reissue 1995) are to govern the administration of the death penalty. Of the aforementioned sections, only § 29-2522 details the standards which govern the imposition of the death penalty. There is then but one standard for imposing the death penalty, not two as postulated by Moore. Under that standard, if sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances, the death penalty cannot be imposed. *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881

(1977), *cert. denied* 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158.

Claimed Vagueness.

Moore further claims that the standard articulated in § 29-2522(2) is rendered vague by the inclusion of the word "approach." His specific complaint is that it is not clear how closely the mitigating circumstances must approximate the weight of the aggravating circumstances before a death sentence becomes inappropriate. Thus, according to Moore, different sentencing authorities could reach different conclusions, rendering the application of the death penalty arbitrary and capricious in violation of the Eighth Amendment.

The U.S. Supreme Court has established two phases to a constitutional capital sentencing process: (1) the determination that the defendant is "death eligible" and (2) the creation of an "individualized sentence" for the defendant. *Tuilaepa v. California*, 512 U.S. 967, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994). In the first phase, "the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase." 512 U.S. at 972. The aggravating circumstance must meet two requirements. First, it must not apply to every defendant convicted of a murder; rather, it must apply to only a subclass of defendants convicted of murder. See *Arave v. Creech*, 507 U.S. 463, 474, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1993) ("[i]f the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm"). Second, the aggravating circumstance may not be unconstitutionally vague. *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980). There is a separate requirement for the second phase, where the sentencing authority determines if a defendant eligible for the death penalty should in fact receive that sentence. What is important here "is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983). At this stage, " 'discretion to evaluate and weigh the circum-

stances relevant to the particular defendant and the crime he committed' is not impermissible in the capital sentencing process." *Tuilaepa*, 512 U.S. at 979, quoting *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987). Indeed, as the U.S. Supreme Court has noted, the sentencing authority may be given " 'unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.' " *Tuilaepa*, 512 U.S. at 979-80, quoting *Zant, supra*.

Although under the federal Constitution it would clearly be permissible to grant the sentencing authority unfettered discretion in determining whether the death penalty should be imposed, our law directs that the death penalty not be imposed in cases where sufficient mitigating factors approach or exceed the weight given to the aggravating circumstances. The narrow question before us, then, is whether the word "approach" is so vague as to compromise the sentencing procedure leading to bias or caprice in sentencing. It is not.

In everyday usage, the word "approach" means "a coming or being near in quality or character." Webster's Third New International Dictionary, Unabridged 106 (1993). Thus, the reasonable meaning of § 29-2522(2) is that when "sufficient mitigating circumstances exist which [come near to] . . . the weight given to the aggravating circumstances," the death penalty cannot be imposed. Although application of the standard obviously requires a balancing of the aggravating and mitigating circumstances, the standard is not vague.

Resolution.

Accordingly, neither is there any merit to this appellate claim.

CUSTODIAL STATEMENTS

The sixth appellate claim avers that the "sentencing panel erroneously considered the defendant[']s custodial statements given to police authorities in that they were obtained in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and also by refusing to grant [Moore] an evidentiary hearing to test their constitutional validity in vio-

lation of the due process clause of the Fourteenth Amendment to the U.S. Constitution."

Essentially, the claim is that the resentencing panel should not have considered Moore's custodial statements because they were obtained in violation of his constitutional rights. But this issue was resolved against Moore at trial, and he failed to raise it in his direct appeal. *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), *cert. denied* 456 U.S. 984, 102 S. Ct. 2260, 72 L. Ed. 2d 864. Just as a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, *State v. Wickline*, 241 Neb. 488, 488 N.W.2d 581 (1992), Moore cannot use the resentencing hearing as a forum to relitigate the admissibility of his custodial statements. Under the law of this state, the issue is procedurally barred, and the panel therefore properly denied Moore's request for an evidential hearing on this matter.

This appellate claim, too, is therefore without merit.

PROPORTIONALITY REVIEW

The seventh appellate claim is that the "proportionality review provided for in Neb. Rev. Statute 29-2522 violates the due process clause and the prohibition against cruel and unusual punishment in the U.S. Constitution and Article I, Sections 3 and 9 of the Constitution of the State of Nebraska."

Moore recognizes that the federal Constitution does not require proportionality review in all capital cases, but he maintains that the U.S. Supreme Court has recognized that some capital sentencing schemes are "so lacking in other checks on arbitrariness that [they] would not pass constitutional muster without comparative proportionality review . . . ." *Pulley v. Harris*, 465 U.S. 37, 51, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). Moore asserts that this state has such a vulnerable sentencing scheme and that a comparative proportionality review in which the defendant's sentence is reviewed in relation to similar defendants in similar cases is required by the state and federal Constitutions. Moore further asserts that the proportionality review we conduct under § 29-2521.03 is inadequate, and he invites us to reconsider our interpretation of that

statute, as set forth in *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).

Moore misunderstands the U.S. Supreme Court's statement in *Pulley*. Read in context, it is clear that the *Pulley* Court did not mean that the Constitution would require comparative proportionality review if a sentencing scheme was so lacking in other checks on arbitrariness, but merely that comparative proportionality review might save such a vulnerable scheme from being unconstitutional. In any event, there are clearly sufficient checks on the arbitrary application of the death penalty in our capital sentencing scheme that comparative proportionality review is not needed to save the system from being unconstitutional. See, e.g., *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979), *cert. denied* 446 U.S. 988, 100 S. Ct. 2974, 64 L. Ed. 2d 846 (1980) (Nebraska death penalty sentencing procedure does not violate either Nebraska or federal Constitution); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *cert. denied* 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158 (death penalty statute does not violate 8th or 14th Amendment to U.S. Constitution or state Constitution).

Not only is this appellate claim meritless, we decline Moore's invitation to reconsider our interpretation of § 29-2521.03 and in that regard reaffirm our holding in *Palmer, supra*.

FINDINGS

In the eighth and final appellate claim, Moore contends that even "if the court finds that the standard of proof is not constitutionally infirm, the sentencing panel committed reversible error by failing to find that the mitigating circumstances approach the weight of the aggravating circumstances in this case."

In order to properly consider this claim, it is necessary to briefly review our capital sentencing procedure. Section 29-2522 requires the sentencing body to proceed as follows:

> 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.

Aggravating circumstances must be proved beyond a reasonable doubt. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), *cert. denied* 469 U.S. 1028, 105 S. Ct. 447, 83 L. Ed. 2d 372. But there is no burden of proof with respect to mitigating circumstances. *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990). The State may present evidence that is probative of the nonexistence of a mitigating circumstance, while the defendant may present evidence that is probative of the existence of a statutory or nonstatutory mitigating circumstance. *Id.* Although the sentencing authority 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), *cert. denied* 456 U.S. 984, 102 S. Ct. 2260, 72 L. Ed. 2d 864, the situation is otherwise with respect to aggravating circumstances. Section 29-2523(1) exclusively lists the aggravating circumstances which may be relied upon in imposing the death penalty. In addition to aggravating circumstances § 29-2523(1)(b) and (1)(d), discussed previously, they include aggravating circumstance § 29-2523(1)(a). Aggravating circumstance § 29-2523(1)(a) reads: "The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity."

The mitigating circumstances defined by § 29-2523(2) include (a) and (g). Mitigating circumstance § 29-2523(2)(a) reads: "The offender has no significant history of prior criminal activity." Mitigating circumstance § 29-2523(2)(g) provides: "At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform

his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication."

The resentencing panel found that with regard to the murder of Reuel Eugene Van Ness, Jr., there existed the aggravating circumstances described in § 29-2523(1)(b) and (1)(d) and the mitigating circumstances described in § 29-2523(2)(a) and (2)(g). With regard to the murder of Maynard D. Helgeland, the panel found aggravating circumstances § 29-2523(1)(a), (1)(b), and (1)(d), along with mitigating circumstance § 29-2523(2)(g). The resentencing panel also found that Moore's terrible childhood and severe personality disorder were nonstatutory mitigating circumstances applicable to both murders.

The determination of whether the mitigating circumstances approach or exceed the weight of the aggravating circumstances is not a numerical process, but, rather, involves the reasoned judgment of the sentencing authority. As we explained in *State v. Reeves*, 239 Neb. 419, 426, 476 N.W.2d 829, 836 (1991), *cert. denied* 506 U.S. 837, 113 S. Ct. 114, 121 L. Ed. 2d 71 (1992):

> "The balancing of aggravating circumstances against mitigating circumstances is not merely a matter of number counting but, rather, requires a careful weighing and examination of the various factors. *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989); *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986). As we observed in *State v. Stewart*, 197 Neb. 497, 518, 250 N.W.2d 849, 862 (1977), quoting *State v. Dixon*, 283 So. 2d 1 (Fla. 1973): ' "It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. . . ." ' "

After consideration of the mitigating and aggravating circumstances it had found to exist, the resentencing panel concluded that the mitigating circumstances were not sufficient to

approach or exceed the weight of the aggravating circumstances in either murder and that Moore should therefore be sentenced to death for each of the murders. The panel also determined that the imposition of the death penalty in this case was not excessive or disproportionate to the penalty imposed in similar cases, considering both Moore and the crimes he committed.

Moore alleges that the resentencing panel erred in not finding that the mitigating circumstances were sufficient to approach or exceed the weight of the aggravating circumstances. He challenges not only the panel's factual findings on the aggravating and mitigating circumstances, but its weighing of them as well. We address, in order, Moore's specific claims in this regard.

Factual Determinations.

The resentencing panel found that with regard to the Helgeland murder, "aggravating circumstance (1)(a) is clearly applicable beyond a reasonable doubt because the killing of . . . Van Ness four days earlier constitutes a history of assaultive or terrorizing criminal activity which is both 'substantial' and 'serious' . . . ." Moore concedes that the Van Ness murder is certainly indicative of serious assaultive criminal activity, but he maintains that this one incident cannot be described as substantial history of the nature contemplated by aggravating circumstance § 29-2523(1)(a).

He is wrong. As we explained in *State v. Holtan*, 197 Neb. 544, 546, 250 N.W.2d 876, 879 (1977), *cert. denied sub nom.* 434 U.S. 912, 98 S. Ct. 313, 54 L. Ed. 2d 198:

> " 'History' " refers to the individual's past acts preceding the incident for which he is on trial and " 'substantial,' " . . . refers to an actual, material, and important history of acts of terror of a criminal nature. It does not refer to the particular incident involving the homicide for which he is subject to sentence.

Clearly, under this definition, the fact that Moore had killed someone prior to the Helgeland murder is sufficient to establish the existence of aggravating circumstance § 29-2523(1)(a). The resentencing panel properly applied this aggravating cir-

cumstance. See, *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), *cert. denied* 456 U.S. 984, 102 S. Ct. 2260, 72 L. Ed. 2d 864; *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).

Second, Moore challenges the resentencing panel's finding that aggravating circumstance § 29-2523(1)(b) was present beyond a reasonable doubt with respect to both murders. The panel based its findings on Moore's confession to police that he had killed the victims so they would not be able to identify him. Moore argues that the panel ignored other evidence which contradicts this account of things, such as that he made admissions concerning his actions in the murders to his brother and girl friend after the killings; that although he wiped his fingerprints from the interior of the cab to avoid detection in the Helgeland murder, there is no evidence that he did so in the Van Ness murder; and that, covered in blood, he walked several blocks from the scene of the Helgeland murder. Moore then directs our attention to passages culled from his confession which he characterizes as "equivocal statements" of his intention to conceal his identity. Brief for appellant at 35.

Based on the foregoing, Moore argues that aggravating circumstance § 29-2523(1)(b) has not been proved beyond a reasonable doubt. We cannot agree. The record establishes beyond a reasonable doubt that Moore murdered both Van Ness and Helgeland to conceal his identity as the perpetrator of a robbery. The evidence cited by Moore is simply too weak to overcome the strong evidence of his confessed intentions. For example, when asked "[t]hen why would you have to shoot him if you were just going to rob [Helgeland,]" Moore replied, "I didn't want him to know me." Similarly, when asked "[h]ow come you planned in mind to shoot [Van Ness] first," Moore replied, "Well I figure the guy probly [sic] get . . . my identification away." Other parts of Moore's confession demonstrate that he viewed killing the victims as an integral part of his ongoing robbery scheme. There can be no doubt that one of Moore's motives for these murders was the

silencing of his victims. Aggravating circumstance § 29-2523(1)(b) clearly applies here.

Third, Moore challenges the resentencing panel's finding that aggravating circumstance § 29-2523(1)(d) existed with respect to both murders. In regard to both murders, the panel found that "[Moore's] cold, calculated planning of each victim's death, as manifested by the purposeful selection of a particular victim on the basis of the specific characteristic of age, establishes the existence of exceptional depravity beyond a reasonable doubt . . . ."

Quoting isolated passages from his confession which he says cast doubt on the theory that he selected his victims on the basis of their age, Moore argues that there is insufficient evidence to sustain a finding that aggravating circumstance § 29-2523(1)(d) exists. Again, he is simply wrong. As the recitation of the circumstances of the murders by Moore demonstrates, there was ample evidence to support beyond a reasonable doubt a finding that Moore planned the victims' deaths and selected his victims on the basis of specific characteristics.

Moore further complains that in order for the exceptional depravity aggravating circumstance to be applied to him, it should be necessary for the prosecution to establish not only that he selected his victims on the basis of age, but also that he had "previously exhibited animosity or hatred for the group." Brief for appellant at 38. Moore misunderstands the definition of exceptional depravity. It is the act of selection, not the duration or nature of the animus toward the characteristic selected, that is the gravamen of this form of the aggravating circumstance.

Moore clearly selected the victims on the basis of the specific characteristic of age so as to make the killings easier on himself.

Thus, the record amply demonstrates that aggravating circumstance § 29-2523(1)(d) is present.

Next, Moore challenges the resentencing panel's finding that mitigating circumstance § 29-2523(2)(a) was not present in the Helgeland murder. Once again, he is wrong. As noted previously, Moore's murder of Van Ness just 4 days earlier

constitutes a significant history of criminal activity for the purposes of mitigating circumstance § 29-2523(2)(a). That being so, it cannot be said that with respect to the Helgeland murder, he had no significant history of prior criminal activity.

Moore does not challenge the resentencing panel's finding that mitigating circumstance § 29-2523(2)(g) existed because he suffered from a mental illness or defect. Rather, Moore argues that the panel should also have found that mitigating circumstance to exist because he was intoxicated from smoking marijuana. But by Moore's own admission, the effects of the marijuana were waning at the time he killed Van Ness. The panel properly rejected Moore's claim in this regard.

Weighing of Circumstances.

In addition to considering in mitigation Moore's turbulent childhood and severe personality disorder, as noted earlier, the resentencing panel also considered Moore's good conduct while incarcerated and his expressions of remorse for the killings. However, the panel did not find them to be of much significance. Moore argues that it did not assign enough weight to these nonstatutory mitigating circumstances. He also argues that the panel assigned too much weight to each of the aggravating circumstances.

The U.S. Supreme Court has made clear that "[a] capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." *Tuilaepa v. California,* 512 U.S. 967, 114 S. Ct. 2630, 2638, 129 L. Ed. 2d 750 (1994). It has also emphasized that " 'discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed' is not impermissible in the capital sentencing process." *Tuilaepa*, 512 U.S. at 979, quoting *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987). After proof of at least one aggravating circumstance, the sentencing authority under our capital sentencing scheme is granted the discretion to determine the weight to be given to aggravating and mitigating circumstances and make " 'a reasoned judgment as to what factual situations require the imposition of death and which can be

satisfied by life imprisonment in light of the totality of the circumstances present. . . .' " *State v. Stewart*, 197 Neb. 497, 518, 250 N.W.2d 849, 862 (1977), quoting *State v. Dixon*, 283 So. 2d 1 (Fla. 1973). Thus, we need not inquire into the weight given to a particular aggravating or mitigating circumstance by the resentencing panel, and we decline to do so.

Based upon our independent examination of the aggravating and mitigating circumstances, we conclude that the aggravating circumstances proven to exist far outweigh the mitigating circumstances and that therefore the imposition of the death penalty is appropriate. In each case, sufficient aggravating circumstances existed to justify the imposition of a death sentence, and the mitigating circumstances did not approach or exceed the aggravating circumstances.

Sentence Comparisons.

The proportionality review we are to make under § 29-2521.03 requires that we determine the propriety of the death sentence by comparing the sentence under review with previous cases involving the same or similar circumstances, which thus ensures that no sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances, and that the review should include only those cases in which the death penalty was actually imposed. See, *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); *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).

After comparing the facts and circumstances of this case with those of all the applicable cases in which the death penalty was imposed, as required by *Palmer*, we find that the sentences imposed in this case are no greater than nor disproportionate to the sentences imposed in any other case with the same or similar circumstances.

Resolution.

Consequently, this appellate claim, like those which preceded it, fails.

CONCLUSION

All of the appellate claims being without merit, we affirm the sentences of death imposed by the resentencing panel.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WAYNE F. SEVERIN, APPELLANT.

553 N.W.2d 452

Filed September 27, 1996. No. S-95-1253.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, an appellate court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Pleas: Waiver.** Neb. Rev. Stat. § 29-1812 (Reissue 1995) provides that a defendant who pleads to the general issue waives all defects which might have been attacked by a motion to quash.
3. **Pleas.** Neb. Rev. Stat. § 29-1812 (Reissue 1995) applies where a plea is entered for a defendant by the court.
4. **Appeal and Error.** Absent plain error, assignments of error not discussed in the briefs will not be addressed by this court.
5. **Constitutional Law: Statutes: Standing.** In order to challenge a statute on the ground of vagueness, one must not have engaged in conduct which is clearly proscribed by the statute and cannot complain of the vagueness of the law as applied to the conduct of others.
6. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
7. **Directed Verdict: Waiver: Convictions: Appeal and Error.** A defendant who moves for a directed verdict at the close of the State's case and proceeds with trial waives any error in the ruling on that motion, but may challenge the sufficiency of the evidence for the defendant's conviction.
8. **Directed Verdict: Appeal and Error.** When a defendant makes a motion at the close of the State's case in chief and again at the conclusion of all the evidence, it is proper to assign as error that the defendant's motion for directed verdict made at the conclusion of all the evidence should have been sustained.

9. **Convictions: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact; a conviction will be affirmed in the absence of prejudicial error if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
10. **Motions for New Trial: Appeal and Error.** The standard of review for the denial of a motion for new trial is whether the trial court abused its discretion in denying the motion.
11. **Words and Phrases.** An abuse of discretion means that the reasons for the ruling are untenable and unfairly deprive a litigant of a substantial right and deny a just result in the matter submitted for disposition.

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

William G. Line for appellant.

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

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ., and QUIST, D.J.

CAPORALE, J.

I. STATEMENT OF CASE

Pursuant to verdict, the district court adjudged the defendant-appellant, Wayne F. Severin, guilty of having been an accessory to a felony, in violation of Neb. Rev. Stat. § 28-204 (Reissue 1995), and sentenced him to imprisonment for a period of 30 days and payment of a $3,000 fine. We granted Severin's motion to bypass the Nebraska Court of Appeals, and he asserts that the district court erred in failing to (1) declare § 28-204 unconstitutional both facially and as applied, (2) direct a verdict in his favor, and (3) grant him a new trial. We affirm.

II. FACTS

In order to appreciate the relevant facts, we must first have in mind the language of § 28-204, which reads:

> (1) A person is guilty of being an accessory to felony if with intent to interfere with, hinder, delay, or prevent

the discovery, apprehension, prosecution, conviction, or punishment of another for an offense, he:

(a) Harbors or conceals the other; or

(b) Provides or aids in providing a weapon, transportation, disguise, or other means of effecting escape or avoiding discovery or apprehension; or

(c) Conceals or destroys evidence of the crime or tampers with a witness, informant, document, or other source of information, regardless of its admissibility in evidence; or

(d) Warns the other of impending discovery or apprehension other than in connection with an effort to bring another into compliance with the law; or

(e) Volunteers false information to a peace officer; or

(f) By force, intimidation, or deception, obstructs anyone in the performance of any act which might aid in the discovery, detection, apprehension, prosecution, conviction, or punishment of such person.

(2) Accessory to crime is a Class IV felony if the actor knows of the conduct of the other and such conduct constitutes a felony of any class.

After receiving information that Kelly Thirtle, a suspect in a forgery case, might be at the Severin residence and that Severin might know of her whereabouts, Lt. Greg Chamberlain and Officer Joyce Heinke of the Fremont Police Department went to the Severin residence on March 10, 1995, arriving at about 2 p.m. Chamberlain told Severin that they were looking for Thirtle and informed Severin that there were both a misdemeanor and a felony warrant for Thirtle's arrest. After advising Severin that the felony warrant was for the sexual assault on a child, Chamberlain showed him a photograph of Thirtle and asked if Severin knew her. Severin acknowledged that he did and explained that Thirtle had been on the premises the day before, but that she was not there currently.

Later that same day, at around 9 p.m., Officer Howard Hanson went to the Severin residence to see if Thirtle was there. After parking some distance from the house, Hanson walked to the house, looked in the window, and saw Thirtle in the kitchen with two men. Hanson then left the area and

radioed for Officer Eric Nordby to come and assist him in arresting Thirtle.

Once Nordby arrived, he and Hanson walked back to the house and looked through the window again. Seeing Thirtle, they began to make plans to arrest her. Nordby stayed outside and kept an eye on the inside of the house through the window; Hanson went to the front of the house and knocked on the door.

After Hanson knocked, he heard the doorknob rattling as if someone was trying to open the door. The person behind the door then said, "[W]ait a minute," and everything became quiet. The person then said, "[W]ait a minute" again, whereupon Hanson looked over at Nordby and asked whether Thirtle was running or hiding. After Nordby told Hanson that she was running, Hanson told Nordby to go get her. Nordby went around to the back of the house, where he encountered Thirtle. Nordby identified himself as a police officer and instructed Thirtle to stop. Instead, Thirtle ran back into the house; Nordby pursued her into the kitchen, where she was apprehended. The same two men, Lloyd Behrens and Guadalupe Pacheco, were also in the kitchen at that time.

While Nordby was chasing Thirtle, Severin had gone to the door and opened it. Hanson explained to Severin that he needed to talk to Thirtle. Severin said that Thirtle was not there. After Hanson insisted that Thirtle was there, Severin opened the door and motioned for him to enter. Hanson went into the kitchen and discovered Thirtle, along with Nordby, Behrens, and Pacheco. At approximately 10:20 p.m., Chamberlain was called to the Severin residence, after which Thirtle was arrested, along with Behrens.

Severin successfully moved to quash the initial information filed against him; an amended information was then filed, and Severin stood mute at his arraignment thereon. At that point, the district court entered a not guilty plea on Severin's behalf.

At trial, Chamberlain, Heinke, Hanson, and Nordby testified to the events that transpired on March 10, 1995, as detailed earlier. The prosecution also called Thirtle, who testified that she had been in the kitchen at the Severin residence with Behrens and Pacheco for only about 20 or 30 minutes

before the police arrived. Thirtle did not remember whether Severin entered the kitchen before or after the police showed up. She explained that she was not running from the officers, but that she was going to leave at that time anyway. She left after she had spoken to Severin but before the police had arrived and, as she had not seen Severin after the police arrived, did not think that he knew she was still in the house. Thirtle stated that she did not discuss with Severin the charges which led to her incarceration. After Thirtle's testimony, the State rested, and Severin unsuccessfully moved for a directed verdict.

Severin then took the stand and confirmed that two police officers came to his door on March 10, 1995, and told him that they had arrest warrants for Thirtle. Severin told the police that she was not there and that he had not seen her recently. Thirtle then showed up at around 3 or 4 p.m., at which time he asked her about the warrants. She told him that "she was definitely wanted" by the police, but that it was all a mistake, that she was on probation, and that there should be no warrants for her arrest. Severin told Thirtle that she could not come around until she got her troubles taken care of because he had "some children that [he] was trying to get ahold of" and did not need any more trouble. Severin then asked Thirtle to leave, and as far as he knew, she did.

Severin testified that he next saw Thirtle when the officers came knocking at his door at around 10 p.m. According to Severin, he had gone to bed at about 9 or 9:30 p.m. On hearing the knocking, he got up and attempted to answer the door, which did not open easily, and he had some difficulty. As he was trying to get the door open, Severin asked who was there. The officers explained that they were the police, that they had talked to him before, and that they were there for Thirtle. When he could not get the door open, Severin turned around to go into the kitchen and saw Thirtle standing there.

Severin testified that he did not know Thirtle was there until that time. He went over to Thirtle and asked her what she was doing there. He then told her that the police were at the door. Thirtle asked Severin what to do, and he replied, "I personally don't know what you are going to do; but I am going to

go answer the front door." Severin then left the room and opened the door. He admitted that when he opened the door, he told the officers that Thirtle was not there and explained that he expected Thirtle would not be there because he had told her to leave.

After resting his case, Severin unsuccessfully renewed his motion for a directed verdict. At the jury instruction conference, Severin took exception to the portion of the instruction defining the elements of the offense which advised that Severin "knew of the conduct of . . . Thirtle; and such conduct constitutes a felony."

III. ANALYSIS

1. Constitutionality

Severin first asserts that § 28-204 is unconstitutional both facially and as applied.

(a) Scope of Review

Whether a statute is constitutional is a question of law; accordingly, an appellate court is obligated to reach a conclusion independent of the decision reached by the court below. See *State v. Kelley*, 249 Neb. 99, 541 N.W.2d 645 (1996). See, also, *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996).

(b) Application of Law

The proper way to challenge the facial validity of a statute is by a motion to quash or by demurrer. See Neb. Rev. Stat. §§ 29-1808 and 29-1810 (Reissue 1995). As first noted in part II, Severin did neither as to the operative amended information. Rather, he stood mute during the arraignment thereon, and as a consequence, the district court entered a plea of not guilty on his behalf.

Neb. Rev. Stat. § 29-1812 (Reissue 1995) provides that a defendant who pleads to the general issue waives all defects which might have been attacked by a motion to quash. *State v. John*, 213 Neb. 76, 328 N.W.2d 181 (1982); *State v. Etchison*, 190 Neb. 629, 211 N.W.2d 405 (1973). This statute has long been interpreted to include the situation where a plea is entered for the defendant by the court. *Etchison, supra*; *Huette*

v. State, 87 Neb. 798, 128 N.W. 519 (1910); *Trimble v. State*, 61 Neb. 604, 85 N.W. 844 (1901). It is therefore clear that Severin waived his right to challenge the facial validity of § 28-204. As a result, we do not consider Severin's facial challenge.

Left for consideration, then, is Severin's application challenge. Although in this regard he urges that, as applied, the statute is both overbroad and vague, Severin does not detail in what manner the statute is overbroad. Our general rule is that absent plain error, assignments of error not discussed in the briefs will not be addressed by this court. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993). See, also, *McWhirt v. Heavey, ante* p. 536, 550 N.W.2d 327 (1996). We therefore do not reach Severin's overbreadth claim.

This leaves only Severin's claim that, as applied, § 28-204 is unconstitutionally vague. In connection with this claim, Severin maintains that the phrase "conduct constituting a felony" has no generally accepted meaning. However, before we can address the merits of this claim, we must determine whether Severin has standing to raise the issue.

In order to challenge a statute on the ground of vagueness, one must not have engaged in conduct which is clearly proscribed by the statute and cannot complain of the vagueness of the law as applied to the conduct of others. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). Thus, as a preliminary matter we must determine whether Severin's conduct was clearly prohibited by the statute.

As noted in part II, the statute makes acting as an accessory a crime "if the actor knows of the conduct of the other and such conduct constitutes a felony of any class." The plain meaning of this provision is that the knowledge requirement is satisfied if one knows of the conduct of the other. A reasonable person could not understand this language as requiring that the accessory have personal knowledge of the specific facts of the other's conduct or that the other's conduct constitutes a felony; it is enough if the accessory was reliably informed of the conduct.

Chamberlain and Heinke had informed Severin that they were looking for Thirtle and that they had two warrants for her

arrest. Chamberlain also told Severin that one of the warrants was for a felony sexual assault on a child. This evidence, together with the evidence that when Thirtle returned to Severin's residence in the afternoon she told Severin that she was wanted by the police, if believed by the jury, establishes beyond a reasonable doubt that Severin had the knowledge required of an accessory.

(c) Resolution

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

2. Directed Verdict

Severin next asserts that the district court erred in overruling his motion for a directed verdict. Although not entirely clear, it appears that Severin argues that at the close of all the evidence, there was "no evidence that [he] affirmatively did anything unlawful." Brief for appellant at 8.

(a) Scope of Review

In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994).

(b) Application of Law

The State contends that this claimed error is improperly assigned because Severin adduced evidence after his motion for a directed verdict at the close of the State's evidence was overruled. In support of its position, the State cites *State v. Gray*, 239 Neb. 1024, 479 N.W.2d 796 (1992), which does hold that a defendant who moves for a directed verdict at the close of the State's case and proceeds with trial waives any error in the ruling on that motion, but may challenge the sufficiency of the evidence for the defendant's conviction. But as we noted in *Hirsch, supra*, a distinction must be made between the situation in *Gray* and one wherein a second motion for directed verdict is made at the conclusion of all the evidence.

When a defendant makes a motion at the close of the State's case in chief and again at the conclusion of all the evidence, it is proper to assign as error that the defendant's motion for directed verdict made at the conclusion of all the evidence should have been sustained. *Hirsch, supra*. See *State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991). In the present case, Severin renewed his motion for directed verdict at the end of the trial, and it was therefore proper for him to assign the overruling of that motion as error.

However, regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact; a conviction will be affirmed in the absence of prejudicial error if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Newman, ante* p. 226, 548 N.W.2d 739 (1996); *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995); *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

We have already considered the knowledge element. The evidence in that regard, as detailed previously, is such that if believed, the jury could find that the State established each element of the offense defined by § 28-204 beyond a reasonable doubt.

(c) Resolution

Consequently, there is no merit to the second assignment of error.

3. New Trial

Finally, Severin urges that the district court should have set aside the verdict and granted him a new trial not only because the evidence does not support the conviction, but because the jury obviously ignored the instruction that "[t]he fact that the State has brought these charges is not evidence of anything."

(a) Scope of Review

The standard of review for the denial of a motion for new trial is whether the trial court abused its discretion in denying

the motion. See *Hirsch, supra*. An abuse of discretion means that the reasons for the ruling are untenable and unfairly deprive a litigant of a substantial right and deny a just result in the matter submitted for disposition. *State v. Atwater*, 245 Neb. 746, 515 N.W.2d 431 (1994).

(b) Application of Law

Having determined, contrary to Severin's contention, that the evidence does support the conviction, we turn our attention to Severin's contention that the jury ignored the instruction that mere charges constitute no evidence of a crime. Severin postulates that the jury obviously concluded that "the fact that Thirtle was charged with a felony sexual offense was . . . evidence that [he] knew the actions and conduct of . . . Thirtle that allegedly constituted the felony sexual offense." Brief for appellant at 9.

Severin apparently misunderstands the purpose of the instruction at issue, which was to inform the jury that the charges against him were not evidence of his guilt. The questioned instruction did not pertain to the charges against Thirtle.

However, the fact that the police advised Severin that warrants for the arrest of Thirtle had been issued constituted evidence upon which the jury could rely in concluding that Severin knew of Thirtle's conduct.

(c) Resolution

Thus, the last assignment of error is as meritless as the first two.

IV. JUDGMENT

We therefore, as foreshadowed in part I, affirm the judgment of the district court.

AFFIRMED.

FAHRNBRUCH, J., not participating.

VILLAGE OF WINSIDE, APPELLEE, V. SCOTT JACKSON, DOING BUSINESS AS WOODLEAF APARTMENTS, APPELLANT.

553 N.W.2d 476

Filed October 4, 1996. No. S-94-506.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Ordinances: Presumptions.** All ordinances are presumed to be valid.
3. **Municipal Corporations: Ordinances: Statutes.** The power of a municipality to enact and enforce any ordinance must be authorized by state statute.
4. **Statutes.** In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
5. **Statutes: Legislature: Intent.** The purpose and intent of the Legislature must be ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
6. **Municipal Corporations: Fees.** Under Neb. Rev. Stat. § 13-2020(4) (Cum. Supp. 1994), a municipality can impose a garbage fee on only those persons that actually use or are served by the garbage services provided.
7. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not there, or to read anything direct and plain out of a statute.
8. **Statutes: Ordinances.** Where there is a direct conflict between an ordinance and a state statute, the statute is superior law.
9. **Municipal Corporations: Ordinances: Public Health and Welfare.** As a general matter, municipalities may, in the exercise of a valid police power, protect the public health through ordinances.
10. **Municipal Corporations: Ordinances.** A municipality's police powers can operate only within legislative limits.
11. **Statutes.** To the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges, on appeal thereto from the District Court for Wayne County, ROBERT B. ENSZ, Judge, on appeal thereto from the County Court for Wayne County, PHILIP R. RILEY, Judge. Judgment of Court of Appeals reversed, and cause remanded.

Craig H. Lane for appellant.

Jeffrey L. Hrouda for appellee.

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

CONNOLLY, J.

We are asked to decide whether a municipality, in conformance with the Integrated Solid Waste Management Act (Act), may charge a garbage fee to persons that do not use the service. We hold that the Act does not permit the imposition of a garbage fee on a nonuser of the service and therefore reverse the Nebraska Court of Appeals' decision affirming the district court's decision.

BACKGROUND

On October 22, 1993, the Village of Winside (Village) filed a claim against Scott Jackson, doing business as Woodleaf Apartments, in small claims court seeking $293.50 plus costs for past-due garbage bill charges incurred since October 1, 1992. In response, Jackson filed a counterclaim in the amount of $317.07 alleging that he had paid for garbage services he never received. The court entered judgment for the Village and against Jackson on the counterclaim. Jackson then appealed to the district court.

In the district court proceedings, the parties stipulated to an amendment to the Village's petition increasing the prayer for damages to $440.50. The trial was held on April 6, 1994. The evidence offered by both parties was essentially uncontested and shows as follows:

The Village enacted an ordinance charging every occupied residence and business a garbage fee. Businesses are charged $24.50 per month for this service, while residents are charged $9.25 per month. These charges are assessed regardless of whether a business or resident chooses not to use the garbage system employed by the Village.

This ordinance was enacted by the Village to comply with the Act, set forth in Neb. Rev. Stat. § 13-2001 et seq. (Cum. Supp. 1994). This Act essentially requires every county and municipality to provide or contract for facilities and systems necessary for the proper disposal of solid wastes. See § 13-2020. Rather than providing the necessary facilities and systems itself, the Village contracted with Arens Sanitation, Inc. (Arens), to provide garbage collection and disposal for the residents and businesses within the Village.

Jackson owns an apartment complex in the Village. The complex consists of four apartments and is housing for the elderly financed by the Farmers Home Administration. At all times relevant to this action, each apartment has been continuously occupied. Jackson testified that although the tenants residing therein generate garbage, they separate it for recycling. Jackson picks up this separated garbage once a week and either uses the garbage as compost on his garden or personally transports it to a recycling center. During the trial, Jackson stated that he recycles all the garbage generated at the complex with the exception of light bulbs, which he stores at his parents' residence in the Village. Having recycled trash for 26 years, Jackson testified that he is "quite passionate about it."

Both parties are in agreement that the garbage services provided by Arens are available to Jackson but that he has never utilized the services. In addition, both parties are in agreement that Jackson has not paid a garbage bill since at least November 1, 1992, and that the bill totaled $440.50 as of the time of trial.

The district court ruled that the Village ordinance assessing a garbage fee regardless of use of the services was in accordance with the Act and was within the police power of the Village. Jackson then appealed to the Court of Appeals, arguing that the ordinance exceeded the scope and authority of the Act and that the district court erred in finding that he violated the provisions of the ordinance. In a memorandum opinion filed February 26, 1996, the Court of Appeals affirmed the district court's decision, holding that the ordinance did not exceed the scope and authority of the Act and that the ordinance was a valid exercise of the Village's police power. We granted Jackson's petition for further review.

ASSIGNMENTS OF ERROR

Jackson contends that the Court of Appeals erred (1) in not finding that the ordinance of the Village exceeded the scope and authority of the Act and (2) in failing to address his second assignment of error, wherein he claimed that the district court was incorrect in finding that he violated the Village ordi-

nance. Jackson therefore asks us to reverse the decision of the Court of Appeals and enter a judgment in his favor on his counterclaim.

STANDARD OF REVIEW

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. *In re Interest of Brandy M. et al., ante* p. 510, 550 N.W.2d 17 (1996); *County Cork v. Nebraska Liquor Control Comm., ante* p. 456, 550 N.W.2d 913 (1996).

ANALYSIS

Scope of Authority Under Act

The primary issue raised by Jackson is whether the Village ordinance exceeds the scope and authority granted by the Act.

The Act, enacted in 1992, is designed to provide a comprehensive scheme to control the collection and disposal of solid wastes. In furtherance of this goal, the Act specifically requires each county and municipality in this state to "provide or contract for facilities and systems as necessary for the safe and sanitary disposal of solid waste generated within its solid waste jurisdiction area." § 13-2020(1). Further authority is granted to a municipality in § 13-2020(4), which provides in pertinent part:

> The governing body of a county, municipality, or agency may make all necessary rules and regulations governing the use, operation, and control of a facility or system. Such governing body may establish *just and equitable rates or charges to be paid to it for the use of such facility or system by each person whose premises are served by the facility or system*, including charges for late payments . . . .

(Emphasis supplied.)

For purposes of the Act, a "system" includes contractors utilized for the purpose of collection, transportation, and disposal of solid waste. § 13-2016.

The Act also allows a municipality to adopt ordinances or regulations governing solid wastes within its jurisdiction as

necessary to protect the public health and welfare as well as the environment. § 13-2023.

In reliance upon these statutory provisions, the Village enacted an ordinance which states in pertinent part:

> Every property owner, occupant, or lessee, who owns, occupies, inhabits, uses, or possesses any residence, house, mobile home, building or institution within the corporate limits of the Village of Winside, Nebraska shall pay a garbage fee as assessed and determined by the Village of Winside, Nebraska.

Winside Code § 4-307 (1993).

As the ordinance makes clear, a resident or business may be assessed a garbage collection fee for occupying any building within the Village. The Village has, in essence, given its citizens an offer they cannot refuse.

In determining the validity of this ordinance, we note that all ordinances are presumed to be valid. *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 660, 515 N.W.2d 390 (1994). However, the power of a municipality to enact and enforce any ordinance must be authorized by state statute. *State v. Austin*, 209 Neb. 174, 306 N.W.2d 861 (1981).

The Village essentially argues that the ordinance in question is a proper exercise of authority granted by the Act. There is little doubt that the Act allows the Village to establish and maintain a garbage collection service within its jurisdiction. The question is whether the Village may charge a flat fee to persons that do not use this service.

In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Goolsby v. Anderson, ante* p. 306, 549 N.W.2d 153 (1996); *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995). The purpose and intent of the Legislature must be ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *County Cork v. Nebraska Liquor Control Comm., ante* p. 456, 550 N.W.2d 913 (1996); *Baker's Supermarkets v. State*, 248 Neb. 984, 540 N.W.2d 574 (1995).

We begin by noting that a municipality is expressly empowered to establish ordinances regulating the collection and removal of garbage. See § 13-2023. This grant of authority, however, must be construed together with other portions of the Act. See *Nebraska Life & Health Ins. Guar. Assn. v. Dobias*, 247 Neb. 900, 531 N.W.2d 217 (1995). The question before us is addressed by § 13-2020(4), which specifically controls the ability of a municipality to charge for garbage services. As previously noted, this section allows a municipality to assess equitable fees for the "*use of such facility or system by each person whose premises are served by* [*it*]." A plain and ordinary reading of this language can lead to only one conclusion: A municipality can impose a garbage fee on only those persons that actually use the garbage services provided. To read the Act as giving a municipality the ability to assess a flat garbage fee on all residents regardless of whether they use the service would require us to read a meaning into the statute that is contrary to the plain and ordinary meaning of the terms employed in § 13-2020(4). While the Legislature is free to regulate a municipality's ability to charge garbage fees as it sees fit, it is not within the province of this court to read a meaning into a statute that is not there, or to read anything direct and plain out of a statute. *Nebraska Life & Health Ins. Guar. Assn. v. Dobias, supra.*

Our plain reading of the Act in no way removes the obligation or ability of a municipality to create a garbage removal service for its residents. Rather than employing language that expressly allows the imposition of a garbage fee on all residents, the Legislature gave municipalities the authority to levy a tax to pay for the garbage services provided. § 13-2020(5). This granting of tax power effectively eliminates any need a municipality may have to assess garbage fees on nonusers in order to defray any costs associated with the providing of such services.

In applying our reading of the Act to the present case, we note that both parties are in agreement that Jackson has not used the garbage collection service offered by the Village. As Jackson is a nonuser of this service, the Village ordinance requiring Jackson to pay a garbage fee is contrary to the plain

language of § 13-2020(4). This court has recently noted that where there is a direct conflict between an ordinance and a state statute, the statute is superior law. *Gillis v. City of Madison*, 248 Neb. 873, 540 N.W.2d 114 (1995). Because the imposition of a flat garbage fee on residents is incompatible with the Act, we hold that Winside Code § 4-307 is invalid insofar as it requires residents to pay a fee for garbage services they do not use.

Police Powers

The Village contends that the assessment of a garbage fee on Jackson is nevertheless proper as an exercise of its police powers. In support of this contention, the Village cites Neb. Rev. Stat. § 17-505 (Reissue 1991), which provides in pertinent part:

> In addition to their special powers, second-class cities and villages shall have the power to make all such ordinances, bylaws, rules, regulations and resolutions, *not inconsistent with the laws of the state*, as may be expedient for maintaining the peace, good government and welfare of the corporation, and its trade, commerce and manufactories . . . .

(Emphasis supplied.)

As a general matter, municipalities may, in the exercise of a valid police power, protect the public health through ordinances. *Village of Brady v. Melcher*, 243 Neb. 728, 502 N.W.2d 458 (1993). However, to be valid such ordinances must operate within legislative limits. *Id.*

We have addressed the authority of a municipality to regulate garbage under the auspices of its police power on previous occasions. In *Urbach v. City of Omaha*, 101 Neb. 314, 163 N.W. 307 (1917), this court upheld as a valid exercise of the municipality's police power the enactment of an ordinance making it illegal for a resident to move or haul garbage through the streets. In so holding, the court stated that " '[t]he removal and disposal of garbage, offal, and other refuse matter is recognized as a proper subject for the exercise of the power of a municipality to pass ordinances to promote the public health, comfort and safety. . . .' " *Id.* at 316, 163 N.W. at 308.

In *State v. Austin*, 209 Neb. 174, 306 N.W.2d 861 (1981), the defendant was charged with violating a city ordinance that prohibited the dumping of refuse within 3 miles of the city. This court upheld the ordinance, noting that the Legislature had granted specific authority for the city to pass ordinances regulating persons within 3 miles of the city as necessary to promote the public health and welfare.

While acknowledging the ability of a municipality to regulate garbage under the police power, provided the municipality acts within legislative limits, we have not directly examined whether this power allows a municipality to assess a garbage fee on an individual that does not use the service. Courts in other jurisdictions have concluded that the imposition of a garbage fee on a nonuser is a valid exercise of police power. See, e.g., *Stone v. Town of Mexico Beach*, 348 So. 2d 40 (Fla. App. 1977) (a town may impose a flat rate, regardless of use, for the collection and disposal of garbage); *City of Glendale v. Trondsen*, 48 Cal. 2d 93, 308 P.2d 1 (1957) (ordinance imposing service charge for garbage collection upon residents could be upheld as police measure, even though residents were required to pay charges without regard to whether they used collection service).

While insightful, these cases are not determinative of the issue before us. Unique to the present situation is this state's Act, which explicitly grants the Village the authority to create a garbage service. To state that the Village has the inherent ability to enact an ordinance charging all residents a garbage fee regardless of use is incorrect, for a municipality's police powers can operate only within legislative limits. *Village of Brady v. Melcher, supra*; *Howard v. City of Lincoln*, 243 Neb. 5, 497 N.W.2d 53 (1993). The Village's reliance on the general powers granted to it under § 17-505 is misplaced, for, as stated therein, the authority to enact rules and regulations cannot be inconsistent with any law of this state. Unlike the broad and sweeping reach of § 17-505, the Act deals specifically with the establishment of a garbage service by a municipality. To the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute. *State ex rel. Stenberg v. Murphy*, 247 Neb. 358, 527 N.W.2d

185 (1995). Accordingly, the specific dictates of the Act that allow the imposition of a garbage fee on only those residents who actually use the services prevail over the general powers enunciated in § 17-505. Thus, we conclude that the Village does not possess the authority under its police powers to charge a garbage fee on those residents who do not use the service.

JACKSON'S COUNTERCLAIM

Remaining is the issue of Jackson's counterclaim against the Village in the amount of $317.07. As asserted by Jackson, this counterclaim reflects payment of garbage fees for services he did not use. In ruling that the Village possessed the authority to assess such a fee, the district court necessarily held against Jackson on his counterclaim. In light of our conclusion that the Village does not possess the authority to charge Jackson for services he does not use, the ruling on his counterclaim was in error. Therefore, this cause must be remanded for determination of Jackson's recovery on his counterclaim.

CONCLUSION

For the reasons discussed above, we hold that the Nebraska Court of Appeals erred in holding that the Village ordinance assessing a mandatory garbage collection fee on all residents and businesses did not exceed the scope of the Act and was within the police powers of the Village. The Court of Appeals' decision affirming the district court's award of $440.50 to the Village is therefore reversed, and the cause is remanded to determine Jackson's recovery on his counterclaim.

REVERSED AND REMANDED.

EVERGREEN FARMS, A GENERAL PARTNERSHIP, APPELLEE, V. FIRST NATIONAL BANK & TRUST COMPANY, A NATIONAL BANK, APPELLANT.

553 N.W.2d 728

Filed October 4, 1996. No. S-94-546.

1. **Jury Instructions: Appeal and Error.** The 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.
2. **Fraud: Proof.** In order to maintain an action for fraudulent misrepresentation, the plaintiff must allege and prove the following elements: (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff did so rely; and (6) that he or she suffered damage as a result.
3. **Judgments: Evidence.** An issue should be decided as a matter of law only where reasonable minds cannot differ and can draw but one conclusion from the evidence.
4. **Damages: Proof.** A claim for lost profits must be supported by some financial data which permit an estimate of the actual loss to be made with reasonable certitude and exactness.
5. **Courts: Damages: Evidence.** It is the duty of the district court to refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine that issue without indulging in speculation and conjecture.
6. **Damages: Pleadings: Proof.** Damages, like any other element of a plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove the plaintiff's alleged damages.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Reversed and remanded with directions to dismiss.

Frederick S. Cassman, of Abrahams, Kaslow & Cassman, and Noyes W. Rogers and Clark J. Grant, of Grant, Rogers, Maul and Grant, for appellant.

David E. Copple and Steven D. Sunde, of Domina & Copple, P.C., for appellee.

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

WRIGHT, J.

I. INTRODUCTION

Evergreen Farms (Evergreen) brought this action for breach of contract and fraudulent misrepresentation against First National Bank & Trust Company (First National). Evergreen sought to recover damages arising from its loan agreement with First National. A jury awarded Evergreen $172,500, and First National appeals.

II. FACTS

1. EVERGREEN FARMS

Evergreen Farms is a general partnership engaged in farming and cattle feeding. The partners are Julius, Lois, and Ricky Osten. In the 1970's, First National began loaning money to Evergreen. In 1986, Evergreen began custom feeding cattle owned by other ranchers. The cattle owners entered into agreements with Evergreen in which Evergreen agreed to feed the cattle and charge the owners based upon the amount of weight the cattle gained. Evergreen charged a set price that varied from 35 to 51 cents per pound for each pound the cattle gained in the feedlot. This price included feed, overhead, and profit. Evergreen maintained no financial records regarding its custom feeding operation for 1987 and 1988. Its only records were the statements it sent to its customers.

2. LOAN AGREEMENTS

On April 24, 1986, a Farmers Home Administration (FmHA) guaranteed loan to Evergreen was approved. This loan, which was managed by First National, was in the form of a master note evidencing a revolving loan with a 3-year life. A total amount of $50,000 could be extended to Evergreen under the condition that all but $10 had to be repaid to First National each year before any additional money could be loaned.

Bank records indicate that $9,000 was initially loaned to Evergreen on May 14, 1986. Evergreen repaid $8,990 to First National on May 19. An additional $40,010 was loaned to Evergreen on December 19. These funds were to be paid back sometime in May 1987.

In May 1987, Julius Osten spoke to Larry Harkrader, vice president of commercial lending at First National, and told him that funds were available to pay off the FmHA loan, but that an additional 1,100 head of cattle were being moved into Evergreen's custom feeding operation. First National was then asked if it would give Evergreen permission to use the funds that would have been used to pay off the FmHA loan for additional operating expenses. Harkrader approved the use of the funds for that purpose instead of requiring that the FmHA loan be paid off in full.

On October 19, 1987, Evergreen paid $49,990 on the FmHA guaranteed loan pursuant to the requirements of the master note. Evergreen subsequently requested to have money advanced under the master note, but First National denied the request.

In addition to the guaranteed FmHA loan, Evergreen had a separate letter of credit from First National for $50,000 dated January 26, 1987. This money was to be loaned to Evergreen so that it could expand its feeding operation. First National did not loan any of these funds to Evergreen.

Along with the $100,000 credit represented in the above agreements, Evergreen had also applied for a $100,000 loan in September 1987. First National also denied this request. First National claimed that it did not loan Evergreen additional funds because Evergreen did not pay its loan balance down to $10 when the loan became due in May 1987. First National also claimed that Evergreen's cash-flow predictions for 1988 indicated Evergreen did not actually need the money.

Evergreen claimed that First National's refusal to loan it $100,000 caused Evergreen to sustain immense losses due to lost profits, silage spoilage, and increased cost of feed. Julius Osten testified that he met with a First National loan officer in early 1987 and requested an additional $50,000 to buy high moisture corn in September, October, and November. First National's January 26, 1987, letter to Osten informed him that the senior loan committee had agreed to make an additional operating loan of $50,000 to Evergreen subject to the conditions that livestock and feed inventory reports were to be submitted on a regular basis and a 1985 income tax return was to

be submitted. Osten claimed that he received First National's approval in May 1987 to use the $50,000 FmHA guaranteed loan to buy corn.

In September 1987, Julius Osten met with Clark Lehr from First National and asked for additional financing to buy more wet corn in October. Lehr's letter of September 18, 1987, advised Osten that First National would not extend additional credit beyond Evergreen's current loan commitments. The letter stated:

> Yesterday the Senior Loan Committee considered your request for additional financing to purchase wet corn this fall. It was the decision of the Committee that the First National Bank will be unable to extend additional credit beyond your current loan commitments.
>
> In carefully reviewing your request, the bank does not feel comfortable enough with the cash flow of your operation to extend additional credit. The cash flow you submitted for 1987 indicated that your present operating loan would be paid to a zero balance sometime in May, and you would be operating on your own cash for the balance of the year. Currently your operating loan is at its maximum balance of $50,000.00 and has been there since the first of the year. If you are successful in repaying this loan in the next thirty days as you have indicated, then this note would be available to cover wet corn purchases for the upcoming year. To meet FmHA requirements, we would need a cash flow for 1988 indicating the repayment of these funds before they could be disbursed.
>
> The bank certainly acknowledges that there could be wet corn available during harvest at what may turn out to be an attractive price. Please understand that any additional loan commitment we extend to you will be completely outside your 90% FmHA guarantee framework, which further complicates your request.
>
> Thank you for submitting your tax returns and they are available for you to pick up here at the bank the next time you are in.

Julius Osten testified that on October 19, 1987, Evergreen paid $49,990 plus interest on its $50,000 FmHA guaranteed

loan, leaving a balance of $10. Osten claimed First National told him that if he did not pay the note, First National could not lend him more money. Osten stated that he again went to First National during the last week of October and asked for $100,000 to buy wet corn, referring to the $50,000 FmHA guaranteed loan and the $50,000 letter of credit dated January 26, 1987. Osten testified he was told that according to " 'your cash flow, you don't need it. We are not going to borrow it to you.' " Evergreen then discontinued banking with First National and did not obtain any further bank credit until the fall of 1989, when an operating loan of $165,000 was approved by the Schuyler State Bank.

3. Trial

In its petition, Evergreen sought damages for (1) lost profits from the feeding operation, (2) spoilage and shrinkage of silage, and (3) increased costs of feed because Evergreen was forced to buy wet corn as funds became available. Evergreen alleged that First National refused to lend the funds pursuant to the FmHA guaranteed loan and the January 26, 1987, letter of credit and that this refusal resulted in Evergreen sustaining losses.

The case was tried to a jury in the district court for Platte County. On March 3, 1994, the jury awarded Evergreen $172,500. First National filed a motion for new trial, which motion was overruled. First National appealed to the Nebraska Court of Appeals, and we removed the case to our docket.

III. ASSIGNMENTS OF ERROR

First National asserts that the district court erred in (1) submitting the issue of loss of profits to the jury and admitting Julius Osten's unsupported testimony that Evergreen lost profits of 10 cents per head per day for 2 years (730 days), (2) admitting into evidence Evergreen's combined tax returns, (3) allowing expert testimony regarding the reasonable standard of profits in the cattle industry, (4) submitting Evergreen's claim for damages due to the varying prices of corn to the jury, (5) submitting Evergreen's claim for spoilage of silage to the jury, (6) submitting Evergreen's claim for breach of contract to the jury, (7) submitting Evergreen's claim of misrepresentation to

the jury, (8) overruling First National's motion for directed verdict, and (9) overruling First National's motion for new trial.

IV. ANALYSIS

1. Breach of Contract

First National argues that the January 26, 1987, loan agreement required Evergreen's performance of two conditions precedent: (1) submit livestock and feed inventory reports on at least a quarterly basis and (2) provide a copy of Evergreen's 1985 income tax returns and 1986 income tax returns when completed. First National claims that Evergreen failed to prove at trial that it performed those conditions, that the district court did not properly instruct the jury on this issue, and that, therefore, the court erred in submitting Evergreen's claim for breach of contract to the jury.

First National did not object or offer more specific instructions regarding the elements of breach of contract when the court's instructions were submitted to counsel for review. The 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. *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995); *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994). We conclude that First National is precluded from raising this objection on appeal and that plain error does not exist with regard to the instructions given to the jury. Whether Evergreen complied with the requirements of the contract between Evergreen and First National was a question of fact which the jury resolved in favor of Evergreen. This assignment of error is without merit.

2. Fraudulent Misrepresentation

First National argues that the district court erred as a matter of law in submitting Evergreen's fraudulent misrepresentation claim to the jury. In order to maintain an action for fraudulent misrepresentation, the plaintiff must allege and prove the following elements: (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without

knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff did so rely; and (6) that he or she suffered damage as a result. *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994). An issue should be decided as a matter of law only where reasonable minds cannot differ and can draw but one conclusion from the evidence. See *Ochs v. Makousky*, 249 Neb. 960, 547 N.W.2d 136 (1996).

Evergreen alleges First National falsely represented that $100,000 would be advanced to Evergreen for 1987 operating expenses. Julius Osten testified that when he asked Harkrader, First National's vice president of commercial lending, to lend Evergreen the money to buy corn, he was told that " '[a]ccording to your cash flow, you don't need it. We are not going to borrow it to you.' " Osten further testified that he was told by Harkrader, " 'We was [sic] going to sell you out once, we can do it again.' " There was conflicting testimony by First National officials as to why Evergreen was not given further credit.

The issue of fraudulent misrepresentation was a question of fact for the jury, and the district court could not have decided this issue as a matter of law. This assignment of error is without merit.

3. Sufficiency of Evidence on Damages

First National asserts that the evidence was insufficient to support the damages awarded by the jury.

(a) Lost Profits

We first address the sufficiency of the evidence as to the damages for lost profits. While lost profits need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural. *Buell, Winter, Mousel & Assoc. v. Olmsted & Perry*, 227 Neb. 770, 420 N.W.2d 280 (1988).

The principal issue is whether the evidence was sufficient to permit Evergreen to recover damages for lost profits caused by First National's failure to loan $100,000 to Evergreen. The focus is whether it is reasonably certain that such lost profits would have been realized and that such profits "can be ascer-

tained and measured from the evidence introduced with reasonable certainty. Such lost profits must not be speculative . . . but must be established with reasonable certainty by the evidence." See *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 706, 261 N.W.2d 358, 364 (1978). Accord *K & R, Inc. v. Crete Storage Corp.*, 194 Neb. 138, 231 N.W.2d 110 (1975).

To support its claim for lost profits, Evergreen offered the testimony of Julius Osten and Dr. Gene Murra. Osten testified that in 1986, Evergreen entered into agreements with various ranchers to feed their cattle on the basis of a guaranteed cost of weight gain. Evergreen did not keep records regarding its custom cattle feeding operation for the years 1987 and 1988, and there were no records to support its claim for lost profits of 10 cents per head per day for 2,000 cattle for 730 days.

Julius Osten testified that when First National refused to lend the money, Evergreen had insufficient capital to make advance purchases of corn to lock in the current market price. Evergreen claimed that because it was unable to offer customers a guaranteed cost of gain, it lost customers. Osten assumed Evergreen would have had an additional 2,000 head of cattle for 2 years. He further assumed that Evergreen would have made a profit of 10 cents per head per day for the entire 2-year period.

Julius Osten stated that Evergreen charged a set price which varied from 35 to 51 cents for each pound the cattle gained while in Evergreen's feedlot. As a part of the set price, Osten included 5 cents for overhead expenses and 10 cents for profit. Osten's opinion regarding lost profits was based upon his education, experience, training, and knowledge in the custom cattle feeding business from 1986 to 1992.

Over First National's objection as to foundation, Julius Osten was allowed to give his opinion that the net earnings would be 10 cents per head per day. His assumption was based upon the fact that Evergreen was feeding 3,500 to 4,000 head of cattle and "all of a sudden we dropped down to from 1,500 to 2,000 for two years." Osten stated that Evergreen lost customers as a result of not being able to guarantee a cost of gain, but he did not set forth the number of cattle involved. Osten

gave his opinion that Evergreen would have had net earnings of 10 cents per head per day for 2,000 head for 2 years. The basis for this opinion was that it took Evergreen 2 years to get enough customers to get its feedlot back to where it was previously. It took 2 years because there were too many feedlots and not enough cattle. Osten calculated his loss of profit by taking 2,000 head of cattle times 10 cents times 730 days.

On cross-examination, Julius Osten testified that when he fed cattle on a guaranteed cost of gain, he guaranteed that the cattle would gain so much weight, and if they did not gain that much weight, he could lose money. He admitted that he really did not know on a guaranteed cost of gain how much money the cattle would make until after he fed them.

A claim for lost profits must be supported by some financial data which permit an estimate of the actual loss to be made with reasonable certitude and exactness. See *Quad-States, Inc. v. Vande Mheen*, 220 Neb. 161, 368 N.W.2d 795 (1985). While damages for lost profits need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural. *Katskee v. Nevada Bob's Golf of Neb.*, 238 Neb. 654, 472 N.W.2d 372 (1991).

The evidence was insufficient to establish with reasonable certitude that Evergreen would have fed 2,000 head of cattle at a net profit of 10 cents per head per day for 730 days. Evergreen's tax returns for the years 1986 through 1990 were prepared on a cash basis, but did not separately reflect profits and losses on Evergreen's custom cattle feeding and therefore did not accurately report the profit and loss of the cattle feeding operation. In addition, Julius Osten produced no business records to support the claim. Thus, Osten's testimony was insufficient to support the jury's award for damages for lost profits.

Murra, a livestock extension marketing specialist, testified that in his opinion, a fee of 10 cents per head per day was a reasonable standard for profit in the cattle industry. Murra stated that he was not offering an opinion regarding what profits Evergreen might have made in the future. He was only testifying about reasonable industry standards.

In *Katskee*, an expert testified regarding lost profits due to the defendant's not being able to expand its store into an adjacent space. We noted that the expert assumed that the only difference between the two locations was square footage and that he used sales figures from a different time period. No studies were made to establish whether there was any change due to these differences, and the expert did not evaluate whether there was a change in the number of competitors or consumer interest in the product. We held that the evidence was too speculative and conjectural, and failed to establish damages with reasonable certainty.

In *Rambo v. Galley*, 188 Neb. 692, 199 N.W.2d 14 (1972), the plaintiff sought to recover damages from the defendants for operating an employment agency in competition with the plaintiff. The plaintiff argued she would have had a greater increase in gross income and profits for a year had the defendants not started a competing agency. However, there was no evidence to indicate what the value of that lost business would be because the plaintiff did not have records to substantiate her claims for damages. We held that the plaintiff failed to establish her damages with reasonable certainty and reasoned that there must be sufficient evidence to enable the court, with a certain degree of exactness, to estimate a plaintiff's damages.

It is the duty of the district court to refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine that issue without indulging in speculation and conjecture. *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978). See, also, *Quad-States, Inc. v. Vande Mheen, supra*. We conclude that Evergreen's proof regarding lost profits is too speculative and conjectural, and that the district court erred in submitting the issue of lost profits to the jury.

(b) Varying Prices of Corn

Evergreen claimed that First National's refusal to advance additional money to Evergreen for the purchase of wet corn caused it to pay higher prices for the corn. Julius Osten testified that the purpose of obtaining the $100,000 loan was to "buy feed mostly and to pay running expenses." Prior to the

end of October 1987, when First National declined to lend Evergreen additional funds, Evergreen had purchased 20,845.6 bushels of wet corn at prices ranging from $1.32 to $1.62 per bushel.

Julius Osten testified that with the $100,000 he could have purchased corn for $1.30 to $1.35 per bushel. He then calculated that he could have purchased 76,930 bushels for $100,000. Since he did not have the money, he did not purchase the corn at this price level and, therefore, could not guarantee a cost of gain.

In summary, Evergreen contends that it would have purchased 76,930 bushels of corn in October 1987 using the $100,000 requested from First National and that it subsequently purchased various amounts of corn at an average price of $2.13 per bushel plus 10 cents per bushel for hauling. From our review of the record, we find that the evidence was insufficient to support this claim for damages. The amount of corn Evergreen would have or could have purchased for $1.30 was never established. On cross-examination, Julius Osten testified that he had speculated corn would go to $1 per bushel and that Evergreen did not start buying more corn until December 1987. We find that the evidence was insufficient to support Evergreen's claim that it would have purchased 76,930 bushels of corn at $1.30 per bushel. The jury could only guess at how much corn Evergreen would have purchased at this price.

(c) Silage Spoilage

Evergreen claimed that it had approximately 7,500 tons of silage on hand in the fall of 1987. According to Julius Osten, approximately 10 percent of this silage spoiled because there were not enough cattle in the feedlot to consume the silage as a result of First National's denial of the loan. Osten stated that the customary valuation of silage is 10 times the price of corn per hundredweight of silage. Murra testified that this calculation was a customary method of silage valuation in the cattle industry, but did not testify regarding Evergreen's damages.

Julius Osten testified that there were not enough cattle to consume the silage and that, therefore, "a foot and a half, maybe two foot," of the silage pile spoiled. Osten testified he

determined the amount of silage that had spoiled by simply looking at the pile, which consisted of approximately 7,500 tons. Osten figured the value of the silage based on the price per bushel of corn at $2.50 times 10, or $25 per ton.

In the fall and winter of 1987 and in the spring and summer of 1988, Evergreen had at least 3,000 head of cattle to feed. Julius Osten's opinion about how much silage spoiled and why it spoiled was a guess and nothing more. How much silage spoiled and why it spoiled were not established with any degree of certainty, and the jury would again be required to indulge in speculation and conjecture. The evidence was insufficient to establish this claim for damages.

V. CONCLUSION

We find that the evidence was insufficient to prove Evergreen's damages. "[D]amages, like any other element of a plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove plaintiff's alleged damages." *Howells Elevator v. Stanco Farm Supply Co.*, 235 Neb. 456, 463, 455 N.W.2d 777, 782 (1990). It is the duty of the district court to refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine that issue without indulging in speculation and conjecture. *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978).

For the foregoing reasons, the judgment entered by the district court in favor of Evergreen must be and is hereby reversed, and the cause is remanded to the district court with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

ELIZABETH CURRIE, A MINOR CHILD, BY AND THROUGH HER FATHER AND NEXT FRIEND, THOMAS CURRIE, AND THOMAS CURRIE, INDIVIDUALLY, APPELLANTS, V. CHIEF SCHOOL BUS SERVICE, INC., APPELLEE.

553 N.W.2d 469

Filed October 4, 1996. No. S-94-692.

1. **Jurisdiction: Judgments: Final Orders: Appeal and Error.** Although an extrajurisdictional act of a lower court cannot vest an appellate court with jurisdiction to review the merits of an appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed.
2. **Jurisdiction: Judgments: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of the jurisdictional issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the jurisdictional issue.
3. **Jurisdiction: Appeal and Error.** As a general proposition, an appellate court and the tribunal appealed from do not have jurisdiction over the same case at the same time.
4. **Actions: Pleadings.** Counterclaims must arise out of the contract or transaction set forth in the petition or be connected with the subject matter of the action.
5. ____: ____. The connection of a counterclaim with the subject matter of the action must be more than casual or incidental; it is required to be immediate and direct.
6. **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.
7. ____: ____: ____. In the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction.
8. **Final Orders: Appeal and Error.** There are three types of final orders which may be reviewed on appeal: (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 upon summary application in an action after a judgment is rendered.
9. **Final Orders: Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
10. **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.

11. ____: ____. Whether an order is final and appealable does not depend upon whether that order completely disposes of the action. An order affecting a substantial right made during a special proceeding is a final and appealable order.
12. **Summary Judgment: Words and Phrases.** The summary judgment process is a special proceeding.
13. **Jurisdiction: Appeal and Error.** Lower courts are divested of subject matter jurisdiction over a particular case when an appeal of that case is perfected.
14. **Judgments: Jurisdiction.** A judgment entered by a court which lacks subject matter jurisdiction is void.
15. **Summary Judgment: Final Orders: Pleadings: Appeal and Error.** An order granting summary judgment is a final, appealable order, notwithstanding the fact that a counterclaim, pled in the answer of the same action, is pending in the trial court at the time the appeal of the order is perfected.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Judgment vacated, and reversed and remanded for a new trial.

Phillip G. Wright, of Quinn & Wright, for appellants.

Michael G. Mullin, of McGrath, North, Mullin & Kratz, P.C., for appellee.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ., and QUIST, D.J.

CONNOLLY, J.

The question for decision is whether an order granting summary judgment is a final, appealable order when a counterclaim in the same action is pending in the district court at the time the appeal of the order granting summary judgment was perfected.

Elizabeth Currie, a minor, by and through her father, Thomas Currie (Currie), brought this negligence action against Chief School Bus Service, Inc. (Chief), to recover damages for injuries sustained, as the result of being punched in the face by another student, while riding one of Chief's buses. Chief filed a counterclaim for attorney fees and costs, alleging that Currie's suit was frivolous. Both parties filed motions for summary judgment on Currie's petition. The district court for Sarpy County granted Chief's motion for summary judgment, dismissed Currie's petition, and set Chief's counterclaim for trial at a later date.

While Chief's counterclaim was pending trial, Currie appealed the district court's summary judgment order to the Nebraska Court of Appeals. Before a decision on the appeal was rendered, the district court conducted a trial on Chief's counterclaim and awarded Chief damages for attorney fees and costs incurred in defending the action. The Court of Appeals then summarily affirmed the district court's order granting Chief's motion for summary judgment, and this court denied further review. Currie appeals the district court's order awarding Chief damages on the counterclaim.

We determine that the district court's order granting Chief's motion for summary judgment was a final, appealable order, notwithstanding the fact that Chief's counterclaim was pending in the district court at the time Currie perfected the appeal of the order. As a result, we conclude that the district court's order awarding Chief damages on the counterclaim is void, because the district court was divested of jurisdiction to proceed on the counterclaim the instant Currie perfected the appeal of the summary judgment order. Thus, we reverse and vacate the district court's order, and remand for a new trial on the counterclaim.

I. BACKGROUND

On March 22, 1991, while riding one of Chief's buses to school, Elizabeth Currie was punched in the face by another student, causing her to strike her head on a window. Prior to bringing this negligence action against Chief, Currie brought a tort action against the student and his father. The jury returned a verdict for Currie, which was affirmed by the Court of Appeals. See *Currie v. Dicus*, 95 NCA No. 31, case No. A-93-1025 (not designated for permanent publication).

On October 21, 1992, Currie filed a negligence action against Chief, alleging essentially that its employee, who was operating the bus the day Elizabeth Currie was injured, knew of the student's violent propensities and failed to exercise a reasonable degree of care to prevent the assault from occurring. Chief counterclaimed, pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1995), alleging that Currie's suit was frivolous. Both parties filed motions for summary judgment on

Currie's petition. In its order dated July 29, 1993, the district court held: "I find Plaintiff's Motion for Summary Judgment should be denied, that Defendant's Motion for Summary Judgment should be granted, that the action by the Plaintiff should be dismissed, and the matter should be set for trial at a later date on Defendant's counter-claim."

On August 24, 1993, Currie filed a notice of intention to appeal this decision to the Court of Appeals. On April 4 and 5, 1994, while the appeal was still pending, evidence was adduced on the trial of the counterclaim. In its order dated June 10, 1994, the district court held:

> Based upon all of the evidence, facts and circumstances, I find the action brought by the plaintiffs against the defendant was frivolous and brought in bad faith. The cost of defending the action, from time of filing through the granting of the motion for summary judgment, was $12,207.48. . . . I conclude the defendant should have judgment in this amount on its counter-claim against plaintiffs' counsel . . . and that the defendant should have a judgment against the plaintiff Thomas Currie for the sum of $3,051.87, which judgment is joint and several with the judgment to be entered against plaintiffs' counsel.

On February 7, 1995, the Court of Appeals summarily affirmed the district court's order granting summary judgment in favor of Chief. On March 22, this court denied Currie's petition for further review. Currie appeals the district court's order awarding Chief damages on the counterclaim.

II. ASSIGNMENTS OF ERROR

Currie alleges that the district court erred in (1) finding that it had jurisdiction to proceed on Chief's counterclaim after Currie perfected the appeal of the order granting summary judgment in the Court of Appeals, (2) finding that Currie's petition was frivolous, (3) failing to allow Currie to produce evidence and testimony subsequent to the summary judgment proceeding, and (4) awarding the amount of damages it did to Chief on Chief's counterclaim.

III. STANDARD OF REVIEW

Although an extrajurisdictional act of a lower court cannot vest the appellate court with jurisdiction to review the merits of the appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994).

When a jurisdictional question does not involve a factual dispute, determination of the jurisdictional issue is a matter of law, which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the jurisdictional issue. *Payne v. Nebraska Dept. of Corr. Servs.*, 249 Neb. 150, 542 N.W.2d 694 (1996); *Becker v. Nebraska Acct. & Disclosure Comm.*, 249 Neb. 28, 541 N.W.2d 36 (1995).

IV. ANALYSIS

Currie asserts that the district court's order, awarding Chief damages on its counterclaim, was void because the district court was divested of jurisdiction to proceed on the counterclaim once Currie perfected the appeal of the order granting summary judgment. As a general proposition, an appellate court and the tribunal appealed from do not have jurisdiction over the same case at the same time. See, e.g., *State Bank of Beaver Crossing v. Mackley*, 118 Neb. 734, 226 N.W. 318 (1929); *County of Douglas v. Burts*, 2 Neb. App. 90, 507 N.W.2d 310 (1993). Thus, we must determine which court, the district court or the Court of Appeals, possessed jurisdiction over this case at the time the trial on the counterclaim was conducted.

Currie cites *Nuttelman v. Julch*, 228 Neb. 750, 424 N.W.2d 333 (1988), in support of the position that the district court was divested of jurisdiction to hear Chief's counterclaim once Currie perfected the appeal of the summary judgment order. In *Nuttelman*, the plaintiff brought a petition in ejectment against the defendants. The defendants counterclaimed, alleging that the plaintiff's petition was frivolous and vexatious, for which they sought relief by injunction and money damages.

The district court dismissed the plaintiff's petition with prejudice and held that there remained justiciable issues of fact to be resolved upon the defendants' counterclaims. After the plaintiff filed an appeal of the decision to this court, the district court dismissed the defendants' counterclaims. This court held that "the district court was without authority to issue an order dismissing the counterclaims. Any order made by the district court after the vesting of jurisdiction in the Supreme Court is void and of no effect. The district court lost jurisdiction the instant the appeal was perfected." *Nuttelman v. Julch*, 228 Neb. at 756, 424 N.W.2d at 338.

Clearly, the court in *Nuttelman*, which is procedurally similar to the instant case, reached a result favorable to Currie's position. However, in *Nuttelman*, the court did not discuss the connection of the counterclaim with the subject matter of the action or analyze whether the order issued was a final, appealable order.

In the instant case, Chief argues that Currie's appeal of the order granting summary judgment did not divest the district court of jurisdiction to consider its counterclaim because (1) the counterclaim arose from a separate and distinct set of operative facts than Currie's cause of action, and (2) the counterclaim was pending in the district court at the time of the appeal, making the appeal a nullity, since appellate courts are without jurisdiction to entertain appeals from nonfinal orders.

1. Connection With Subject Matter of Action

Chief first asserts that the district court retained jurisdiction over the counterclaim because the counterclaim was not closely enough connected with Currie's negligence action. In Nebraska, all counterclaims are permissive. In other words, the defendant is not required to plead the counterclaim. The penalty for failure to so plead is that, in subsequent action thereon, the defendant cannot recover costs. See Neb. Rev. Stat. § 25-814 (Reissue 1995). See, also, *Rogers v. Buettgenback*, 114 Neb. 834, 211 N.W. 168 (1926). Although counterclaims are not compulsory in this state, Neb. Rev. Stat. § 25-813 (Reissue 1995) requires that counterclaims must arise out of the contract or transaction set forth in the petition *or* be

connected with the subject matter of the action. See, also, *Klitzing v. Didier*, 215 Neb. 122, 337 N.W.2d 418 (1983). The connection of a counterclaim with the subject matter of the action must be more than casual or incidental; it is required to be immediate and direct. *McGerr v. Marsh*, 148 Neb. 50, 26 N.W.2d 374 (1947).

In the instant case, Chief's counterclaim for damages was in response to what it perceived as a frivolous attempt by Currie to hold Chief liable for Elizabeth Currie's injuries. We determine that Chief's counterclaim was immediately and directly connected with the subject matter of that action. Moreover, Currie never objected to, but in fact answered, the counterclaim. As a result, we determine that Chief's argument, that the trial court retained jurisdiction over the counterclaim because the counterclaim arose from a separate and distinct set of operative facts, is without merit.

2. FINAL ORDER

Chief next asserts that the district court retained jurisdiction over the counterclaim because the Court of Appeals was without jurisdiction to entertain Currie's appeal from a nonfinal order. 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. *Village of Orleans v. Dietz*, 248 Neb. 806, 539 N.W.2d 440 (1995); *Olsen v. Olsen*, 248 Neb. 393, 534 N.W.2d 762 (1995). In the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction. *In re Adoption of Krystal P. & Kile P.*, 248 Neb. 907, 540 N.W.2d 312 (1995); *Olsen v. Olsen, supra*.

There are three types of final orders which may be reviewed on appeal: (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 upon summary application in an action after a judgment is rendered. *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994); *Jarrett v. Eichler*, 244 Neb. 310,

506 N.W.2d 682 (1993). See, also, Neb. Rev. Stat. §§ 25-1902 and 25-1911 (Reissue 1995).

(a) Substantial Right

All three types of final, appealable orders share the requirement that a substantial right be affected. A substantial right is an essential legal right, not a mere technical right. *Rohde v. Farmers Alliance Mut. Ins. Co., supra*; *Jarrett v. Eichler, supra*. 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*.

We determine that a substantial right of Currie was affected, because the order granting summary judgment in favor of Chief dismissed Currie's negligence claim with prejudice. However, the determination that a substantial right was affected does not end our inquiry as to whether the summary judgment order satisfies any of the three definitions of a final, appealable order.

(b) Does Not Determine Action and Prevent Judgment

The first type of final order, i.e., an order which determines the action and prevents a judgment, was discussed in *Rohde v. Farmers Alliance Mut. Ins. Co., supra*. In that case, this court stated:

> To be a "final order" under the first type of reviewable order, an order must dispose of the whole merits of the case and must leave nothing for further consideration of the court, and thus, the order is final when *no* further action of the court is required to dispose of the pending cause; however, if the cause is retained for further action, the order is interlocutory.

(Emphasis supplied.) *Id.* at 868-69, 509 N.W.2d at 623.

Although Chief was not required by law to bring its counterclaim in this action, it chose to do so, as permitted by law. The district court, by setting Chief's counterclaim for trial at a later date, retained the cause for further action, and thus, did not "dispose of the whole merits of the case." As a result, the district court's order does not meet the definition of the first type of final, appealable order.

(c) Special Proceeding

However, " '[w]hether an order is final and appealable does not depend upon whether that order completely disposes of the action. . . . [A]n order affecting a substantial right made during a special proceeding is a final and appealable order.' " *In re Adoption of Krystal P. & Kile P.*, 248 Neb. at 911, 540 N.W.2d at 315 (quoting *Jarrett v. Eichler, supra*). Thus, we must determine whether the summary judgment process is a special proceeding.

Most recently, this court has construed the phrase "special proceeding" to mean "every civil statutory remedy which is not encompassed in chapter 25 of the Nebraska Revised Statutes." *State v. Hansen*, 249 Neb. 177, 182, 542 N.W.2d 424, 429 (1996). Accord, *Jarrett v. Eichler, supra*; *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). However, this court has not consistently construed the meaning of the phrase "special proceeding." In addition to the aforementioned definition, this court has stated:

> A special proceeding which affects a substantial right is, by definition, not part of an action. Rather, a special proceeding includes " 'every special statutory remedy which is not in itself an action.' " *In re Interest of R.G.*, 238 Neb. at 413, 470 N.W.2d at 787 (quoting *Turpin v. Coates*, 12 Neb. 321, 11 N.W. 300 (1882)). Accord *Western Smelting & Refining Co. v. First Nat. Bank*, 150 Neb. 477, 35 N.W.2d 116 (1948).
>
> . . . A "special proceeding" occurs when the law has conferred a right and has authorized an application to the court to enforce that right. *Sullivan v. Storz*, 156 Neb. 177, 55 N.W.2d 499 (1952).

Jarrett v. Eichler, 244 Neb. 310, 313-14, 506 N.W.2d 682, 685 (1993).

Thus, we determine that "every civil statutory remedy which is not encompassed in chapter 25" is not an all-inclusive definition of special proceeding. In other words, the fact that the summary judgment process is encompassed in chapter 25 (Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 1995)) does not preclude this court from finding the summary judgment process to be a special proceeding. In fact, this court has

clearly stated that "[t]here can be little doubt that the summary judgment process as defined by statute is a special proceeding." *Otteman v. Interstate Fire & Cas. Co., Inc.*, 171 Neb. 148, 151, 105 N.W.2d 583, 586 (1960). See, also, *In re Interest of R.G., supra* (listing *Grantham v. General Telephone Co.*, 187 Neb. 647, 193 N.W.2d 449 (1972), a case involving a summary judgment, as an example of a special proceeding). Thus, we conclude that the district court's order granting summary judgment in favor of Chief, which order dismissed Currie's negligence claim with prejudice, meets the definition of the second type of final, appealable order because it affected substantial rights of Currie and was made during a special proceeding.

Lower courts are divested of subject matter jurisdiction over a particular case when an appeal of that case is perfected. *Anderzhon/Architects v. 57 Oxbow II Partnership, ante* p. 768, 553 N.W.2d 157 (1996); *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995). Thus, the Court of Appeals, not the district court, had jurisdiction to proceed on this case once Currie perfected the appeal of the order granting summary judgment in the Court of Appeals. A judgment entered by a court which lacks subject matter jurisdiction is void. *Bradley v. Hopkins*, 246 Neb. 646, 522 N.W.2d 394 (1994); *VonSeggern v. Willman*, 244 Neb. 565, 508 N.W.2d 261 (1993). Because we conclude that the district court did not have jurisdiction to proceed on the counterclaim and that thus its order is void, we need not analyze Currie's other assigned errors.

V. CONCLUSION

We determine that an order granting summary judgment is a final, appealable order, notwithstanding the fact that a counterclaim, pled in the answer of the same action, is pending in the trial court at the time the appeal of the order is perfected. As a result, we conclude that the district court's order, awarding Chief damages on the counterclaim, is void because the district court was divested of jurisdiction to proceed on the counterclaim the instant Currie perfected the appeal of the summary judgment order. Thus, we reverse and vacate the dis-

trict court's order, and remand for a new trial on the counterclaim.

JUDGMENT VACATED, AND REVERSED AND REMANDED FOR A NEW TRIAL.

FAHRNBRUCH, J., not participating.

LANDMARK ENTERPRISES, INC., A NEBRASKA CORPORATION, APPELLANT, V. M.I. HARRISBURG ASSOCIATES, A NEBRASKA PARTNERSHIP, ET AL., APPELLEES.

554 N.W.2d 119

Filed October 4, 1996. No. S-94-886.

1. **Appeal and Error.** A claimed prejudicial error must not only be assigned, but must be discussed in the brief of the asserting party; an appellate court will not consider assignments of error which are not discussed in the brief.
2. **Agency: Words and Phrases.** An agency is a fiduciary relationship resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent, and further resulting from another's consent to so act.
3. **Agency.** Whether an agency exists depends on the facts underlying the relationship of the parties irrespective of the words or terminology used by the parties to characterize or describe their relationship.
4. **Landlord and Tenant: Liens: Improvements.** A tenant cannot without the authority of the landlord charge the land with a lien for materials for constructing or improving a building thereon, and the tenant is not the landlord's agent for this purpose, even if the tenant has the landlord's consent.
5. **Landlord and Tenant: Improvements.** The landlord-tenant relationship does not, in and of itself, create a principal-agent relationship, even if the tenant has permission to improve the property.
6. **Principal and Agent.** Apparent or ostensible authority may be conferred if the alleged principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon the apparent authority.
7. ____. A party who has knowingly permitted others to treat one as his or her agent is estopped to deny the agency.
8. ____. Apparent authority or agency for which a principal may be liable must be traceable to the principal and cannot be established by the acts, declaration, or conduct of the agent.

9. **Estates: Equity: Mechanics' Liens.** Although a mechanic's lien when filed attaches only to an equitable estate, it may be enforced against the fee after the equitable and legal titles have merged.
10. **Estates: Merger.** In general, where two unequal estates vest in the same person at the same time without an intervening estate, the smaller is thereupon merged into the greater.
11. **Merger: Equity: Intent.** The doctrine of merger is not favored, and equity will prevent or permit a merger as will best subserve the purposes of justice and the actual and just intent of the parties, whether express or implied.
12. **Merger: Equity.** In determining whether a merger has taken place, a court is to consider the circumstances of the particular case in the light of equity and good conscience.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

William P. Jones and Hugh I. Abrahamson for appellant.

Irving B. Epstein, of Epstein & Epstein, for appellee M.I. Harrisburg Associates.

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

CAPORALE, J.

I. STATEMENT OF CASE

The plaintiff-appellant, Landmark Enterprises, Inc., a Nebraska corporation, challenged in the Nebraska Court of Appeals the district court's dismissal of this action to foreclose the construction lien Landmark filed against premises owned by the defendant-appellee M.I. Harrisburg Associates, a Nebraska partnership. In doing so, Landmark asserted, in summary, that the district court erred in finding (1) when the defendant-appellee lessee, Darren Owen, doing business as Catch 22, defaulted on his lease payments; (2) that there was no contract between Landmark and Harrisburg; (3) that Harrisburg did not benefit from Landmark's work; and (4) that the termination of Owen's leasehold interest did not merge his leasehold interest and attendant lien into Harrisburg's fee simple title such as to make the lien enforceable against Harrisburg's interest. On our own motion, we, under our authority to regulate the caseloads of the two courts, removed the matter to this court. We now affirm.

II. SCOPE OF REVIEW

An action to foreclose a construction lien is one grounded in equity. *Franksen v. Crossroads Joint Venture*, 245 Neb. 863, 515 N.W.2d 794 (1994); *Hulinsky v. Parriott*, 232 Neb. 670, 441 N.W.2d 883 (1989). 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 that 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. *Gustin v. Scheele, ante* p. 269, 549 N.W.2d 135 (1996); *Mackiewicz v. J.J. & Associates*, 245 Neb. 568, 514 N.W.2d 613 (1994).

III. FACTS

In consideration of rental payments of $3,100 per month, Harrisburg leased certain space in the subject premises to Owen for a term beginning May 1, 1991, and ending July 31, 1994, for the latter's use as a cocktail lounge. At the time the lease was executed, the space was unimproved and thus not equipped for such an operation. The lease imposed upon Owen the sole responsibility to pay for improvements or alterations. The lease also provided that Owen was to "give sufficient security that the [p]remises will be completed free and clear of liens" and required Owen to obtain written consent from Harrisburg prior to undertaking any improvements.

Owen entered into a verbal agreement with Landmark whereby Landmark would make the necessary revisions for $62,380. Harrisburg was not a party to this agreement and did not make any promise to pay Landmark. During construction, Owen authorized changes in the amount of $11,285, making the total price for the project $73,665.

The only contact between Harrisburg and Landmark during construction was through Harrisburg's real estate agent, John Bilby. Landmark also had contact with one Williams. Although Steve Faller, Landmark's president, assumed that Williams worked for Harrisburg, no evidence exists as to Williams' relationship to Harrisburg, if any. In any event,

Bilby and Williams merely asked questions to "see how the construction was coming."

Sometime after construction was completed, Owen became delinquent in his lease payments and also failed to pay Landmark the remaining $11,285 Landmark claimed to be due. Landmark filed a construction lien and claims to have mailed a copy to Harrisburg's business address. Harrisburg, however, asserts it was unaware of the lien.

Upon becoming 3 or 4 months delinquent in his lease payments, Owen sold his business to the defendant-appellee Drinks, Inc., which had conducted the business under Owen's lease and liquor license for a short period. Owen then terminated his lease with Harrisburg, and at almost the same time, Harrisburg leased the subject space to Drinks, Inc., under a new lease agreement calling for rental payments of $2,600 per month.

In accordance with a provision of the lease between Harrisburg and Owen, by Harrisburg's election, the improvements Owen made reverted to Harrisburg when the lease was terminated. Harrisburg admitted that it was "[p]robably" a lot easier to relet the space to Drinks, Inc., because it was already prepared for use as a cocktail lounge. Part of Drinks, Inc.'s interest in Owen's business was the fact that improvements had already been made, so it could open for business without making any renovations.

IV. ANALYSIS

1. Lease Default

In the first summarized assignment of error, Landmark asserts that the district court wrongly determined when Owen defaulted in his lease payments. However, Landmark does not argue this issue in its briefs.

A claimed prejudicial error must not only be assigned, but must be discussed in the brief of the asserting party; an appellate court will not consider assignments of error which are not discussed in the brief. *McArthur v. Papio-Missouri River NRD, ante* p. 96, 547 N.W.2d 716 (1996); *Ford Motor Credit Co. v. All Ways, Inc.*, 249 Neb. 923, 546 N.W.2d 807 (1996); *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248

Neb. 651, 538 N.W.2d 732 (1995). As Landmark has failed to address this matter, we do not concern ourselves with it.

2. Contracting Parties

In the second summarized assignment of error, Landmark claims that the district court mistakenly found that Harrisburg had no contract with Landmark. In this regard, Landmark urges not that there existed a direct agreement between Landmark and Harrisburg, but, rather, that a contract between them came into existence through Owen's actions as Harrisburg's agent.

An agency is a fiduciary relationship resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent, and further resulting from another's consent to so act. *Franksen v. Crossroads Joint Venture*, 245 Neb. 863, 515 N.W.2d 794 (1994); *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990). Whether an agency exists depends on the facts underlying the relationship of the parties irrespective of the words or terminology used by the parties to characterize or describe their relationship. *Franksen, supra*; *Delicious Foods Co. v. Millard Warehouse*, 244 Neb. 449, 507 N.W.2d 631 (1993).

A tenant cannot without the authority of the landlord charge the land with a lien for materials for constructing or improving a building thereon, and the tenant is not the landlord's agent for this purpose, even if the tenant has the landlord's consent. *Waite Lumber Co., Inc. v. Masid Bros., Inc.*, 189 Neb. 10, 200 N.W.2d 119 (1972); *Platner Lumber Co. v. Krug Park Amusement Co.*, 131 Neb. 831, 270 N.W. 473 (1936). Thus, the landlord-tenant relationship does not, in and of itself, create a principal-agent relationship, even if the tenant has permission to improve the property. Clearly, there was here no actual authority for Owen to act on Harrisburg's behalf.

Neither was there any apparent or ostensible authority for Owen to act as an agent of Harrisburg. Such authority may be conferred if the alleged principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon

the apparent authority. *Franksen, supra*; *Corman v. Musselman*, 232 Neb. 159, 439 N.W.2d 781 (1989). A party who has knowingly permitted others to treat one as his or her agent is estopped to deny the agency. *Western Fertilizer v. BRG*, 228 Neb. 776, 424 N.W.2d 588 (1988); *Department of Banking v. Davis*, 227 Neb. 172, 416 N.W.2d 566 (1987). However, the apparent authority or agency for which a principal may be liable must be traceable to the principal and cannot be established by the acts, declaration, or conduct of the agent. *Franksen, supra*; *Corman, supra*.

Landmark's reliance on *Sheehy v. Fulton*, 38 Neb. 691, 57 N.W. 395 (1894), and *Guiou v. Ryckman*, 77 Neb. 833, 110 N.W. 759 (1906), for the proposition that Owen was Harrisburg's agent are inapplicable. The *Sheehy* vendor conveyed land to the vendee for a certain sum in cash, the remainder to be paid in 37 days, with the understanding that the vendee would erect a building on the land. The vendor retained a mortgage on the property. The remainder of the purchase price was to be paid from the proceeds of a loan which could not be made until the excavations of the building were made and the foundations were in. The vendee defaulted, whereupon the vendor sued to foreclose his lien for the purchase money, and a number of liens for services and supplies were asserted. The evidence established that the vendor endeavored to have the vendee change contractors because those already hired were working too slowly, and there was evidence that the vendor exercised control over the construction. Furthermore, when a supplier had refused to extend credit to the vendee for building materials, the vendor accompanied the vendee to the supplier and said that " 'he would protect' " the supplier. 38 Neb. at 697, 57 N.W. at 397. The *Sheehy* commissioners concluded that although a "border line" case, *id.* at 696, 57 N.W. at 396, the vendor had established the vendee as the vendor's agent in the building operations sufficiently to charge the vendor's fee estate with the burden of the mechanics' liens arising out of the construction.

In *Guiou*, the legal titleholder vendor entered into a contract to convey two lots to the vendee, with an express provision that the vendee erect houses on each of the lots. The ven-

dor also agreed to take a second mortgage on both the houses and lots if the vendee were unable to secure a loan sufficient to erect the buildings. In holding the vendor liable for the liens filed by the suppliers and laborers, the *Guiou* commissioners wrote that

> where the vendor and vendee cooperate together in plans for the erection of improvements upon real estate covered by their agreement, the interest of the vendor, as well as that of the vendee, is bound for the payment of liens for labor and material which have been furnished for such improvements.

77 Neb. at 837, 110 N.W. at 760.

While it is true that some similarities exist between the present case and the facts in *Sheehy,* the cases are nonetheless distinguishable. While in the present case the lease required Owen to obtain written consent from Harrisburg prior to making any renovations and provided that Harrisburg could require that its own employees perform the work and that Harrisburg could supervise the renovations, none of these lease terms were implemented, and there is no evidence that Landmark knew and relied upon those provisions. Neither did Harrisburg exercise any control over the construction. Bilby's visit to the construction site and occasional questions did not constitute the exercise of control over the construction. Moreover, both Harrisburg and Owen understood that renovations would be necessary to operate a cocktail lounge, and unlike the situation in *Sheehy*, Harrisburg never guaranteed payment to Landmark.

Guiou is also distinguishable. Not only does the instant case not involve a vendor and vendee, the *Guiou* contract concerned not only the sale of land, but required that the vendee construct two homes. Furthermore, unlike the situation in *Guiou*, here Harrisburg did not agree to provide funding for the construction. The contract in the instant case is merely a lease of property for a limited purpose. It is only because of the condition of the property that Owen was required to make renovations.

In short, Harrisburg did nothing to cause Landmark to believe that Owen was an agent of Harrisburg. Thus, the evidence does not establish that Harrisburg caused Landmark to

believe that Owen had any authority to act on Harrisburg's behalf and does not establish that Owen was Harrisburg's agent.

3. Benefit to Harrisburg

The third summarized assignment of error avers that the district court wrongly found that Harrisburg did not benefit from the work done by Landmark. However, contrary to that assertion, the district court made no such finding. The district court merely noted Landmark's position that its work benefited Harrisburg by permitting it to immediately relet the space for the same use, albeit at a lesser monthly rental.

4. Merger of Lien Into Fee Title

That brings us to the fourth, last, and dispositive summarized assignment of error, that the district court erred in finding that a merger had not taken place. In this connection, Landmark asserts that under the equitable doctrine of merger, the termination of Owen's leasehold estate caused that estate and the attendant construction lien to merge into Harrisburg's fee simple estate, thereby making the construction lien enforceable against Harrisburg's interest in the property.

Although a mechanic's lien when filed attaches only to an equitable estate, it may be enforced against the fee after the equitable and legal titles have merged. *Franksen v. Crossroads Joint Venture*, 245 Neb. 863, 515 N.W.2d 794 (1994); *Waite Lumber Co., Inc. v. Masid Bros., Inc.*, 189 Neb. 10, 200 N.W.2d 119 (1972); *Central Construction Co. v. Highsmith*, 155 Neb. 113, 50 N.W.2d 817 (1952). The general rule is that where two unequal estates vest in the same person at the same time without an intervening estate, the smaller is thereupon merged into the greater. *Franksen, supra*; *Waite Lumber Co., Inc., supra*; *Central Construction Co., supra*.

But the doctrine of merger is not favored, and equity "will prevent or permit a merger as will best subserve the purposes of justice and the actual and just intent of the parties, whether express or implied." *Franksen*, 245 Neb. at 873, 515 N.W.2d at 802, citing *Waite Lumber Co., Inc., supra*, and *American Savings & Loan Ass'n v. Barry*, 123 Neb. 523, 243 N.W. 628 (1932). As a consequence, merger does not always or neces-

sarily result from a coinciding of two unequal estates. *Central Construction Co., supra.*

We have held that in determining whether a merger has taken place, a court is to consider the circumstances of the particular case in the light of equity and good conscience. *Franksen, supra*; *Waite Lumber Co., Inc., supra*; *American Savings & Loan Ass'n, supra.* In *Harte v. Shukert*, 94 Neb. 210, 142 N.W. 517 (1913), Shukert had leased a building to Hanson. Under the terms of the lease, any improvements made to the building by the lessee would revert to the owner upon expiration of the lease. Hanson hired Harte to undertake extensive expenditures to improve the building. Harte billed Hanson for $42,628.19, $27,515.11 of which Hanson paid. While the improvements were being made, Hanson did not pay rent becoming due; but Shukert did not exercise his option to cancel the lease, nor did he try to collect payment according to the terms of the lease. Shukert also allowed the improvements to continue after Hanson was in default for 2 months of rent. We ruled that under the circumstances, Shukert was estopped from declaring a forfeiture, and that by assuming to forfeit the lease and taking possession of the building, he failed to keep the fee and the leasehold estates separate; therefore, the lien merged with the fee.

In *Platner Lumber Co. v. Krug Park Amusement Co.*, 131 Neb. 831, 270 N.W. 473 (1936), the fee owner failed to exercise his option to declare a forfeiture of the lease for nonpayment of the past-due rent while the lessee operator of an amusement park continued to make improvements to the property which were known to the fee owner. When the lessee went into bankruptcy, the fee owner allowed a former officer of the lessee to run the park, but refused to insure his possession as against the lessee or anyone else. We concluded that although the fee owner was estopped from declaring a forfeiture, it did not necessarily follow that the estoppel caused a merger of the estates and an attachment of the lien to the fee, and held that no such merger had taken place. The main distinguishing fact between *Platner* and *Shukert* is that the landlord in *Shukert* "took possession and appropriated the leasehold interest, including the expensive improvements erected by the lessee, to

his own use and benefit, to the exclusion of a lienholder." *Platner Lumber Co.*, 131 Neb. at 839, 270 N.W. at 477. In *Platner Lumber Co.*, the fee owner did not take possession of the premises, but, rather, merely allowed a former agent of the lessee to run the amusement park on the property.

In *Central Construction Co., supra,* the owner of the property sold to Highsmith. Highsmith mortgaged it to the Bilbys, and a mechanic's lien was placed on Highsmith's equitable interest. The owner then sold its legal title to Ehlers. Highsmith also sold his equitable interest to Ehlers. In addition, Ehlers paid for the release of the Bilbys' mortgage. Finding those facts to have established a clear intention on Ehlers' part to acquire all the titles, we concluded that the equities required a merger of the owner's legal title and Highsmith's equitable interest and, as a consequence, held that the mechanic's lien became a lien on Ehlers' fee title. But *Central Construction Co.* too is distinguishable from the instant case. Here, Harrisburg merely terminated the lease with Owen in order to lease the property to Drinks, Inc. The intent of the parties in the instant case was merely to allow Harrisburg to relet the property.

Finally, in *Waite Lumber Co., Inc. v. Masid Bros., Inc.*, 189 Neb. 10, 200 N.W.2d 119 (1972), Masid, the owner of the land involved, leased half a building to Verges to operate a restaurant for a 5-year term with an option to renew. The lease required that Verges undertake substantial remodeling at his own expense and that, on the termination of the lease, anything attached to the building remain a part thereof. Masid was responsible for getting utilities to the leased premises. Masid was familiar with all of the improvements required of Verges. All of the contractors working to improve the building dealt exclusively with Verges and had no contracts with Masid. Neither did Masid agree to be responsible for Verges' debts. However, although Verges was in default of rent during most of the construction period, Masid did not exercise its option to forfeit or cancel the lease. Rather, Masid stood by and let the material and labor suppliers continue on the job. In addition, Masid visited the construction site several times and spoke

with the general foreman about what portion of the improvements was Masid's responsibility.

After the restaurant opened, Verges suddenly abandoned the premises and Masid took immediate possession. Masid made some minor improvements to the property and then leased the building to another tenant 5 months after Verges left. Concluding that Masid clearly intended to foreclose Verges from any and all leasehold estate he had, we held that a merger resulted. In doing so, we noted that Masid now owned a building, half of which had been completely changed into a restaurant and lounge at no cost to Masid, notwithstanding the lease called for a significant portion of the improvements to be made by Masid. Under those circumstances, we wrote that "[t]o allow Masid to so enrich itself at the expense of [the lienholders] would produce an unconscionable result, which equity will not permit." 189 Neb. at 20, 200 N.W.2d at 125.

But as noted earlier, in the instant case, Owen entered into a lease knowing that he was required to do substantial remodeling solely at his cost. At no time did Harrisburg enter into an agreement with Landmark or promise to pay Landmark for the work done. While in *Waite Lumber Co., Inc.*, the landlord was bound by the lease to pay for "a significant portion of the improvement," *id.* at 19, 200 N.W.2d at 125, here, it appears that Owen made his rent payments on time while the construction was taking place and did not become delinquent until after construction was completed. In *Harte v. Shukert*, 94 Neb. 210, 142 N.W. 517 (1913), and *Waite Lumber Co., Inc., supra*, the landowners allowed construction to continue although the tenant was in default of rent.

It is true that prior to the improvements Owen caused to be made, Harrisburg owned a partially unimproved building, and that space now contains $73,665 worth of improvements, for which Harrisburg paid nothing. It is also true that in determining that a merger should result in *Waite Lumber Co., Inc.*, we observed that Masid would not be permitted to be enriched at the lienholders' expense. However, the differences, as mentioned previously, are that while here, Harrisburg was under no duty to pay for any of the improvements, the owner in *Waite Lumber Co., Inc.*, was so obligated, and that while here,

Owen did not default until construction was completed, the *Waite Lumber Co., Inc.*, owner permitted construction to continue after he knew the tenant had defaulted.

While Harrisburg has been enriched at Owen's expense, the enrichment is not the result of any wrongdoing on Harrisburg's part. Simply put, Harrisburg's tenant hired a contractor and then failed to pay the contractor in full. All Harrisburg did was to lease unimproved space to a tenant who was willing to and negotiated a lease which obligated him to personally undertake the necessary improvements. Under these circumstances, equity does not require that the leasehold estate merge with Harrisburg's fee estate.

V. JUDGMENT

Accordingly, the decree of the district court is affirmed.

AFFIRMED.

LANPHIER, J., participating on briefs.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. FRANK P. RAMACCIOTTI, RESPONDENT.

553 N.W.2d 467

Filed October 4, 1996. No. S-95-844.

1. **Disciplinary Proceedings: States: Proof.** In reciprocal disciplinary actions, a judicial determination of attorney misconduct in one state is conclusive proof of guilt and is not subject to relitigation in the second state.
2. ____: ____: ____. In determining the appropriate discipline in a reciprocal disciplinary action, the Nebraska Supreme Court is entitled to make an independent assessment of the facts and an independent determination of an attorney's fitness to practice law in the State of Nebraska and of what disciplinary action is required to protect the interests of the state.
3. **Disciplinary Proceedings.** To determine what discipline is appropriate, the Nebraska Supreme Court will consider the following factors: (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.

Original action. Judgment of disbarment.

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

PER CURIAM.

Respondent, Frank P. Ramacciotti, was admitted to the practice of law in the State of Nebraska on October 7, 1971, and in the State of Minnesota on October 13, 1978. On April 12, 1995, the Minnesota Supreme Court suspended respondent from practicing law in that state for an indefinite period of time due to his failure to comply with the stipulated terms of a previous probation, his being found in contempt for failing to pay maintenance and child support obligations, and his failure to file federal and state income tax returns for the years 1987 through 1994 and for a number of years prior to 1987. In response, pursuant to Neb. Ct. R. of Discipline 21(A) (rev. 1996), the Counsel for Discipline of relator, the Nebraska State Bar Association, filed a motion for reciprocal discipline with this court on August 8, 1995.

An order to show cause was then entered by this court on November 8, 1995, directing respondent to show cause, within 14 days of service of the order, why we should not enter an order imposing an appropriate disciplinary sanction, including the possibility of disbarment. Although this order was personally served on respondent on February 15, 1996, he failed to respond within the required timeframe. Relator now moves for judgment on the pleadings, pursuant to Neb. Ct. R. of Discipline 10(I) (rev. 1996). A copy of the amended motion for judgment on the pleadings was served on respondent on August 22, 1996.

We find that the requirements of rule 10(I) have been satisfied and see no reason why a judgment on the pleadings should not be granted.

Pursuant to rule 21(A), this court is authorized to reciprocate the disciplinary measures of another state on a member of the Nebraska bar. For purposes of reciprocal disciplinary actions, we have repeatedly held that a judicial determination

of attorney misconduct in one state is conclusive proof of guilt and is not subject to relitigation in the second state. *State ex rel. NSBA v. Johnson*, 249 Neb. 563, 544 N.W.2d 803 (1996); *State ex rel. NSBA v. Ogborn*, 248 Neb. 767, 539 N.W.2d 628 (1995). Since the Minnesota Supreme Court indefinitely suspended respondent's license to practice law in that state, the imposition of discipline by this court is warranted.

In determining the appropriate discipline, we are entitled to make an independent assessment of the facts and an independent determination of the attorney's fitness to practice law in this state and of what disciplinary action is required to protect the interests of this state. *Id.* In so doing, we consider the following factors: (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. *State ex rel. NSBA v. Johnson, supra*; *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995).

The conduct attributed to respondent by the Minnesota Supreme Court constitutes, at the very least, violations of Canon 1, DR 1-102(A)(1), (4), (5), and (6), of the Code of Professional Responsibility. In addition to respondent's suspension by the Minnesota Supreme Court, the record before us reveals that the imposition of disciplinary measures on respondent has been commonplace during the past 10 years. Since 1987, respondent has been on probation in the State of Minnesota at least three times. These probationary sanctions were imposed due to respondent's engaging in conduct outside the practice of law; his neglect and incompetence in handling a client matter, as well as his failure to pay an acknowledged debt; and his interfering with a court hearing regarding his own marital dissolution. Furthermore, we note that respondent was suspended from the practice of law in this state on June 17, 1994, because of his failure to pay dues to the Nebraska State Bar Association. Also troubling is respondent's complete failure to respond to this court's order to show cause as to why he should not be disciplined. Such neglectful and uncooperative practices will not be tolerated. See *State ex rel. NSBA v.*

Johnson, supra. In light of his repeated lack of professionalism and corresponding discipline, it is clear that respondent is unfit to practice law.

For these reasons, we feel that a reciprocal suspension in this case is insufficient to protect the public as well as the reputation of the bar. Therefore, we grant relator's amended motion for judgment on the pleadings and disbar respondent from the practice of law in Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

FAHRNBRUCH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. MARK BAKER, APPELLANT.
553 N.W.2d 464

Filed October 4, 1996. Nos. S-95-1204, S-95-1205.

1. **Sentences: Appeal and Error.** Unless the sentencing court has abused its discretion in imposing a sentence, that sentence, imposed within the statutory limits, will not be disturbed on appeal.
2. **Sentences.** Credit against the maximum term and any minimum term shall be given to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based.
3. ____. Neb. Rev. Stat. § 83-1,106(1) (Reissue 1994) provides a defendant credit for jail time, which is time he or she spends in detention pending trial and sentencing.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Richard A. Birch, of Nielsen & Birch, and Leonard P. Vyhnalek for appellant.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ., and QUIST, D.J.

WHITE, C.J.

On January 14, 1992, Mark Baker (appellant) was convicted of being a felon in possession of a firearm and was subsequently sentenced to serve 1½ to 3 years in prison. Appellant was then initially charged in county court with three counts: first degree murder of Evelyn Delmar, robbery, and use of a knife in the commission of a felony.

Upon completing his felon in possession of a firearm sentence on October 14, 1994, appellant was held in custody, pending proceedings related to Delmar's murder. An information charging appellant with first degree murder, robbery, and use of a knife in the commission of a felony was filed in the district court for Lincoln County. A second information was later filed in the same court charging appellant with conspiracy to commit first degree murder. Appellant was found guilty of second degree murder, robbery, use of a knife in the commission of a felony, and attempted conspiracy to commit first degree murder, and he was sentenced accordingly. Appellant was given 322 days' credit for time served on the robbery charge.

Appellant assigns as error the district court's computation of credit for time served. We affirm.

On September 16, 1991, Evelyn Delmar was murdered at her place of employment. In conjunction with the murder, approximately $200 was stolen from the business.

On September 17, a search warrant was issued for appellant's residence and vehicle. While executing the search of appellant's residence, a handgun was found. Because appellant had previously been convicted of felony arson, he was arrested on that same day for being a felon in possession of a firearm and was incarcerated.

While appellant was incarcerated, he approached a cellmate and requested that the cellmate put him in touch with someone who would kill certain individuals. The cellmate related the information to his attorney, who then reported it to the Lincoln County Attorney. In response to this information, Lt. Norbert Liebig of the Nebraska State Patrol, posing as a hit man, contacted appellant. Appellant admitted to Liebig that he

had committed the murder of Delmar and that he had robbed her place of employment.

On January 14, 1992, appellant was tried and convicted of the felon in possession of a firearm charge. On March 11, he was sentenced to serve 1 1/2 to 3 years in prison. On that same day, he was also initially charged in Lincoln County Court with first degree murder, robbery, and use of a knife in the commission of a felony in relation to the murder of Delmar.

After completing his felon in possession of a firearm sentence on October 14, 1994, appellant remained in custody, charged with Delmar's murder. On February 11, 1995, an information was filed in Lincoln County District Court charging appellant with first degree murder, robbery, and use of a knife in the commission of a felony. A second information was filed in the district court for Lincoln County on April 24, charging appellant with conspiracy to commit first degree murder. Later, the first degree murder charge was amended to second degree murder, and the conspiracy charge was reduced to attempted conspiracy.

Appellant entered pleas of no contest, a factual basis was provided by the State, and appellant was found guilty. On October 2, 1995, appellant was sentenced to life imprisonment on the second degree murder conviction. He received a sentence of 16 2/3 to 50 years' imprisonment on the robbery conviction, 6 2/3 to 20 years' imprisonment on the use of a knife conviction, and 4 to 20 years' imprisonment on the attempted conspiracy conviction. All of these sentences were to be served consecutively. Appellant was given credit for time served of 322 days, from October 14, 1994, to October 2, 1995, on the robbery charge.

A notice of appeal was filed with the district court for Lincoln County in each of the cases on October 31, 1995. The cases were consolidated for the purpose of appeal.

Appellant assigns two errors which can be summarized as follows: When sentencing on the robbery conviction, the district court erred when it did not credit the time spent in jail from appellant's arrest on September 17, 1991, on the felon in possession of a firearm charge until the sentencing for that crime.

Unless the sentencing court has abused its discretion in imposing a sentence, that sentence, imposed within the statutory limits, will not be disturbed on appeal. *State v. Kitt*, 232 Neb. 237, 440 N.W.2d 234 (1989).

Neb. Rev. Stat. § 83-1,106(1) (Reissue 1994) provides:

> Credit against the maximum term and any minimum term shall be given to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. This shall specifically include, but shall not be limited to, time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to delivery of the offender to the custody of the Department of Correctional Services, the county board of corrections, or, in counties which do not have a county board of corrections, the county sheriff.

Appellant contends that the district court miscalculated the credit he was to receive under this section.

We previously addressed the issue of credit computation in two cases which are factually similar to this case, *State v. Fisher*, 218 Neb. 479, 356 N.W.2d 880 (1984), and *State v. Kitt, supra*. In *Fisher, supra*, defendant was arrested and charged on November 16, 1982, with having made terroristic threats and, as a result of a separate incident, with having committed a robbery. Defendant was convicted of having made terroristic threats and, on May 20, 1983, was sentenced to serve 18 months to 5 years in prison. The robbery charge was later reduced to a charge of being a felon in possession of a firearm. Defendant was convicted of the reduced charge and sentenced to prison on June 9, 1983, for a period of 18 months to 5 years, a sentence to be served concurrently with the earlier terroristic threats sentence. This court held that defendant was to be credited with the time he spent incarcerated from April 15 through May 19, 1983. We further held, however, that there was no legal basis for crediting defendant with time spent incarcerated from May 20 through June 8, 1983.

In *Kitt, supra*, defendant was charged in Lancaster County with attempts to obtain possession of a controlled substance

through a forged prescription on November 9, 1987. Sometime before January 7, 1988, defendant was transferred to Douglas County to await trial on a charge of theft. He was convicted of theft and sentenced on February 23, 1988. On March 23, defendant was transferred back to Lancaster County for arraignment on the pending controlled substances charges. On September 28, he was convicted and sentenced. The sentences imposed in Lancaster County were to be served consecutively with the sentences imposed in Douglas County. This court held that defendant was not entitled to credit for time served during the period of February 23 to September 28, 1988.

Section 83-1,106(1) provides a defendant credit for jail time, which, as stated in both *Fisher* and *Kitt*, is time he or she spends in detention pending trial and sentencing. In *Fisher*, defendant's incarceration between his terroristic threats conviction and felon in possession of a firearm conviction was not time spent awaiting trial and sentencing for the second conviction, but was time spent serving the sentence imposed for the first conviction. Similarly, in *Kitt*, defendant was incarcerated in Douglas County for the purpose of serving the sentence imposed for theft and not for the purpose of awaiting trial in Lancaster County for the controlled substances charges.

Like the defendants in *Fisher* and *Kitt*, appellant herein was sentenced to imprisonment for two separate offenses arising out of two separate incidents. Appellant was first charged, convicted, and sentenced for being a felon in possession of a firearm; appellant had earlier been convicted of felony arson, and on September 17, 1991, a handgun was found in his residence as a result of a lawful search. Appellant was then charged, convicted, and sentenced for second degree murder, robbery, use of a knife in the commission of a felony, and attempted conspiracy to commit first degree murder; such convictions arose out of the murder of Delmar occurring on September 16, 1991, and subsequent incarceration for that murder.

From September 17, 1991, to October 14, 1994, appellant was serving time on the felon in possession of a firearm sen-

tence. Appellant was not, however, spending time in jail awaiting trial and sentencing for the charges arising out of Delmar's murder. Therefore, appellant was not entitled to credit on the sentences which were imposed for the commission of second degree murder, robbery, use of a knife in the commission of a felony, and attempted conspiracy to commit first degree murder.

AFFIRMED.

FAHRNBRUCH, J., not participating.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLANT, V. D.F. LANOHA LANDSCAPE NURSERY, INC., ET AL., APPELLEES.

553 N.W.2d 736

Filed October 11, 1996. No. S-94-330.

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. **Insurance: Contracts: Liability: Motor Vehicles.** Once the named insured of a policy which contains an omnibus clause that extends liability coverage to those driving the covered automobile with the insured's consent gives such consent to another, any third person allowed to drive the vehicle by the initial permittee likewise is covered, except in cases of theft or conversion.
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. **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.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Joseph E. Jones and James A. Mullen, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

Terry K. Gutierrez, of Schmid, Mooney & Frederick, P.C., for appellee Roger R. Yager.

J. Joseph McQuillan and Jon J. Puk, of Walentine, O'Toole, McQuillan & Gordon, for appellees Paul B. Chatterton and Farmers Union Cooperative Insurance Company.

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

GERRARD, J.

On May 12, 1991, Isidro Luna Martinez, an employee of D.F. Lanoha Landscape Nursery, Inc. (Lanoha Nursery), was driving a van owned by Lanoha Nursery on U.S. Highway 6 in Douglas County. The van crossed the centerline and collided with two vehicles, an automobile driven by Roger R. Yager and a van driven by Paul B. Chatterton. Yager sued Lanoha Nursery for injuries sustained and loss incurred as a result of the collision.

Lanoha Nursery's insurer, State Farm Mutual Automobile Insurance Company (State Farm), brought a declaratory judgment action to determine coverage with respect to its insured. State Farm asserts that at the time of the accident, Martinez was operating Lanoha Nursery's vehicle without its knowledge and without its express or implied consent. In separate motions, Yager, David F. Lanoha (Lanoha) and Lanoha Nursery, and Farmers Union Cooperative Insurance Co. (Farmers Union) and its insured Chatterton moved the district court for summary judgment against State Farm. State Farm filed a cross-motion for summary judgment.

At the hearing on State Farm's motion, Farmers Union and Chatterton withdrew their motion for summary judgment, and it was agreed that an order would be entered overruling Lanoha Nursery and Lanoha's motion. The district court granted Yager's motion for summary judgment and overruled State Farm's motion for summary judgment, finding that the initial permission rule made Martinez an additional insured

within the meaning of Lanoha Nursery's automobile insurance coverage. It is from this order that State Farm appeals.

Finding genuine issues of material fact to be in controversy, we affirm the district court's denial of State Farm's motion for summary judgment, but reverse the district court's granting of Yager's motion for summary judgment, and remand the matter for further proceedings.

FACTUAL BACKGROUND

In the spring of 1991, Lanoha Nursery's owner, Lanoha, and Jeff Svik, the nursery's production manager, hired eight migrant farm laborers. As a part of their compensation, these laborers were furnished housing in a trailer park located 3 to 4 miles from the nursery. In April 1991, Lanoha and Svik decided to provide transportation for the laborers living in the trailer park as a benefit to these employees and to make certain that they would arrive at work on time.

Toward this end, Lanoha Nursery provided the workers with a van titled, licensed, and insured in Lanoha Nursery's name. In addition, Lanoha Nursery paid all associated expenses on the van such as gasoline and maintenance. Lanoha and Svik testified that they selected one of the laborers, Francisco Calderon, as the only person authorized to drive the van. Calderon was chosen because he was older and more mature than the rest of the laborers and because Calderon was the only one of the laborers who could speak English and possessed a valid Nebraska driver's license. Lanoha and Svik testified that, as per their request and while they were present, Calderon instructed all the other laborers in their native language that Calderon was the only person authorized to drive the van. Calderon was permitted to operate the van to transport the laborers to and from the nursery. Lanoha and Svik also testified that Calderon was allowed to use the van to transport the laborers for personal reasons such as to go to the Laundromat and to purchase groceries.

Svik testified that he talked to Calderon and the other laborers on a weekly basis, reminding them that only Calderon was permitted to drive the van. Both Lanoha and Svik claimed that they were unaware of any instance prior to the accident

where a laborer other than Calderon drove the van. Two of the laborers, Manuel Garcia Sanchez and Jorge Gomez, testified that through Calderon, Lanoha and Svik instructed the entire group that only Calderon was allowed to drive the van. Furthermore, both testified that prior to the accident, they had no knowledge of a laborer other than Calderon driving the van for any purpose.

Martinez, however, paints a different picture. Martinez testified that the laborers were instructed that they could not drive any of the other nursery vehicles except for the van and that he had driven the van on at least three occasions prior to the accident. Although he was aware the van had been entrusted to Calderon, Martinez said he and the other laborers were permitted to take the van at any time in order to go to the store. Martinez said Calderon knew other laborers drove the van on occasion and did nothing to stop the practice. According to Martinez, Calderon would merely tell the individual using the van to be careful when he drove it. Furthermore, Martinez claimed that neither Lanoha nor Svik expressly prohibited the other laborers from driving the van, except that Lanoha told the group they could not use the van to drive to a bar.

Another laborer confirmed much of Martinez' testimony. Gregorio Luis Perez testified that Calderon was in charge of the van; however, many other laborers, including Perez, were either expressly or implicitly allowed to drive the van. In particular, a laborer named "Sergio" would drive the field crew to the nursery and back for work whenever Calderon did not. Furthermore, Sergio would frequently drive the van on Sunday, the laborers' only day off, when they would go to the Laundromat, shop for clothing or food, or drive to rent videotapes. Perez testified that laborers named "Ricardo," "Manuel," and "Jorge" also drove the van at various times. Perez stated that when he drove the van, Calderon gave his express permission for its use. However, he was unsure whether Calderon gave express permission to the others. Perez said Calderon would leave the keys to the van so that anyone could just take the van whenever he pleased.

On Sunday, May 12, 1991, after spending much of the day drinking beer and tequila with some of the other laborers, including Calderon, Martinez decided to drive to the store and buy more beer. Martinez testified that he did not ask Calderon if he could take the van. In fact, Martinez said that at this time Calderon was asleep. Martinez said the keys had been left in the van by another laborer who had driven the van earlier in the day. Instead of going directly to the store, Martinez decided to go to a bar first, where Martinez testified he drank half of one beer. On his way back to the trailer, Martinez crossed the centerline of Highway 6 and collided with a car driven by Yager and a van driven by Chatterton.

SCOPE 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. *Boyd v. Chakraborty, ante* p. 575, 550 N.W.2d 44 (1996); *Harrison v. Seagroves, ante* p. 495, 549 N.W.2d 644 (1996).

ASSIGNMENTS OF ERROR

State Farm assigns that the district court erred in overruling its motion for summary judgment and in granting Yager's competing motion for summary judgment.

ANALYSIS

The State Farm policy covering Lanoha Nursery's van contained an omnibus clause which, in pertinent part, defined an insured as "any other ***person*** while using such a ***car*** if its use is within the scope of consent of ***you*** or ***your spouse*** . . . ." (Emphasis in original.) For many years, this court in construing an omnibus clause has adhered to the so-called liberal or initial permission rule. See *Arndt v. Davis*, 183 Neb. 726, 163 N.W.2d 886 (1969). We recently reaffirmed our commitment to this rule in *Barry v. Tanner, ante* p. 116, 547 N.W.2d 730 (1996). Colorfully put, the initial permission rule provides:

> "[I]f the vehicle was originally entrusted by the named insured, or one having proper authority to give permission, to the person operating it at the time of the accident, then despite hell or high water, such operation is considered to be within the scope of the permission granted, regardless of how grossly the terms of the original bailment may have been violated." 7 Appleman, Insurance Law and Practice, § 4366, p. 308.

Hull v. Allstate Ins. Co., 187 Neb. 130, 132, 187 N.W.2d 650, 651 (1971).

Justification for the initial permission rule is based on the theory that

> the purpose of the omnibus clause is to broaden the coverage of the policy to cover *all persons operating the insured automobile with the knowledge and consent of the insured owner* and insist that *once the owner has placed the automobile in the possession of the driver and consented to his operating the automobile*, any deviation from the purposes for which the automobile was entrusted to the operator is immaterial.

(Emphasis supplied.) *Arndt v. Davis*, 183 Neb. at 729, 163 N.W.2d at 888. Thus, although the initial permission rule is a liberal construction, it is still necessary that an owner must entrust possession of his or her automobile to a driver in order for that driver to be within the meaning of an other insured for the purposes of an omnibus clause.

However, the consent of an insured owner may be express or implied. "Such motor vehicle liability policy: . . . (2) shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the *express or implied permission of such named insured* . . . ." (Emphasis supplied.) Neb. Rev. Stat. § 60-534 (Reissue 1993).

> " 'Thus permission is not limited to that expressly granted, but may arise and be implied from a course of conduct pursued with knowledge of the facts for a considerable time, as where there is a prolonged, frequent, and habitual use with the knowledge and acquiescence of

> the owner, which must be regarded as a "permission" within the policy. . . .' "

MFA Ins. Companies v. Mendenhall, 205 Neb. 430, 437, 288 N.W.2d 270, 274 (1980) (quoting *State Farm Mutual Automobile Ins. Co. v. Kersey*, 171 Neb. 212, 106 N.W.2d 31 (1960)).

One further nuance of the initial permission rule which must be addressed is the application of the rule to a second permittee, also known as a permittee's permittee. Heretofore, the factual contexts in which we have decided whether a second permittee is an additional insured within the meaning of an omnibus clause have not addressed whether the rule in this regard is as broad as the initial permission rule itself.

In *Protective Fire & Cas. Co. v. Cornelius*, 176 Neb. 75, 125 N.W.2d 179 (1963), we held that a second permittee, operating an automobile while the initial permittee was a passenger in that automobile, was an additional insured for the purposes of the omnibus statute, § 60-534. However, our decision was based on the notion that the omnibus statute specifically referred to *use* of a motor vehicle, not the *operation* of one. We concluded that an initial permittee riding in an automobile as a passenger, although not operating the vehicle, was nonetheless still using the automobile for the purposes of the omnibus statute.

In *Farm Bureau Ins. Co. v. Allied Mut. Ins. Co.*, 180 Neb. 555, 143 N.W.2d 923 (1966), we held that a grant of unrestricted use by the owner of an automobile to an initial permittee allows the initial permittee to treat the automobile as his own, and, obviously, an owner has an absolute right to loan his automobile to another. Thus, an unqualified use granted to an initial permittee implied consent for the initial permittee to grant use to a second permittee.

We have not considered the initial permission rule with respect to a second permittee in the factual context presented in the instant case—that is, where the initial permittee is not a passenger in the automobile and the owner of the vehicle attempted to limit the scope of the initial permittee's use to preclude use by a second permittee. Instructive are those deci-

sions from other jurisdictions that, like Nebraska, are committed to the initial permission rule.

In *Odolecki v. Hartford Accident & Indemnity Co.*, 55 N.J. 542, 264 A.2d 38 (1970), the owner of the insured vehicle had given general permission to her son to use her automobile. However, she had also instructed her son on several occasions not to let anyone else drive the car. Her son allowed his friend to borrow the car to pick up the friend's girl friend. On his way to the hospital where the girl friend worked, the second permittee was involved in an accident. The New Jersey Supreme Court overruled its prior rule and held the second permittee to be an additional insured for the purposes of the omnibus clause at issue. Unable to reconcile its former rule concerning second permittees with the initial permission rule, the court stated:

> We fail, however, to see the distinction between a case where a first permittee exceeds the scope of permission in terms of time, place, or purpose, and a case where he exceeds the scope of permission in terms of use of the vehicle by another. Once an owner voluntarily hands over the keys to his car, the extent of permission he actually grants is as irrelevant in the one case as in the other. . . . We think that once the initial permission has been given by the named insured[,] coverage is fixed, barring theft or the like.

Id. at 549-50, 264 A.2d at 42.

In *Maryland Cas. Co. v. Iowa Nat. Mut. Ins.*, 54 Ill. 2d 333, 297 N.E.2d 163 (1973), the Supreme Court of Illinois quoted extensively from *Odolecki* and concluded that consistent with the public policy underlying the initial permission rule, once initial permission is given by the named insured, a further grant of permission to a second permittee brings the second permittee within the applicable omnibus clause as an additional insured—that is, barring theft or the like.

We are likewise persuaded by the reasoning of the New Jersey Supreme Court in *Odolecki*. Therefore, in keeping with those public policy considerations which underlie the initial permission rule, we hold that once the named insured of a policy which contains an omnibus clause that extends liability

coverage to those driving the covered automobile with the insured's consent gives such consent to another, any third person allowed to drive the vehicle by the initial permittee likewise is covered, except in cases of theft or conversion.

With the foregoing in mind, we conclude that a grant of summary judgment to either party was error under the facts of the instant case. 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. *Harrison v. Seagroves, ante* p. 495, 549 N.W.2d 644 (1996); *Continental Mortgage v. Johnson, ante* p. 484, 549 N.W.2d 640 (1996). The issue in this case is whether Martinez was a second permittee within the meaning of the rule announced herein, or whether the second permittee rule is inapplicable because the *driver*, Martinez, had been denied permission to operate the vehicle directly by the named insured.

When the evidence is viewed in a light most favorable to State Farm, the court would be compelled to conclude that Lanoha and Svik never gave permission, express or implied, to anyone other than Calderon to drive the van. More specifically, Lanoha and Svik testified that they expressly told Martinez, as well as the other laborers, that they were prohibited from driving the van. The second permittee rule is obviously inapplicable in a case in which the named insured communicates directly with a driver and specifically *prohibits* the operation of the insured vehicle by *that driver*. Thus, when the evidence is viewed in a light most favorable to State Farm, there is not even a possibility of second permittee liability, because the named insured communicated directly with Martinez and specifically denied Martinez permission to use the vehicle for *any* purpose.

On the other hand, when the evidence is viewed in a light most favorable to Yager, the court could conclude, based upon Martinez' testimony, that Lanoha gave his express permission for the laborers to use the van, but not to use the other nursery vehicles. Alternatively, the court could find that Calderon, as the initial permittee, gave either express or implied permis-

sion for Martinez, as well as the other laborers, to use the van through a course of conduct pursued with knowledge of the van's use by the laborers for a considerable time period. Thus, the court could find Martinez to be a second permittee within the rule announced herein, if it accepts Martinez' and Perez' testimony that the named insured never directly prohibited Martinez and the other laborers from driving the van.

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. *Boyd v. Chakraborty, ante* p. 575, 550 N.W.2d 44 (1996); *Harrison v. Seagroves, supra.* Obviously, the determination of whether Martinez is a second permittee or a driver who was directly denied permission to use the van by the named insured depends on which witnesses' testimony is believed by the finder of fact. The foregoing questions of fact are not properly decided in the context of a motion for summary judgment. Therefore, we conclude that the district court was correct in overruling State Farm's motion for summary judgment, but erred when it granted summary judgment in favor of Yager.

CONCLUSION

Finding genuine issues of material fact to be present, we reverse the order of the district court granting summary judgment in favor of Yager, and remand the cause to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GARY COTTON, GUARDIAN AND CONSERVATOR OF THE ESTATE OF JANICE LEA ELLIOTT, A PROTECTED PERSON, APPELLEE AND CROSS-APPELLEE, V. RENEE ELLIOTT OSTROSKI, APPELLEE AND CROSS-APPELLANT, ROBBIE ELLIOTT, ALSO KNOWN AS ROBERT R. ELLIOTT III, A MINOR, APPELLANT, AND FIRST STATE BANK, SCOTTSBLUFF, NEBRASKA, A CORPORATION, APPELLEE.

554 N.W.2d 130

Filed October 11, 1996. No. S-94-937.

1. **Mental Competency: Joint Accounts.** An action alleging lack of mental capacity to effect a change in the ownership of a jointly held certificate of deposit sounds in law and not in equity. As such, the trial court's factual findings will be upheld unless they are clearly wrong.
2. **Pleadings.** A pleading has two purposes: (1) to eliminate from consideration contentions which have no legal significance and (2) to guide the parties and the court in the conduct of cases.
3. **Pleadings: Words and Phrases.** Facts are sufficient to constitute a cause of action when they are a narrative of the events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff.
4. **Pretrial Procedure: Pleadings.** The issues set out in a pretrial order supplant those raised in the pleadings.
5. **Pretrial Procedure.** The purpose of a pretrial conference is to simplify the issues, to amend pleadings when necessary, and to avoid unnecessary proof of facts at trial. To that end, litigants must adhere to the spirit of the procedure and are bound by the pretrial order to which no exception has been taken.
6. **Joint Accounts: Mental Competency: Proof.** In order to set aside an instrument for lack of mental capacity on the part of the person executing such instrument, the burden of proof is upon the party so asserting to establish that the mind of the person executing the instrument was so weak or unbalanced when the instrument was executed that the person could not understand or comprehend the purport and effect of what he or she was doing.
7. **Joint Accounts: Mental Competency: Undue Influence: Proof.** In an action to set aside an instrument on the basis of incapacity or undue influence, the plaintiff has the burden of establishing the elements of those theories by clear and convincing evidence.
8. **Evidence: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
9. **Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong.
10. **Judgments: Appeal and Error.** In reviewing a judgment awarded in a bench trial, an 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.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Randall L. Lippstreu, guardian ad litem, for appellant.

George A. Sommer for appellee Cotton.

Paul E. Hofmeister, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellee Ostroski.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ., and RIST, D.J.

WRIGHT, J.

Robert R. Elliott III (Robbie) appeals the trial court's finding that Janice Lea Elliott lacked the requisite mental capacity to remove her name from a jointly held certificate of deposit and the trial court's order which reinstated Janice's name to the certificate of deposit. Renee Elliott Ostroski cross-appeals.

SCOPE OF REVIEW

An action alleging lack of mental capacity to effect a change in the ownership of a jointly held certificate of deposit sounds in law and not in equity. As such, the trial court's factual findings will be upheld unless they are clearly wrong. See *Peterson v. Peterson*, 230 Neb. 479, 432 N.W.2d 231 (1988).

FACTS

In 1968, Janice married Robert R. Elliott II. Two children were born to the marriage: Renee and Robbie. At the time of trial, Janice was 49 years old, Renee was 23, and Robbie was 18.

In 1982, Janice was diagnosed with multiple sclerosis. Janice and her husband separated in 1988, and in April 1989, she moved to Scottsbluff to live with her mother, Evelyn Cotton. The marriage was dissolved in 1990, and Janice received a lump-sum settlement from the divorce in the amount of $50,000.

On March 28, 1990, Janice invested $45,000 of the settlement in a time certificate of deposit with the First State Bank in Scottsbluff. Janice listed herself, Renee, and Robbie as joint owners of the certificate of deposit. Janice also held a savings certificate of deposit worth approximately $1,900 with First National Bank in North Platte. Apparently, Janice's sole sources of income from January 1992 until November 25, 1992, were the interest from these accounts, combined with her monthly Social Security disability benefits of approximately $947.

Janice's condition began to deteriorate significantly during the summer of 1992. In September, she hired a home health caregiver to provide her daily health care. Janice's relatives, including her mother and her brother, Gary Cotton, determined that Janice would soon need full-time care in a nursing facility. As a result, the relatives asked Renee and Robbie to come to Nebraska to observe their mother's condition and discuss her future care. Renee and Robbie came to Nebraska in November, stayed with Janice for 2 weeks, and left on November 26, 1992.

The day prior to their departure, Janice requested that Renee and Robbie take her to the First State Bank so that she could withdraw the funds from the $45,000 certificate of deposit. At the bank, Janice discussed her intentions with a bank employee. The bank employee informed Janice that she could not withdraw the money without incurring a significant penalty. When Janice told the bank employee that she simply wanted the money to go to her children, the bank employee suggested that she merely remove her name from the certificate of deposit. Janice agreed with this suggestion and formally removed her name from the certificate of deposit by signing the appropriate documents. The underlying funds were never withdrawn.

Subsequently, Gary was appointed guardian and conservator for Janice, and he made arrangements for her to enter a local nursing home in February 1993 where she would receive full-time care. He then filed an application for Janice to receive medicaid coverage for her nursing home costs. The Department of Social Services worker who was supervising

Janice's benefits became aware of the removal of Janice's name from the certificate of deposit and instructed Gary that in order for Janice to be eligible for full-time nursing home care benefits, Gary would be required to file an action for recovery of Janice's interest in the certificate of deposit. Gary then commenced the present action.

The trial court found that on November 25, 1992, Janice lacked the mental capacity necessary to remove her name from the certificate of deposit and ordered that Janice's ownership interest in the certificate of deposit be reinstated.

ASSIGNMENTS OF ERROR

In his appeal, Robbie assigns the following errors: (1) The trial court erred in concluding that Janice lacked sufficient mental capacity on November 25, 1992, to remove her name from the jointly held certificate of deposit, and (2) the trial court erred in assessing costs against Robbie. Renee argues the same assignments of error in her cross-appeal.

ANALYSIS

Initially, we must determine the appropriate standard of review. Renee and Robbie argue that the matter is equitable in nature and that the standard of review is de novo. In *Fremont Nat. Bank & Trust Co. v. Beerbohm*, 223 Neb. 657, 392 N.W.2d 767 (1986), we held that an action to set aside inter vivos transfers of property on the basis that they were made as the result of undue influence was one in equity and was reviewed by an appellate court de novo on the record. Similarly, in *Miller v. Westwood*, 238 Neb. 896, 472 N.W.2d 903 (1991), we held that an action to set aside a land contract on the basis of a lack of mental capacity was an action in equity.

Gary argues that a determination regarding whether Janice lacked the mental capacity to change the ownership of the joint certificate of deposit is an action at law and that the trial court's findings of fact should not be disturbed unless they are clearly wrong. We have never directly addressed whether an allegation of lack of mental capacity at the time of a change in ownership of a joint account such as a certificate of deposit sounds in law or in equity.

In *Peterson v. Peterson*, 230 Neb. 479, 432 N.W.2d 231 (1988), however, we addressed a similar issue. In *Peterson*, an elderly man had a close, long-term relationship with one of his nephews and had previously purchased three certificates of deposit in his and his nephew's name. The man fell, broke his hip, was hospitalized, and was eventually placed in a nursing home until he died. During his hospitalization, a second nephew stayed with the uncle and cared for him until he was placed in the nursing home.

While in the hospital, the uncle issued a power of attorney to the second nephew, giving him the power to manage the uncle's financial affairs, including implementing his wish that his assets be divided equally among his niece and nephews upon his death. The second nephew, while working on the uncle's affairs, came across the three certificates of deposit and reminded the uncle of his wish that his assets be divided equally. Subsequently, the uncle had the certificates modified so that they would be placed in his name only and added a provision in his will explaining his purpose for doing so. After the uncle's death, the first nephew filed an action alleging that the removal of his name from the certificates of deposit was the result of undue influence by the second nephew.

In *Peterson*, we noted two characteristics which led us to the conclusion that the action to set aside a modification of the names of the cotenants on a joint account sounds in law and not in equity. First, one who knowledgeably creates a joint account ordinarily does so with the present intent to employ the account's survivorship characteristics. The creation of the joint account does not amount to a present transfer of money from the depositor to the cotenant of the account. Rather, the transfer actually occurs at the death of the depositor. Until then, the cotenant may withdraw funds the depositor has placed in the account, but remains liable for any amounts withdrawn until the transfer actually occurs on the death of the depositor. Second, the depositor of a joint account may change his or her mind regarding the disposition of the moneys in the account at any time prior to his or her death.

In view of these two characteristics, we concluded that the creation of a joint account such as a certificate of deposit was

more like a testamentary devise than an outright gift. Therefore, we held that an action alleging undue influence regarding a change in the ownership of a joint account sounds in law and not in equity. As such, the trial court's factual findings will be upheld unless they are clearly wrong.

Actions which allege that one of the owners of a joint account removed his or her name from the account on the basis of undue influence or that the owner's removal was ineffective because the owner lacked mental capacity at the time of the change reflect similar concerns regarding the modification of joint accounts. The creation and management of a jointly held certificate of deposit are more analogous to actions with respect to a testamentary document than to an inter vivos gift. As a result, we extend our conclusion in *Peterson* to govern our review of actions to set aside modifications of joint accounts for lack of mental capacity. Therefore, in the instant case, the factual findings of the trial court will not be disturbed unless they are clearly wrong.

Next, we address the argument raised by Renee and Robbie that the trial court improperly held in favor of Gary on a theory of recovery that was not sufficiently raised by the pleadings—Janice's lack of mental capacity. Renee and Robbie argue that the only cause of action alleged in the petition was that Janice was subjected to undue influence. For the reasons set forth below, we find that the trial court properly considered the issue of Janice's lack of mental capacity at the time she removed her name from the certificate of deposit. Two items are informative for deciding this issue: (1) the allegations set forth in the petition and, most notably in this case, (2) the order regarding the pretrial conference.

The petition alleged that after Janice purchased the certificate of deposit, her condition steadily worsened both physically and mentally until sometime prior to the fall of 1992, when her condition deteriorated so much that she was unable to conduct her own business affairs and lacked the mental capacity to manage her business affairs.

In *Christianson v. Educational Serv. Unit No. 16*, 243 Neb. 553, 501 N.W.2d 281 (1993), we explained that a pleading has two purposes: (1) to eliminate from consideration contentions

which have no legal significance and (2) to guide the parties and the court in the conduct of cases. "The purpose of pleadings is to frame the issues upon which a cause is to be tried and advise the adversary as to what he must meet." *Bashus v. Turner*, 218 Neb. 17, 21, 352 N.W.2d 161, 165 (1984).

A petition is sufficient if, under the facts alleged, the law entitles a plaintiff to recover. Facts are sufficient to constitute a cause of action when they are a narrative of the events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff. See *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994). Here, the petition clearly alleges that Janice lacked the mental capacity to manage her business affairs, including, presumably, the capacity to sign away a $45,000 asset.

Moreover, the issue of Janice's mental capacity is emphasized in the pretrial order. On June 8, 1994, the trial court filed a pretrial order directing the parties and their attorneys to sign, file, and serve the following papers by 3 working days before the pretrial conference:

> (1) The witness list shall contain the name, address, telephone number and a numbered list of points the witness will establish. . . .
>
> . . . .
>
> (3) The statement of elements shall be a numbered list of the ultimate facts made essential by law to establish each claim or defense that the party has pleaded.

In compliance with this pretrial order, Gary's statement of elements stated that he intended to establish (1) Janice's mental capacity and (2) the fact that Janice's decision to remove her name from the certificate of deposit was motivated by Renee's undue influence. In addition, Gary listed Dr. Terry M. Himes as a witness. Gary stated that Himes would testify to, inter alia, Janice's physical and mental condition, and Himes' opinion as to Janice's mental capacity. The issues set out in a pretrial order supplant those raised in the pleadings. *Engelhaupt v. Village of Butte*, 248 Neb. 827, 539 N.W.2d 430 (1995); *Malerbi v. Central Reserve Life*, 225 Neb. 543, 407 N.W.2d 157 (1987). The purpose of a pretrial conference is to simplify the issues, to amend pleadings when necessary, and

to avoid unnecessary proof of facts at trial. To that end, litigants must adhere to the spirit of the procedure and are bound by the pretrial order to which no exception has been taken. *Cockrell v. Garton*, 244 Neb. 359, 507 N.W.2d 38 (1993). In view of the pretrial order, Renee and Robbie cannot argue that they did not have notice that lack of mental capacity would be an issue in this case.

We find that the petition states sufficient facts to establish that Gary was entitled to recover under the theory of lack of mental capacity as pled. The petition and the pretrial order sufficiently advised Renee and Robbie of the issues that would be presented at trial and were sufficient to support the theory of recovery upon which the trial court entered judgment for Gary.

We next address the issue of lack of mental capacity. In order to set aside an instrument for lack of mental capacity on the part of the person executing such instrument, the burden of proof is upon the party so asserting to establish that the mind of the person executing the instrument was so weak or unbalanced when the instrument was executed that the person could not understand or comprehend the purport and effect of what he or she was doing. *Miller v. Westwood*, 238 Neb. 896, 472 N.W.2d 903 (1991); *Wurst v. Blue River Bank*, 235 Neb. 197, 454 N.W.2d 665 (1990). In an action to set aside an instrument on the basis of incapacity or undue influence, the plaintiff has the burden of establishing the elements of those theories by clear and convincing evidence. See *Miller v. Westwood, supra*. Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *Records v. Christensen*, 246 Neb. 912, 524 N.W.2d 757 (1994).

In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *Kreus v. Stiles Service Ctr., ante* p. 526, 550 N.W.2d 320 (1996). In reviewing a judgment awarded in a bench trial, an appellate court does not reweigh the evidence, but considers the judgment in a light most favorable to the successful party and resolves evi-

dentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Bristol v. Rasmussen*, 249 Neb. 854, 547 N.W.2d 120 (1996).

Therefore, the remaining issue is whether the trial court's determination that Gary demonstrated by clear and convincing evidence that Janice lacked the requisite mental capacity to remove her name from the certificate of deposit was clearly erroneous. Our review of the testimony presented at trial demonstrates the evidentiary basis for the trial court's conclusion.

Himes, a board-certified neurologist and Janice's treating physician since 1988, testified that from 1988 to 1992, Janice's condition had relentlessly deteriorated in virtually all aspects of her functioning, including her intellectual capacity. Himes testified based on his knowledge and observation of Janice that on November 25, 1992, Janice was "intelligently impaired at that time. It was also my opinion that she was sufficiently impaired at that time that she was not competent to make significant financial decisions on her own behalf." Himes testified he was concerned that Janice had demonstrated a lack of judgment in her decisionmaking regarding her illness and her medical needs.

Janice's mother, Evelyn, with whom Janice lived from April 1989 to February 1993, testified extensively regarding her observations of Janice's mental awareness and functioning. Evelyn testified that as early as 1989, Janice's intellectual capacities were erratic. Sometimes they were normal, and on other occasions, she was incoherent. Evelyn's testimony suggests that during the time Janice lived with her, Janice's mind deteriorated to such an extent that Janice had no comprehension of her financial condition. Evelyn testified that Janice did not keep track of her personal checks as she signed them. Evelyn recalled that when Janice's bank statement arrived, Janice "would spend — oh, almost a half a day trying to figure it out, and she would never get her checkbook figured out at all." When Janice's checks eventually began to bounce, Janice was shocked and stated, " 'I am not out of money. I got plenty of money.' "

Evelyn testified that sometime prior to October 1992, Janice lost her ability to add and subtract. In addition, although Janice had a calculator, she could not use it. Evelyn testified that Janice "just couldn't comprehend enough figures, I mean, she just could not figure anything out." Evelyn stated that when Janice received bills from doctors, she could not understand them. At times, Janice would demand that Evelyn cash her benefit checks. She would then resist paying her bills, saying, " 'It is my money.' " Just prior to the time when Renee and Robbie visited Janice in November 1992, Janice told Evelyn, " 'Well, I don't owe any more bills. I just don't owe any more bills. The way I got it figured out the doctors are starting to pay me now.' "

The evidence regarding Janice's comprehension of the removal of her name from the certificate of deposit is in conflict. Bank employees testified that in their view, Janice appeared to understand the significance of her action and appeared to be aware and coherent when she signed the necessary documents. However, there is a significant amount of evidence which suggests that Janice did not comprehend the significance or the effect of removing her name from the certificate of deposit. Some of the evidence demonstrated that after Janice removed her name from the certificate of deposit, she believed that she would retain control over it until her death and believed that the money was accessible to meet her needs. For example, after removing her name from the certificate of deposit, Janice purchased a motorized wheelchair which cost nearly $9,400. Approximately $3,000 of the cost of the chair was paid by medicaid, and Janice was responsible for the difference. Janice testified that she purchased the wheelchair on credit, believing that she had enough money to pay for it using the surplus money she had in her Social Security checks and the money that she received from her ex-husband, that is, the funds placed in the certificate of deposit.

Although Renee and Robbie provided alternative explanations concerning the evidence, there was sufficient evidence upon which the trial court could conclude that Janice lacked the mental capacity on November 25, 1992, to remove her

name from the certificate of deposit. Therefore, we cannot say that the trial court's determination was clearly erroneous.

Finally, Renee and Robbie argue that the trial court erred in assessing the costs of the action against Robbie, because Robbie is a minor. This assigned error was not raised in Renee's or Robbie's motions for new trial, and therefore, we will not address it on appeal. Alleged errors by the trial court in an action at law which are not referred to in a motion for new trial will not be considered on appeal. *Scudder v. Haug*, 201 Neb. 107, 266 N.W.2d 232 (1978); *Torstenson v. Melcher*, 195 Neb. 764, 241 N.W.2d 103 (1976).

The judgment of the district court is affirmed.

AFFIRMED.

FAHRNBRUCH, J., not participating.

MARY CHISM, APPELLANT, V. ALLAN S. CAMPBELL, M.D., ET AL., APPELLEES.

553 N.W.2d 741

Filed October 11, 1996. No. S-94-1065.

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: Proof.** 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.
3. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Summary Judgment: Affidavits.** In summary judgment proceedings, a supporting affidavit may be used if it is based on personal knowledge, sets forth

facts that would be admissible in evidence, and is made by a person competent to testify on the matter in issue.

5. **Trial: Negligence.** Res ipsa loquitur (literally meaning "the thing speaks for itself") is a procedural tool that, if applicable, allows an inference of a defendant's negligence to be submitted to the fact finder, where it may be accepted or rejected.
6. **Negligence.** Res ipsa loquitur allows an inference of a defendant's negligence because the inference is probable and more plausible than any other explanation propounded.
7. **Negligence: Proof.** In order that the doctrine of res ipsa loquitur may be invoked, it must be shown that the occurrence is one which would not, in the ordinary course of things, happen in the absence of negligence; the instrumentality which produces the occurrence is under the exclusive control and management of the alleged wrongdoer; and there is an absence of explanation by the alleged wrongdoer.
8. **Malpractice: Negligence: Proof.** In medical malpractice cases brought under the res ipsa loquitur doctrine, negligence may be inferred in three situations without affirmative proof: (1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, et cetera, in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries.

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

Larry R. Demerath, of Demerath Law Offices, for appellant.

Mark E. Novotny and Raymond E. Walden, of Kennedy, Holland, DeLacy & Svoboda, for appellee Campbell.

Edward F. Noethe, of Sodoro, Daly & Sodoro, for appellee Sandra Landmark, M.D.

Michael J. Mooney and John A. Svoboda, of Gross & Welch, P.C., for appellee Midlands Community Hospital.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ., and RIST, D.J.

CONNOLLY, J.

Mary Chism brought this medical malpractice action based on the doctrine of res ipsa loquitur against Allan S. Campbell, M.D.; Sandra Landmark, M.D.; and Midlands Community

Hospital for injuries Chism allegedly suffered to her tooth as a result of having a surgical operation to remove her gallbladder. The district court for Sarpy County granted a summary judgment for each appellee, holding the doctrine of res ipsa loquitur to be inapplicable. We conclude that given the underlying facts of this case, the doctrine of res ipsa loquitur is not applicable and there is no genuine issue as to any material fact. We therefore affirm.

BACKGROUND

SURGERY

On April 24, 1991, Mary Chism was admitted to Midlands Community Hospital for a cholecystectomy, which is the surgical removal of the gallbladder. The surgery was performed by Dr. Allan S. Campbell, a general surgeon. Throughout the operation, Chism was unconscious as the result of a general anesthesia. Dr. Sandra Landmark, a board-certified anesthesiologist, and Kay Timm, a certified registered nurse anesthetist, were responsible for applying the anesthesia to Chism.

General anesthesia was administered to Chism using a process called endotracheal intubation. This procedure requires the insertion of a tube into a patient's trachea, through which tube anesthesia is administered. As a consequence of using endotracheal intubation, various pieces of equipment were placed in Chism's mouth. In her deposition, Chism testified that prior to her surgery an anesthesiologist asked her if she had any loose teeth, partials, dentures, or capped teeth, and the location of all her capped teeth. Chism further acknowledged that she was told a crown could be knocked loose and that therefore all crown locations had to be ascertained. Landmark stated in her affidavit that she informed Chism of the risk of damage to her teeth prior to the intubation procedure, although Chism denies receiving such information.

Chism stated in her deposition that on April 25, 1991, the day after the surgery, she noticed that the inside of her lower lip was "cut up pretty bad" and that a tooth was loose on the upper left side of her mouth. Chism further testified that she visited her dentist, Dr. F.H. Tafoya, on May 6, and was

informed that her "No. 11" tooth was broken inside the gum area. Tafoya recommended a bridge, but attempted at that time to affix the crown to the tooth. Due to the unsuccessful results of this procedure, Chism had further work done on her tooth by Tafoya. At her deposition, Chism stated that her tooth eventually had to be removed, along with some bone, in 1992.

LAWSUIT

In her amended petition, Chism sought damages from Campbell, Landmark, and the hospital for medical malpractice that allegedly caused damage to her tooth. Chism relied solely on the doctrine of res ipsa loquitur to establish the appellees' negligence. Each appellee moved for summary judgment.

A hearing was held in the district court on June 23, 1994, for the summary judgment motions of Landmark and the hospital. Both Landmark and the hospital offered into evidence signed affidavits from Landmark and Dr. James W. Chapin, a board-certified anesthesiologist. In their affidavits, both Landmark and Chapin stated that in their professional opinions, there is an "inherent risk" that a patient's teeth may be damaged when using general anesthesia. They further opined that damage to the teeth occurs in a "fixed percentage" of patients, even when the appropriate standard of care has been met by all persons in the operating room. Chism objected to the use of these affidavits on the ground of insufficient foundation for the statements that there is always an "inherent risk" that a "fixed percentage" of persons will suffer damage to the teeth during surgery when using general anesthesia. The district court overruled the evidentiary objection and admitted the affidavits.

Landmark and the hospital also produced an affidavit from Timm, the nurse anesthetist who assisted in administering the anesthesia to Chism. In her affidavit, Timm stated that certain appliances must be inserted into a patient's mouth prior to administering general anesthesia by endotracheal intubation. Timm further stated that there is always an inherent risk of damage to a patient's teeth while under general anesthesia even when the appropriate standard of care is met, because it is impossible to know if or when the patient will bite down on

the mouthpieces. According to Timm, there is no manner in which to prevent this occurrence. The affidavits of Landmark, Chapin, and Timm stated that the required standard of care for administering general anesthesia for a cholecystectomy was met or exceeded.

In opposition to the motions for summary judgment, Chism produced an affidavit from her dentist, Tafoya. In his affidavit, Tafoya stated that in his opinion, as a practicing dentist, Chism's tooth would not have been damaged during her gallbladder surgery "unless there was [sic] some extraordinary circumstances." In addition, Tafoya stated that he was not aware of some " 'fixed percentage' " of patients who might receive injury to their teeth while under general anesthesia.

The affidavit of Chism was also offered at the summary judgment hearing. According to her affidavit, Chism stated that her mouth was not cut and her tooth was not damaged prior to her surgery at the hospital. Chism further stated that from her lifetime experiences, she would not expect to receive a broken tooth or to have her mouth damaged as a result of instruments being placed in her mouth by an anesthesiologist.

Campbell's motion for summary judgment was heard by the district court on August 10, 1994. In support of his motion, Campbell submitted his own affidavit, albeit similar to the affidavits of Landmark and Chapin, wherein he stated that it was his professional opinion that there is always an inherent risk of damage to the teeth of a fixed percentage of patients who receive general anesthesia, even if all persons involved adhered to the proper standard of care. Campbell also stated that in providing the medical services as a surgeon to Chism, he met or exceeded the appropriate standard of care for a cholecystectomy. In opposition to Campbell's motion, Chism offered the same evidence offered against Landmark and the hospital in the June 23, 1994, hearing; namely the affidavits of Tafoya and Chism.

The district court sustained the summary judgment motions for Landmark and the hospital on July 14, 1994, and for Campbell on August 10. Chism appeals the district court's decision.

ASSIGNMENTS OF ERROR

Chism assigns four errors, which can be summarized as follows: (1) The district court erred in admitting evidence over Chism's objections, (2) the district court erred in finding that the doctrine of res ipsa loquitur did not apply, and (3) the district court erred in sustaining the appellees' motions for summary judgment.

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. *Boyd v. Chakraborty, ante* p. 575, 550 N.W.2d 44 (1996); *Harrison v. Seagroves, ante* p. 495, 549 N.W.2d 644 (1996).

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. *Harrison v. Seagroves, supra*; *O'Connor v. Kaufman, ante* p. 419, 550 N.W.2d 902 (1996).

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. *Torrison v. Overman, ante* p. 164, 549 N.W.2d 124 (1996); *Ford Motor Credit Co. v. All Ways, Inc.*, 249 Neb. 923, 546 N.W.2d 807 (1996).

ANALYSIS

Evidentiary Ruling

Chism first alleges that the district court erred in overruling her foundational objections to the affidavits of Landmark and Chapin. In particular, she alleges that there was no foundation for the statements that there is an "inherent risk" of damage to the teeth for a "fixed percentage" of persons who

undergo surgery using general anesthesia. Chism's main contention appears to be that Landmark and Chapin are not qualified to make such assertions without supporting evidence.

In summary judgment proceedings, a supporting affidavit may be used if it is based on personal knowledge, sets forth facts that would be admissible in evidence, and is made by a person competent to testify on the matter in issue. Neb. Rev. Stat. § 25-1334 (Reissue 1995); *Young v. First United Bank of Bellevue*, 246 Neb. 43, 516 N.W.2d 256 (1994). Examination of the Landmark and Chapin affidavits reveals that both physicians are board-certified anesthesiologists and are familiar with the appropriate standard of care for an anesthesiologist in the Papillion, Nebraska, area. The affidavits further show that both physicians were familiar with the medical care given to Chism at the hospital. In light of these facts, it is apparent that both Landmark and Chapin are thoroughly competent to testify as to possible complications of anesthetic procedures. Chism's objection as to foundation was therefore properly overruled.

Res Ipsa Loquitur

Chism next asserts that the district court erred in not applying the doctrine of res ipsa loquitur. In particular, Chism claims that the general experience and observation of mankind teaches that her injury would not be expected without negligence.

We have recently reexamined the contours of res ipsa loquitur, noting that it is an exception to the general rule that negligence cannot be presumed. *Roberts v. Weber & Sons, Co.*, 248 Neb. 243, 533 N.W.2d 664 (1995). Res ipsa loquitur (literally meaning "the thing speaks for itself") is a procedural tool that, if applicable, allows an inference of a defendant's negligence to be submitted to the fact finder, where it may be accepted or rejected. See, *id.*; *Harvey v. Metropolitan Utilities Dist.*, 246 Neb. 780, 523 N.W.2d 372 (1994). Res ipsa loquitur allows this inference of negligence because the inference is probable and more plausible than any other explanation propounded. *Swierczek v. Lynch*, 237 Neb. 469, 466 N.W.2d 512 (1991).

The crucial question in any res ipsa loquitur situation is whether the doctrine applies at all. In *Roberts v. Weber & Sons, Co., supra*, this court noted the three essential elements for the res ipsa loquitur doctrine to apply:

> In order that the doctrine of res ipsa loquitur may be invoked, it must be shown that the occurrence is one which would not, in the ordinary course of things, happen in the absence of negligence; the instrumentality which produces the occurrence is under the exclusive control and management of the alleged wrongdoer; and there is an absence of explanation by the alleged wrongdoer.

Id. at 247, 533 N.W.2d at 667-68.

For medical malpractice cases brought under the res ipsa loquitur doctrine, we have held that negligence may be inferred in three situations without affirmative proof:

> " '(1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, etc., in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries.' "

Swierczek v. Lynch, 237 Neb. at 476, 466 N.W.2d at 517 (quoting *McCall v. St. Joseph's Hospital*, 184 Neb. 1, 165 N.W.2d 85 (1969)).

Considering these general principles, we must determine whether there is a genuine issue of fact as to whether Chism's alleged injuries would have occurred absent some negligent act. In reaching our conclusion, we view the evidence in a light most favorable to Chism, for she is the party against whom summary judgment was granted. See, *Torrison v. Overman, ante* p. 164, 549 N.W.2d 124 (1996); *Ford Motor Credit Co. v. All Ways, Inc.*, 249 Neb. 923, 546 N.W.2d 807 (1996).

OCCURRENCE OF INJURY IN ABSENCE OF NEGLIGENCE

We begin by noting that the first element of res ipsa loquitur requires a plaintiff to show that the injury incurred is one which would not, in the ordinary course of events, happen in the absence of negligence. *Roberts v. Weber & Sons, Co., supra.*

The affidavits of the appellees essentially state that there always exists an inherent risk that a patient under general anesthesia may suffer damage to the teeth, even if the proper standard of care is adhered to. The evidence proffered by the appellees further states that it is impossible to say if or when a patient will bite down on the mouthpieces used with an endotracheal intubation and that there is no manner in which to prevent such an occurrence. Finally, the affidavits offered by the appellees state that the proper standard of care was met or exceeded during Chism's surgery.

The affidavits offered by Chism do not refute these statements. As noted above, Chism's dentist, Tafoya, did not state that there is no inherent risk that a fixed percentage of anesthetized persons will suffer damage to the teeth; rather, he simply stated that he has "not become aware" of any such fixed percentage. Furthermore, Tafoya's opinion that Chism should not have suffered damage to her tooth unless there were some "extraordinary circumstances" in no way negates the statements in the appellees' affidavits that the proper standard of care was met or exceeded. In addition, Chism offered no evidence or affidavit refuting Timm's statements that there is no way to prevent an unconscious patient from biting down on the mouthpieces used with an endotracheal intubation. Since these facts were not contradicted, we treat them as undisputed for purposes of summary judgment. See, *Washa v. Miller*, 249 Neb. 941, 546 N.W.2d 813 (1996); *Raskey v. Michelin Tire Corp.*, 223 Neb. 520, 391 N.W.2d 123 (1986).

Because the uncontroverted facts in this case establish that a fixed percentage of patients under general anesthesia will suffer damage to the teeth even in the absence of negligence and that there is simply no manner in which to prevent such an occurrence, we hold that the doctrine of res ipsa loquitur is inapplicable as a matter of law. See, e.g., *Hughes v. Hastings*,

225 Tenn. 386, 469 S.W.2d 378 (1971) (res ipsa loquitur inappropriate when record shows damage to patient's tooth while plaintiff was under general anesthesia could not have been prevented); *Tappe v. Iowa Methodist Medical Center*, 477 N.W.2d 396 (Iowa 1991) (res ipsa loquitur cannot apply when all experts agree that stroke occurs in fixed percentage of all bypass surgeries even in absence of negligence); *Piquette v. Midtown Anesthesia Assoc.*, 192 Ill. App. 3d 219, 548 N.E.2d 659 (1989) (res ipsa loquitur held not to apply where defendants' affidavits establish that broken teeth are risk of laryngoscopic procedure); *Perin v. Hayne*, 210 N.W.2d 609 (Iowa 1973) (res ipsa loquitur held inapplicable where nerve injury from procedure used is inherent risk even when due care is used).

Chism relied solely upon the doctrine of res ipsa loquitur in bringing this action. Because we hold the doctrine to be inapplicable in light of the undisputed facts, summary judgment was appropriately granted in favor of the appellees. See *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992).

CONCLUSION

For the reasons discussed above, we hold that the district court was correct in concluding there was sufficient foundation for statements found in the affidavits of Landmark and Chapin and in finding the doctrine of res ipsa loquitur to be inapplicable. Because Chism's sole theory of recovery was under this doctrine, the granting of summary judgment was correct.

AFFIRMED.

FAHRNBRUCH, J., not participating.

WHITE, C.J., dissenting.

I agree with the majority that the initial question in any res ipsa loquitur case is whether it is appropriate to apply the doctrine. However, I disagree with the majority's conclusion that, as a matter of law, res ipsa loquitur is not applicable in this particular case.

This court has addressed hospital liability under the res ipsa loquitur doctrine on only two occasions. See, *Swierczek v. Lynch*, 237 Neb. 469, 466 N.W.2d 512 (1991); *McCall v. St.*

Joseph's Hospital, 184 Neb. 1, 165 N.W.2d 85 (1969). *Swierczek* is of particular interest in this case. In *Swierczek*, the plaintiff brought negligence and res ipsa loquitur actions based on nerve injuries she had allegedly suffered as a result of dental surgery. The plaintiff named several doctors, a nurse anesthetist, and a hospital as defendants. At various times throughout the litigation, the defendants moved for summary judgment. The district court sustained a doctor's, a nurse's, and the hospital's motions for summary judgment. The plaintiff appealed.

According to this court's analysis in *Swierczek*, for res ipsa loquitur to apply, the plaintiff is not obligated to prove the exact manner in which he or she was injured or the precise act or event which led to his or her injury. Negligence may be inferred without definite proof " ' "when the general experience and observation of mankind teaches that the result would not be expected without negligence," ' " 237 Neb. at 476, 466 N.W.2d at 517; it is enough to establish that it is within the common knowledge of a layperson that an individual does not enter the hospital to have her teeth pulled and leave the hospital with damage to nerves in her arms and hands without some type of negligence occurring, *Swierczek, supra*. Reliance on the res ipsa loquitur doctrine in such situations raises an inference of negligence which should be allowed to go to the jury if the facts pled in the petition are supported by ample proof.

The proof offered in support of Chism's action in this case was an affidavit signed by her dentist, Tafoya. To determine whether this affidavit sufficiently supports Chism's allegations for purposes of defending a summary judgment motion, it is essential to assess the contents of the affidavit submitted by Tafoya.

In general medical malpractice cases, an affidavit submitted by a defendant physician, which states that the defendant did not breach the appropriate standard of care, creates a prima facie case of lack of negligence for purposes of summary judgment. *Wagner v. Pope*, 247 Neb. 951, 531 N.W.2d 234 (1995). The burden then shifts to the plaintiff to counter the defendant's evidence with a showing that the defendant had not fol-

lowed the appropriate standard of care. See *DeCamp v. Lewis*, 231 Neb. 191, 435 N.W.2d 883 (1989). See, also, *Smith v. Klebanoff*, 84 N.M. 50, 499 P.2d 368 (N.M. App. 1972) (holding that plaintiffs, in order to defeat summary judgment on basis that doctrine of res ipsa loquitur was applicable, had burden of demonstrating that factual dispute existed as to whether incident was one that does not occur in absence of negligence).

In the instant case, the appellees submitted affidavits stating that there was an inherent risk that any patient during surgery and while under general anesthesia will suffer damage to the teeth. The affidavits also stated that the proper standard of care was met. It can be argued in this case that Tafoya's affidavit refuted these statements. Specifically, Tafoya states that "unless there was [sic] some extraordinary circumstances during surgery, Mrs. Chism should not have received any injuries to her teeth." In viewing this affidavit in the light most favorable to the nonmoving plaintiff, Chism, a reasonable inference can be drawn that such a statement was made for the purpose of establishing that Chism's injuries were caused by unusual circumstances and negligence, and not as a result of ordinary circumstances and care. Tafoya's affidavit sufficiently demonstrated that there is a material question of fact: Were Chism's injuries the result of negligence?

Since a material question of fact existed, the court could not have concluded as a matter of law that the res ipsa loquitur doctrine did not apply. Therefore, the district court erred in granting the appellees' motions for summary judgment.

STATE OF NEBRASKA, APPELLEE, V. ROGER D. JOHNSON, JR., APPELLANT.

554 N.W.2d 126

Filed October 11, 1996. No. S-95-1226.

1. **Convictions: Appeal and Error.** A conviction in a bench trial of a criminal case must be sustained on appeal if the evidence, viewed and construed in the light most favorable to the State, is legally sufficient to support that conviction.
2. ____: ____. In reviewing a criminal conviction, an appellate court must view the evidence in the light most favorable to the prevailing party.
3. **Statutes: Appeal and Error.** The meaning of a statute is a question of law. In connection with a question of law, a reviewing court has an obligation to reach a conclusion independent of that of the inferior court.
4. **Convictions: Appeal and Error.** In determining whether there is sufficient evidence to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence, which are within the fact finder's province for disposition.
5. **Circumstantial Evidence: Proof.** A fact proved by circumstantial evidence is nonetheless a proven fact.

Appeal from the District Court for Seward County, BRYCE BARTU, Judge, on appeal thereto from the County Court for Seward County, GERALD E. ROUSE, Judge. Judgment of District Court affirmed.

David L. Kimble for appellant.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

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

WRIGHT, J.

Roger D. Johnson, Jr., was convicted in the Seward County Court of driving while under the influence of alcohol. The district court affirmed the conviction and sentence, and Johnson appealed. The State of Nebraska filed a petition to bypass the Nebraska Court of Appeals, and we granted the State's petition.

SCOPE OF REVIEW

A conviction in a bench trial of a criminal case must be sustained on appeal if the evidence, viewed and construed in the

light most favorable to the State, is legally sufficient to support that conviction. *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994). In reviewing a criminal conviction, an appellate court must view the evidence in the light most favorable to the prevailing party. *State v. Drinkwalter*, 242 Neb. 40, 493 N.W.2d 319 (1992).

The meaning of a statute is a question of law. In connection with a question of law, a reviewing court has an obligation to reach a conclusion independent of that of the inferior court. *State v. Sundling*, 248 Neb. 732, 538 N.W.2d 749 (1995).

FACTS

On May 9, 1993, Officer Jerry Chab of the Nebraska State Patrol received a message from a dispatcher to look for a possible drunk driver headed westbound on Interstate 80 in Lancaster County. The officer was provided with a description of the vehicle, as well as its license plate number. He observed a vehicle matching this description exit Interstate 80 without signaling. After turning around, the officer pulled up behind the vehicle, which was stopped on the westbound off ramp of the Pleasant Dale interchange. The vehicle was running, and its headlights were on.

The officer observed two people inside the vehicle. Johnson was seated behind the steering wheel, and the owner of the vehicle, Chris Manning, was in the passenger's seat. Upon contact with Johnson, the officer smelled alcohol and noticed that Johnson's speech was thick and slurred, and that his eyes were bloodshot and watery. The officer had Johnson perform field sobriety tests, which Johnson failed, and administered a preliminary breath test, which Johnson also failed. Johnson was then arrested for driving while under the influence of alcohol.

At trial, Johnson testified that he and Manning were returning to Exeter from Lincoln and that Manning was driving the vehicle when Johnson noticed Manning had begun to doze off. Johnson said that he offered to drive the rest of the way and that Manning then exited the Interstate. Johnson testified that he felt "okay to drive, so that's why I offered, I guess, to take over." Johnson testified that after the vehicle stopped, he

moved to the driver's seat. There was no testimony that Johnson was actually touching the controls of the vehicle when he was approached by the officer. Manning testified that he was driving when the vehicle pulled off the Interstate at the Pleasant Dale interchange.

The Seward County Court found that Johnson was "in operation" of a motor vehicle while in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1992) (now codified at Neb. Rev. Stat. § 60-6,196 (Reissue 1993)). The district court affirmed, and Johnson appealed.

ASSIGNMENT OF ERROR

Johnson asserts that the district court erred in finding that he was operating a motor vehicle while under the influence of alcohol, in violation of § 39-669.07.

ANALYSIS

Johnson was convicted under § 39-669.07, which provides in relevant 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.

Johnson does not dispute that he was under the influence of alcohol or that he had more than the permitted amount of alcohol in his breath or blood. He claims that the evidence fails to establish beyond a reasonable doubt that he was operating or in actual physical control of a motor vehicle within the meaning of § 39-669.07.

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 courts below. *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995). We have not addressed the distinc-

tion, if one exists, between "operate" and "actual physical control" as those terms are used in § 39-669.07.

In *State v. Baker*, 236 Neb. 261, 461 N.W.2d 251 (1990), we interpreted the meaning of "operate" under § 39-669.07. Baker was behind the wheel of a suburban vehicle that was being pulled from a ditch. The arresting officer observed that the suburban's engine was running, and its reverse lights were on. The officer saw the suburban move backward under its own power toward the pickup. Baker was arrested for driving while intoxicated. We held that "operate," as used in § 39-669.07, means the " 'actual physical handling of the controls of the vehicle' . . . ." See *Baker*, 236 Neb. at 264, 461 N.W.2d at 253. There, Baker was actually physically handling the controls of the vehicle, and his conviction was upheld.

In the present case, the State argues that the statutory definition of driving while under the influence is disjunctive. It permits a conviction if the State proves either (1) that the defendant was "operating" a vehicle or (2) that the defendant was in "actual physical control" of the vehicle while under the influence. Based upon our holding in *Baker* that the term "operate" means actual physical handling of the controls of the vehicle, the State argues that the second prong of the statute—actual physical control—must criminalize behavior that is different from actual physical handling of the controls of the vehicle.

However, in the present case, the sufficiency of the evidence to support the conviction does not depend upon whether Johnson actually had his hands on the controls of the vehicle or was in actual physical control of the vehicle. There are two cases in which we upheld driving while under the influence convictions without direct evidence that the defendant had physically handled the controls of the vehicle.

In *State v. Eckert*, 186 Neb. 134, 181 N.W.2d 264 (1970), the defendant's vehicle was found parked in the right-hand lane of a public highway. The defendant was the sole occupant of the vehicle and was slumped over the steering wheel in a drunken stupor. We held this evidence was sufficient to demonstrate that the defendant had operated his vehicle while under the influence of alcohol because circumstantial evidence

established that the defendant had driven the vehicle to the point where it had stopped on the highway.

Similarly, in *State v. Miller*, 226 Neb. 576, 412 N.W.2d 849 (1987), the defendant's vehicle was stopped sideways in the road, blocking traffic. The defendant was the sole occupant of the vehicle, had no clear recollection of the events leading up to the accident, and was under the influence of alcohol. We held there was sufficient circumstantial evidence to establish that the defendant had operated the vehicle while under the influence, because he had driven to the point where his vehicle stopped in the road.

In the case at bar, the evidence places Johnson behind the wheel of the vehicle which was stopped on the westbound off ramp of an Interstate 80 exit. The vehicle was running, and its headlights were on. There was sufficient circumstantial evidence to establish that Johnson was operating the vehicle. Although Manning was in the passenger's seat and he and Johnson testified that they had stopped and changed places, the weight and credibility of this evidence are for the trier of fact. Factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong. *State v. Wilson*, 238 Neb. 217, 469 N.W.2d 749 (1991).

In determining whether there is sufficient evidence to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence, which are within the fact finder's province for disposition. *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996). There was sufficient circumstantial evidence that Johnson had driven the vehicle which was stopped on the Interstate off ramp. A fact proved by circumstantial evidence is nonetheless a proven fact. *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

A conviction in a bench trial of a criminal case must be sustained on appeal if the evidence, viewed and construed in the light most favorable to the State, is legally sufficient to support that conviction. *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994). The evidence established that Johnson

was found behind the wheel of a vehicle which was parked on an Interstate off ramp with the engine running and the headlights on. Viewing this evidence, and all reasonable inferences therefrom, in the light most favorable to the State, we conclude that the evidence was sufficient to establish that Johnson was operating a motor vehicle while in violation of § 39-669.07. The judgment of conviction and sentence are affirmed.

AFFIRMED.

LANPHIER, J., participating on briefs.

PAUL BALTENSPERGER, APPELLANT, V. OTTO WELLENSIEK AND FIRST NATIONAL BANK OF SYRACUSE, A NEBRASKA CORPORATION, APPELLEES.

554 N.W.2d 137

Filed October 18, 1996. No. S-94-998.

1. **Pleadings: Demurrer: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the facts pled, 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. **Actions: Bankruptcy.** The plain language of 11 U.S.C. § 108(a) (1994) does not provide for that statute to apply in a postpetition cause of action.
5. **Pleadings: Demurrer: Limitations of Actions.** A petition is demurrable which on its face shows that the action is barred by a statute of limitations and no allegations tolling the statute are made.
6. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect.

7. **Actions: Judicial Notice.** Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.

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

Robert Wm. Chapin, Jr., for appellant.

Anne M. Marcotte, of Wellensiek Law Offices, for appellee Wellensiek.

Donald R. Witt and Allan E. Wallace, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Bank.

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

PER CURIAM.

This action was brought in the Otoe County District Court by the appellant, Paul Baltensperger, claiming that the appellees, First National Bank of Syracuse and its president, Otto Wellensiek, breached an oral contract, tortiously interfered with Baltensperger's contracts, tortiously interfered with Baltensperger's business relations, and committed fraudulent misrepresentation in dealing with Baltensperger. Subsequently, Baltensperger filed amended and second amended complaints and the appellees filed demurrers. The district court dismissed the second amended complaint on the basis that the applicable statute of limitations had elapsed. Baltensperger appealed to the Nebraska Court of Appeals, stating (1) that the district court erred by sustaining the appellees' demurrers, since a demurrer to the statute of limitations is not a proper pleading under Nebraska law; (2) that under Nebraska law, a separate proceeding should have taken place to determine the statute of limitations issue; and (3) that the court erred by holding that the statute of limitations for Baltensperger had not expired. We removed the case to this court, pursuant to our power to regulate the dockets of the lower courts. We find no merit to Baltensperger's assignments of error. We therefore affirm.

BACKGROUND

First National Bank had made loans to Baltensperger, which loans were secured by certain parcels of land. From September 1, 1983, until approximately June 1, 1987, Baltensperger conducted negotiations with the bank in an attempt to restructure and reorganize his debt. On May 9, 1986, Baltensperger filed a chapter 11 bankruptcy petition in the U.S. Bankruptcy Court for the District of Nebraska.

In June 1987, Baltensperger and Otto Wellensiek, president of the bank, held a conversation regarding Baltensperger's proposal to purchase his obligation to the bank in order to retain Baltensperger's interest in the land. Wellensiek agreed on behalf of the bank that Baltensperger would be able to buy out the bank's interest.

During these negotiations, Baltensperger arranged for the land to be placed into a conservation reserve program through the U.S. Department of Agriculture, for which Baltensperger was to receive payments. Upon the request of Wellensiek, Baltensperger entered into an agreement to have all of the land farmed. In November 1987, Wellensiek informed Baltensperger that he would not honor the buyout agreement and that he was putting the land up for sale.

Baltensperger, as debtor in possession and on behalf of the debtor, filed an adversary proceeding in the U.S. Bankruptcy Court for the District of Nebraska on August 3, 1988.

In the adversary proceeding, Baltensperger alleged breach of contract, fraudulent misrepresentation, and tortious interference with Baltensperger's contracts, among other allegations, against First National Bank, Wellensiek, and others.

On February 25, 1991, the U.S. Bankruptcy Court for the District of Nebraska dismissed the adversary proceeding.

As stated, the actions Baltensperger claims are the basis of his causes of action occurred in 1987. Baltensperger filed the original complaint in the case at bar in the Otoe County District Court on July 7, 1993. Baltensperger filed an amended complaint in the Otoe County District Court on December 15, 1993, and a second amended complaint on April 21, 1994. The statute of limitations for breach of oral

contract and tortious interference is 4 years. Neb. Rev. Stat. §§ 25-206 and 25-207 (Reissue 1995).

Baltensperger alleged that the applicable statute of limitations was tolled on August 3, 1988, pursuant to 11 U.S.C. § 108(a) (1994), by the filing of the adversary proceeding and that it commenced to run on February 25, 1991, when the adversary proceeding was dismissed, until July 7, 1993, the date the case at bar was originally filed. Baltensperger further alleged that due to the tolling of said statute of limitations, only 43 of the 48 months of the statute of limitations had run.

On May 19, 1994, demurrers to the second amended complaint were filed in the Otoe County District Court. On September 26, 1994, the Otoe County District Court dismissed Baltensperger's second amended complaint with prejudice.

ASSIGNMENTS OF ERROR

Baltensperger assigns as error:

> The District Court of Otoe County, Nebraska erred by sustaining the appellees' Demurrers as the Demurrer to the statute of limitation is not a proper pleading under Nebraska law; that under Nebraska law a separate proceeding should have taken place to determine the statute of limitations issue; and that the Court erred by holding that the statute of limitations for the appellant had not been tolled.

STANDARD OF REVIEW

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *Meyer Bros. v. Travelers Ins. Co., ante* p. 389, 551 N.W.2d 1 (1996); *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783, 545 N.W.2d 451 (1996); *Vowers & Sons, Inc. v. Strasheim*, 248 Neb. 699, 538 N.W.2d 756 (1995).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Heins v. Webster County, ante* p. 750, 552 N.W.2d 51 (1996);

Goolsby v. Anderson, ante p. 306, 549 N.W.2d 153 (1996); *Scholl v. County of Boone, ante* p. 283, 549 N.W.2d 144 (1996).

ANALYSIS

In considering a demurrer, a court must assume that the facts pled, 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. *Guzman v. Barth, ante* p. 763, 552 N.W.2d 299 (1996); *Pilot Investment Group v. Hofarth, ante* p. 475, 550 N.W.2d 27 (1996); *Berntsen v. Coopers & Lybrand*, 249 Neb. 904, 546 N.W.2d 310 (1996).

In his second amended complaint, Baltensperger states a conclusion of law, that is, that 11 U.S.C. § 108(a) tolled the statute of limitations, so that only 43 of the 48 months of the statute of limitations had run, thereby acknowledging that the statute of limitations for the claim in this case is 48 months. The interpretation of 11 U.S.C. § 108(a) is a conclusion of law, and therefore, we reach our own conclusions about its effect on the statute of limitations. See, *Heins, supra*; *Goolsby, supra*; *Scholl, supra*.

11 U.S.C. § 108(a) states:

> If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period *has not expired before the date of the filing of the petition*, the trustee may commence such action only before the later of—
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) two years after the order for relief.

(Emphasis supplied.)

We hold that this federal statute does not have a tolling effect on the statute of limitations in this case. As alleged in Baltensperger's second amended complaint, Baltensperger's

claims arose after the bankruptcy petition was filed. Baltensperger filed the bankruptcy petition on May 9, 1986. Baltensperger's petition alleges that in June 1987, Wellensiek, the president of First National Bank, entered into an agreement with Baltensperger and that on November 5, 1987, Wellensiek refused to honor that agreement. Baltensperger did not file the original complaint in this matter until July 7, 1993. The plain language of the statute does not provide for it to apply in this, a postpetition, cause of action. See *Matter of Phillip*, 948 F.2d 985, 987 (5th Cir. 1991) (stating, "At least in the ordinary case, no compelling reason exists for extending the prescription periods of postpetition claims, since trustees or debtors in possession should be aware of them as they arise"). See, also, *In re Northern Specialty Sales, Inc.*, 57 B.R. 557 (Bankr. D. Or. 1986).

Addressing Baltensperger's first and second assignments of error, the granting of the demurrer without a separate hearing to address the statute of limitations "issue" pursuant to Neb. Rev. Stat. § 25-221 (Reissue 1995) was proper because no facts, only conclusions of law, had been alleged to toll the statute of limitations. The provision in § 25-221 that the statute of limitations issue may be tried separately presupposes facts at issue rather than legal conclusions, as in this case.

A petition is demurrable which on its face shows that the action is barred by a statute of limitations and no allegations tolling the statute are made. *Calvert v. Roberts Dairy Co.*, 242 Neb. 664, 496 N.W.2d 491 (1993); *Bend v. Marsh*, 145 Neb. 780, 18 N.W.2d 106 (1945); *Pohle v. Nelson*, 108 Neb. 220, 187 N.W. 772 (1922).

When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect. *Pilot Investment Group, supra*; *Fox v. Metromail of Delaware*, 249 Neb. 610, 544 N.W.2d 833 (1996); *Vanice v. Oehm*, 247 Neb. 298, 526 N.W.2d 648 (1995).

Baltensperger has already filed a second amended complaint. We hold that no reasonable possibility exists that amendment will correct the violation of the statute of limita-

tions on the face of Baltensperger's second amended complaint.

First National Bank has filed a motion with this court for attorney fees. Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. *Baltensperger v. United States Dept. of Ag., ante* p. 216, 548 N.W.2d 733 (1996); *Peterson v. The Nebraska Nat. Gas Co.*, 204 Neb. 136, 281 N.W.2d 525 (1979). In ruling in the appellees' favor, we note other of Baltensperger's lawsuits on substantially the same set of facts which have been appealed to this court and affirmed either summarily or by published opinion. We award attorney fees to First National Bank in the amount of $2,152 and expenses in the amount of $301.61 against Baltensperger and his attorney.

CONCLUSION

Finding Baltensperger's assignments of error to be without merit, the judgment of the district court is hereby affirmed.

AFFIRMED.

LANPHIER, J., participating on briefs.

PONDEROSA RIDGE LLC, APPELLANT, V. BANNER COUNTY ET AL., APPELLEES, APPLICATION TA-19 OF PONDEROSA RIDGE LLC.

554 N.W.2d 151

Filed October 18, 1996. No. S-95-1228.

1. **Administrative Law: Waters: Statutes: Appeal and Error.** In an appeal from the Department of Water Resources, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations

are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable; however, on questions of law, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal determinations made by the director.

2. **Standing.** In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy.
3. **Constitutional Law: Statutes: Standing.** Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right.
4. **Standing: Courts: Jurisdiction: Parties.** Because the requirement of standing is fundamental to a court's exercising jurisdiction, a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding.
5. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
6. **Constitutional Law: Statutes: Proof.** The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional.
7. ____: ____: ____. The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
8. **Constitutional Law: Legislature.** While the Legislature may not delegate legislative power to an administrative or executive authority, the Legislature has the power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations; however, the standards by which the granted powers are to be administered must be clearly and definitely stated in the authorizing act and may not rest on indefinite, obscure, or vague generalities, or upon extrinsic evidence not readily available.
9. ____: ____. Where the Legislature has provided reasonable limitations and standards for carrying out delegated duties, there is no unconstitutional delegation of legislative authority.
10. **Constitutional Law: Waters: Words and Phrases.** Water is an article of commerce, implicating the Commerce Clause of the U.S. Constitution.
11. **Statutes: Waters: Public Purpose: Appeal and Error.** Where a statute regulates water even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, the statute will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.
12. **Administrative Law: Words and Phrases.** A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion.

13. ____: ____. A capricious decision is one guided by fancy rather than by judgment or settled purpose; such a decision is apt to change suddenly; it is freakish, whimsical, humorsome.
14. ____: ____. The term "unreasonable" can be applied to an administrative decision only if the evidence presented leaves no room for differences of opinion among reasonable minds.
15. **Actions: Parties: Proof.** Generally, it is the party asserting the affirmative of an issue that has the burden of proving that issue.

Appeal from the Department of Water Resources. Affirmed.

Clark G. Nichols, of Nichols, Douglas, Kelly, and Meade, P.C., for appellant.

James M. Worden, Banner County Attorney, for appellee County.

James M. Mathis, of Holtorf, Kovarik, Ellison & Mathis, P.C., for appellee North Platte Natural Resources District.

Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellees Eldon Lundberg, Dale Ward, and Wayne Palm.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ., and RIST, D.J.

CAPORALE, J.

I. STATEMENT OF CASE

The appellant, Ponderosa Ridge LLC, a Nebraska limited liability company, applied for a permit to transfer ground water from a well located in Banner County, Nebraska, to Laramie County, Wyoming. The appellees, Banner County, Eldon Lundberg, Wayne Palm, Dale Ward, and North Platte Natural Resources District, filed objections, and the director of the Department of Water Resources denied the application. In appealing, Ponderosa Ridge asserts, in summary, that the director's order is arbitrary, capricious, and unreasonable in that it is (1) contrary to law and (2) not supported by the evidence. We affirm.

II. BACKGROUND

The application requested a transfer of a maximum of 1,532 acre-feet of water per year at a rate of no more than 1,368,000

gallons per day. The water was to be used to flush pig production facilities and then stored in the lagoon upstream from Ponderosa Ridge's well, which is located approximately 50 feet from the Nebraska-Wyoming border. Water from the lagoon was then to be used in center-pivot systems to irrigate land in Wyoming. The well was to be continuously operated 24 hours a day, 356 days a year, and was to provide a "cone of depression" which would trap any leakage from the lagoon and prevent any pollution or contamination of the aquifer downstream.

In entering his order of denial, the director determined that granting the permit would result in a beneficial use of the water, but that a supply developed from sources in Wyoming would be sufficient to meet the needs of Ponderosa Ridge, that the negative effects the withdrawal of ground water might cause could not be quantitatively determined, and that the expected impacts upon future demands were unclear. The facts relating to these findings are set forth in parts IV(1)(c)(ii) and (2) below.

III. SCOPE OF REVIEW

In an appeal from the department, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable. *Central Platte NRD v. City of Fremont, ante* p. 252, 549 N.W.2d 112 (1996). However, on questions of law, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal determinations made by the director. *Id.*

IV. ANALYSIS

Before we turn our attention to the summarized assignments of error, we consider whether all of the objectors had the requisite standing to challenge Ponderosa Ridge's application before the director. We have recently reaffirmed that in order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy. See, *Metropolitan Utilities Dist. v. Twin Platte NRD, ante* p. 442, 550 N.W.2d 907 (1996);

Marten v. Staab, 249 Neb. 299, 543 N.W.2d 436 (1996); *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995). Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question. To establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right. See, *Metropolitan Utilities Dist., supra*; *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994); *Styskal v. Wright*, 246 Neb. 513, 519 N.W.2d 543 (1994). We have also explained that the fact that water rights of the constituents of a natural resources district may be affected by an application to appropriate water does not confer standing upon such a district to object to the application. See *Metropolitan Utilities Dist., supra*.

The record establishes that the individual objectors Lundberg and Ward had water use interests to protect; however, we are not directed to, nor do we find, any evidence that the individual objector Palm had any such interests. Neither have we been directed to, nor do we find, any evidence that the objectors Banner County and North Platte Natural Resources District had any such interests. Indeed, Banner County advised the director that it was appearing on behalf of its residents, and North Platte Natural Resources District stated that it was not "trying to be adversarial, necessarily, to any particular party," but, rather, that it was appearing to protect the public interest.

Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993). See *Whitmore v. Arkansas*, 495 U.S. 149, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990). Because the requirement of standing is fundamental to a court's exercising jurisdiction, a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding. *Baltimore, supra*. Under the record presented, we find that

Lundberg and Ward were the only objectors properly before the director.

1. Law Claim

Ponderosa Ridge's claim that the director's order of denial is contrary to law rests on three premises: Neb. Rev. Stat. § 46-613.01 (Reissue 1993) unlawfully delegates legislative power to the director, in violation of Neb. Const. art. II, § 1, and art. III, § 1; the statute is so vague as to deny Ponderosa Ridge the due process of law required by U.S. Const. amend. XIV; and the statute, both facially and as applied, discriminates against interstate commerce, in violation of U.S. Const. art. I, § 8, cl. 3.

In considering these propositions, we bear in mind that a statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *State v. Carpenter, ante* p. 427, 551 N.W.2d 518 (1996); *Swanson v. State*, 249 Neb. 466, 544 N.W.2d 333 (1996); *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995); *Callan v. Balka*, 248 Neb. 469, 536 N.W.2d 47 (1995). The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional. *Swanson, supra*; *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995); *Hlava v. Nelson*, 247 Neb. 482, 528 N.W.2d 306 (1995). The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Carpenter, supra*; *Swanson, supra*; *Kuchar v. Krings*, 248 Neb. 995, 540 N.W.2d 582 (1995); *Chrysler Motors Corp. v. Lee Janssen Motor Co.*, 248 Neb. 322, 534 N.W.2d 309 (1995).

(a) Unlawful Delegation

Section 46-613.01 provides:

> The Legislature recognizes and declares that the maintenance of an adequate source of ground water within this state is essential to the social stability of the state and the health, safety, and welfare of its citizens and that reasonable restrictions on the transportation of ground water from this state are a proper exercise of the police powers of the state. The need for such restrictions, which protect the health, safety, and general welfare of the citizens of

this state, is hereby declared a matter of legislative determination.

Any person, firm, city, village, municipal corporation, or other entity intending to withdraw ground water from any water well located in the State of Nebraska and transport it for use in another state shall apply to the Department of Water Resources for a permit to do so. In determining whether to grant such permit, the Director of Water Resources shall consider:

(1) Whether the proposed use is a beneficial use of ground water;

(2) The availability to the applicant of alternative sources of surface or ground water;

(3) Any negative effect of the proposed withdrawal on surface or ground water supplies needed to meet reasonable future demands for water in the area of the proposed withdrawal; and

(4) Any other factors consistent with the purposes of this section that the director deems relevant to protect the interests of the state and its citizens.

Issuance of a permit shall be conditioned on the applicant's compliance with the rules and regulations of the natural resources district from which the water is to be withdrawn. The applicant shall be required to provide access to his or her property at reasonable times for purposes of inspection by officials of the district or the Department of Water Resources.

The director may include such reasonable conditions on the proposed use as he or she deems necessary to carry out the purposes of this section.

In arguing that the statute unconstitutionally delegates legislative authority, Ponderosa Ridge contends that "[w]ith the exception of beneficial use, the statute gives no guidance to [Ponderosa Ridge], or the [d]irector, as to how to apply [the] factors. Nor does it define the factors." Brief for appellant at 19.

In *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 780-81, 104 N.W.2d 227, 230-31 (1960), we observed:

> It is fundamental that the Legislature may not delegate legislative power to an administrative or executive authority. . . . The Legislature does have power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations. Such authority is administrative in its nature and its use by administrative officers is essential to the complete exercise of the powers of all departments. . . .
>
> The limitations of the power granted and the standards by which the granted powers are to be administered must, however, be clearly and definitely stated in the authorizing act.

Such standards may not rest on indefinite, obscure, or vague generalities, or upon extrinsic evidence not readily available. *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988). See, also, *Kwik Shop v. City of Lincoln*, 243 Neb. 178, 498 N.W.2d 102 (1993).

However, where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, there is no unconstitutional delegation of legislative authority. *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; *Bosselman, Inc., supra*; *In re Application U-2*, 226 Neb. 594, 413 N.W.2d 290 (1987). In *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 464-65, 283 N.W.2d 12, 24 (1979), we wrote:

> The exercise of a legislatively delegated authority to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation or enforcement of a law with clearly designated limitations and standards, is not an exercise of legislative power. . . .
>
> The question of how far the Legislature should go in filling in the details of the standards which an administrative agency is to apply raises large issues of policy in which the Legislature has a wide discretion, and the court should be reluctant to interfere with such discre-

> tion. Such standards in conferring discretionary power upon an administrative agency must be reasonably adequate, sufficient, and definite for the guidance of the agency in the exercise of the power conferred upon it and must also be sufficient to enable those affected to know their rights and obligations. . . . The modern tendency is to be more liberal in permitting grants of discretion to an administrative agency in order to facilitate the administration of laws as the complexity of economic and governmental conditions increases.

See, also, *Bamford, supra*; *Kwik Shop, supra*; *Bosselman, Inc., supra*; *In re Application U-2, supra*. Delegation of legislative power is most commonly indicated where the relations to be regulated are highly technical or where regulation requires a course of continuous decision. *Anderson v. Tiemann*, 182 Neb. 393, 155 N.W.2d 322 (1967), *appeal dismissed* 390 U.S. 714, 88 S. Ct. 1418, 20 L. Ed. 2d 254 (1968).

We have acknowledged the difficulties inherent in requiring the Legislature to spell out each standard in areas of complex fields where expanding technology and complex theories change rapidly, *Bamford, supra*, and the Legislature has recognized the expertise and experience needed to determine the difficult questions presented in the overall management of water in this state when it required, pursuant to Neb. Rev. Stat. § 46-701 (Reissue 1993), that the director be a professional engineer with at least 5 years' experience in a position of responsibility in irrigation work, *Bamford, supra*; *In re Application U-2, supra*.

The question, therefore, is whether the challenged statute provides the director with adequate, sufficient, and definite standards within which to exercise his or her discretion. Section 46-613.01 provides four factors that the director must consider in determining whether to grant a permit to withdraw ground water and transport it to another state. The first of these is whether the proposed use is a beneficial use of ground water. Ponderosa Ridge concedes in its brief that this factor is not vague and thus provides adequate, sufficient, and definite standards within which the director must exercise his or her

discretion. Indeed, the term "beneficial use" is found throughout the statutes pertaining to water use and is a term used in the Nebraska Constitution. Neb. Const. art. XV, § 6; Neb. Rev. Stat. §§ 46-233.01(2)(d), 46-242(1), 46-246, 46-252(1), 46-288(2), and 46-642 (Reissue 1993).

The second factor is the availability to an applicant of alternative sources of surface or ground water. Ponderosa Ridge complains that as this factor is not defined, its impact cannot be determined. That is to say, according to Ponderosa Ridge, the statute does not specify whether there must be no water at all available for appropriation from another source, or whether cost to the applicant for alternative sources is a consideration. Ponderosa Ridge's complaint seems to be that this factor is subject to interpretation by the director; that is, the impact of this factor will vary from case to case, depending on the facts of each case. But just as the fact that a term is subject to interpretation by an administrative agency does not render the term unconstitutionally vague, see, *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 113 S. Ct. 2151, 124 L. Ed. 2d 368 (1993); *Vulcraft v. Karnes*, 229 Neb. 676, 428 N.W.2d 505 (1988); *Hadden v. Aitken*, 156 Neb. 215, 55 N.W.2d 620 (1952), *overruled on other grounds, Stauffer v. Weedlun*, 188 Neb. 105, 195 N.W.2d 218 (1972), neither does such a circumstance in and of itself mean that there has been an unlawful delegation of legislative power. The test, as noted previously, is whether the director has been provided with an adequate, sufficient, and definite standard with which to exercise his or her discretion. By being told that the availability of water is a factor to be considered, such has been accomplished. The Legislature cannot be expected to foresee every possible circumstance under which it might be said that water is or is not available. The questioned language certainly puts an applicant, any objector, and the director on notice that the availability of water to an applicant is to be considered.

The third factor is whether the proposed withdrawal would have a negative effect on surface or ground water supplies needed to meet reasonable future demands in the area of the proposed withdrawal. Given the language of § 46-613.01 that the "Legislature recognizes and declares that the maintenance

of an adequate source of ground water within this state is essential to the social stability of the state and the health, safety, and welfare of its citizens," this factor is also sufficiently definite to put everyone, including the director, on notice of what is to be considered.

The fourth and last factor allows the director to consider any other factor consistent with the purposes of the statute which the director deems relevant to protect the interests of the state and its citizens. In this regard, the director noted in his order that although some of the parties raised issues with which he had not dealt, in view of his other findings, resolution of those issues was not required. He then specifically declined to apply this statutory factor. Thus, as Ponderosa Ridge has not been, and is not about to be, adversely affected by that factor, it has no standing to challenge it. See discussion concerning standing in part IV above.

For the foregoing reasons, it cannot be said in this case that § 46-613.01 delegates legislative power to the director, in violation of Neb. Const. art. II, § 1, or art. III, § 1.

(b) Due Process Vagueness

When a legislative enactment is challenged on vagueness grounds, the issue is whether the two requirements of procedural due process are met: (1) adequate notice to citizens and (2) adequate standards to prevent arbitrary enforcement. In other words, due process requires that an enactment supply (1) a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) explicit standards for those who apply it. *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; *Kwik Shop v. City of Lincoln*, 243 Neb. 178, 498 N.W.2d 102 (1993). As discussed in the immediately preceding subsection of this opinion, the challenged factors applied by the director provide the applicant, objectors, and the director with sufficient notice and standards. Therefore, the challenged statute is not unconstitutionally vague, in violation of U.S. Const. amend. XIV.

(c) Discrimination Against Interstate Commerce

In *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982), the U.S. Supreme Court held that water was an article of commerce, implicating the Commerce Clause of the U.S. Constitution. See U.S. Const. art. I, § 8, cl. 3. However, the fact that water is an article of commerce and that Congress has not exercised federal legislation in the area "does not foreclose state regulation of its water resources, of the uses of water within the State, or indeed, of interstate commerce in water." 458 U.S. at 954. In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970), the U.S. Supreme Court provided the general rule for determining the validity of state statutes affecting interstate commerce:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Richard S. Harnsberger et al., Interstate Transfers of Water: State Options After *Sporhase*, 70 Neb. L. Rev. 754, 769 (1991), states:

> To pass constitutional muster under the *Bruce Church* test, a statute that burdens interstate commerce must serve a legitimate local interest and operate even-handedly on both interstate and intrastate commerce. If it does, the Court then weighs the beneficial local effects to be produced against the burden imposed on interstate commerce. State legislation will be upheld only when it incidentally burdens or discriminates against interstate commerce; state legislation that imposes burdens on commerce that are clearly excessive in relation to local benefits is invalid. Where burdens are not clearly exces-

sive in relation to the local benefits, the constitutionality of a statute then depends on the character of the local interest and whether it could be promoted equally well by means having a lesser impact on interstate activities.

In *Sporhase, supra*, the U.S. Supreme Court held that a portion of the predecessor statute to the current § 46-613.01 was an unconstitutional burden on interstate commerce. The predecessor to the challenged statute provided:

> Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska.

§ 46-613.01 (Reissue 1978).

(i) Facial Validity

The U.S. Supreme Court stated that a facial examination of the first three conditions set forth in the predecessor statute did not impermissibly burden interstate commerce.

> The State's interest in conservation and preservation of ground water is advanced by the first three conditions in § 46-613.01 for the withdrawal of water for an interstate transfer. . . . Although Commerce Clause concerns are implicated by the fact that § 46-613.01 applies to interstate transfers but not to intrastate transfers, there are legitimate reasons for the special treatment accorded requests to transport ground water across state lines. Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State. An

exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation. At least in the area in which appellants' Nebraska tract is located, the first three standards of § 46-613.01 may well be no more strict in application than the limitations upon intrastate transfers imposed by the Upper Republican Natural Resources District.

Moreover, in the absence of a contrary view expressed by Congress, we are reluctant to condemn as unreasonable, measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage. Our reluctance stems from the "confluence of [several] realities." *Hicklin v. Orbeck*, 437 U. S. 518, 534[, 98 S. Ct. 2482, 57 L. Ed. 2d 397] (1978). First, a State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens—and not simply the health of its economy—is at the core of its police power. For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other. See *H. P. Hood & Sons v. Du Mond*, 336 U. S. 525, 533[, 69 S. Ct. 657, 93 L. Ed. 865] (1949). Second, the legal expectation that under certain circumstances each State may restrict water within its borders has been fostered over the years not only by our equitable apportionment decrees, see, *e. g.*, *Wyoming v. Colorado*, 353 U. S. 953[, 77 S. Ct. 865, 1 L. Ed. 2d 906] (1957), but also by the negotiation and enforcement of interstate compacts. Our law therefore has recognized the relevance of state boundaries in the allocation of scarce water resources. Third, although appellee's claim to public ownership of Nebraska ground water cannot justify a total denial of federal regulatory power, it may support a limited preference for its own citizens in the utilization of the resource. See *Hicklin v. Orbeck, supra*, at 533-534. In this regard, it is relevant that appellee's claim is logically more substantial than claims to public ownership of other natural resources. See *supra*, at 950-951. Finally,

> given appellee's conservation efforts, the continuing availability of ground water in Nebraska is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage.

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 955-57, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982). However, the Court did find that the reciprocity provision of the predecessor statute violated the Commerce Clause and was thus unconstitutional. As Colorado forbad interstate transfers of ground water, the reciprocity provision operated as a barrier to commerce between Nebraska and Colorado. Nebraska thus bore the initial burden of demonstrating a close fit between the reciprocity requirement and the asserted local purpose of conservation and preservation. The Court concluded that this burden was not met because there was no evidence that the restriction was narrowly tailored to the conservation and preservation rationale. On remand, we ruled that the reciprocity provision was severable from the statute and that the remainder constituted a viable statute. *State ex rel. Douglas v. Sporhase*, 213 Neb. 484, 329 N.W.2d 855 (1983).

Two other cases involving similar issues, *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983) (*El Paso I*), and *City of El Paso v. Reynolds*, 597 F. Supp. 694 (D.N.M. 1984) (*El Paso II*), are of note. In *El Paso I*, the city, located in the State of Texas, sought to transfer ground water from New Mexico to Texas. New Mexico denied the city's applications on the ground that the New Mexico Constitution precluded utilization of New Mexico ground water outside the borders of the state. A New Mexico statute also expressly prohibited the transport of ground water from New Mexico for use in another state.

The city then sought a federal court declaration that New Mexico's ground water embargo was unconstitutional and sought an injunction against its enforcement. The federal district court held that the ground water embargo violated the Commerce Clause of the U.S. Constitution and enjoined the defendants from enforcing it. The court reasoned that as New Mexico's embargo barred the export of ground water

absolutely, it was an explicit barrier to interstate commerce and subject to the strictest scrutiny; i.e., the defendants were required to "demonstrate that the embargo serve[d] a legitimate local purpose, that it [was] narrowly tailored to that purpose and that there [were] no adequate nondiscriminatory alternatives." *El Paso I*, 563 F. Supp. at 388. The defendants asserted that the purpose of the overall system of ground water regulation was to conserve and preserve the state's internal water supply; however, the court concluded that while the state's scheme of water regulation demonstrated a genuine effort to promote optimum utilization of its diminishing water resources and might justify a limited, nondiscriminatory burden on interstate commerce, it could not support a total ban on interstate transportation of ground water.

The New Mexico Legislature then repealed the challenged statute, enacted provisions dealing with the out-of-state use of water, and otherwise amended New Mexico's water code. *El Paso II*. Following these enactments, the defendants appealed the court's decision in *El Paso I* to the U.S. Court of Appeals for the Tenth Circuit, urging that the case had become moot. The Tenth Circuit vacated the district court's judgment and remanded the matter for consideration in light of the intervening change in New Mexico law.

In *El Paso II*, the city challenged the constitutionality of the intervening legislation. The new export statute required New Mexico's state engineer to find that an applicant's withdrawal and transportation of water for use outside the state would not impair existing water rights, would not be contrary to the conservation of water within the state, and was not otherwise detrimental to the public welfare of the citizens of New Mexico in order to approve an application. The city claimed that allowing exports only when they were not contrary to the conservation of water within the state and not otherwise detrimental to the public welfare of the citizens of New Mexico unconstitutionally discriminated against interstate commerce. The federal district court ruled otherwise, noting that on its face, the statute appeared to apply the conservation and public welfare criteria evenhandedly, as the new export statute mirrored the requirements of the statute governing applications

for new in-state appropriations of ground water from declared basins. In addition, the court wrote:

> Although the court in *Sporhase* did not delineate the extent to which a state may prefer its own citizens in the utilization of water, it provided some guidelines. A state may not limit water exports merely to protect local economic interests. . . . This is true even though the health of the state's economy has a direct bearing on the public welfare of its citizens. . . . Other than excluding economic interests, however, the Court did not limit the public welfare interests a state may protect by regulating interstate commerce in ground water.
>
> On its face, [the new export statute] does not direct the State Engineer to deny applications for exports that would be detrimental only to the economic interests of New Mexico's citizens. "Public welfare" is a broad term including health and safety, recreational, aesthetic, environmental and economic interests. Admittedly, except to the extent that it refers to bare human survival, every aspect of the public welfare has economic overtones. This does not mean that New Mexico may constitutionally exercise a limited preference for its citizens only when their survival is at stake. The Supreme Court in *Sporhase* did not equate "public welfare" with "human survival." However, when the State exercises a preference for its citizens under the rubric of protecting their public welfare and economic interests are implicated, the resulting burden on interstate commerce must be weighed against the putative, non-economic local benefits. . . . If the public welfare criterion is used to effectuate simple economic protectionism, a per se rule of invalidity will be applied. . . . If it is used to promote a legitimate purpose with only incidental burdens on interstate commerce, the Court must try to accommodate the competing local and national interests. . . . If equally effective, less burdensome alternatives are available, the State must use them. . . .
>
> . . . .

> . . . The term "public welfare" includes many interests, some of which the State may legitimately advance by regulating water exportation. The statutory use of the term is not forbidden since it can be narrowed by construction in this court, in the state administrative proceedings and in the state courts.

El Paso II, 597 F. Supp. at 700-02. As for the conservation factor, the court stated that "[a] state may . . . 'conserve' water within its borders for the use of its citizens to the same limited extent that it may prefer its citizens in the utilization of the resource." *Id.* at 702.

The city also objected to six additional factors that the state engineer was required to consider when acting upon any application to export ground water. The first four factors required the state engineer to determine whether there were water shortages within the state which could be alleviated by the intrastate transportation of the water sought for export. The *El Paso II* court found that there was a legitimate reason for this requirement in that a determination of whether a shortage of water existed in the state was necessary if the state engineer was to constitutionally exercise a preference for the citizens of New Mexico in accordance with *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982). The remaining two factors required an evaluation of the export applicant's water supply, of the demand placed on that supply, and of the alternative sources of supply available to the applicant in the state of import. The court found that there was also a legitimate reason for this requirement in that a state may favor its own citizens in the utilization of scarce water resources unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits, and the local benefits cannot be weighed against the burdens on commerce without knowledge of the export applicant's need for the water relative to that of prospective in-state users. The *El Paso II* court did, however, find those portions of the new legislation that required the application of conservation and public welfare criteria to all interstate uses of ground water, but only to some intrastate uses, to be unconstitutional

as discriminating on their face against interstate commerce. In that regard, the court wrote:

> While the State may constitutionally regulate water usage to promote the conservation of water and the public welfare of its citizens, it may not require interstate commerce to shoulder the entire burden of furthering those interests. There is no legitimate reason to deny interstate transfers and domestic wells if detrimental to those interests yet permit intrastate transfers and domestic wells when they are detrimental to them.

El Paso II, 597 F. Supp. at 704.

In contrast, the transportation of Nebraska ground water from the underlying land for any use, interstate or intrastate, is severely curtailed. The transportation of ground water for intrastate use is prohibited except for specific statutory exceptions. See, Neb. Rev. Stat. §§ 46-638 through 46-650 and 46-675 through 46-690 (Reissue 1993); Neb. Rev. Stat. § 46-691 (Supp. 1995). See, also, *Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 190, 376 N.W.2d 539, 547 (1985) ("[b]y enacting the Municipal and Rural Domestic Ground Water Transfers Permit Act as a part of Nebraska's policy, the Legislature altered certain aspects of common law governing use of ground water. Permittees under the act are exonerated from the common-law prohibition against transfer and transportation of ground water"); *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 706-07, 305 N.W.2d 614, 617 (1981) ("[s]ince the Nebraska common law of ground water permitted use of the water only on the overlying land, legislative action was necessary to allow for transfers off the overlying land, even for as pressing a need as supplying urban water users. . . . [T]he Legislature has the power to determine public policy with regard to ground water and . . . it may be transferred from the overlying land only with the consent of and to the extent prescribed by the public through its elected representatives"), *reversed on other grounds* 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982). If a proposed intrastate use comes within the purview of the Municipal and Rural Domestic Ground Water Transfers Permit Act, §§ 46-638 through 46-650, or the Industrial Ground Water Regulatory

Act, §§ 46-675 through 46-690, the prospective user of the ground water is required to apply for a permit to do so, similar to the requirements imposed on interstate transportation of ground water. If a proposed intrastate use comes within the purview of the ground water transfer law, § 46-691, the applicable natural resources district is required to conduct an investigation of the withdrawal and transfer of ground water if an affected party objects to the transfer, and may prohibit the transfer if it does not comply with the district's rules and regulations or is required to request a hearing before the Department of Water Resources if the proposed transfer does not meet certain statutory requirements.

The Municipal and Rural Domestic Ground Water Transfers Permit Act regulates the transfer of ground water for the supply of water to inhabitants of cities, villages, or rural areas for domestic or municipal purposes. In order to transfer ground water for such a purpose, a public water supplier is required to make an application to the director of the Department of Water Resources for a permit. § 46-639. Upon receiving an application, the director is required to cause a notice of such application to be published, and the notice must state that any interested person may object to and request a hearing on the application. § 46-640. The director must grant the application if he or she finds that the withdrawal and transportation of ground water requested by an applicant are reasonable, are not contrary to the conservation and beneficial use of ground water, and are not otherwise detrimental to the public welfare. § 46-642.

The Industrial Ground Water Regulatory Act governs the use of water for industrial purposes. Any person wanting to transfer ground water from aquifers located within the State of Nebraska for industrial purposes is required to apply for a permit to do so. §§ 46-677 and 46-678. After the director accepts the application for such a permit, he or she is required to set a time and place for a public hearing on the application. § 46-680. The director shall grant the permit only if he or she finds that the applicant's withdrawal and any transfer of ground water are in the public interest. In determining

whether the withdrawal and transfer are in the public interest, the director is required to consider:

(a) Possible adverse effects on existing surface or ground water users;

(b) The effect of the withdrawal and any transfer of ground water on surface or ground water supplies needed to meet reasonably anticipated domestic and agricultural demands in the area of the proposed ground water withdrawal;

(c) The availability of alternative sources of surface or ground water reasonably accessible to the applicant in or near the region of the proposed withdrawal or use;

(d) The economic benefit of the applicant's proposed use;

(e) The social and economic benefits of existing uses of surface or ground water in the area of the applicant's proposed use and any transfer;

(f) Any waivers of liability from existing users filed with the director; and

(g) Other factors reasonably affecting the equity of granting the permit.

§ 46-683.

The ground water transfer law provides, in part:

> Any person who withdraws ground water for agricultural purposes, or for any purpose pursuant to a ground water remediation plan as required under the Environmental Protection Act . . . from aquifers located within the State of Nebraska may transfer the use of the ground water off the overlying land if the ground water is put to a reasonable and beneficial use within the State of Nebraska and is used for an agricultural purpose, or for any purpose pursuant to a ground water remediation plan as required under the Environmental Protection Act, including the providing of water for domestic purposes, after transfer, and if such withdrawal, transfer, and use (a) will not significantly adversely affect any other water user, (b) is consistent with all applicable statutes and rules and regulations, and (c) is in the public interest.

§ 46-691(1). Any affected party may file an objection to the transfer with the office of the natural resources district containing the land from which the ground water is withdrawn. § 46-691(2). Either upon the filing of an objection or on its own initiative, the natural resources district is required to conduct a preliminary investigation to determine if the withdrawal, transfer, and use of ground water are consistent with the requirements of § 46-691(1). If the natural resources district has reason to believe that the withdrawal, transfer, or use may not comply with the rules or regulations of the district, it may prohibit such withdrawal, transfer, or use. If the natural resources district has reason to believe that the withdrawal, transfer, and use are consistent with the rules and regulations of the district, but may not comply with the requirements of § 46-691(1), the district is required to request a hearing before the department. § 46-691(2).

Although the factors that the director is to consider in determining whether to grant a permit for an interstate transfer of ground water are not identical to those considered for other intrastate transfers of ground water, the differences do not require interstate commerce to suffer any greater burden than that placed on intrastate commerce. As noted earlier, the first of the factors the director must consider in determining whether to grant a permit for an interstate transfer of water, whether the proposed use is a beneficial one, runs throughout the code governing the regulation of water. Indeed, the common law in Nebraska forbids the owner of land from extracting ground water under his or her land in excess of a beneficial use. *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981), *reversed on other grounds* 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982).

The second factor, the availability of alternative sources of ground water, fosters the purpose of conserving and preserving ground water in the state, an "unquestionably legitimate and highly important" purpose. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 954, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982).

The third factor, the negative effects of the proposed withdrawal, fosters the purpose of conserving and preserving ground water.

Since, as determined in part IV(1)(a) above, the fourth factor, allowing the director to consider other unnamed relevant matters, was not applied in this case, Ponderosa Ridge has no standing to challenge its constitutionality.

Thus, although § 46-613.01 operates only on interstate uses and imposes a burden on interstate commerce, when compared with the regulation of intrastate uses of ground water, the overall regulation relevant to this litigation is evenhanded. "Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State. An exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation." *Sporhase*, 458 U.S. at 956.

Consequently, the statute does not facially violate the Commerce Clause found in U.S. Const. art. I, § 8, cl. 3.

(ii) Validity as Applied

But that does not end our Commerce Clause inquiry, for Ponderosa Ridge also asserts that the statute is unconstitutional in that regard as applied. It first argues that the director erred by requiring it to quantitatively determine the negative effects of the proposed withdrawal and requiring it to demonstrate why water from Wyoming sources was not its first choice. However, as discussed in part (2) below, Ponderosa Ridge bears the burden of presenting evidence on these factors in order that the director can make a determination on whether to grant the application. Such a requirement does not place an impermissible burden on Ponderosa Ridge.

Ponderosa Ridge next argues that the director discriminated against interstate commerce in his order by stating: "Finally, denying [the application] will not result in the well being shut down. Instead it will be pumped with the water used to irrigate cropland in Nebraska . . . ." The argument is that in the director's order, the purposes of conservation and preservation are not being considered if the ground water from the well is

to be used in Nebraska, but are considered if the ground water is to be used in Wyoming.

However, this aspect of the order more fully reads:

> 4. Negative Effects
>
> . . . .
>
> Finally, denying [the application] will not result in the well being shut down. Instead it will be pumped with the water used to irrigate cropland in Nebraska . . . . Thus, in pumping from the aquifer the well would still serve as a safeguard against the possible spread of pollution in the manner described by Lerwick . . . and Listone [sic] . . . .

The testimony of James R. Lerwick, vice president of the board of directors of Ponderosa Ridge and president of the company that manages the daily operation of Ponderosa Ridge's production facility referred to in the director's order, was as follows:

> Q Is there a particular reason that the well is located downgradient from the nursery facilities?
>
> A Well, of course, the most obvious is that we'll learn the water flows this way from west to east downgradient and that as we've worked with Wyoming DEQ, we've worked under an assumption that the cone of depression is the best monitoring of our lagoons and the deeper we can develop the cone of depression, the more likely we will be to observe if there is any leakage of nitrates or any other contaminants to the water table and not only detect it, but be able to control it, and so —
>
> Q And how do you control it?
>
> A The way that we control it, of course, is to create that cone of depression that lets the water flow until it reaches the cone and then down into our pumping, pump station, and back into our system, and that would allow us at some point in time, if it ever came to that, to empty the lagoons, which would stop the nitrate, continue the pumping for irrigation or whatever purposes until the nitrate leaching ceased.

The testimony of Christopher D. Lidstone, a geologist and hydrologist called by Ponderosa Ridge, to which the director referred, was as follows:

> Q Would you describe for me how you were involved in the water quality permitting for Ponderosa in Wyoming?
>
> A In the State of Wyoming, DEQ Water Quality Division has a series of rules. The Chapter 3 regulations supplied [sic] to wastewater lagoons, as part of the requirement for a permit to construct, one must evaluate the aquifer conditions in the area and develop as appropriate potential monitoring locations and to look at, from the standpoint of potential for contamination of the ground water, and that's Water Quality's primary role.
>
> . . . .
>
> With respect to the pig farms that . . . Lerwick has spoken about, they were fairly new in 1990. That was really the first of all the commercial pig farms that had been applied to — and . . . Lerwick's operation had a water-handling scheme that required land application as part of it, and also required the flushing and water use aspects of things. At that stage of the game, we proposed to Water Quality Division that we actually use our production wells for monitoring, and Water Quality Division required us to establish that the pumping well itself would serve as a monitoring point and that's where we first began the modeling efforts that we've done on behalf of the various pork operations over the past.

Thus, the director was not discriminating against interstate commerce by the questioned statement in his order, but, rather, was noting that denying the permit will not cause a negative effect because the well could still be used as a monitoring point to check for contamination from leakage of Ponderosa Ridge's wastewater lagoons. In addition, the director did not state that the quantity of water sought to be transferred could still be used to irrigate cropland in Nebraska. Therefore, the inference Ponderosa Ridge wishes to draw, that the purposes of preservation and conservation were ignored because the water sought to be withdrawn for Ponderosa

Ridge's project could be used to irrigate cropland in Nebraska, is not warranted. The North Platte Natural Resources District was required by the Nebraska Legislature to file a ground water management plan, which must address issues of ground water conservation and management, including when to impose quantity controls. § 46-673.01. The director's order therefore has no bearing on the quantity of water that can be withdrawn from the well to irrigate cropland in Nebraska.

(d) Resolution

As on the issues in this case § 46-613.01 does not unconstitutionally delegate legislative power to the director, is not vague, and does not violate the Commerce Clause, there is no merit to the first summarized assignment of error.

2. Evidence Claim

In considering whether the evidence supports the director's order such that the order is not arbitrary, capricious, and unreasonable, we recall that a decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion. *Central Platte NRD v. City of Fremont, ante* p. 252, 549 N.W.2d 112 (1996). A capricious decision is one guided by fancy rather than by judgment or settled purpose; such a decision is apt to change suddenly; it is freakish, whimsical, humorsome. *Id.* The term "unreasonable" can be applied to an administrative decision only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Id.*

As detailed in part (1) above, in its order, the director considered three of the four factors listed in § 46-613.01.

(a) Beneficial Use

First, the director found that Ponderosa Ridge's proposed use is a beneficial one. Since no appellee with standing to do so has filed a separate cross-appeal with respect to this finding, we do not concern ourselves with whether the use is in fact beneficial; rather, for the purpose of this analysis, we treat it as being such.

(b) Availability of Water

As for the second, or water availability, factor, the director found that

> it appears a supply developed from sources in Wyoming would be sufficient to meet the needs of Ponderosa Ridge. While costs may be a factor in rejecting that alternative . . . Lerwick's remarks . . . and Malm's testimony . . . suggest Ponderosa Ridge has not thoroughly explored all the possibilities. . . . Ponderosa Ridge has sufficient financial resources for that purpose . . . .

The record reveals that a supply of water is necessary for Ponderosa Ridge's planned operations and that there is no body of surface water in the vicinity of its premises. However, the record also establishes that a number of sources of ground water exist other than the source proposed in the subject application. Ponderosa Ridge has purchased the superior right to use the first 300 gallons per minute of continuous waterflow from the "Malm 3-1" well. In addition, it has purchased, if Malm Ranch Company finds using the effluent water is no longer economical, the right to use the Malm 3-1 well at 950 gallons per minute or 180 acre-feet from the Malm 33-1 well. In addition, Lerwick testified that Ponderosa Ridge could negotiate to use water from the "Anderson No. 2" well to flush and water the latter's facilities. Moreover, Ponderosa Ridge has not applied with the Wyoming state engineer to drill or change the use of any well to flush and water the facilities.

Nonetheless, Ponderosa Ridge argues that

> [t]he requirement of the Wyoming Department of Environmental Quality for a "capture well" makes it not only necessary, but much more efficient, to have the well downgradient from the lagoons. Use of the Malm 3-1 well, a mile upgradient, or the Anderson No. 2 well, three-fourths of a mile upgradient, as proposed by the protesters['] expert, Vincent Dreeszen . . . would obviously require pumping a great deal more water to provide a cone of depression that would intercept contamination from the lagoons, than would the location chosen by Ponderosa Ridge . . . .

Brief for appellant at 31-32. However, Vincent Dreeszen, a ground water consultant, testified that either the Malm 3-1 well or the Anderson No. 2 well would provide a capture zone for the entire project.

The decision of the director concerning this second factor is supported by competent and relevant evidence.

(c) Negative Effect

In considering the third, or negative effect, factor, the director found that Lidstone's computations were known to be in error. The director went on to write:

> But, whether they overstate additional drawdown (inferred from his belief that the water table will continue to rise), or whether they understate it (due to unquantified corrections to account for boundary conditions), cannot be determined. Because of that uncertainty, negative effects withdrawals from [the subject well] might cause cannot be quantitatively determined. Consequently, expected impacts upon future demands are unclear also.

In stating in the order that because of the uncertainty of Lidstone's computations, the negative effects of the withdrawal could not be quantitatively determined, the director seems to have placed a burden of production and proof on Ponderosa Ridge with regard to the negative effects of the withdrawal. Although the director did not make any finding as to what the negative effects of the withdrawal would be, he apparently found against Ponderosa Ridge on this factor because he could not make a determination as to the precise nature of the negative effects of the proposed withdrawal.

The question is whether an applicant bears the burden of production and proof on a factor that the director must consider; i.e., Must an applicant prove that the negative effects of a proposed withdrawal are minimal or are outweighed by the potential benefits of the proposed use?

The appellees cite to *In re Application U-2*, 226 Neb. 594, 413 N.W.2d 290 (1987), for the proposition that the burden is on an applicant to convince the director to approve the application. In that case, a department regulation provided that in addition to notice to be published, each application was to be

accompanied by sufficient hydrologic information. In dicta, we observed:

> The objectors knew from reading the regulation above that they could defeat the application by showing that the applicant did not supply sufficient information to permit the director to approve the application. Objectors presented their position by skilled, close cross-examination of applicant's experts and by presenting an expert witness of their own.

Id. at 609-10, 413 N.W.2d at 301. However, a similar department regulation is not found in the record of this case, and for that reason, *In re Application U-2* is not applicable to these facts.

Nonetheless, someone must present evidence relating to the factors that the director must consider in order to determine whether to grant an application. Generally, it is the party asserting the affirmative of an issue that has the burden of proving that issue. *Alliance RR. Comm. Credit Union v. County of Box Butte*, 243 Neb. 840, 503 N.W.2d 191 (1993). We conclude that an applicant bears the burden of providing the director enough evidence on which to base a decision.

Lidstone testified that there would be minimal negative impacts. However, Dreeszen testified that there could be significant negative consequences and criticized Lidstone's findings. The director was free to believe one expert and disbelieve the other. See *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996). In this case, not only did the director not believe Lidstone, he found that Lidstone's computations were in error. He therefore could properly find that Ponderosa Ridge had failed in its burden of proof in that regard.

(d) Resolution

As the director could properly find that although the proposed use was beneficial, alternative sources of water were available, and that the negative effects of the proposed withdrawal could not be determined from the evidence presented, the director's denial of Ponderosa Ridge's application cannot be said to be arbitrary, capricious, or unreasonable.

Accordingly, there is no merit to the second summarized assignment of error.

V. JUDGMENT

Inasmuch as the record sustains neither summarized assignment of error, the order of the director is, as first noted in part I, affirmed.

AFFIRMED.

FAHRNBRUCH, J., not participating.

IN RE INTEREST OF AMBER G., JESSICA G., ADAM G., AND BRITTANY G., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. TERRY G., APPELLANT, AND DOLLY C., APPELLEE.

554 N.W.2d 142

Filed October 18, 1996. No. S-95-1266.

1. **Juvenile Courts: Final Orders: Appeal and Error.** On appeal of a final order of a juvenile court, an appellate court tries factual questions de novo on the record. Although an appellate court's review is independent of the findings of the trial court, when there is conflict, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of facts rather than another.
2. **Judgments: Appeal and Error.** An appellate court reaches conclusions of law independent of those of the trial court.
3. **Child Custody: Appeal and Error.** Absent an abuse of discretion, a trial court's decision bearing on custody of a minor child will not be disturbed on appeal.
4. **Divorce: Child Custody.** The placement of a child in the custody of one parent as opposed to the other in a divorce action does not extinguish the noncustodial parent's right to custody, nor does it constitute an adverse determination of the fitness of the noncustodial parent in that or other proceedings.
5. **Parental Rights.** The rights of the parent and the child are protected by the separate adjudication and dispositional phases of the dependency proceeding. A petition brought under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) is brought on behalf of the child, not to punish the parents.

6. **Parental Rights: Child Custody.** The purpose of the adjudication phase of the dependency proceeding is to protect the interests of the child; the purpose of the dispositional phase is to determine placement and the rights of the parties in the action.
7. **Juvenile Courts: Jurisdiction: Proof.** It is not improper for the court to sustain jurisdiction at the adjudication phase if the State makes a proper prima facie showing of lack of proper parental care in the child's present living situation.
8. **Juvenile Courts: Child Custody.** Juvenile courts are accorded broad discretion in their determination of the placement of children adjudicated abused or neglected.
9. **Child Custody: Parental Rights.** In a child custody controversy between a biological or adoptive parent and one who is neither a biological nor an adoptive parent of the child involved in the controversy, a fit biological or adoptive parent has a superior right to the custody of the child.
10. **Child Custody: Parental Rights: Proof.** A court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right; neither can a court deprive a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child.
11. **Child Custody: Parental Rights.** While it is true that a parent has a natural right to the custody of his child, the court is not bound as a matter of law to restore a child to a parent under any and all circumstances.
12. ____: ____. The parent's natural right to the custody of his or her child is limited by the State's power to protect the health and safety of the children.
13. **Child Custody: Parental Rights: Proof.** The best interests of the children must always be considered in determining matters of child custody, and where the parent is shown to be unfit or to have forfeited his superior right to custody, the court may place the children in the custody of an unrelated third party.
14. ____: ____: ____. Where there are two parents with separate homes, the children can be removed from the home of the unfit parent at the adjudication hearing without prejudicing the other parent's right to gain custody of the child at the dispositional hearing upon a sufficient showing that he or she is capable of providing proper parental care.
15. **Parental Rights: Words and Phrases.** A termination of parental rights is a final and complete severance of the child from the parent and removes the entire bundle of parental rights.

Appeal from the County Court for Cedar County: PAUL R. ROBINSON, Judge. Affirmed.

Alice L. Rokahr for appellant.

Don Stenberg, Attorney General, Royce N. Harper, and Beth Tallon, Special Assistant Attorney General, for appellee State.

Jeffrey H. Greve, Cedar County Attorney, for appellee State.

Scott D. Freese, of Hutton, Freese & Einspahr, P.C., for appellee Dolly C.

William L. Binkard, guardian ad litem.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ., and QUIST, D.J.

WHITE, C.J.

Terry G. appeals the order of the county court for Cedar County, Nebraska, approving the case plan of the Department of Social Services (DSS) recommending permanent guardianship of his four minor children. In its October 26, 1995, journal entry, the county court found that all reasonable efforts had been made to return the juveniles to a parental home, that custody should remain with DSS, and that the DSS case plan should be approved. We affirm.

Terry G. (father) and his ex-wife, Dolly C. (mother), have four minor children—Amber G., Jessica G., Adam G., and Brittany G. The mother was given sole custody of the children following the mother and father's divorce in 1991, and the father was given visitation rights. The father subsequently moved to Missouri.

On January 18, 1992, the two oldest children, Amber and Jessica, were removed from the mother's home pursuant to the emergency placement provisions of Neb. Rev. Stat. § 43-250 (Reissue 1993) after law enforcement officials received reports of sexual abuse and neglect. The juveniles were placed in the temporary custody of DSS pending adjudication. On February 25, with the mother, the guardian ad litem, the county attorney, and the juveniles present, the county court adjudicated the juveniles to be children delinquent within the provisions of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993). At this hearing, the court continued temporary custody of the juveniles with DSS and ordered that DSS make all reasonable efforts to reunite the children with their mother. The father was not named as a parent in the petitions filed on behalf of Amber and Jessica.

DSS initiated a plan dated April 1992 for reunification with the mother and visitation with the father pursuant to its statutory authority under Neb. Rev. Stat. § 43-285 (Reissue 1993), and both parents agreed to the placement of the children in foster care. This first DSS report listed its goal as "[r]eunification . . . with a parent" and indicated a willingness to place the children with the father, provided the Missouri Interstate Compact home study was favorable.

During subsequent investigations into the mother's home, DSS determined that the two youngest children, Adam and Brittany, were also at risk. Petitions alleging abuse and neglect under § 43-247(3)(a) as to Adam and Brittany, and listing both the mother and father as parents, were filed on June 4, 1992, and a hearing was held on June 11, with the father present. Due to the incapacity of the mother, the adjudication hearings were continued until November 5, 1992, at which time the court found Adam and Brittany to be within the provisions of § 43-247(3)(a) and placed them in foster care with a directive to reunify them with a parent if possible. All parties, including the father, agreed to temporary custody of the children with DSS.

From April 1992 to June 1995, DSS made continued efforts to reunite the family. Visitations with both parents occurred on a regular basis, and the DSS reports recommended counseling and therapy for both the father and the mother. The DSS reports indicated "[p]ast abuse and chaotic or dysfunctional life styles by both parents," that "placement [with the father] has been questioned as marginal due to past history," and that while both parents' lifestyles "must change to provide safety and stability . . . [t]his is questionable due to the ongoing instability both have or have had."

During this period, the father made numerous requests for placement or relocation of the children closer to his Missouri home, but DSS denied these requests because the Missouri Interstate Compact home study indicated potential risk factors in placement with the father. The home study documented "[a] report of inappropriate punishment [that] has been substantiated in the past . . . [a] report of poor hygiene, bruises and

welts [and that the father] has had ongoing Protective Services cases opened in the past . . . ."

The father requested a hearing prior to the disposition at issue in this case for the purpose of determining (1) whether the court was obligated under Neb. Rev. Stat. § 43-284 (Reissue 1993) to find that out-of-home placement continues to be the least restrictive placement possible as to both parents and (2) whether the situation leading to the removal of the children from the mother existed as to both parents. The court refused to review the question of least restrictive placement because the father failed to appeal any orders of the court regarding placement within the statutory time limit. Additionally, the court found that it was required to consider the situation of the children at the time of removal and not the situation of both parents, and that it was therefore required to evaluate only the environment in which the children were residing at the time of the removal in order to adjudicate them within the provisions of § 43-247(3)(a).

On August 28, 1995, the court held a dispositional hearing regarding the approval of the DSS report dated June 1, 1995, and supported by DSS, the mother, and the guardian ad litem. The father opposed the case plan because it recommended permanent guardianship. DSS advocated permanent guardianship as in the best interests of the children because of continued significant concerns about placement with the father and because of the children's need for stability and permanency. During the hearing, Brenda Wiedmeier, the social worker in charge of the case, testified as to some of DSS' concerns about the father as a placement possibility:

> The children reported dad had said [during visitation that the foster parents] were thieves and liars. [The foster mother] is fat because she eats too much candy and called her fatso. . . . [It was the social worker's] fault for not spending more than five dollars [on gifts for the children during visitation]. That dad said he could knock [the social worker] clear across the street. That he wanted to push his fist down [the foster mother's] throat. Lot of swearing, such as, and pardon my language[,] ass hole, shit used frequently. Threaten to sue the [foster family],

> accusing them of taping conversations. That he was going to start trouble in Clearwater. I guess that's kind of self explanatory in how that would affect the children and the fear they have. The last visit I made with the children about the visit, they said they were scared of dad. Dad was mean. And I know that's hard to hear for dad, or I would think it would be. It creates turmoil in their lives. It creates fear.

Wiedmeier also testified that during visits with the father, the children were allowed to hit one another, the father stated that he hated Adam, the children wore feces-stained underpants and other unwashed clothing, the children's hair was washed only once, and the children took their own medication without adult supervision.

At the hearing, the report of clinical social worker Daniel S. Campbell was admitted into evidence. Campbell reported that during his June 4, 1993, interview with the father, the father explained his philosophy for managing his children on a daily basis as follows: "When kids ain't fightin' or runnin' away, I don't give a shit what they do." Campbell noted that while the father was well-intentioned, he

> seem[ed] nearly oblivious to the numerous other potential hazards to [his children's] well-being. . . . [H]is ability to live up to that expectation is extremely questionable, due to his inattentiveness which would mean, in all probability, that he would be unaware of a need for protection for his children until the damage had been done.

The father admitted at this hearing that he had made threats against the foster family and the social worker. The father also testified that he has dreams in which he can predict future events and stated as follows:

> I go to sleep at night. About five minutes, if I'm asleep I see things. And if — I don't want to see them, so I wake up. But they just keep coming back. Three nights in a row. And when they do, then I know it's going to happen. That's all I can say.

Julie Ohlund, a therapist who worked with the father, mother, and children, testified that in her opinion, guardianship would be in the best interests of the children due to the

stability and follow-through provided by the foster family. The guardian ad litem also stated on behalf of the children that "they are quite happy in their present situation" with the foster family.

In an order dated August 28, 1995, the court continued custody of the children with DSS and stated that it would review the case plan. On October 26, 1995, the court approved the case plan recommending permanent guardianship with the foster family. The court found that "all reasonable efforts have been made to prevent or eliminate the need for removal of the juveniles from their home and to make it possible for the juveniles to return to the parental home." The father appealed.

On appeal, the father assigns the following errors: (1) The juvenile court lacked jurisdiction for adjudication when there was no allegation that the factual basis justifying removal from the mother also justified refusal to place the children with the father; (2) the dispositional phase of juveniles adjudicated under § 43-247(3)(a) is unconstitutional in its application when the court determines only whether the juveniles should be returned to the parental home from which they were removed and disregards the constitutional rights of the noncustodial parent; (3) the county court erred in finding that reasonable efforts had been made to reunite the children with a parent because the court refused to consider placement with the noncustodial biological parent and failed to provide a factual basis for its findings; and (4) the court erred in approving the case plan permitting permanent guardianship because this case plan resulted in a de facto termination of the father's parental rights, and the juvenile court's exclusive jurisdiction in these matters deprives the father of any method through which to seek custody.

On appeal of a final order of a juvenile court, we try factual questions de novo on the record. Although our review is independent of the findings of the trial court, when there is conflict, we may give weight to the fact that the trial court observed the witnesses and accepted one version of facts rather than another. *In re Interest of L.W.*, 241 Neb. 84, 486 N.W.2d 486 (1992). This court reaches conclusions of law independent of those of the trial court. *State v. Yelli*, 247 Neb. 785, 530

N.W.2d 250 (1995). Absent an abuse of discretion, a trial court's decision bearing on custody of a minor child will not be disturbed on appeal. *Demerath v. Demerath*, 233 Neb. 222, 444 N.W.2d 325 (1989).

In the father's first assignment of error, he argues that the juvenile court could not properly take jurisdiction if there were no allegations that the father abused and neglected the children. The father seems to rely heavily on the theory that the juvenile court justified taking jurisdiction of the children because the father was not given custody during the 1991 divorce proceedings and was therefore unfit to have custody in this proceeding. This is clearly an erroneous interpretation of the jurisdiction of the juvenile court and the two-step process involved in juvenile proceedings.

It is important to note that if the juvenile court's jurisdiction over the children at the adjudication stage was based upon the earlier divorce decree giving sole custody to the mother, this would be in error. The placement of a child in the custody of one parent as opposed to the other in a divorce action does not extinguish the noncustodial parent's right to custody, nor does it constitute an adverse determination of the fitness of the noncustodial parent in that or other proceedings. *Matter of Mary L.*, 108 N.M. 702, 778 P.2d 449 (N.M. App. 1989).

In Nebraska, the rights of the parent and the child are protected by the separate adjudication and dispositional phases of the dependency proceeding. A petition brought under § 43-247(3)(a) is brought on behalf of the child, not to punish the parents. *In re Interest of Constance G.*, 247 Neb. 629, 529 N.W.2d 534 (1995). The purpose of the adjudication phase of the proceeding is to protect the interests of the child; the purpose of the dispositional phase is to determine placement and the rights of the parties in the action. *Matter of La Shonda B.*, 95 Cal. App. 3d 593, 157 Cal. Rptr. 280 (1979). It is not improper for the court to sustain jurisdiction at the adjudication phase if the State makes a proper prima facie showing of lack of proper parental care in the child's present living situation. See *In re Interest of Constance G., supra.*

In this case, the issue at the adjudication phase was whether the children lacked proper parental care in the custody of their

mother. The question of whether the father was fit or unfit to have custody did not arise and should not have arisen until the dispositional phase. The record clearly indicates that the mother admitted to the allegations of the petitions at each adjudication, and thus the juvenile court could properly take jurisdiction and did so without reference to the determination of custody in an unrelated divorce proceeding that occurred well before this case arose. To protect the minor children involved in this case from further abuse in the mother's home, the court took jurisdiction and removed the children from their mother's custody. See *In re Interest of Constance G., supra.* Because we find that the juvenile court properly took jurisdiction at the adjudication phase of this case, we find the father's assignment of error as to jurisdiction to be without merit.

The father's next assignment of error involves the constitutionality of the dispositional phase of proceedings involving juveniles adjudicated abused or neglected under § 43-247(3)(a). The father argues that § 43-284 is unconstitutional because it does not require a determination of whether placement with the noncustodial parent is proper when return to the home of the custodial parent is contrary to the welfare of the child. The father further argues that the statute violates his rights of due process in that it does not require the court to consider the homes of both parents in its placement decision.

Section 43-284 provides in pertinent part:

> When any juvenile is adjudged to be under subdivision (3) of section 43-247, the court *may* permit such juvenile to remain in his or her own home subject to supervision or *may* make an order committing the juvenile to the (1) care of some suitable institution, (2) care of some reputable citizen of good moral character, (3) care of some association willing to receive the juvenile . . . (4) care of a suitable family, or (5) care and custody of the Department of Social Services.

(Emphasis supplied.)

This statutory provision does, by its liberal use of the word "may," authorize the juvenile court to exercise broad discre-

tion in its disposition of children who have been found to be abused or neglected. This court as well has acknowledged the broad discretion accorded juvenile courts in their determination of the placement of children adjudicated abused or neglected. See, *In re Interest of K.L.C. and K.C.*, 227 Neb. 76, 416 N.W.2d 18 (1987); *In re Interest of V.T. and L.T.*, 220 Neb. 256, 369 N.W.2d 94 (1985).

However, this broad discretion is not without limitation. This court has long held that in a child custody controversy between a biological or adoptive parent and one who is neither a biological nor an adoptive parent of the child involved in the controversy, a fit biological or adoptive parent has a superior right to the custody of the child. *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992). A court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right; neither can a court deprive a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child. *State v. Worrell*, 198 Neb. 507, 253 N.W.2d 843 (1977); *Nielsen v. Nielsen*, 207 Neb. 141, 296 N.W.2d 483 (1980).

While it is true that a parent has a natural right to the custody of his child, the court is not bound as a matter of law to restore a child to a parent under any and all circumstances. *Nielsen v. Nielsen, supra*. Instead, the parent's natural right is limited by the State's power to protect the health and safety of the children. *Cornhusker Christian Ch. Home v. Dept. of Soc. Servs.*, 227 Neb. 94, 416 N.W.2d 551 (1987). The best interests of the children must always be considered in determining matters of child custody, and where the parent is shown to be unfit or to have forfeited his superior right to custody, the court may place the children in the custody of an unrelated third party. *Hensman v. Parsons*, 235 Neb. 872, 458 N.W.2d 199 (1990); *Nielsen v. Nielsen, supra*.

In the instant case, the court in its dispositional decision was required to consider the placement of the children with their biological father because Nebraska law creates a pre-

sumption in favor of custody with a biological parent as against an unrelated third party. It is clear from the record that the court and DSS did indeed make considerable efforts to reunite the children with a parent and to facilitate return of the children to a parental home.

The first two children were removed from their custodial parent's home on January 18, 1992. Although the father was not notified of the removal prior to the adjudication of these children by the court and their placement in the temporary custody of DSS, the father, when notified, agreed to their placement with the foster family. The father received notification concerning the removal and adjudication of the youngest two children and again agreed to their placement with the foster family. The father continued to agree to this placement until December 1993.

From April 1992 to June 1995, DSS' goal as indicated in its reports was to reunite the children with a parent. DSS also worked extensively with both the father and mother, arranging parenting classes, therapy, and visitation with the children. However, the father failed to attend all of the classes and scheduled therapy sessions, and DSS received the Missouri Interstate Compact home study which indicated significant concerns about placement of the children with their father.

By 1995, DSS had worked with the parents for almost 4 years and had seen little documented progress with regard to the concerns about placement with either parent due to concerns of unfitness. In June 1995, in an attempt to create some stability and security for the four children, and finding that placement with either parent would not be in the children's best interests, DSS recommended permanent guardianship for the children.

The father requested and received a hearing, and, as noted above, significant evidence was presented to indicate that the father was unfit to receive custody. When the children went to Missouri for visitation with their father, they came back with extensive bugbites, reported having not been washed or provided with clean clothes to wear, and expressed fear of their father due to his threats of violence against their foster family and the social worker involved in this case. The children

would also experience periods of "acting out," and demonstrated behavioral problems after visiting with their father.

In his meetings with the father, the clinical social worker expressed significant concerns about the father's fitness to have custody due to his claims that he can predict future events through his dreams and his lack of awareness as to the significant needs of his children. DSS reported that the father was simply unequipped to provide the special services and support required to assist his children with the aftereffects of their abuse and that he was not fit to have custody of the four minor children.

While it is true that the juvenile court has broad discretion to determine placement, that discretion is limited by the presumption in favor of the biological parent. Absent an affirmative finding of unfitness, the father is entitled to the custody of his children. Here, the court clearly considered placement of the children with either biological parent, found on the record before it that placement with either parent would not be in the best interests of the children, and determined that the father was unfit to have custody.

The father argues that because the court was not required to consider the homes of both parents in its placement decision under § 43-284, his constitutional rights of due process were violated. We disagree. Where there are two parents with separate homes, the children can be removed from the home of the unfit parent at the adjudication hearing without prejudicing the other parent's right to gain custody of the child at the dispositional hearing upon a sufficient showing that he or she is capable of providing proper parental care. *Matter of La Shonda B.*, 95 Cal. App. 3d 593, 157 Cal. Rptr. 280 (1979). Here, the evidence demonstrated that the father is not capable of providing proper parental care, as discussed above. Where the father received notice, an opportunity to be heard, and ample consideration at the hearings (all of which occurred in this case), the judge's decision not to place the children with their father did not violate his constitutional rights. *In re L.J.T.*, 608 A.2d 1213 (D.C. App. 1992).

The father also assigns as error the county court's finding that reasonable efforts had been made to reunite the children

with a parent and the court's failing to provide a factual basis for its findings. As noted above, clearly on the record the court and DSS did make reasonable efforts to reunite this family. From the time the children were removed from their home until the June 1, 1995, DSS report, DSS worked extensively with this family, arranging counseling, therapy, and visitation and offering other assistance. However, after 3½ years, the court found that the best interests of the children required that they have stability and permanency in the form of guardianship. We find, based on the discussion above, that the juvenile court did not abuse its discretion in so finding.

The father argues that the juvenile court failed to make factual findings on the record and that this is fatal to the court order. While the juvenile court is required to make specific findings of fact supporting the provisions contained in rehabilitation plans, our review is de novo on the record, and we find that the record is sufficient to support a finding of unfitness on the part of the father to have custody of his children and that the father's assignment of error in this regard is without merit. See *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992).

Finally, the father argues that the case plan permitting permanent guardianship is tantamount to a de facto termination of parental rights and that the juvenile court's exclusive jurisdiction in § 43-247(3)(a) cases deprives the noncustodial parent of any method through which to seek custody. We note first that permanent guardianship does not result in a de facto termination of parental rights. A termination of parental rights is a final and complete severance of the child from the parent and removes the entire bundle of parental rights. *In re P.F.*, 265 Ill. App. 3d 1092, 638 N.E.2d 716 (1994). "[L]egal custody is not parenthood or adoption. A person appointed guardian . . . is subject to removal at any time . . . ." *Stanley v. Illinois*, 405 U.S. 645, 648, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). In this case, where the father retains his visitation rights and there has been no authority given to consent to adoption, it is clear that all of the father's parental rights regarding his children have not been severed.

The juvenile court's exclusive jurisdiction in this matter does not deny the father the right to attempt to seek custody in the future. The father retains the right to petition the court for restoration of custody and full parental rights in the event of a change in the circumstances which at this time justify permanent guardianship and support a finding of the father's unfitness. See *In re P.F., supra*; *Custody of a Minor*, 21 Mass. App. 1, 483 N.E.2d 473 (1985).

We hold that the record supports a finding of unfitness as to the father; that the juvenile court had jurisdiction in this case; that the court, as required by statute and case law, did consider placement with the father and rejected such placement as not in the best interests of the children; and that permanent guardianship does not amount to a de facto termination of parental rights.

AFFIRMED.

FAHRNBRUCH, J., not participating.

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