Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub/
11/08/2026 10:58 AM CST

STATE OF NEBRASKA, APPELLEE, V. ARCHIE M. BISHOP, APPELLANT.

399 N.W.2d 271

Filed January 16, 1987. No. 86-436.

1. **Implied Consent: Miranda Rights: Blood, Breath, and Urine Tests.** There is no requirement in this jurisdiction that *Miranda* warnings be given prior to a request to submit to a chemical test of blood, breath, or urine.
2. **Implied Consent: Blood, Breath, and Urine Tests: Right to Counsel.** Under the implied consent law, a driver is not entitled to consult with an attorney, nor is a delay in the test required should a driver request to consult with an attorney.
3. **Implied Consent: Constitutional Law: Evidence: Self-Incrimination.** Evidence obtained in the implied consent context is not testimonial or communicative and does not fall within the privilege against self-incrimination.
4. **Arrests: Probable Cause.** Probable cause for a warrantless arrest exists when, at the time of the arrest, the officer had knowledge of the facts and circumstances based on reasonably trustworthy information which was sufficient to warrant a prudent man in believing the defendant had committed or was committing an offense.
5. **Arrests.** A suspect may not defeat a warrantless arrest which has been set in motion in a public place upon probable cause by the expedient of escaping to a private place.
6. **Constitutional Law: Criminal Law: Due Process: Jury Trials.** The U.S. Constitution, through the due process clause of the 14th amendment, requires the states to provide a trial by jury whenever the 6th amendment would so require if the case were in federal court.
7. **Constitutional Law: Jury Trials: Waiver.** A voluntary waiver of the constitutional right to a jury trial must be express and intelligent.
8. **Jury Trials: Waiver.** A demand is required to invoke the statutory right to a jury trial for a petty offense in county court. A failure to file a timely request in accordance with the rules of court constitutes a waiver of the statutory right to a jury trial.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Judgment on count I affirmed as modified. Judgment on count II affirmed. Judgment on count III reversed, and the cause remanded for a new trial.

Clyde F. Starrett, for appellant.

Robert M. Spire, Attorney General, and Janie C. Castaneda, for appellee.

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

BOSLAUGH, J.

The defendant was found guilty of driving while under the influence (count I), refusing a chemical test (count II), and resisting arrest (count III). On count I he was fined $250 and sentenced to 7 days in jail, and his operator's license was revoked for 6 months; on count II he was fined $200 and sentenced to 7 days in jail, the sentences to run concurrently; and on count III he was fined $250. He was found not guilty of leaving the scene of a property damage accident (count IV).

The district court affirmed the convictions and sentences. This appeal followed.

The incident which led to the convictions occurred on December 22, 1984. On that evening, at approximately 8:50, Officer Barbara McMullen was traveling south on U.S. Highway 83, near McCook, Nebraska, when she observed the defendant's vehicle turn north onto the highway. The officer then observed the vehicle swerve from the roadway onto the shoulder of the road several times, heard the sound of metal on metal, and saw the vehicle "come off of a highway steel reflector post" and continue down on the grass and snow. The officer turned her vehicle around, activated the red lights, and began to follow the defendant's vehicle. While she followed, the defendant's vehicle twice swerved into the oncoming traffic lane. The officer activated her police siren and observed the defendant drive in the oncoming lane for 250 feet and then turn into a farmyard.

The officer followed the defendant into the farmyard and approached the defendant as he stepped out of his vehicle. She asked to see his driver's license, and the defendant handed her a handful of papers, from which she located a Colorado license. As they talked, the officer noticed a strong odor of alcohol, that the defendant held onto the car, and that he had "extreme difficulty" standing without holding onto something. His face was very red, and his eyes were bloodshot. His speech was blurred and hard to understand. He was having difficulty understanding questions. The defendant was asked to submit to a preliminary test but refused to do so.

At that time a second officer, Sgt. Rick Stalder, arrived. After he was apprised of the situation, Sergeant Stalder

informed the defendant that he was under arrest and had to accompany the officers to the station. The defendant refused to leave his property, got into his vehicle, and attempted to shut the door. He then held on to the doorjamb with one hand and the steering wheel with the other. Officer McMullen testified she pulled his fingers from the steering wheel with "a great deal of effort," and Sergeant Stalder pulled him out of the car. Once out of the car, the defendant "went limp and let himself fall to the ground," and the officers were required to expend "a good deal of effort" to handcuff him. When the defendant refused to get up, he was pulled up by the officers and forcibly placed in the patrol car. The defendant's car keys remained in the ignition during the struggle. The officers' testimony as to the circumstances of the arrest was not disputed.

En route to the station, the defendant complained of an injury to his hand and asked to be taken to the hospital. Officer McMullen communicated this request to Sergeant Stalder, who advised her to proceed to the station. Once there, several people examined the defendant's hand while Officer McMullen read the informed consent form to the defendant and asked him to take a breath test. The defendant refused to sign the forms or take the test.

The defendant was then transported to the hospital, where he again refused to submit to a chemical test, and also refused treatment of his hand. He was taken back to the station and placed in jail. About 1 hour later he was taken back to the hospital and treated.

At trial the State presented the officers' testimony and rested. The defendant presented several witnesses who testified they had seen the defendant at various times on the day of his arrest and that he had appeared not to be intoxicated.

The defendant alleged 10 assignments of error but failed to brief 6 of them. Accordingly, our review will be limited to those discussed in his brief. See Neb. Ct. R. of Prac. 9D(1)d (rev. 1986). See, also, *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986).

The defendant first assigns as error the trial court's denial of his motion to suppress all evidence obtained after the defendant was stopped. It is the defendant's position that suppression was

required because the officers failed to give the defendant the *Miranda* warnings when he was arrested. This contention is without merit.

There is no requirement in this jurisdiction that *Miranda* warnings be given prior to a request to submit to a chemical test of blood, breath, or urine. *State v. Klingelhoefer*, 222 Neb. 219, 382 N.W.2d 366 (1986); *Fulmer v. Jensen*, 221 Neb. 582, 379 N.W.2d 736 (1986); *Wiseman v. Sullivan*, 190 Neb. 724, 211 N.W.2d 906 (1973). In addition, under the implied consent law, a driver is not entitled to consult with an attorney, nor is a delay in the test required should a driver request to consult with an attorney. *Fulmer, supra*. Evidence obtained in the implied consent context is not testimonial or communicative and does not fall within the privilege against self-incrimination. *Fulmer, supra*. See, also, *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

The defendant next contends the county court erred in finding that the officers properly entered the defendant's property without a warrant. The defendant argues that the officers should have obtained a warrant for his arrest before entering his property. This contention is not supported by the facts or the law.

Neb. Rev. Stat. § 29-404.02 (Reissue 1985) provides for warrantless arrest if an officer has reasonable cause to believe a person has committed

> (2) A misdemeanor, and the officer has reasonable cause to believe that such a person either (a) will not be apprehended unless immediately arrested; . . . (c) may destroy or conceal evidence of the commission of such misdemeanor; or (d) has committed the misdemeanor in the presence of the officer.

Probable cause for a warrantless arrest exists when, "at the time of the arrest, the officer had knowledge of the facts and circumstances based on reasonably trustworthy information which was sufficient to warrant a prudent man in believing the defendant had committed or was committing an offense." *State v. Evans, ante* p. 64, 67, 395 N.W.2d 563, 566-67 (1986) (citing *State v. Ware*, 219 Neb. 594, 365 N.W.2d 418 (1985)). See, also, *State v. Tipton*, 206 Neb. 731, 294 N.W.2d 869 (1980).

The officers clearly had probable cause to arrest the defendant. Officer McMullen saw the defendant drive erratically, observed him drive over a reflector post, and observed that the defendant appeared to be intoxicated. This was sufficient cause to support the officer's belief the defendant had committed a misdemeanor in her presence: driving while intoxicated. Further, the delay caused by obtaining a warrant could have resulted in the destruction of evidence: the metabolism of the alcohol in the defendant's body. See, *State v. Halligan*, 222 Neb. 866, 387 N.W.2d 698 (1986); *Schmerber v. California, supra*.

The warrantless arrest was not invalid because it occurred on the defendant's property. In *State v. Penas*, 200 Neb. 387, 263 N.W.2d 835 (1978), we held that a warrantless entry is valid if the police officer enters under exigent circumstances such as hot pursuit or the imminent destruction of evidence. This holding was grounded on *United States v. Santana*, 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976). In *Santana* the U.S. Supreme Court held that a suspect may not defeat a warrantless arrest which has been set in motion in a public place upon probable cause by the expedient of escaping to a private place. The arrest in *Santana* occurred in the vestibule of the accused's home.

The defendant contends that several recent Supreme Court cases cast doubt on the continued validity of our holding in *Penas*. The cases cited are not applicable here because they involved warrantless arrests in a home in the absence of exigent circumstances. The defendant in this case was arrested in his farmyard after the arresting officer had actively pursued him on the highway for several minutes, with red lights flashing and the siren activated. Further, evidence of the defendant's intoxication would have been lost had the officers waited to obtain an arrest warrant. These facts constituted exigent circumstances which justified the warrantless entry onto the defendant's property.

The defendant next assigns as error the county court's overruling of his motion for a jury trial. The defendant contends he should have been granted a jury trial on each charge.

The defendant was arraigned on January 17, 1985. He was

represented by counsel and informed by the court of his right to a jury trial. Pleas of not guilty were entered and a hearing on motions set for February 14, 1985. A motion for a jury trial was filed and bears a handwritten notation "hand delivered 2-6-85." It is signed by the defendant's attorney. The trial court denied the motion as untimely.

The rules of the county court of the 14th Judicial District of Nebraska (rev. 1984) were introduced into evidence and appear in the record. Rule 25 provides that all demands for a jury trial in misdemeanor cases must be made within 10 days following the entry of a plea of not guilty. The rule draws no distinction between jury trials provided for by statute and those constitutionally required.

The U.S. Constitution, through the due process clause of the 14th amendment, requires the states to provide a trial by jury whenever the 6th amendment would so require if the case were in federal court. *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986). A jury trial is not constitutionally required in every criminal case, but must be provided when the offense is "serious." *Id.* A serious offense is one which carries a maximum penalty in excess of 6 months' imprisonment. *Baldwin v. New York*, 399 U.S. 66, 90 S. Ct. 1886, 26 L. Ed. 2d 437 (1970).

The right to a jury trial is a personal right which may be waived by the defendant. *State v. Miles*, 202 Neb. 126, 274 N.W.2d 153 (1979); *State v. Godfrey*, 182 Neb. 451, 155 N.W.2d 438 (1968), *cert. denied* 392 U.S. 937, 88 S. Ct. 2309, 20 L. Ed. 2d 1396. See, also, Fed. R. Crim. P. 23(a). A voluntary waiver of this right must be express and intelligent. *State v. Miles, supra*. See, also, *Patton v. United States*, 281 U.S. 276, 50 S. Ct. 253, 74 L. Ed. 854 (1930). Waiver cannot be presumed from a silent record. *State v. Predmore*, 220 Neb. 336, 370 N.W.2d 99 (1985).

The right to a jury trial is also provided by statute. Neb. Rev. Stat. § 24-536 (Reissue 1985) provides that "[e]ither party to any case in county court, except criminal cases arising under city or village ordinances, traffic infractions, and other infractions . . . may demand a trial by jury." A demand is required to invoke the statutory right to a jury trial. *State v. Vernon*, 218 Neb. 539, 356 N.W.2d 887 (1984). A failure to file a

timely request in accordance with the rules of court constitutes a waiver of the statutory right to a jury trial. *Id.* A defendant charged with driving under the influence, pursuant to Neb. Rev. Stat. § 39-669.07 (Reissue 1984), has a right under § 24-536 to demand a jury trial. *State v. Karel*, 204 Neb. 573, 284 N.W.2d 12 (1979).

The defendant was charged with four separate counts. The charge of resisting arrest was filed pursuant to Neb. Rev. Stat. § 28-904 (Reissue 1985). That offense is classified as a Class I misdemeanor, and carries a maximum penalty of 1 year's imprisonment, or a $1,000 fine, or both. Neb. Rev. Stat. § 28-106 (Reissue 1985). It is a serious offense for which a jury trial is constitutionally required unless waived by the defendant. See, *Baldwin v. New York, supra; Patton v. United States, supra.*

There is no showing, on the record, that the defendant waived a jury trial on this matter. To the contrary, the defendant requested a jury trial and was denied it solely on the grounds the request was untimely. Since the record does not show that the defendant knowingly and intelligently waived his right to a jury trial on the charge of resisting arrest, the judgment on count III must be reversed and the cause remanded for a new trial.

The charges of driving while under the influence of drugs or alcohol pursuant to § 39-669.07 and refusing to take a chemical test pursuant to Neb. Rev. Stat. § 39-669.08 (Reissue 1984) are Class W misdemeanors and, for first offense, carry maximum and mandatory penalties of 7 days' imprisonment and fines of $200. § 28-106. They are petty offenses for which a jury trial is not constitutionally required. See *State v. Lynch, supra.* As to these charges, the defendant had only a statutory right to a jury trial, for which a proper demand was required. See, *State v. Karel, supra; State v. Vernon, supra.*

The defendant requested a jury trial February 6, 1985, more than 10 days after his plea of not guilty was entered on January 17, 1985. His request was untimely under the court rules and constituted a waiver of his statutory right to a jury trial on these charges. The county court therefore properly overruled his request for a jury trial on these charges.

The defendant also contends the evidence was insufficient to

support the finding of guilty. As the cause is being remanded on the charge of resisting arrest, we will not review the evidence concerning that count.

In determining the sufficiency of the evidence,

> "[T]his court [will not] resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it."

State v. Ellis, 223 Neb. 779, 783, 393 N.W.2d 719, 722 (1986) (citing *State v. Rolling,* 209 Neb. 243, 307 N.W.2d 123 (1981)). A guilty verdict will not be reversed by this court unless the evidence presented is so lacking in probative force that it is insufficient as a matter of law. *State v. Babajamia,* 223 Neb. 804, 394 N.W.2d 289 (1986).

There was substantial evidence to support the court's finding that the defendant operated a motor vehicle while intoxicated. Officer McMullen testified the defendant drove erratically, appeared intoxicated, and had a strong odor of alcohol about him. Sergeant Stalder testified the defendant was, in his opinion, "very intoxicated." Although the defendant disputed this testimony, it was sufficient to support a conviction for operating a motor vehicle while under the influence of alcohol. See *Wisch v. Jensen*, 221 Neb. 609, 379 N.W.2d 755 (1986).

The finding that the defendant refused to submit to a chemical test is also supported by the record. The test used to determine whether a driver has refused to submit to a test is whether the driver conducted himself in such a way that a reasonable person would be justified in believing the driver had understood he had been asked to take the test but refused to do so. *Bauer v. Peterson*, 212 Neb. 174, 322 N.W.2d 389 (1982). Officer McMullen testified the defendant refused to sign the implied consent form and twice refused to submit to a test of his blood alcohol content. The judgment on that count is affirmed.

We note, as plain error, that the defendant was fined $250 for first offense driving while intoxicated. Section 28-106 provides for a mandatory fine of $200 for this offense. The fine imposed is excessive, and must be reduced to $200. Neb. Rev. Stat.

§ 29-2308 (Reissue 1985). The judgment on count I, as so modified, is affirmed.

The judgment on count I is affirmed as modified. The judgment on count II is affirmed. The judgment on count III is reversed and the cause remanded for a new trial.

JUDGMENT ON COUNT I AFFIRMED AS MODIFIED.
JUDGMENT ON COUNT II AFFIRMED.
JUDGMENT ON COUNT III REVERSED, AND THE CAUSE REMANDED FOR A NEW TRIAL.

ARNOLD J. OSTWALD, JR., APPELLANT, V. CITY OF OMAHA, A METROPOLITAN CITY, AND THE OMAHA PERSONNEL BOARD, APPELLEES.

399 N.W.2d 783

Filed January 23, 1987. No. 85-439.

Municipal Corporations: Public Officers and Employees: Termination of Employment: Controlled Substances. When an employee of the city, whose duties in part are to help apprehend persons using marijuana, himself engages in such activity, such action does constitute an act unbecoming an incumbent of the particular position, does affect the efficient conduct of the business of the city, and is not in the best interest of the city government.

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

James E. Schaefer, for appellant.

Herbert M. Fitle, Omaha City Attorney, and Kent N. Whinnery, for appellees.

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

KRIVOSHA, C.J.

The appellant, Arnold J. Ostwald, Jr., was employed by the communications division, department of public safety, City of Omaha. On April 17, 1984, he was suspended for a period of 15

days, pending termination of employment effective May 2, 1984.

Ostwald had worked as a senior communications operator with the 911 system run by the City of Omaha. The 911 system is considered a support agency of the Omaha Police Division. Specifically, his duties and responsibilities consisted of working an assigned position and overseeing the shift as a supervisor. More specifically, the 911 operators are responsible for advising officers on the streets regarding reported crimes such as marijuana usage.

His suspension and subsequent discharge were as a result of telephone conversations held between Ostwald and his wife, also a 911 operator, concerning the purchase and use of marijuana for their personal consumption. Specifically, Ostwald was suspended and then discharged because he was found to have violated a portion of Omaha Mun. Code, ch. 23, art. II, § 23-291 (1982), which provided in part as follows:

> (j) Commission of acts or omissions unbecoming an incumbent of the particular office or position held, which render his or her reprimand, suspension, demotion or discharge necessary or desirable for the economical or efficient conduct of the business of the city or for the best interest of the city government.

Following his suspension and discharge, Ostwald appealed to the Omaha Personnel Board. The Omaha Personnel Board upheld the suspension and discharge. Ostwald then filed error proceedings in the district court for Douglas County, Nebraska, which also upheld his suspension and termination. It is from that decision which he now appeals to this court.

We have now reviewed the record and conclude that the record establishes that the board acted within its jurisdiction, and its findings are sustained by some competent evidence. We therefore sustain the action of the district court in upholding Ostwald's suspension and termination. See, *Caniglia v. City of Omaha*, 210 Neb. 404, 315 N.W.2d 241 (1982); *Matula v. City of Omaha*, 223 Neb. 421, 390 N.W.2d 500 (1986).

The evidence before the personnel board was uncontradicted. While Ostwald's wife was engaged in performing her duties as an operator of the 911 system, she

phoned Ostwald at home on a telephone which was a part of the 911 system, but which employees were permitted to use. The telephone conversation was known by the employees to be taped, as are all 911 telephone conversations. The telephone conversation makes it clear that Ostwald was apparently attempting to locate marijuana and that his wife was reporting to him that she was having difficulty locating the marijuana. Ostwald does not deny the substance of the conversation, but merely maintains that the use of the telephone for discussing the purchase of marijuana did not affect the efficient conduct of the business of the city and, therefore, should not have resulted in his discharge. In that regard, Ostwald reads the ordinance much too narrowly. We believe that it is clear that when an employee of the city, whose duties in part are to help apprehend persons using marijuana, himself engages in such activity, such action does constitute an act unbecoming an incumbent of the particular position, does affect the efficient conduct of the business of the city, and is not in the best interest of the city government.

Ostwald has simply failed to establish that error was committed by the city in discharging him for engaging in conversation, over the 911 telephone system, for the purpose of purchasing marijuana. The fact that the particular call monitored was initiated by Ostwald's wife rather than by Ostwald does nothing to change that situation. Had Ostwald not been a willing participant, he could have insisted that his wife hang up the phone and discontinue the conversation. Yet the conversation goes on for several minutes, with Ostwald urging his wife to find marijuana for him.

The judgment of the district court is affirmed.

AFFIRMED.

WALLACE F. LESEBERG ET AL., APPELLEES, V. LAVERNE H. MEINTS ET AL., APPELLEES, AND DAVID MEINTS, APPELLANT.
399 N.W.2d 784

Filed January 23, 1987. No. 85-485.

1. **Final Orders: Foreclosure: Appeal and Error.** A decree of foreclosure is a final order for purposes of appeal to this court.
2. **Appeal and Error.** To be considered by this court, errors must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred.
3. **Pleadings: Trial: Appeal and Error.** Generally, this court will not consider for the first time on appeal issues not properly raised in the pleadings nor litigated at trial.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

David Meints, pro se.

James G. Sharp of Everson, Wullschleger, Sutter, Sharp, Korslund & Willet, for appellees Leseberg.

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

PER CURIAM.

This action was brought to foreclose a mortgage upon a tract of land in Gage County, Nebraska. The mortgage was executed and delivered on May 31, 1979, by the defendants Laverne H. and Marilyn Meints, to secure a promissory note in the amount of $127,500 payable to the plaintiffs, Wallace F. and Juanita Leseberg. The note was payable in annual installments of $8,500, commencing June 1, 1980, with a balloon payment of $42,500 due on June 1, 1990. The mortgage secured the promissory note.

When the defendants failed to pay the installments due on the note and the real estate taxes as required by the mortgage, on July 30, 1981, the plaintiffs declared the entire balance of the note due and payable.

A decree of foreclosure was entered on December 13, 1984. The trial court found there was $110,670 due the plaintiffs, that the mortgage was a first lien upon the real estate, and that any claim of the defendant David Meints was subject to the lien of the mortgage.

An order of sale was issued January 3, 1985, and the property sold to the plaintiffs on February 4, 1985. A motion for confirmation was filed on the same day and an order of confirmation entered on February 19, 1985.

On April 23, 1985, the defendant David Meints filed an "application" alleging that the plaintiffs had not complied with Neb. Rev. Stat. §§ 25-1531 (Reissue 1985) and 40-103 (Reissue 1984), and requested that the sale be set aside as required by § 25-1531. The application was heard and overruled on May 15, 1985. David Meints filed a notice of appeal to this court on June 14, 1985.

The only matter brought to this court for review is the ruling on the application filed April 23, 1985. The time for appeal as to all previous orders expired before the notice of appeal was filed on June 14, 1985. See *Schuyler Building & Loan Ass'n v. Fulmer*, 61 Neb. 68, 84 N.W. 609 (1900). See, also, *First Trust Co. v. Eastridge Club*, 134 Neb. 785, 279 N.W. 720 (1938); *France v. Bell*, 52 Neb. 57, 71 N.W. 984 (1897).

In his brief, David Meints makes three assignments of error: (1) The plaintiffs failed to adhere to the truth in lending provisions for disclosure of credit terms, entitling the defendants to avoid the terms of the mortgage and note; (2) The contract was unconscionable for failure to balance the protection of the parties against circumstances out of their control; and (3) To the extent of any failure to perform on the contract, avoidable or not, the plaintiffs ought to foreclose and obtain control of only their remaining interest in the land. None of the assignments of error relate to the application to set aside the sale. Instead, they relate to the validity of the decree of foreclosure.

The only issue raised by the application was whether David Meints received proper notice regarding homestead exemption procedures as required by § 25-1531. No error has been assigned as to the overruling of the application and the rejection of the appellant's contention that he did not receive proper notice prior to the sale.

"To be considered by this court, errors must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred." *Fee v. Fee*, 223 Neb. 128, 134, 388 N.W.2d 122,

126 (1986).

The only record filed in this court is a transcript of the pleadings and orders filed in the district court. Because there is no bill of exceptions, there is no evidence upon which to review the ruling on the application, and we are unable to determine that the issues raised on appeal were ever litigated in the lower court. The documents in the transcript indicate that these issues were not raised in the application to set aside the sale. The pleadings, motions, and orders relevant to the decree of foreclosure and confirmation of sale indicate that these issues were not raised in those proceedings.

Generally, this court will not consider for the first time on appeal issues not properly raised in the pleadings nor litigated at trial. *Armstrong v. Hartford Life Ins. Co.*, 219 Neb. 128, 361 N.W.2d 511 (1985).

For these reasons, the errors assigned are without merit, and the judgment of the trial court is affirmed.

AFFIRMED.

ROBERT MATZKE ET AL., APPELLEES, V. WALTER HACKBART ET AL., APPELLANTS.

399 N.W.2d 786

Filed January 23, 1987. No. 85-567.

1. **Boundaries.** In an action to establish a boundary line in accordance with Neb. Rev. Stat. § 34-301 (Reissue 1984), one need not present a survey that qualifies as an official record of survey under Neb. Rev. Stat. § 81-8,122.01 (Cum. Supp. 1986).
2. **Adverse Possession: Boundaries.** Proof of the adverse nature of the possession of the land is not sufficient to quiet title in the adverse possessor; the land itself must also be described with enough particularity to enable the court to exact the extent of the land adversely possessed and to enter a judgment upon the description.
3. **Adverse Possession: Appeal and Error.** In determining whether a claimant of title by adverse possession met the required burden of proof, we review the record de novo and reach conclusions independent of the trial judge.
4. **Adverse Possession.** A claim of title by adverse possession must be proved by a preponderance of the evidence.

5. **Adverse Possession: Boundaries.** Where an exact metes and bounds description is impossible to ascertain from the record, the failure to adequately describe the proposed boundary is fatal to a claim of adverse possession.
6. _____: _____. A claimant of title by adverse possession must describe the land adversely possessed in an exact and definite manner.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Affirmed.

Blevens, Blevens & Jacobs, for appellants.

Larry L. Brauer of Allan, Brauer & Mullally, for appellees.

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

WHITE, J.

The Matzkes, the plaintiffs-appellees, brought this action in the district court for Seward County to settle a boundary dispute with their neighbors to the north, the Hackbarts, as provided under Neb. Rev. Stat. § 34-301 (Reissue 1984). The district court ordered the boundary to be established at a line consistent with the survey presented by the appellees. The Hackbarts appeal.

The first assignment of error by the appellants is that the district court erred in not establishing the boundary line at an ancient fence line and that removal of a fence does not forfeit the land previously adversely possessed. The second asserted error is that the district court erred in holding the appellants had not proved adverse possession. The third is that the district court "erred in ignoring the easement for access and right-of-way granted by the State for the benefit of the appellants." We affirm the district court's order due to a failure of the appellants to describe the extent of the land allegedly adversely possessed with sufficient particularity to enable a judgment to be entered upon description.

While negotiating a purchase of the land to the south of the Hackbarts' property in 1984, the Matzkes had a survey conducted to determine the perimeters of the land. The survey stake on the east end of the north line was placed in the middle of a driveway used by the Hackbarts to enter their southern 40 acres. Walter Hackbart considered the survey stakes to be too

far north. He pulled up the stakes and drove them in where he believed the line to be. Due to the boundary line dispute, the Matzkes negotiated a $1,500 reduction of the purchase price which was calculated by prorating the cost of the contested acreage. Robert Matzke testified that the reduction reflected his concern of an impending lawsuit and was not the result of purchasing less property than the deed described.

On January 11, 1985, the Matzkes filed a petition in the district court for Seward County requesting a judgment establishing a permanent boundary line at the survey line. The Hackbarts' answer claimed that they had adversely possessed for more than 10 years land south of the survey line and that the permanent boundary line should be established at an ancient fence line. The Hackbarts also cross-petitioned, praying that title to the contested strip of land be quieted and confirmed in them.

At the time of trial Walter Hackbart testified that he was 64 years old and had been born on the farm, which had been in his family for three generations. He farmed the property his whole life, except for a short period of time when he was in the service. For as long as he could remember, and for a period exceeding 10 years, an ancient fence marked the southern boundary of his property and the northern edge of the land then owned by William Reber, which eventually came to be owned by the Matzkes.

According to Hackbart, for years he plowed away from the fence and Reber plowed toward the fence, which created a ridge or dropoff at the fence line. Approximately 7 years before the trial the fence was taken down to clear away brush and grade out some trees, but the ridge remained, as did some trees on the east end of the fence line. At the time of trial a ridge was evident only on the eastern one-third of the disputed strip of land.

At trial the appellees, the Matzkes, presented exhibit 1, a copy of a survey prepared by Dennis Simonds, the Seward County surveyor. In their brief the appellees represent exhibit 1 to be an official record of survey and therefore entitled to be considered to be presumptive evidence of the facts stated within the survey, as authorized by Neb. Rev. Stat. § 81-8,122.01 (Cum. Supp. 1986). Section 81-8,122.01 requires that official

records of survey be filed in the survey record repository within 90 days of the completion of the survey. Exhibit 1 does not, on its face, reflect that it was timely filed or that it was ever filed, and Simonds' testimony that he filed the survey is not competent evidence of a timely, proper filing. Therefore, we do not consider exhibit 1 to be an official record of survey or afford it the legal presumption provided for in § 81-8,122.01 as the appellees urge us to do.

However, § 34-301 does not require that an official record of survey be presented to the court. It requires that the plaintiff's petition describe the land "as accurately as may be." The testimony of Simonds and the copy of his survey sufficiently establish the factual basis for the description contained in the petition. Since the results of the survey are uncontroverted, there can be no question that the Matzkes sustained their burden of proof with respect to where the boundary line should be, absent proof that the boundary is elsewhere due to adverse possession by the Hackbarts.

The Hackbarts' first and second assignments of error essentially voice the same concern. Whether the district court erred in not establishing the boundary at the old fence line is dependent upon whether the court erred in finding that the appellants did not sustain the burden of proof required to establish title to the land up to a line alleged to be an ancient boundary line. The Hackbarts' position is that they met their burden of proof with respect to adverse possession by proving actual, continuous, exclusive, notorious, and adverse possession of the strip of land for the statutory period of 10 years. See *Hardt v. Eskam*, 218 Neb. 81, 352 N.W.2d 583 (1984). However, proof of the adverse nature of the possession of the land is not sufficient to quiet title in the adverse possessor; the land itself must also be described with enough particularity to enable the court to exact the extent of the land adversely possessed and to enter a judgment upon the description. *Steinfeldt v. Klusmire,* 218 Neb. 736, 359 N.W.2d 81 (1984); *Petsch v. Widger,* 214 Neb. 390, 335 N.W.2d 254 (1983); *Layher v. Dove,* 207 Neb. 736, 301 N.W.2d 90 (1981).

In *Pokorski v. McAdams*, 204 Neb. 725, 285 N.W.2d 824 (1979), this court adopted the rule as stated in 2A C.J.S.

Adverse Possession § 264 (1972):

> "A claimant of title by adverse possession must further show the extent of his possession, the exact property which was the subject of the claim of ownership, that his entry covered the land up to the line of his claim, and that he occupied adversely a definite area sufficiently described to found a verdict upon the description."

204 Neb. at 731, 285 N.W.2d at 827. In determining whether the appellants met this burden of proof, we review the record de novo and reach conclusions independent of the trial judge. *Steinfeldt v. Klusmire, supra; Weiss v. Meyer*, 208 Neb. 429, 303 N.W.2d 765 (1981). The appellants must prove their case by a preponderance of the evidence. *Layher v. Dove, supra; Weiss v. Meyer, supra.*

In its order establishing the boundary at the line described by plaintiffs' exhibit 1, the district court found that

> [i]t is impossible to formulate a metes and bounds description of the area claimed by the defendants from the evidence or from permanent relevant landmarks. To do so would require speculation and conjecture.
>
> Defendants have failed to sustain their burden of proof to gain title by adverse possession, and their cross-petition must be and is hereby dismissed with prejudice.

Our review of the record leads us to the same conclusion as that of the district court, that the Hackbarts failed to describe with certainty where the fence used to be.

As to the east end of what Walter Hackbart felt should be his southern boundary, he testified that the corner was at the entry point of his easement from the south and that when he removed the fence, he had left some trees at the east end. Hackbart also testified that an original fencepost still stood at the east end, although Robert Matzke testified the pole was erected after the boundary dispute started and Simonds, the surveyor, testified that he did not observe any fenceposts at the time he made his survey. A ridge approximately 8 to 12 inches high was visible on the eastern one-third of the property. No permanent landmarks of any sort marked the west end of the original fence line.

Hackbart stated that Elsie Gerkensmeyer's (neighbor to the east) ancient fence, still standing at the time of trial, was in a line

with where his fence used to be. However, the neighbor's fence cannot be used to determine the western corner by extrapolation. The record contains no descriptions whatsoever of the placement of the neighbor's fence that are in any way related to the strip of land in question. The record contains no evidence establishing where the boundary would be if one extended the line created by the neighbor's fence by some reliable and mathematically accurate means, nor is there any evidence of an attempt to do so.

Cross-examination of Hackbart about where he considered the line to be proceeded as follows:

> Q. . . . [H]ow many feet south of the survey line is . . . the east end?
>
> A. On the east end it's 13 foot.
>
> Q. On the west end it's ten feet?
>
> A. Ten feet.
>
> Q. Is that exactly ten feet and exactly 13 feet?
>
> A. No, it is not.
>
> Q. How do you know?
>
> A. That is my estimate. I have never measured it off. That was my estimate.

Nowhere in the record does the appellant Walter Hackbart reveal how he derived his estimation that the west end was 10 feet south of the survey line. Neither does he ever describe any part of the western two-thirds of his proposed boundary line with any more particularity than the guesses made in the excerpt above.

The last illustration of where the fence line used to be to be dealt with is testimony by Walter Hackbart that he farmed due west from the entry point of the easement. The survey line runs east and west; by the appellants' own estimation, their proposed boundary line is not parallel to the survey line. This attempt tends to contradict rather than clarify the other representations of the location of the fence line.

The boundary dispute in *Layher v. Dove*, 207 Neb. 736, 301 N.W.2d 90 (1981), was similar to the instant case in several ways. An ancient fence had been removed, leaving only a few posts on the west bank of the creek. There was a partial ridge on the old fence line resulting from leveling that was essentially

undisputed as the old boundary for the length of its distance. The survey was received into evidence, and its correctness was uncontradicted, just as in the present case. The claim of title by adverse possession was denied because the claimant's evidence, much like the evidence in this case, first of all failed to establish where the specific boundary line was, and secondly, failed to describe the land so as to enable the court to enter a verdict upon the description.

In *Petsch v. Widger*, 214 Neb. 390, 397, 335 N.W.2d 254, 259 (1983), which also involved a boundary dispute due to a removed fence, we considered the language in *Layher v. Dove, supra*, to indicate "that a description must not only be sufficient to found a verdict on but must also be *'exact' and 'definite.'* " (Emphasis supplied.) The claimants by adverse possession in *Petsch* were unable to prove the exact location of the original fence. For that reason, and others, their claim was denied.

In this case the clearest of the descriptions presented is an admitted estimation, with no factual basis expressed in the record. An exact metes and bounds description is impossible to ascertain from the record, and the appellants' failure to adequately describe their proposed boundary is fatal to their claim of adverse possession. *Steinfeldt v. Klusmire*, 218 Neb. 736, 359 N.W.2d 81 (1984). The assigned errors are without merit because the appellants have not met their burden of proof so as to entitle them to have the boundary declared to be at the place of the old fence line.

The last assignment of error to be addressed is the appellants' assertion that the district court "erred in ignoring the easement for access and right-of-way granted by the State for the benefit of appellants."

The Hackbarts' farm was divided by Interstate 80 in 1963. As a result, access from the north to the "southern 40" was cut off, and the southern parcel was landlocked. The Hackbarts owned a piece of land southeast of the southern 40 that had the vertex of its northwestern corner at the same point as the vertex of the southern 40's southeastern corner. Elsie Gerkensmeyer, who owned the land to the east of the southern 40, sold a small triangle-shaped piece of land from her southwest corner to the

State of Nebraska. The state, in turn, granted an easement to the Hackbarts allowing them ingress and egress from the southern 40.

The deed from Gerkensmeyer to the State of Nebraska and the grant of an easement from the state to the Hackbarts were both received into evidence.

The assignment of error is unclear as to what is actually being complained of, although a review of Walter Hackbart's testimony leads us to believe the appellants' complaint might be that the easement indicates the survey is wrong or that the boundary as established by the district court has the effect of denying the Hackbarts access to their southern 40 because the easement does not reach the ordered boundary. We find no error in either regard.

First of all, Walter Hackbart testified that the surveyor put a survey stake in the middle of his easement and that the land the easement is on is owned by the State of Nebraska. He testified that the easement was marked out for him by the State of Nebraska surveyors. Yet, he did not have the land resurveyed to show the appellees' survey was in error. When asked if he had a copy of the state's survey at trial, he declared he did not have it with him.

The Simonds survey indicates that the old fence was erected in the wrong place. Absent a conflicting survey or other evidence that the easement is actually in the place described by the deed to the state and the grant to Hackbarts, we must assume that the survey is correct and their easement lies elsewhere. There is no error in this regard.

With respect to the fact that the new boundary may deny the Hackbarts access to their property, their cross-petition contained a claim of adverse possession. It did not request in the alternative that the court grant the appellants a prescriptive easement due to their continuous use of the strip since 1963. The Matzkes had not denied them access as of the time of trial, and although we find that the appellants did not prove their case of adverse possession, we do not speak as to the merits of a possible claim for an easement across the appellees' land, since that is not the case that is before us. It was not error for the district court to be silent regarding the easement granted to the

appellants.

Having reviewed the record and finding no error, we affirm the district court's order establishing the boundary line at the place described in appellees' exhibit 1, the survey conducted by Simonds.

AFFIRMED.

SCHOOL DISTRICT NO. 46, SARPY COUNTY, NEBRASKA, AND DAVID K. KENTSMITH, APPELLANTS, V. CITY OF BELLEVUE AND BELLEVUE SCHOOL DISTRICT, SARPY COUNTY, NEBRASKA, APPELLEES.

400 N.W.2d 229

Filed January 23, 1987. No. 85-639.

1. **Schools and School Districts: Actions: Boundaries: Standing.** Notwithstanding that the statute provides that a school district is a body corporate, possesses the usual powers of a corporation for public purposes, and may sue and be sued, it is the law of this state that a school district may not maintain an action involving a change in the boundaries of a school district.
2. **Statutes: Constitutional Law: Appeal and Error.** If the statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the legislature to accomplish that end.
3. **Legislature: Statutes: Constitutional Law.** If the legislature has made a reasonable classification, one that is not a mere cloak or cover for an arbitrary exemption of certain persons or a certain class of persons, but a natural and proper selection of those who, upon a reasonable view of the mischiefs to be met, should be subject to the regulations prescribed, and the law is made to operate generally and uniformly upon all of the class so constituted, the constitutional provision in question is not violated.
4. **Schools and School Districts: Boundaries: Legislature.** The fixing of boundaries of school districts is exclusively a legislative function, and it may be properly delegated to a subordinate agency, providing the Legislature prescribes the manner and the standards under which the power of the designated board may be exercised. The Legislature may delegate this authority provided it states the purpose for doing so and sets up reasonable standards to guide the agency which is to administer it.

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

L. Bruce Wright and Kathleen A. Jaudzemis of Cline, Williams, Wright, Johnson & Oldfather, for appellants.

John E. Rice, Bellevue City Attorney, for appellee City of Bellevue.

Dixon G. Adams, for appellee Bellevue School District.

KRIVOSHA, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and CHEUVRONT, D.J.

KRIVOSHA, C.J.

The question presented by this appeal is whether the provisions of Neb. Rev. Stat. § 79-801(4) (Cum. Supp. 1984) are unconstitutional for any of the various reasons alleged by the appellants, school district No. 46 of Sarpy County and David K. Kentsmith. The district court for Sarpy County, Nebraska, found, in effect, that § 79-801(4) did not violate either the U.S. Constitution or the Constitution of the State of Nebraska by sustaining demurrers filed by the appellees, the Bellevue School District and the City of Bellevue. For reasons more particularly set out hereinafter, the judgment of the district court is affirmed.

Section 79-801(4) provides as follows:

> Whenever an application for approval of a final plat or replat is filed for territory which lies within the zoning jurisdiction of a city of the first or second class and does not lie within the boundaries of a Class IV or V school district, the affected school board of the city district or its representative and the affected school board or boards serving the territory subject to the final plat or replat or their representative shall meet within thirty days of such application and negotiate in good faith as to which district shall serve the platted or replatted territory and the effective date of any transfer based upon the criteria prescribed in subsection (2) of this section.
>
> If no agreement has been reached prior to the approval of the final plat or replat, the territory shall transfer to the

school district of the city of the first or second class upon the filing of the final plat unless an affected district petitions the district court within ten days of approval of the final plat or replat and obtains an order enjoining the transfer and requiring the affected school boards to continue negotiation. The court shall issue the order upon a finding that the affected board or boards have not negotiated in good faith based on one or more of the criteria listed in subsection (2) of this section. The district court shall require no bond or other surety as a condition for any preliminary injunctive relief. If no agreement is reached after such order by the district court and additional negotiations, the platted or replatted territory shall become a part of the school district of the city of the first or second class.

Section 79-801(2) provides in part:

During the process of negotiation, the affected school boards shall consider the following criteria:

(a) The educational needs of the students in the affected school districts;

(b) The economic impact upon the affected school districts;

(c) Any common interests between the annexed or platted area and the affected school districts and the community which has zoning jurisdiction over the area; and

(d) Community educational planning.

The undisputed evidence is that school district No. 46 and the Bellevue School District are both Class III school districts located in Sarpy County, Nebraska, and share a common boundary line. The City of Bellevue is a city of the first class, and the zoning jurisdiction of the City of Bellevue extends for a distance of 2 miles beyond the city limits and into the territory served by school district No. 46. Similarly, by definition as a Class III school district, school district No. 46 also must have a city or village in it which has extraterritorial zoning powers. See § 79-801(1).

On April 11, 1985, an application for final plat was filed, seeking to replat a number of lots in Normandy Hills

subdivision, which is located in school district No. 46, south of the Bellevue School District's southernmost boundary. While the subdivision lies wholly outside the boundaries of the City of Bellevue and also outside the boundaries of the Bellevue School District, the subdivision does lie within the zoning jurisdiction of the City of Bellevue. This application triggered the transfer of the property out of school district No. 46 and into the Bellevue School District pursuant to the provisions of § 79-801(4). A request was made by the Bellevue School District to school district No. 46 to negotiate, as provided by § 79-801(4). District No. 46, however, chose not to negotiate and, instead, filed an action in the district court for Sarpy County, Nebraska, seeking an injunction and a declaration that § 79-801(4) is unconstitutional. This is not the same injunction which might have been obtained if good faith negotiations had not been conducted as provided by § 79-801(4). The district court determined that the act was not unconstitutional. It is from that order that this appeal is now taken.

Before proceeding to address the constitutional issue, we are required to first address the question of whether school district No. 46 is a proper party to this action. We believe it is not. In the case of *Board of Education v. Winne*, 177 Neb. 431, 434-35, 129 N.W.2d 255, 257-58 (1964), quoting from *Halstead v. Rozmiarek*, 167 Neb. 652, 94 N.W.2d 37 (1959), we said:

> "In reference to the assertion of appellees that the proposed change of boundaries would affect the Baker district because it would deprive it of a part of its territory and this would result in a decrease of the amount and value of the taxable property in the district and would cause an increase of the tax burden upon the remaining property therein, it may be appropriately said that notwithstanding the statute provides that a school district is a body corporate, possesses the usual powers of a corporation for public purposes, and may sue and be sued, it is the firmly established law of this state that a school district may not maintain an action involving a change in the boundaries of a school district. A school district in this state has no territorial integrity. It is subject to the reserve power of the state exercised through

> administrative authority to change its territory according to current educational needs and good educational principles. The state may change or repeal all powers of a school district, take without compensation its property, expand or restrict its territorial area, unite the whole or a part of it with another subdivision or agency of the state, or destroy the district with or without the consent of the citizens."

It therefore follows that if a school district may not question a change in boundary, it also may not attack the law which prescribes how and in what manner those boundaries shall be changed. School district No. 46 has no legal interest in the question presented by the case and, therefore, no standing to raise the constitutional issues set out in its petition.

The situation in regard to the additional appellant, Kentsmith, is, however, another matter. By his petition he first alleges that he is a resident, property owner, and taxpayer of school district No. 46. He then alleges in his first cause of action that the transfer of the land will "cause great damage . . . to Kentsmith from loss of tax support and student population . . . ." He further alleges in his third cause of action that "[a]s a property owner whose property is taxed to support School District No. 46, Kentsmith's financial burden would be increased if the replatted territory is transferred from School District No. 46 to School District of Bellevue." He further alleges that he "received no notice from and has been afforded no hearing by the City or by the School District of Bellevue regarding the transfer . . . ." These are all allegations made on his own behalf and not on behalf of school district No. 46. To this petition the City of Bellevue and the Bellevue School District demurred. While the allegations do not entitle Kentsmith to any relief, they are, nevertheless, sufficient to give him standing to sue. It is *his* tax burden which he alleges will be affected by the transfer, and his property which will be "injured" by the transfer.

In *Farrell v. School Dist. No. 54*, 164 Neb. 853, 868, 84 N.W.2d 126, 136 (1957), we said:

> "A court of equity will, on the application of resident taxpayers, restrain public officers from doing an illegal

> act where the effect of such act, if consummated, would be a waste of public funds raised by taxation." See, also, McLain v. Maricle, 60 Neb. 353, 83 N.W. 85; [citation omitted].

In *Lindeman v. Corson*, 93 Neb. 548, 550, 141 N.W. 153, 154 (1913), we said:

> "In an action by injunction, brought to restrain officers of a school district from removing to another location a schoolhouse situated in said district, the right of plaintiffs to maintain the action is established, if it appears that they are resident taxpayers of the district, and the proposed removal, if unauthorized, would involve a waste and an unwarranted expenditure of public funds; and no other or greater interest need be shown."

See, also, *Hess v. Dodge*, 82 Neb. 35, 116 N.W. 863 (1908).

While we do not find that Kentsmith's claims are meritorious, we perceive of no reason why, if one who is a taxpayer and resident may seek an injunction on a claim that the act to be performed is illegal, he or she does not have standing to seek an injunction when he or she alleges that he or she is a resident taxpayer who is about to be injured by reason of the fact that an unconstitutional act is about to be performed. Kentsmith does, therefore, have standing to sue, and we are therefore required to review his constitutional claims.

Specifically, Kentsmith claims that § 79-801(4) is in violation of the Constitutions of both the United States and the State of Nebraska for one or more of the following reasons: (1) It violates Neb. Const. art. I, § 1, and art. III, § 18, and the 14th amendment to the U.S. Constitution; (2) Section 79-801(4) is an unconstitutional delegation of legislative power; and (3) Section 79-801(4) denies to patrons of school district No. 46 due process, in violation of Neb. Const. art. I, § 3, and the 14th amendment to the U.S. Constitution. We shall address each of these claims in the order in which they have been raised.

I. *Section 79-801(4) constitutes special legislation, in violation of Neb. Const. art. III, § 18, and the equal protection guarantees of both the federal and state Constitutions.*

Kentsmith argues that § 79-801(4) is special legislation because it has granted to certain Class III school districts, such

as the Bellevue School District, certain rights which are denied to other Class III school districts, such as school district No. 46. We believe that not to be the case. An examination of the act discloses that all Class III school districts have been granted the same rights and that, therefore, there is no special class created. Section 79-801 provides that a Class III school district shall be a district which is embraced within the corporate limits of each incorporated city or village, together with such additional territory and additions to such city or village as may be added thereto where the city or village has a population of more than 1,000 and less than 100,000. All such villages or cities have extraterritorial zoning jurisdiction, although the distances may vary depending upon the class of the city or village. Neb. Rev. Stat. § 15-902 (Supp. 1985) (3 miles for city of primary class); Neb. Rev. Stat. § 16-901 (Reissue 1983) (2 miles for city of first class); Neb. Rev. Stat. § 17-1001 (Reissue 1983) (1 mile for city of second class and villages). In the instant case both school district No. 46 and the Bellevue School District have as their principal location a city or village having a population of more than 1,000 and less than 100,000, because unless school district No. 46 has within its boundaries a city or village having a population of more than 1,000 and less than 100,000, it cannot be a Class III school district. As a result, both school district No. 46 and the Bellevue School District have the right, whenever an application for approval of a final plat is filed regarding property which is located within the zoning jurisdiction of the city or village and which is also located within the respective school district, to annex to the school district the land included in the area for which the final plat or replat is sought. The fact that the specific land involved in this action lies only within the zoning jurisdiction of the City of Bellevue, and, therefore, the Bellevue School District, does not make the act class legislation. By the same token, if the final plat involved land lying within the zoning jurisdiction of the city or village which permits school district No. 46 to be a Class III school district, school district No. 46 would have the right to cause the transfer of such land to become a part of its school district.

The fact that in the instant case school district No. 46 must yield to the Bellevue School District does not make the

classification unlawful. The test is not whether a particular entity may exercise a right in a given situation but, rather, whether the class is so constructed that other entities may exercise rights and be a part of the class if they acquire the necessary characteristics and meet the necessary prerequisites.

Whenever a plat or replat is filed within the zoning jurisdiction of the city or village having a population of more than 1,000 and less than 100,000 inhabitants, a Class III school district which serves that city or village may exercise the rights granted Class III school districts under the provisions of § 79-801. There is no distinction between "urban Class III" school districts and "rural Class III" school districts, as suggested by Kentsmith. All Class III school districts have the same characteristics and are afforded the same rights under § 79-801(4). The argument that this is special legislation or that a separate class within Class III school districts has been created is simply not supported by the facts. See, also, *Hunzinger v. State*, 39 Neb. 653, 58 N.W. 194 (1894). There is simply no basis to Kentsmith's claim that there is an improper class created by the provisions of § 79-801(4) and, therefore, no basis to the argument that § 79-801(4) violates either Neb. Const. art. I, § 1, or art. III, § 18, or the 14th amendment to the U.S. Constitution.

II. *Section 79-801(4) denies to persons within school district No. 46 equal protection of the law.*

Nor is there any basis for contending that the statute denies to the persons within school district No. 46 equal protection of the law. We have previously held that in analyzing equal protection claims in the social and economic context for claims which do not involve suspect classes or fundamental rights, if there exists such classification, the court uses the "rational basis test." In *State v. Michalski*, 221 Neb. 380, 385, 377 N.W.2d 510, 515 (1985), we said:

> [I]f the statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the legislature to accomplish that end. See, e.g., *Vance v. Bradley*, 440 U.S. 93, 99 S. Ct. 939, 59 L. Ed. 2d 171

(1979); *New Orleans v. Dukes*, 427 U.S. 297, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976). Upon a showing of a rational relationship between means and ends, courts will find such legislation constitutionally healthy.

And, earlier, in *McDonald v. Rentfrow*, 176 Neb. 796, 800-01, 127 N.W.2d 480, 483-84 (1964), we said:

> "[I]f the legislature has made a reasonable classification, -not a mere cloak or cover for an arbitrary exemption of certain persons or a certain class of persons, but a natural and proper selection of those who, upon a reasonable view of the mischiefs to be met, should be subject to the regulations prescribed, -and the law is made to operate generally and uniformly upon all of the class so constituted, the constitutional provision in question is not violated."

Kentsmith's principal argument seems to be that persons in "rural Class III school districts" are treated differently and unfairly as compared to persons in "urban Class III school districts." As we have already noted, § 79-801(4) does not make such an urban versus rural classification, but, rather, all Class III school districts are treated equally.

Furthermore, even if the Legislature had created classifications between Class III school districts, we have previously held that the state has a rather obvious interest in providing for the orderly expansion of cities and villages and corresponding school districts principally located within such cities and villages. See *Northwest High School Dist. No. 82 v. Hessel*, 210 Neb. 219, 313 N.W.2d 656 (1981). This court is simply unable to say that there is no rational basis for suggesting that as a city acquires zoning jurisdiction over land, the school district principally located within the city or village should not have first right to provide for the educational needs of the people in that plat. In fact, in most instances the land will not only be within the city's zoning jurisdiction but, after a time, within the corporate limits itself. The district court was correct in refusing to find that § 79-801(4) denied to persons within school district No. 46 the equal protection of the law.

III. *Section 79-801(4) is an unconstitutional delegation of legislative power.*

We have previously addressed this question and rejected such argument. In *McDonald v. Rentfrow, supra* at 800, 127 N.W.2d at 483, we said:

> The fixing of boundaries of school districts is exclusively a legislative function, and it may be properly delegated to a subordinate agency, providing the Legislature prescribes the manner and the standards under which the power of the designated board may be exercised. Nickel v. School Board of Axtell, 157 Neb. 813, 61 N.W.2d 566; Schutte v. Schmitt, 162 Neb. 162, 75 N.W.2d 656; Roy v. Bladen School Dist. No. R-31, 165 Neb. 170, 84 N.W.2d 119. Stated more precisely this court said in Schutte v. Schmitt, *supra*: "The Legislature may delegate this authority provided it states the purpose for doing so and sets up reasonable standards to guide the agency which is to administer it." See, also, School Dist. No. 39 v. Decker, 159 Neb. 693, 68 N.W.2d 354; Nickel v. School Board of Axtell, *supra*; § 79-420, R.S. Supp., 1961.

An examination of § 79-801(4) clearly provides those standards. The mechanism which triggers the transfer is clearly prescribed by statute. Furthermore, the criteria which are to be used in negotiating the transfer are set out by § 79-801(2). Finally, the act also provides that if the parties are unable to negotiate in accordance with the standards, then the school district located within the village or city having zoning jurisdiction over the land in question shall acquire the land and make it a part of its school district. There are certainly limits to the school district's discretion in that scheme. We, again, believe that the district court was correct in its determination.

IV. *Section 79-801 violates due process rights because it does not provide for notice and a hearing.*

We have, likewise, addressed this issue and held to the contrary. In *Nickel v. School Board of Axtell*, 157 Neb. 813, 825-26, 61 N.W.2d 566, 574 (1953), we said:

> Questions of public policy, convenience, and welfare, as related to the creation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, or any change in the boundaries thereof, are,

in the first instance, of purely legislative cognizance and, when delegated to any public body having legislative power, any action in regard thereto does not come within the due process clause of either the state or federal Constitutions. See, Searle v. Yensen, 118 Neb. 835, 226 N.W. 464, 69 A.L.R. 257; Ruwe v. School District, *supra*; Nebraska Mid-State Reclamation Dist. v. Hall County, *supra*; Seward County Rural Fire Protection Dist. v. County of Seward, *supra*.

But when, as a condition to their creation or change, the public body to which such authority is delegated must find certain facts to exist upon which the Legislature has said depends its authority to declare such subdivision, or any change therein, to exist then the questions presented are of a quasi-judicial character. In such cases a hearing must be had to determine if such facts exist and proper notice thereof must be provided for and given to all parties interested therein. See, Searle v. Yensen, *supra*; Ruwe v. School District, *supra*.

In the present case the school districts are not required to find certain facts before they have authority to act. The triggering mechanism is the filing of a request for the acceptance of a plat or replat. Once that application for approval is filed, the two districts are required to negotiate. There is no quasi-judicial function delegated to the school districts in this regard, and there are no findings to be made concerning the request for approval of a final plat or replat. The fact of the existence of a request for approval of a final plat or replat becomes evident and apparent once the application is filed. Thereafter, the process becomes completely mechanical. The filing of the application triggers the act, and no findings by the school districts are required or made. Consequently, the requirement for the attachment of due process rights does not exist.

For the foregoing reasons we conclude that the district court was correct in its conclusion that § 79-801(4) does not violate either the U.S. Constitution or the Constitution of the State of Nebraska. The request for an injunction should have been denied on the basis requested, and the demurrers, therefore, were correctly sustained. The judgment is affirmed.

AFFIRMED.

SHANAHAN, J., concurring.

While reaching a correct result regarding school district No. 46, the majority has overlooked some basic premises and principles of constitutional law. The majority states: "School district No. 46 has no legal interest in the question presented by the case and, therefore, no standing to raise the constitutional issues set out in its petition."

In these proceedings the plaintiffs' petition commences: "COME NOW the plaintiffs, School District No. 46 . . . and David K. Kentsmith . . . and for *their* causes of action . . . ." (Emphasis supplied.) The petition then sets out six causes of action, one of which claims that Neb. Rev. Stat. § 79-801 (Cum. Supp. 1984) violates "the equal protection clauses of the United States Constitution and the Nebraska Constitution" (sixth cause of action) and requests a declaration that § 79-801 is unconstitutional, while another cause of action asserts that § 79-801, possibly reducing the school district's tax revenue and number of pupils, is "special legislation" in violation of Neb. Const. art. III, § 18 (first cause of action), and is, therefore, unconstitutional.

Among the safeguards of the 14th amendment to the U.S. Constitution is the "equal protection" clause, namely: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." Neb. Const. art. I, § 1, provides: "All persons are by nature free and independent, and have certain inherent and inalienable rights . . . ." Further, according to Neb. Const. art. III, § 18: "The Legislature shall not pass local or special laws . . . [g]ranting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . ." As this court expressed in *City of Plattsmouth v. Nebraska Telephone Co.*, 80 Neb. 460, 464, 114 N.W. 588, 590 (1908): "A special privilege in constitutional law is a right, power, franchise, immunity or privilege granted to, or vested in, a person or class of persons to the exclusion of others and in derogation of common right."

Recently, we pointed out:

> The 14th amendment to the U.S. Constitution prohibits a state from, among other things, denying any person

> equal protection of the laws and from depriving any person of property without due process of law.
>
> Article I, § 1, of the Nebraska Constitution does not concern itself with equal protection of the laws. It is article III, § 18, which deals with disparate treatment by concerning itself with special legislation.

Porter v. Jensen, 223 Neb. 438, 443, 390 N.W.2d 511, 515 (1986).

A school district has been judicially recognized as a species of municipal corporation. See *Nickel v. School Board of Axtell*, 157 Neb. 813, 61 N.W.2d 566 (1953). There is a definite difference between a business corporation and a municipal corporation, a distinction recognized by the Supreme Court of Missouri in *St. Louis v. Smith*, 325 Mo. 471, 477, 30 S.W.2d 729, 730 (1930):

> [A business corporation is] organized for the purpose of carrying on a business for profit; while [a municipal corporation] is organized with political and legislative powers for the local civil government and police regulation of the people of a particular district included within its boundaries; and that it is a subordinate branch of the domestic government of a state.

This court has employed a definition for *association*, namely, " 'The act of a number of persons in uniting together for some purpose. The persons so joining.' " *In re Estate of Sautter*, 142 Neb. 42, 52, 5 N.W.2d 263, 268 (1942).

A municipal corporation, as a subdivision of a state, is not a "person" guaranteed equal protection of the laws. See, *Bd. Comm'rs v. Kokomo City Plan Comm.*, 263 Ind. 282, 330 N.E.2d 92 (1975); *Shelby v. City of Pensacola*, 112 Fla. 584, 151 So. 53 (1933); *Warren County, Mississippi v. Hester*, 219 La. 763, 54 So. 2d 12 (1951). As expressed by Justice Cardozo in *Williams v. Mayor*, 289 U.S. 36, 40, 53 S. Ct. 431, 77 L. Ed. 1015 (1932): "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."

Other jurisdictions have specifically held that a school district, being neither a natural nor artificial person, but being a

legislative creation, is not a "person" within the meaning of any bill of rights or constitutional limitation. See, *Ind. Sch. Dist. v. Board*, 230 Iowa 924, 299 N.W. 440 (1941); *Grasko v. Los Angeles City Board of Education*, 31 Cal. App. 3d 290, 107 Cal. Rptr. 334 (1973); *Dean v. Armstrong*, 246 Iowa 412, 415, 68 N.W.2d 51, 53 (1955) ("[A] school district 'is a legislative creation. It is not organized for profit. It is an arm of the state, a part of its political organization. It is not a "person" within the meaning of any bill of rights or constitutional limitation. It has no rights, no functions, no capacity, except such as are conferred upon it by the legislature. . . .' "). Therefore, the equal protection clause of the 14th amendment to the U.S. Constitution and the "special laws" provision of the Nebraska Constitution are not applicable to a school district, which is not a "person" protected by the Constitution, state or federal. Those constitutional guarantees providing equal protection and prohibiting special legislation contemplate an entity having existence independent of a legislature's largess.

Kentsmith ostensibly asserts a claim on behalf of school district No. 46, alleging constitutional considerations of equal protection and special legislation, and thereby acts as a surrogate or alter ego for the school district, seeking redress for school district No. 46. Generally, one cannot assert the constitutional rights of another. See *Blackledge v. Richards*, 194 Neb. 188, 231 N.W.2d 319 (1975). Ordinarily, a challenge to constitutionality of a statute on the ground that the assailed statute denies equal rights and privileges by discriminating between persons or classes may not be made by one not belonging to the class alleged to be discriminated against. See *Griffin v. Gass*, 133 Neb. 56, 274 N.W. 193 (1937). See, also, *Ritums v. Howell*, 190 Neb. 503, 209 N.W.2d 160 (1973) (one who is not harmfully affected by a particular feature of a statute, alleged to be unconstitutional, may not urge the unconstitutionality of the statute in question). As this court announced in *State ex rel. Nelson v. Butler*, 145 Neb. 638, 651, 17 N.W.2d 683, 691-92 (1945):

> It is firmly established as the universal rule that a person "may attack the constitutionality of a statute only when and so far as it is being or is about to be applied to his

> disadvantage; and to raise the question he must show that the alleged unconstitutional feature of the statute injures him and so operates as to deprive him of a constitutional right, and, of course, it is prerequisite that he establish in himself the claimed right which is alleged to be infringed."

If a school district is not a person with constitutional stature to assert certain rights under the Constitutions, Kentsmith, as a protagonist for the school district, cannot by litigation enhance the school district's stature and produce rights for the district greater than those existing in the constitutional realities of the situation before us.

Consequently, in situations such as the present and as the result of a school district's existence as a municipal corporation and subdivision of the state, neither school district No. 46 nor Kentsmith on behalf of that school district has the capacity to raise constitutional questions concerning equal protection and special legislation. In approving a school district's amorphous existence in relation to equal protection and special legislation, today's decision introduces forensic fog into already clouded cases concerning a school district's capacity to raise constitutional questions.

VALERIE A. PETERSON, APPELLEE, V. RAYMOND D. PETERSON, APPELLANT, NORDON WOOLLEN AND MARY ANN WOOLLEN, HUSBAND AND WIFE, INTERVENORS-APPELLEES.

399 N.W.2d 792

Filed January 23, 1987. No. 85-777.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the sound discretion of the trial court. On appeal the judgment of the trial court will be affirmed in the absence of a clear abuse of discretion.
2. **Child Custody.** Where the custody of a minor child is involved, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. The courts may not properly deprive a parent of the custody of a 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.

3. **Child Custody: Courts.** As authorized by Neb. Rev. Stat. § 42-364 (Reissue 1984), a district court may maintain legal custody while awarding physical custody to a parent or other party. Section 42-364 authorizes the court to place the custody of a minor child in the court, to determine custody on the basis of the best interests of the child, and to make subsequent changes when required. When the best interests of a child, in regard to custody, are not clear, the court may, and should, place custody in the court.

Appeal from the District Court for Phelps County: BERNARD SPRAGUE, Judge. Reversed and remanded with direction.

Greg C. Harris, for appellant.

Marmion F. Yeagley of State, Yeagley & George, for intervenors-appellees.

No appearance for appellee.

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

PER CURIAM.

In October 1984 Valerie A. Peterson filed for a dissolution of her marriage with Raymond D. Peterson and prayed that the court award her custody of the couple's 6-year-old son, Brooke. Raymond Peterson, as the respondent and cross-petitioner, alleged that Valerie was unfit to have custody of Brooke due to her mental illness and asked for custody of Brooke. The child's maternal grandparents, Nordon and Mary Ann Woollen, who had physical custody of Brooke, intervened in the proceedings without objection, alleged that Raymond Peterson was unfit for custody of Brooke, and asked that custody of Brooke be placed with the grandparents.

Trial was held on August 5, 1985, and evidence was presented to the district court on the fitness of the parties for custody of the minor child, Brooke.

Evidence presented by the wife, Valerie Peterson, described the physical violence inflicted on her by her husband, Raymond. At least once a week Raymond would clench his fists and beat Valerie about her face and head, leaving bruises and causing bleeding. Such physical abuse was corroborated by a member of the wife's church. Also, Mary Ann Woollen, the

wife's mother, testified that on several occasions during the marriage she observed Valerie Peterson's bruised face, swollen nose, and black eyes. Valerie Peterson testified that physical abuse was caused by Raymond Peterson's drinking problem.

Raymond Peterson admitted that he had been convicted of drunk driving in Colorado approximately 1 year prior to the dissolution proceedings. However, he denied that he had any drinking problem. In his testimony, Raymond Peterson admitted that he struck his wife. His reason for striking his wife was her religious practices. As testified by the husband, Valerie Peterson would awaken during the night, claiming to hear voices of people talking to her. Almost every day the wife would pray in the closet with the door closed and lights off, and anointed Brooke and herself with olive oil. Valerie Peterson would also write religious sayings in crayon on the walls of the couple's house.

There was evidence that Valerie suffered from a form of schizophrenia which required hospitalization in 1980. At the time of trial, Valerie Peterson was taking prescription medication for her mental condition. Raymond Peterson testified that his wife persisted in her religious practices, aforementioned, both when she did not take her prescriptions and notwithstanding the medications.

The grandparents, as intervenors, offered evidence of a therapist specially trained in drug and alcohol abuse counseling. The therapist had interviewed Raymond Peterson as the result of Raymond's Colorado drunk driving conviction. The therapist testified that Raymond Peterson suffered from blackouts, morning trembling, job difficulties including missing work, and marital problems, and was inclined to physically abuse his wife. The therapist further testified that tests indicated that Raymond Peterson was a "serious problem drinker."

Raymond Peterson testified about his work history. Peterson testified that he only worked about half the time during which he and Valerie were married and that his present employment would provide support for Brooke. Raymond Peterson's employment included two jobs, one a well-drilling job which required 50 to 60 hours per week and the other being a

deliveryman for a courier service. The well-drilling job sometimes required that Raymond Peterson work until 8 p.m. The courier job required that Raymond Peterson be away from home from noon on Friday through late morning on Saturday. However, Raymond Peterson testified that he could make arrangements with a child care facility and certain relatives for the care of Brooke when Raymond Peterson was not at home.

Evidence on behalf of the grandparents, Nordon and Mary Ann Woollen, indicated that Brooke had spent a substantial amount of time with his grandparents on their farm near Wilcox, Nebraska. Brooke had lived with his grandparents for 6 months during his mother's illness and hospitalization in 1980. At the time of the dissolution proceedings, Valerie Peterson and Brooke had been living with the Woollens since June of 1984, when Raymond Peterson left to work in Colorado. Mary Ann Woollen estimated that Brooke had spent approximately 2 of his 6 years with his grandparents. Mary Ann Woollen also testified that the Woollens have provided support for Raymond, Valerie, and Brooke by paying grocery, clothing, medical, and utility bills over a period of time from February 1979 to April 1983.

Further testimony offered by the Woollens showed that Nordon, age 58, and Mary Ann, age 52, were in good health and financially able to provide for Brooke. Nordon Woollen testified that he takes Brooke with him to check livestock and to do the irrigating, and also plays ball with Brooke. The entire family, including Brooke and his mother, attend church regularly. During the school year preceding the dissolution proceedings, Brooke had been enrolled in kindergarten in the Wilcox public schools and had done well academically, according to the testimony of Mary Ann Woollen, who had attended parent-teacher conferences for Brooke. Mary Ann Woollen also testified that she takes care of Brooke, bathes him, plays with him, does his laundry, sees to it that he gets to school, makes certain Valerie takes her medication, and never leaves Brooke alone with Valerie.

To prove that it was in Brooke's best interests to be in the custody of his grandparents, the Woollens offered the testimony of two experts. Dr. Charles Eigenberg conducted a

family evaluation of the Woollens, Valerie, and Brooke approximately 1 month prior to the dissolution proceedings. Dr. Eigenberg observed a "very good solid attachment" between Brooke and his grandparents, and further noted that Brooke "[s]eemed to be well adjusted" to the living situation involving his grandparents. Upon further evaluation and testing, Dr. Eigenberg concluded that in his opinion it would be detrimental to Brooke to break the bond with the Woollens, as Brooke views the Woollens as parents rather than grandparents. Dr. Eigenberg also expressed his opinion in regard to the danger of Valerie's being in the same home with Brooke, and concluded that he foresaw no risk of harm as long as the medication is controlled and adequately supervised. Dr. Eigenberg concluded it would be in Brooke's best interests to stay with his grandparents. Dr. Gerald Daly, a psychologist, generally agreed with Dr. Eigenberg. Dr. Daly had interviewed Brooke, his mother, and his grandparents. Based upon this interview, Dr. Daly expressed his opinion that Mary Ann Woollen has become Brooke's primary caregiver, in that she is the person Brooke turns to for comfort and depends on in stressful situations.

In response to the evidence proffered by the Woollens, Raymond offered the testimony of Dr. Ernest Matuschka, a clinical psychologist, whose practice includes family therapy and the treatment and rehabilitation of alcoholics. Dr. Matuschka testified that, in his opinion, Brooke could not be safe at home with Valerie for the reason that many schizophrenics outside the hospital setting do not stay on medication, as the disease affects their thought processes, and that even while on medication they may be dangerous to others. In regard to Raymond Peterson's drinking problem, Dr. Matuschka defined Raymond Peterson as a "reactive problem drinker" since age 16. Dr. Matuschka described this type of problem drinking as stress-induced and one that can occur again and, thus, would require professional help for Raymond Peterson. Although Dr. Matuschka noted that returning Brooke to his father would not be detrimental to the child, he felt Brooke's return to his father would be disruptive until Brooke made the readjustment. On cross-examination Dr. Matuschka admitted his opinions were based only on his

discussions with Raymond and Brooke and not on any personal evaluation of Valerie or the Woollens. Further, Dr. Matuschka admitted that Raymond's work schedule made him "hard pressed time-wise" to meet his obligations to Brooke. Finally, Dr. Matuschka admitted that Brooke, during the interview, had indicated a preference for staying with his grandparents.

Upon completion of the evidence, the district court stated, in a "decree of dissolution of marriage" entered September 4, 1985:

> [N]either the petitioner, Valerie A. Peterson, nor the respondent, Raymond D. Peterson, are [sic] fit and suitable parents to have custody of the minor child at this time and that it is in the best interests of the child that custody of the child be awarded to Nordon Woollen and Mary Ann Woollen, intervenors . . . .

On September 4 the court also entered another order, as follows:

> [A] follow-up examination of the child, Brooke Ian Peterson, should be performed by Dr. Ernest Matuschka and Dr. Gerald Daly in March of 1986 to determine the emotional state and condition of the child at that time. The parties should notify the psychologists of the contents of this Order and arrange for each psychologist to prepare such a report in March of 1986. Each psychologist should prepare a report and submit the original to Judge Bernard Sprague with a copy of each report to counsel of record.
>
> IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED BY THE COURT that a follow-up examination of the child, Brooke Ian Peterson, should be performed by Dr. Ernest Matuschka and Dr. Gerald Daly in March of 1986 and the reports should be furnished to the Court with copies to counsel of record.

Raymond Peterson has appealed from the judgment of the district court and alleges the district court erred in finding that the respondent was unfit to serve as custodial parent and in finding that the best interests of Brooke require the placement of the child with the Woollens. Valerie Peterson has not appealed.

Although our review of the judgment is de novo on the

> record, child custody determinations are matters initially entrusted to the sound discretion of the trial court. On appeal the judgment of the trial court will be affirmed in the absence of a clear abuse of discretion. *Clark v. Clark*, 220 Neb. 771, 371 N.W.2d 749 (1985). We also "give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other." *Id.* at 777, 371 N.W.2d at 754.

Ainsworth v. Ainsworth, ante p. 160, 161, 396 N.W.2d 285, 286 (1986). See, also, *Hicks v. Hicks*, 223 Neb. 189, 388 N.W.2d 510 (1986).

Neb. Rev. Stat. § 42-364 (Reissue 1984) provides:

> When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, including placing the minor children in the custody of the court or third parties . . . . Custody . . . of minor children shall be determined on the basis of their best interests.

However, when the controversy as to custody is between the natural parent and other relatives or strangers, the guiding principles are:

> Where the custody of a minor child is involved . . . , the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent.
>
> The courts may not properly deprive a parent of the custody of a 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.
>
> The right of a parent to the custody of his minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and the courts may not deprive a parent of such custody unless he is shown to be unfit or to have forfeited his superior right to such custody.

Nielsen v. Nielsen, 207 Neb. 141, 149, 296 N.W.2d 483, 488 (1980).

On our review of the record, we find that the district court did not abuse its discretion in determining that Raymond

Peterson was unfit to be the custodial parent of Brooke. The evidence presented relating to Raymond's continuing drinking problem, his failure to support his wife and Brooke during the marriage, and the unsuitable parenting schedule he intends to maintain supports the decision of the district court that Raymond is not fit to be a custodial parent. See *Ainsworth v. Ainsworth, supra.*

An abundance of evidence was offered to show the positive adjustment Brooke has made to living with his grandparents, including evidence which indicated that he preferred to maintain that living arrangement. See *State ex rel. Sanders v. Doyle*, 187 Neb. 453, 191 N.W.2d 545 (1971). The relative age of the Woollens, their financial stability, and the positive involvement with Brooke indicate that the Woollens may be suitable persons to have physical custody of Brooke Peterson.

However, we are concerned about the living arrangement at the home of Nordon and Mary Ann Woollen involving the presence of Valerie Peterson in that arrangement. Evidence indicates that there remains some danger to Brooke should he be left unattended with Valerie while in the custody of the Woollens. In apparent recognition of this problem, the district court ordered followup examinations in March of 1986 by Drs. Matuschka and Daly to determine Brooke's emotional status and to report their findings to the court. The results of the followup examinations, if such examinations have taken place, are not a part of the record before us.

We agree with the precaution taken by the district court in seeking additional information about Brooke, but this raises a question as to whether or not the district court should have retained legal custody of Brooke under the circumstances. It is clear that a district court may maintain legal custody while awarding physical custody to a parent or other party. See § 42-364. See, also, *Swearingen v. Swearingen*, 201 Neb. 255, 267 N.W.2d 514 (1978); *Mason v. Mason*, 200 Neb. 476, 263 N.W.2d 865 (1978). As we stated in *Bartlett v. Bartlett*, 193 Neb. 76, 78-79, 225 N.W.2d 413, 415 (1975):

> Section 42-364, R.R.S. 1943, authorizes the court to place the custody of minor children in the court, to determine custody on the basis of the best interests of the

> children, and to make subsequent changes when required. When the best interests of the children, in regard to custody, is not clear, the court may, and should, place custody in the court. In regard to such disposition we have stated that: "Its purpose is to 'facilitate judicial supervision and summary power to act swiftly in their [the children's] best interests.' * * * The parent having possession where the court has retained custody is in effect an agent of the court." Benson v. Benson, 190 Neb. 87, 206 N.W.2d 51.

See, also, *Berry v. Berry,* 202 Neb. 540, 276 N.W.2d 200 (1979). Further, we have admonished that "[t]he interests of minor children should be safeguarded even to the extent of taking precautions which may prove to be unnecessary." *Bralick v. Bralick,* 194 Neb. 183, 184, 231 N.W.2d 129, 131 (1975).

We find that the district court abused its discretion by placing legal custody of Brooke Peterson with the Woollens. The district court should have retained legal custody for the purpose of protecting Brooke's best interests and ensuring that he would be protected from any adverse behavior of his mother, i.e., by eliminating the possibility that he would ever be left alone with Valerie Peterson as long as her condition remains as it has been in the past. We do not feel that the information in the record is current enough to enter an order regarding physical location or physical custody of the child. The district court has also indicated some concern in view of the supplemental reports to be made by the psychologists and a reevaluation concerning the child's well-being 6 months after the trial in the dissolution proceedings. For this reason, we reverse the judgment of the district court and remand these proceedings to the district court with direction that the legal custody of Brooke Peterson be placed in the district court and that further evidence, if such evidence has not already been received, be provided to the district court, bearing upon the placement of physical custody in the best interests of Brooke Peterson.

REVERSED AND REMANDED WITH DIRECTION.

COUNTY OF LANCASTER, NEBRASKA, APPELLEE, V. DANIEL L. MASER ET AL., APPELLEES, DEPARTMENT OF BANKING AND FINANCE OF THE STATE OF NEBRASKA, RECEIVER FOR COMMONWEALTH SAVINGS COMPANY, APPELLANT.
COUNTY OF LANCASTER, NEBRASKA, APPELLEE, V. MICHAEL A. MENCK ET AL., APPELLEES, DEPARTMENT OF BANKING AND FINANCE OF THE STATE OF NEBRASKA, RECEIVER FOR COMMONWEALTH SAVINGS COMPANY, APPELLANT.
COUNTY OF LANCASTER, NEBRASKA, APPELLEE, V. COMMONWEALTH SAVINGS COMPANY ET AL., APPELLEES, TABITHA DEVELOPMENT CORPORATION, A NEBRASKA CORPORATION, ET AL., APPELLANTS.

400 N.W.2d 238

Filed January 23, 1987. Nos. 85-890, 85-916, 85-917.

1. **Statutes: Legislature.** One of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give effect to that intent.
2. _____: _____. When statutory language is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the intent of the lawmakers.
3. **Statutes: Legislature: Appeal and Error.** In determining the intent of the Legislature, the Supreme Court considers the history of the legislation and the reasonableness of an interpretation, weighed against an unreasonable or absurd construction evidently not intended by the Legislature.
4. **Statutes: Legislature.** Legislative history includes the record of a floor explanation or debate, which is an extrinsic, secondary source in statutory interpretation.
5. **Foreclosure: Liens: Tax Sale: Redemption: Time.** The time for redemption, as such phrase is used in Neb. Rev. Stat. § 77-1902 (Reissue 1986), is the 3 years immediately following a delinquent tax sale. An action to foreclose a tax lien pursuant to § 77-1902 can only be brought within the 90 days immediately after expiration of the time for redemption.
6. **Case Overruled.** *Bish v. Fletcher*, 219 Neb. 863, 366 N.W.2d 778 (1985), is overruled.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded with direction.

D.C. Pierson of Pierson, Ackerman, Fitchett, Akin & Hunzeker, for appellant Department of Banking and Finance.

Douglas D. Cyr, Deputy Lancaster County Attorney, for appellee County of Lancaster.

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

SHANAHAN, J.

The Department of Banking and Finance of the State of Nebraska, Receiver for Commonwealth Savings Company; Tabitha Development Corporation, a Nebraska corporation; Tabitha Village, Inc., a Nebraska corporation; Tabitha Home, a Nebraska corporation; and Autumn Wood Venture, a Nebraska corporation, as owners of real estate in Lancaster County, Nebraska, have appealed the decree foreclosing real estate tax liens of Lancaster County in consolidated actions involving tax sale certificates purchased by the county and foreclosure of tax liens represented by those certificates.

A review of applicable statutes will assist understanding the positions taken by the parties.

Neb. Rev. Stat. § 77-1824 (Reissue 1986) states in part: "The owner or occupant of any land sold for taxes or any person having a lien thereupon or interest therein, may redeem the same at any time before the delivery of tax deed by the county treasurer . . . ."

Neb. Rev. Stat. § 77-1837 (Reissue 1986) states in part:

> (1) Except as provided in subsection (2) of this section, at any time within ninety days after the expiration of three years from the date of sale of any real estate for taxes or special assessments, if the same shall not have been redeemed, the county treasurer, on request, and on production of the certificate of purchase, and upon compliance with the provisions of sections 77-1801 to 77-1837, shall execute and deliver to the purchaser, his heirs or assigns, a deed of conveyance for the real estate described in such certificate.

Neb. Rev. Stat. § 77-1902 (Reissue 1986) in pertinent part provides:

> (1) Where land has been sold for delinquent taxes and a tax sale certificate or tax deed has been issued, the holder of such tax sale certificate or tax deed may, instead of

> demanding a deed or, if a deed shall have been issued, by surrendering the same in court, proceed in the district court of the county in which the land is situated to foreclose the lien for taxes represented by the tax sale certificate or tax deed, and all subsequent tax liens thereon, in the same manner and with like effect as in the foreclosure of a real estate mortgage, except as otherwise specifically provided by sections 77-1903 to 77-1917. Except as provided in subsection (2) of this section, *such action shall only be brought within ninety days after the expiration of the time for redemption from the tax sale upon which the tax sale certificate or tax deed is based.*

(Emphasis supplied.) Neb. Rev. Stat. § 77-1917 (Reissue 1986) in part recites: "Any person, entitled to redeem any lot or parcel of land, may do so at any time after the decree of foreclosure and before the final confirmation of the sale . . . ."

Last, but certainly not least, is Neb. Const. art. VIII, § 3, pertaining to the right of redemption:

> The right of redemption from all sales of real estate, for the non-payment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less than two years from such sales thereof. Provided, that occupants shall in all cases be served with personal notice before the time of redemption expires.

Since certain real estate taxes and assessments for prior years were unpaid, on August 22, 1980, Lancaster County issued and purchased tax sale certificates for such unpaid levies, see Neb. Rev. Stat. § 77-1809 (Reissue 1986) (delinquent tax sales; purchase by county), which certificates matured on August 23, 1983, entitling Lancaster County to a treasurer's tax deed on real estate which had not been redeemed. See § 77-1837. In the present case, the owners' real estate was not redeemed. On November 22 and November 23, 1983, that is, 91 and 92 days after its tax sale certificates had matured, Lancaster County commenced actions to foreclose those certificates pursuant to § 77-1902(1).

The owners responded that the county's actions were barred by the 90-day limit prescribed by § 77-1902(1). On October 8,

1985, the district court found that Lancaster County had timely commenced its actions, and subsequently entered a decree foreclosing the tax liens of the tax sale certificates. In ruling that Lancaster County had timely filed its petitions, the district court apparently relied upon *Bish v. Fletcher*, 219 Neb. 863, 366 N.W.2d 778 (1985), which was issued approximately 6 months before the district court's decree of foreclosure.

In this appeal, the sole issue is whether the county filed its foreclosure actions within the time specified in § 77-1902(1). We are not concerned here with the county's tax lien, which continues until that lien has been divested by payment of taxes or sale of real estate in foreclosure of such lien as authorized in Neb. Rev. Stat. § 77-1901 (Reissue 1986). See *County of Valley v. Milford*, 70 Neb. 313, 97 N.W. 310 (1903).

The real estate owners contend that the "time for redemption" expressed in § 77-1902(1) expires when a tax sale certificate matures 3 years after the tax sale. Thus, the owners argue that the tax sale certificates in the present cases matured on August 23, 1983, and that the county's petitions for foreclosure, which were filed more than 90 days after expiration of the time for redemption, were not filed within the time limits specified in § 77-1902(1).

All parties in the present proceedings pointedly criticize *Bish v. Fletcher, supra*, where, similar to the present case, the appellees held a tax sale certificate which matured on August 23, 1983. Rather than demanding a tax deed, the appellees in *Bish* filed a petition to foreclose the lien of their tax sale certificate in the district court on February 3, 1984, pursuant to § 77-1902. In holding that the petition, which was filed 164 days after the tax sale certificate had matured, was timely filed, we stated:

> [A] holder of a tax certificate may request a deed at any time after 3 years from the date of sale and up until 90 days thereafter, and because § 77-1824 allows the owner to redeem at any time before delivery of a tax deed, it would be possible for the period of redemption to cover at least 3 years and 90 days. The time for redemption would finally expire in this case on November 21, 1983. The action to foreclose had to be brought within 90 days of that date,

which it was.

219 Neb. at 865, 366 N.W.2d at 780. In *Bish* we held that the "time for redemption" from a tax sale was 3 years and 90 days and that a petition to foreclose the lien of a tax sale certificate may be brought within 90 days after expiration of the "3 years and 90 days" period. Thus, in *Bish* this court equated "time for redemption" (§ 77-1902) with the "right of redemption" (§§ 77-1824 and 77-1917).

The focal point of this case is a characterization or illustration of the phrase "time for redemption" found in § 77-1902(1).

Guided by the language "for a period of not less than two years" found in Neb. Const. art. VIII, § 3, this court long recognized 2 years as the period of time for redemption in reference to tax sales. For example, in *McGavock v. Pollack*, 13 Neb. 535, 536, 14 N.W. 659 (1882), this court examined statutes which provided: " 'The owner or occupant of any lands sold for taxes . . . may redeem the same at any time within two years after the day of sale,' " and " 'If no person shall redeem such lands within 2 years, at any time after the expiration thereof [a treasurer's deed may be delivered to the purchaser].' " (Emphasis omitted.) In construing the foregoing statutes, this court, in *McGavock*, declared void a tax deed issued 1 day before expiration of the 2-year time for redemption and stated at 536, 14 N.W. at 659: "[T]he owner of land sold for taxes, or other interested person, shall have two full years 'after the day of such sale' within which to redeem it." (Emphasis omitted.)

Parker v. Matheson, 21 Neb. 546, 32 N.W. 598 (1887), involved a petition filed on February 21, 1885, to foreclose a lien based on a tax sale certificate purchased on February 5, 1878. *Parker* involved a statute providing a 2-year period for redemption and a 5-year limitation for foreclosure of a tax sale lien. Deciding that the foreclosure action was barred because the proceedings were not commenced within the statutory time, this court expressed in *Parker*:

> The action to foreclose could not have been brought until the time given to redeem had expired. . . . The sale was simply void and conferred a lien for the taxes which might be foreclosed after the expiration of the time in which the

> defendant might redeem. That time was two years from date of sale. February 6th, 1880, the action could have been maintained. The suit was instituted February 21st, 1885, five years and fifteen days after the expiration of the time for redemption.

21 Neb. at 547, 32 N.W. at 598. In *County of Valley v. Milford*, 70 Neb. 313, 316, 97 N.W. 310, 311 (1903), which also involved a 5-year statute of limitations for foreclosure of a lien acquired through a tax sale certificate, we stated:

> In view of the constitutional provision which provides that the tax debtor may redeem from the tax sale at any time within two years, and in view of other provisions of the statute, this court has repeatedly held that the five years, within which foreclosure proceedings might be brought, did not commence to run until the expiration of the two years within which the tax debtor might redeem from the sale.

An analysis of the time allowed for redemption from a tax sale and lien is found in *Connely v. Hesselberth*, 132 Neb. 886, 889, 273 N.W. 821, 823 (1937):

> Where there has been a valid administrative sale by the county treasurer to a private individual and he has not brought foreclosure action until more than two years after the issuance of the tax sale certificate, the owner, or other person interested, is not entitled to two years in which to redeem from the confirmation of sale under decree of foreclosure. He is entitled to only one two-year period, and that has been given from the time of the administrative sale and before the commencement of the foreclosure action. It is true, however, that in such case he is entitled to an additional period in which to redeem; that is, at any time prior to the confirmation of the sale. The correct rule is that owners and others interested in realty, sold under decree foreclosing valid tax sale certificate, where foreclosure was commenced more than two years subsequent to issuance of tax sale certificate, are barred from the right of redemption on confirmation of such judicial sale.

See, also, *Peterson v. Swanson*, 133 Neb. 164, 274 N.W. 482

(1937); *County of Madison v. Walz*, 144 Neb. 677, 14 N.W.2d 319 (1944); *County of Lincoln v. Provident Loan & Investment Co.*, 147 Neb. 169, 22 N.W.2d 609 (1946). In *Connely*, this court recognized the very important distinction between the "time for redemption," which was the constitutional right of redemption for 2 years from the date of the tax sale, and the statutory right of redemption which existed thereafter until confirmation of a judicial sale of the property. In *Bish v. Fletcher*, 219 Neb. 863, 366 N.W.2d 778 (1985), we overlooked such distinction between "time for redemption" and "right of redemption." Also, the 2-year "time for redemption" was statutorily expressed in § 77-1837 (Reissue 1971): "At any time within three years after the expiration of two years from the date of sale of any real estate for taxes or special assessments," making it clear that, after expiration of the 2 years for redemption, a purchaser of a tax sale certificate had 3 years to obtain a treasurer's tax deed. By virtue of §§ 77-1824 and 77-1917 (Reissue 1971), the right of redemption continued, however, until either a treasurer's tax deed was issued or there was judicial confirmation of a sheriff's sale in foreclosure of the lien for delinquent taxes.

In 1975, the Nebraska Legislature passed L.B. 78, which amended § 77-1837, expanding the time for redemption to 3 years and decreasing the time for commencement of a tax lien foreclosure or acquisition of a treasurer's tax deed, namely, a decrease from 3 years to 90 days after expiration of the time for redemption.

Returning to *Bish v. Fletcher, supra*, we concluded that since a *right* of redemption existed anytime until the issuance of a tax deed (§ 77-1824 (Reissue 1986)), the *time* for redemption (§ 77-1902(1) (Reissue 1986)) coexisted for the same duration. However, the ultimate extension of the *Bish* rule—"time for redemption" and "right of redemption" exist for the same duration—ironically produces a peculiar result. Under § 77-1902, a tax foreclosure cannot be commenced until the time for redemption has expired. Yet, under § 77-1917 (Reissue 1986), a right of redemption exists in a tax foreclosure until the sale in the foreclosure proceeding is confirmed, concluding the foreclosure and extinguishing the right of redemption.

According to *Bish*, the time for redemption and the right of redemption endure for the same period, that is, until confirmation of a tax foreclosure sale. But a tax foreclosure proceeding cannot be commenced before expiration of the time for redemption (§ 77-1902), that is, according to *Bish*, until a tax foreclosure sale has been confirmed. Therefore, as a result of *Bish*, a tax foreclosure proceeding cannot be commenced until such foreclosure proceeding has been concluded by confirmation. We do not believe such a catch-22 was intended as a part of the statutory scheme pertaining to tax foreclosure sales.

"One of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give effect to that intent." *Spence v. Terry*, 215 Neb. 810, 814, 340 N.W.2d 884, 886 (1983). "When statutory language is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the intent of the lawmakers." *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 121, 362 N.W.2d 35, 40 (1985). See, also, *Worley v. City of Omaha*, 217 Neb. 77, 348 N.W.2d 123 (1984). In determining the intent of the Legislature, the Supreme Court considers the history of the legislation and the reasonableness of an interpretation, weighed against an unreasonable or absurd construction evidently not intended by the Legislature. *Otto v. Hahn*, 209 Neb. 114, 306 N.W.2d 587 (1981). See, also, *Johnson v. School Dist. of Wakefield*, 181 Neb. 372, 148 N.W.2d 592 (1967). "Legislative history includes the record of a floor explanation or debate, which is an extrinsic, secondary source in statutory interpretation." *Spence v. Terry, supra* at 815, 340 N.W.2d at 887.

A review of the legislative history of L.B. 78, which amended § 77-1902 in 1975, discloses that the bill's introducer stated during floor debate:

> [W]e have spelled this out plainly what our intent was in three years to bring this back for a tax sale. . . . [T]his is quite plain now and it does bring it down to three years and then they have to move on it in 90 days after that three year period.

Floor Debate, L.B. 78, 84th Leg., 1st Sess. 1592 (Mar. 19,

1975). The Legislature intended that a tax foreclosure under § 77-1902 can only be brought within the 90 days immediately after expiration of 3 years from the tax sale on which a tax sale certificate or tax deed is based.

We now hold that the "time for redemption," as such phrase is used in § 77-1902, is the 3 years immediately following a delinquent tax sale and that an action to foreclose a tax lien pursuant to § 77-1902 can only be brought within the 90 days immediately after expiration of such time for redemption. Consequently, *Bish v. Fletcher*, 219 Neb. 863, 366 N.W.2d 778 (1985), stating that the "time for redemption" is 3 years and 90 days from the date of a tax sale, is overruled.

We must, therefore, reverse the judgment of the district court and remand this matter with direction to dismiss the actions of Lancaster County because the county's petitions were not filed within the time prescribed by § 77-1902.

REVERSED AND REMANDED WITH DIRECTION.

CHARLES O'KEEFE, APPELLANT, V. TABITHA, INC., AND RONALD E. SORENSEN, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLEES.

399 N.W.2d 798

Filed January 23, 1987. No. 86-071.

1. **Employment Security Law: Appeal and Error.** In an appeal regarding disqualification of benefits under Neb. Rev. Stat. § 48-628(b) (Reissue 1984), the Supreme Court retries factual questions de novo on the record and reaches conclusions independent of those reached by the district court.
2. **Employment Security Law.** While absences due to illness may not constitute an employee's misconduct, an employee's chronic and excessive absenteeism demonstrates a wanton and willful disregard of the employer's interests for the purpose of Neb. Rev. Stat. § 48-628(b) (Reissue 1984).
3. **Employment Security Law: Labor and Labor Relations.** A labor contract is irrelevant to the determination of the existence of misconduct, because,

generally, private labor agreements may not render an unemployment compensation law ineffectual.

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

Noel S. DeKalb, for appellant.

Jerry L. Pigsley of Nelson & Harding, for appellee Tabitha, Inc.

Laureen Van Norman, for appellee Sorensen.

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

SHANAHAN, J.

Charles O'Keefe appeals the judgment of the district court for Lancaster County, affirming the decision of the Nebraska Appeal Tribunal which had determined that, on account of misconduct as an employee of Tabitha, Inc., O'Keefe was disqualified from unemployment benefits for a period of 9 weeks, according to Neb. Rev. Stat. § 48-628 (Reissue 1984), which provides:

> An individual shall be disqualified for benefits:
>
> . . . .
>
> (b) For the week in which he or she has been discharged for misconduct connected with his or her work, if so found by the commissioner, and for not less than seven weeks nor more than ten weeks which immediately follow such week, as determined by the commissioner in each case according to the seriousness of the misconduct; *Provided,* that if the commissioner finds that such individual's misconduct was gross, flagrant, and willful, or was unlawful, the commissioner shall totally disqualify such individual from receiving benefits with respect to wage credits earned prior to such misconduct.

Tabitha operates a nursing home, supplying services to as many as 236 dependent residents of the home. Since 1983, Tabitha has employed O'Keefe in dietary services and, in September of 1984, adopted a written "no fault attendance policy" which was distributed to its employees. Under such

policy, an employee's absence from work, regardless of cause, was charged against the total number of absences which constituted a basis for terminating employment at Tabitha. According to the Tabitha policy adopted in 1984, two absences within a 2-month period resulted in a first notice to an employee; four absences within 6 months, a second notice; and six absences within 10 months, a third and final notice. Six absences within a 12-month period were a cause for Tabitha's dismissal of an employee.

Before adoption of the written policy in 1984, O'Keefe was sick and absent from employment 4 days in January of 1984, 2 days in February, 2 days in March, 3 in April, 2 in May, 2 in July, and 6 in August. On January 21, 1984, some unidentified person called Tabitha on behalf of O'Keefe and reported that O'Keefe would not report for work. On May 30, O'Keefe called in and stated he would not report for work, since he was working on his automobile. O'Keefe failed to call in or show up for work on August 19. After adoption of the written policy and between September 1, 1984, and February 22, 1985, O'Keefe missed 15 days on account of sickness and missed an additional 3 nonconsecutive days for reasons other than illness. On March 4, 1985, O'Keefe called in after a shift had commenced and informed his supervisor that he was unable to report for work. O'Keefe had been warned about his absences and was dismissed from employment on March 5.

In an appeal regarding disqualification of benefits under § 48-628(b), the Supreme Court retries factual questions de novo on the record and reaches conclusions independent of those reached by the district court. See, *Heimsoth v. Kellwood Co.*, 211 Neb. 167, 318 N.W.2d 1 (1982); *McClemens v. United Parcel Serv.*, 218 Neb. 689, 358 N.W.2d 748 (1984); *Smith v. Sorensen*, 222 Neb. 599, 386 N.W.2d 5 (1986).

For his first assignment of error, O'Keefe argues that the evidence does not sustain a disqualification from benefits under § 48-628(b).

As this court expressed in *McCorison v. City of Lincoln*, 215 Neb. 474, 475-78, 339 N.W.2d 294, 295-96 (1983):

> We have previously defined misconduct as referred to in § 48-628(b). Specifically, in *Stuart v. Omaha Porkers*, 213

Neb. 838, 840, 331 N.W.2d 544, 546 (1983), we recently said: "While the term 'misconduct' is not specifically defined in the statute, it has generally been defined to include behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations." [Citations omitted.]

. . . .

An employer has a right to expect an employee to be on the job except when otherwise excused and as authorized by the employment rules. The City, through its personnel code, provided for certain authorized times to be absent from work, including sick leave with pay, funeral leave with pay, and injury leave with pay. However, the absences, as reflected by the record, were neither explained nor justified by McCorison.

In an extensive annotation found at 41 A.L.R.2d 1158, 1160 (1955), the author notes: "Under statutes providing that unemployment benefits are to be denied or delayed to one whose unemployment results from discharge for wilful misconduct, it has been held or recognized that persistent or chronic absenteeism, at least where the absences are without notice or excuse, and are continued in the face of warnings by the employer, constitutes wilful misconduct within the statute." In *Keefer v. Com., Unemployment Comp. Bd. of Rev.*, 47 Pa. Commw. 281, 407 A.2d 934, 935 (1979), the Pennsylvania Commonwealth Court said: "However, excessive unjustified absenteeism can constitute willful misconduct because it may evidence a wanton and willful disregard of the employer's interest or a disregard of the standards of behavior which an employer can rightfully expect from his employee."

. . . .

"No aspect of contract of employment is more basic

> than the right of the employer to expect employees will appear for work on the day and at the hour agreed upon. Persistent failure to honor that obligation evinces a substantial disregard for the employer's interest and may justify a finding of misconduct connected with the employment.
>
> "Ample authority may be found in other jursidictions to the effect that persistent or chronic absenteeism without notice or excuse in the face of warnings from the employer constitutes such misconduct as requires a denial of unemployment compensation. [Citations omitted.]" [Citing *Wallace v. Stewart*, 559 S.W.2d 647 (Tenn. 1977).]

Also, as observed by this court in *Stuart v. Omaha Porkers*, 213 Neb. 838, 840, 331 N.W.2d 544, 546 (1983):

> In common experience, the presence of or at least the preshift notice of absence of a workman is essential to the efficient operation of an assembly line production system and is a legitimate interest of the employer. The absence without notice, taken with previous warning, was sufficient to find that Stuart was discharged for willful misconduct.

See, also, *Strauss v. Square D Co.*, 201 Neb. 571, 270 N.W.2d 917 (1978).

In the case before us, Tabitha had an understandably strict schedule to maintain in view of the services to be provided to residents of a nursing home. While absences due to illness may not constitute an employee's misconduct, we conclude that an employee's chronic and excessive absenteeism demonstrates a wanton and willful disregard of the employer's interests for the purpose of § 48-628(b). See *McCorison v. City of Lincoln, supra*.

As a second assignment of error, O'Keefe contends that Tabitha violated its written policy regarding warnings to be given to its employees before termination of employment. In this regard O'Keefe relies upon *Morris v. Lutheran Medical Center*, 215 Neb. 677, 340 N.W.2d 388 (1983). *Morris* involved an employee's suit on an employment contract and the necessity of pleading and proving a deviation from the employer's "policies and procedures" which were incorporated into the

contract of employment. In this case, however, O'Keefe has not brought suit to enforce whatever may be his rights under his employment contract with Tabitha. O'Keefe has brought the action to collect unemployment benefits authorized by statute. *Smith v. Sorensen*, 222 Neb. 599, 386 N.W.2d 5 (1986), contains the rule applicable for disposing of O'Keefe's second assignment of error. *Smith v. Sorensen* teaches that a "labor contract is irrelevant to the determination of the existence of misconduct, as it appears that, generally, private labor agreements may not render an unemployment compensation law ineffectual." *Id.* at 605, 386 N.W.2d at 9. See, also, *Strauss v. Square D Co., supra.*

As his third and final assignment of error, O'Keefe claims it was improper to consider his work record as such existed before Tabitha adopted its written attendance policy in September 1984. We disagree. Under the circumstances, we find it is proper to consider an employee's work history as a course of conduct and behavior which may constitute "misconduct" necessary for disqualification from unemployment compensation. See *Roll v. City of Middleton*, 105 Idaho 22, 665 P.2d 721 (1983).

Upon our de novo review of the record in this case, we find misconduct within the meaning of § 48-628(b) has disqualified O'Keefe from unemployment compensation for a period of 9 weeks, as determined by the district court. We, therefore, affirm the judgment of the district court.

AFFIRMED.

JOANNE HAYES, APPELLEE, V. A.M. COHRON, INC., APPELLANT.
400 N.W.2d 244

Filed January 23, 1987. No. 86-197.

1. **Workers' Compensation: Words and Phrases.** The definition of "accident," as used in Neb. Rev. Stat. § 48-101 (Reissue 1984), includes injuries resulting from activities which create a series of repeated traumas ultimately producing disability.

2. **Workers' Compensation.** Neb. Rev. Stat. § 48-168 (Reissue 1984) provides, among other things, that the compensation court shall not be bound by any technical or formal rules of procedure.
3. **Workers' Compensation: Proof.** A workers' compensation plaintiff has the burden of proving that an injury resulted from an accident arising out of and in the course of employment.
4. _____: _____. If it is claimed that the injury was the result of employment exertion, the evidence must show that the employment contributed to the cause of the injury in some material and substantial degree.
5. _____: _____. The presence of a preexisting condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment.
6. **Expert Witnesses: Words and Phrases.** The meaning of words used by medical experts at times presents a problem of interpretation which may be resolved by the sense in which they were used.
7. **Workers' Compensation: Wages: Employment Contracts.** The wage rate is to be computed according to the contract of hire in force at the time of the accident.

Appeal from the Nebraska Workers' Compensation Court. Affirmed as modified, and cause remanded with direction.

James J. DeMars of Barlow, Johnson, DeMars & Flodman, for appellant.

Robert R. Moodie of Friedman Law Offices, for appellee.

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

PER CURIAM.

The appellee employee, Joanne Hayes, alleged she sustained personal injury in an accident arising out of and in the course of her employment with the appellant employer, A.M. Cohron, Inc., when she felt a sudden, sharp pain in her knee while "lifting a 200 pound I-beam with a co-worker." The compensation court found Hayes suffered accidental injury to her right leg arising out of and in the course of her employment with Cohron by virtue of being "frequently required to work on her knees," and awarded her certain benefits under the provisions of Neb. Rev. Stat. §§ 48-120 (Reissue 1984) and 48-121 (Cum. Supp. 1986). Cohron appeals and assigns as errors the compensation court's (1) finding that Hayes suffered an injury arising out of and in the course of her employment, (2)

finding the evidence sufficient to support its award, (3) receiving a certain deposition in evidence, and (4) basing Hayes' weekly benefits upon a 45-hour workweek.

Hayes testified she was hired by Cohron to work 45 hours per week as a construction crew general laborer. During the period of her employment, April 17 through June 3, 1985, Hayes performed tasks which required her to kneel 75 percent of the time.

Sometime after Hayes began her work, she experienced pain and swelling in her knees. The condition worsened near the end of May; however, she continued working. She testified that on June 3, 1985, while she and fellow employee Richard Kenney were lifting heavy I-beams, she felt something tear in her right leg. Hayes put the I-beam down, told Kenney she had been injured, and went to locate her foreman. Hayes continued working that day, but at lighter duties.

Hayes sought medical attention from a Lincoln, Nebraska, orthopedic surgeon on the following day. This physician testified that during the first visit Hayes stated she was experiencing pain in both knees, especially in the right one, and that she had experienced this pain for "quite some time at the job she was working on." X rays showed that Hayes had abnormally tilted kneecaps on both sides. It was the physician's diagnosis that Hayes was suffering from a "tendency of the kneecap to dislocate." The physician further stated that the condition is usually present in the teenage years, but symptoms do not occur unless the afflicted person enters the type of activity Hayes had been performing.

The physician initially prescribed a drug for the pain, a knee brace, and physical therapy. Hayes was later given a release on June 18, 1985, to return to work. She then went to work loading trucks for an employer other than Cohron but, because of the pain in her right knee, had to quit after 3 days. Surgery was performed on the right knee on July 24, 1985.

Hayes had not informed the physician of the June 3 I-beam incident until September 4, 1985, after she had filed this suit. In the physician's opinion Hayes' preexisting knee condition had been aggravated, and the aggravation "could have been caused by an accident such as [the June 3 incident] or by the repetitive

kneeling and squatting that she was required to do." The physician further stated that he could not tell "which may have caused it."

Hayes' last visit to the physician occurred on October 15, 1985, at which time he felt Hayes was able to return to light work.

Cohron's first assignment of error, which attacks the finding that Hayes' injury arose out of and in the course of her employment, rests on the fact that, while the compensation court found that the injury resulted from the cumulative trauma attendant to Hayes' frequently working on her knees, Hayes had pled the injury occurred as the result of a specific, single incident, the lifting of a beam. Cohron argues that the compensation court's finding is outside the issues of the case.

Cases exist which have denied a claim for workers' compensation benefits because of a variance between the pleadings and the proof. For example, in *Cearley v. Royal Globe Ins. Co.*, 632 S.W.2d 942 (Tex. App. 1982), the plaintiff's original petition alleged that he had suffered an injury to his respiratory system by excess exposure to gases in the work environment on a specific date. The testimony at trial, however, revealed that plaintiff's breathing problems had developed over a gradual period due to repetitive exposure to the gases in the work environment. The court held that because the evidence showed a disability due to an occupational disease rather than an injury occurring on a specific date as alleged, plaintiff could not recover. However, *Cearley* is inapposite, for the jurisdiction in which it was decided, unlike Nebraska, adheres to the one specific incident "traceable to a definite time and place" theory of "accident." *Id.* at 946. *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982), makes clear that in Nebraska the definition of "accident," as used in Neb. Rev. Stat. § 48-101 (Reissue 1984), includes injuries resulting from activities which create a series of repeated traumas ultimately producing disability. See, also, *Masters v. Iowa Beef Processors*, 220 Neb. 835, 374 N.W.2d 21 (1985); *McLaughlin v. Self-Insurance Servs.*, 219 Neb. 260, 361 N.W.2d 585 (1985); *Tranmer v. Mass Merchandisers*, 218 Neb. 151, 352 N.W.2d 610 (1984); *Crosby v. American Stores*, 207 Neb. 251, 298 N.W.2d

157 (1980).

Other cases have challenged compensation claims on the basis that the variance in proof violated due process by not giving the defendant adequate notice of what it was to defend against. For example, in *Moore v. Carter Carb. Div. ACF Industries*, 628 S.W.2d 936 (Mo. App. 1982), the plaintiff filed a claim alleging disability by reason of inhaling gasoline fumes. At trial, however, the medical testimony attributed the disability to either the inhalation of gasoline fumes or the inhalation of emery dust, also found at the workplace, or to both. That court noted that technical rules of pleading and strict rules of evidence were to be avoided in compensation cases and ruled that there was sufficient evidence to identify the illness sustained and the probable cause or causes thereof to support the claim as filed.

In *City of Altoona v. Workmen's Comp. App. Bd.*, 50 Pa. Commw. 178, 411 A.2d 1322 (1980), the plaintiff alleged in his petition that he had suffered a heart attack on the job. The examining physician testified, however, that although plaintiff had suffered chest pains creating the need for hospitalization, he had not suffered a heart attack but, rather, some other heart malfunction. Noting that compensation pleadings were to be liberally construed, the court held that plaintiff had suffered some disabling injury to the heart in the course of employment and thus suffered a compensable injury.

Neb. Rev. Stat. § 48-168 (Reissue 1984) provides, among other things, that the compensation court shall not be bound by any technical or formal rules of procedure. Indeed, even the rules of civil procedure applicable to the district courts provide, in Neb. Rev. Stat. § 25-846 (Reissue 1985), that no variance between the allegations in a pleading and the proof shall be deemed material unless it has actually misled the adverse party to his or her prejudice and that the court may order the pleading amended under such terms as may be just. Making those observations, *Faulhaber v. Roberts Dairy Co.*, 147 Neb. 631, 24 N.W.2d 571 (1946), approved the compensation court's allowance of a postinitial hearing amendment to the workman's petition. The injured workman alleged he had hit his thumb with a hammer. After the initial hearing, at which the workman

testified as he had alleged in his petition, he was permitted to amend the petition to allege that some molten solder got caught in a bandage at the end of his thumb, which had not previously recovered from a prior injury. The workman's testimony at the rehearing then conformed with the allegations in the amended petition. In affirming an award of benefits to the workman, the *Faulhaber* court concluded that the workman's expanded testimony, which he justified by explaining that he simply had not thought of the second accident when testifying at the initial hearing, did not discredit him as a matter of law.

While the variance between the allegation Hayes made in her petition and the testimony she produced may bear on the issue of her credibility, the variance is not such as to discredit her as a matter of law. Neither was the variance between the allegations of the petition and the proof of such a nature as to deprive Cohron of due process by failing to advise it of the issue against which it was to defend, that is, whether Hayes sustained injury in an accident arising out of and in the course of her employment with Cohron.

There being no merit to Cohron's first assignment of error, we direct our attention to its second assignment, the claim that the evidence is insufficient to support the award.

There is no question but that a workers' compensation plaintiff has the burden of proving that an injury resulted from an accident arising out of and in the course of employment. *Laffin v. Nelson Enterprize*, 222 Neb. 226, 382 N.W.2d 371 (1986). Moreover, if it is claimed that the injury was the result of employment exertion, the evidence must show that the employment contributed to the cause of the injury in some material and substantial degree. *Crosby v. American Stores*, 207 Neb. 251, 298 N.W.2d 157 (1980). Further, the presence of a preexisting condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment. *Wilson v. City of North Platte*, 221 Neb. 90, 375 N.W.2d 134 (1985).

The essence of Cohron's argument is that the physician testified only that either the frequent use of her knees or the lifting of the beam could have caused Hayes' injury and resultant disability and did not testify with reasonable medical

certainty or probability that one of those alternative causes did in fact bring about the disability.

As we have noted previously, the meaning of words used by medical experts at times presents a problem of interpretation which may be resolved by the sense in which they were used. *Snyder v. IBP, Inc.*, 222 Neb. 534, 385 N.W.2d 424 (1986). A fair reading of the physician's entire testimony leaves no doubt but that in his opinion it was reasonably certain from a medical point of view that the preexisting abnormal tilt of Hayes' right knee was aggravated either by the lifting of the beam or the frequent use of her knees to the point that the preexisting condition produced disability. What he was uncertain of was which of the two alternative possible employment causes was responsible, because either of them could be. Since, however, as our earlier analysis of Cohron's first assignment of error demonstrates, either cause would, in and of itself, qualify as an accident arising out of and in the course of employment, that uncertainty is immaterial.

The cases Cohron cites which reach contrary results are not applicable. *Scott v. State*, 218 Neb. 195, 352 N.W.2d 890 (1984), was an occupational disease case in which the medical evidence was interpreted to mean that the employee experienced only a normal progression of his preexisting condition. In *Caradori v. Frontier Airlines*, 213 Neb. 513, 329 N.W.2d 865 (1983), the evidence was only that the employment accident could have caused the disability, not, as in the present case, that one of two employment accidents did cause the disability. *Eliker v. D. H. Merritt & Sons*, 195 Neb. 154, 237 N.W.2d 130 (1975), does indeed hold that the failure to tie the injury and resultant disability to a specific work event fails to establish an accident which "arose in the course" of employment. It must be borne in mind, however, that *Eliker* was decided before development of the rule that in the case of an injury which develops over a period of time, the "in the course of" requirement is met by showing that employment exertion contributed in some material and substantial degree to cause the injury. See, *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982); *Crosby v. American Stores, supra.*

The second assignment of error thus fails, bringing us to

Cohron's third assignment, which claims that the compensation court erred in receiving into evidence the deposition of Hayes' coworker Kenney.

In that deposition Kenney testified that about an hour after he and Hayes had moved some I-beams, Hayes said that she could not stand it any longer, her right knee had given out. Cohron's contention is that since Kenney had failed to appear at several scheduled times to take his deposition, had not been subpoenaed to appear any of those times, and had not been subpoenaed to appear at the rehearing, it was an abuse of discretion to permit his deposition to be taken and submitted after the presentation of live testimony had been concluded. However, the compensation court's determination that it was the repeated use of her knees which caused Hayes' injury and resultant disability renders Kenney's deposition testimony irrelevant and immaterial to the disposition of this case. Thus, we need not, and therefore do not, decide the issue this assignment of error presents.

Cohron's fourth and last assignment of error argues that the compensation court erred in basing Hayes' permanent partial disability benefit upon a 45-hour workweek.

Section 48-121(4) provides in relevant part:

> For disability resulting from permanent disability, if immediately prior to the accident the rate of wages was fixed by the . . . hour, . . . the weekly wages shall be taken to be computed upon the basis of a work week of . . . a minimum of forty hours, if the wages are paid by the hour . . . .

Neb. Rev. Stat. § 48-126 (Reissue 1984) provides in relevant part:

> Wherever . . . the term wages is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident. . . . In continuous employments, if immediately prior to the accident the rate of wages was fixed by the . . . hour . . . his weekly wages shall be taken to be his average weekly income for the period of time ordinarily constituting his week's work, and using as the basis of calculation his earnings during as

> much of the preceding six months as he worked for the same employer . . . . The calculation shall also be made with reference to the average earnings for a working day of ordinary length and exclusive of earnings from overtime; *Provided*, that if the insurance company's policy of insurance provides for the collection of a premium based upon such overtime, then such overtime shall become a part of the basis of determining compensation benefits.

The evidence contradicts Hayes' stated expectation that she would work 45 hours per week. It establishes that she was paid $5.25 per hour for the first 8 hours of work per day and one and a half times that amount for work performed after the first 8 hours of work per day. The evidence also establishes that of the 7 full weeks Hayes worked for Cohron, there were only 3 weeks during which she worked 5 full days. It is clear that in each of those 3 weeks, she earned somewhat more than she would have earned by working no more than 8 hours per day, but there is no way to determine from the record how many hours she worked in any one day or how many hours she worked in any one of those 3 weeks. The record demonstrates, however, that she did not average 45, or for that matter 40, hours per week throughout her period of employment. While the record suggests that Cohron was insured, it does not reflect whether the insurer collected a premium based on Hayes' overtime work.

There is no question but that the wage rate is to be computed according to the contract of hire in force at the time of the accident. *Gruber v. Stickelman*, 149 Neb. 627, 31 N.W.2d 753 (1948); *Johnsen v. Benson Food Center*, 143 Neb. 421, 9 N.W.2d 749 (1943); § 48-126. The controlling inquiry is what that contract was. Irrespective of Hayes' stated expectation, the contract of employment was performed with a workweek of less than 40 hours. The acts of the parties and their practical interpretation of a contract while engaged in its performance before any controversy is one of the best indications of their true intent and meaning, and courts should ordinarily enforce such construction. *DeFilipps v. Skinner*, 211 Neb. 801, 320 N.W.2d 737 (1982). See, also, *Smith v. Daub*, 219 Neb. 698, 365

N.W.2d 816 (1985); *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983). If there exist facts which explain why the contract was for a workweek longer than the hours actually worked, it was incumbent upon Hayes, as the party with the burden of proof, *Laffin v. Nelson Enterprize*, 222 Neb. 226, 382 N.W.2d 371 (1986), to offer that explanation, not upon Cohron to show why evidence which appears to support its position in fact does not do so. Under the circumstances, § 48-121(4) requires that Hayes' permanent partial disability benefit be computed on the basis of a 40-hour week.

Since the record does not establish that overtime is to be considered, $5.25 is the appropriate hourly rate to be used for each of the 40 hours.

We therefore affirm but modify the award of the compensation court and remand the cause to that court with the direction that it enter an award which is consistent with this opinion.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED WITH DIRECTION.

CAPORALE, J., dissenting in part.

While I agree with the majority's analysis and resolution of the wage issue, I must nonetheless dissent.

It seems to me that the fear expressed in my dissent in *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982), has come to pass by the majority's resolution of this case. Mere hard work has become an "accident . . . arising out of and in the course of . . . employment" within the meaning of Neb. Rev. Stat. § 48-101 (Reissue 1984). According to the majority, there was an accident because plaintiff used her knees in doing her work, and the accident arose out of the employment because she felt pain while she was at work. Such a thought process fleeces of any meaning the word "accident" and the phrase "arising out of."

For the reasons expressed in *Sandel v. Packaging Co. of America, supra*, I would find the plaintiff failed to sustain the burden of proving she suffered an injury resulting from an accident arising out of and in the course of her employment. I thus would reverse the judgment of the compensation court and

direct dismissal of the action.

BOSLAUGH and HASTINGS, JJ., join in this dissent.

SANDRA JEAN WILSON, APPELLEE, V. RICHARD ALAN WILSON, APPELLANT.

399 N.W.2d 802

Filed January 23, 1987. No. 86-251.

1. **Child Custody.** Joint custody is not favored by the courts of this state and will be reserved for only the rarest of cases.
2. **Modification of Decree: Child Support.** A significant increase in the appellant's income, along with the increased ages of the children and the inability of the appellee to afford to pay the children's bills on the current support payment, meets the requirement of a material change in circumstances and supports the trial court's decision to modify child support payments.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed as modified.

Miles W. Johnston, Jr., of Johnston, Wherry & Knight, for appellant.

Steven J. Reisdorff of The Law Office, P.C., for appellee.

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

WHITE, J.

This is an appeal from the district court for Saline County. The parties to this case, Sandra Jean Wilson and Richard Alan Wilson, were divorced on October 4, 1982. As part of the decree the court approved a property settlement agreement. The property settlement agreement provided for the joint custody of their four children. Specifically, the appellee, Sandra Wilson, was awarded custody of the children during the school year, and the appellant had rights of visitation during every other weekend and holiday. The custody and visitation arrangements were reversed during the summer months. Richard Wilson was also ordered to pay $50 per month per child

during the time when the children were with their mother, but was excused from payment during the time the children were with him. In an addendum to the original property settlement, the appellant was ordered to pay one-half of all medical expenses and to obtain and maintain health insurance coverage on the children.

In March of 1984 the decree was modified to provide that the appellant pay a total of $200 per month child support except in any month in which he has the children 25 days or more. The appellant was also ordered to pay all reasonable and necessary medical expenses incurred by the children.

The third and final modification of the visitation, custody, and support rights came in March of 1986. The appellee was given custody of the children. The appellant was given visitation for 30 days in the summer, along with every other weekend, and was excused from the payment of support during that time. The appellant was permitted to pick up his children at 6 p.m. on Friday and return them at 7 p.m. on Sunday. He was also ordered to maintain present health care obligations.

This appeal follows the final modification. Appellant assigns error to the trial court's modification of the custody, support, and visitation provisions of the decree. We affirm as modified.

Addressing the issue of the custody of the four minor children, the appellant argues that the trial court erred in changing the custody of the Wilson children from joint custody in both parents to custody in the children's mother. Neb. Rev. Stat. § 42-364(3) (Cum. Supp. 1986) permits joint custody only in situations where both parents agree, and then only after a public hearing is conducted on that issue. Regardless of any agreement by the parents on the outcome of the public hearing, the court must find that joint custody is in the best interests of the children.

We have, in our previous opinions on the issue of joint custody, stated explicitly that joint custody is not favored and must be reserved for only the rarest of cases. *Trimble v. Trimble*, 218 Neb. 118, 352 N.W.2d 599 (1984); *Korf v. Korf*, 221 Neb. 484, 378 N.W.2d 173 (1985). Although each parent has shown only love and affection for the children, our review of the record makes apparent that the Wilsons' inability to

agree on custody arrangements has disrupted the children's home life and caused much unneeded stress. Although each parent is capable of providing a secure and happy home for the children, it is in the best interests of the children that there be only one custodial parent. From a de novo review of the record, which we are required to conduct, we find that the district court has made an admirable effort to find a solution for a situation in which none is really apparent. We find no abuse of discretion and affirm the district court's placement of the custody of the children with the appellee.

Appellant next assigns as error the district court's change of child support from a total of $200 per month to $120 per month per child. Questions relating to the modification of child support are entrusted to the sound discretion of the trial court. Although our review is de novo on the record, absent an abuse of discretion on the part of the trial court the decision of the trial court will be affirmed on appeal. *Wagner v. Wagner, ante* p. 155, 396 N.W.2d 282 (1986).

The rule is well established that, absent a material change of circumstances, child support payments are not subject to modification. *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985). The record reveals that the appellant's income has increased from over $10,000 in 1983 to over $19,000 in 1984. The appellant argues that this increase in income does not justify the lower court's increase in support payments. The appellee testified in court that the $200 per month she currently received in child support barely enabled her to feed the children and did not provide extra money to pay any additional expenses.

In *Morisch v. Morisch*, 218 Neb. 412, 413, 355 N.W.2d 784, 785-86 (1984), this court enumerated the situations which would meet the requirement of a material change of circumstances as follows:

> "Material change in circumstances" in reference to modification of child support is analogous to modification of alimony for "good cause." See Neb. Rev. Stat. § 42-365 (Cum. Supp. 1982); cf. *Chamberlin v. Chamberlin*, 206 Neb. 808, 814, 295 N.W.2d 391, 395 (1980) (modification of alimony on account of a "change

> of circumstances of a material and substantial nature"). "Material change in circumstances" eludes precise and concise definition. Courts may consider various factors to determine if a material change in circumstances has occurred. Among some of the factors or circumstances considered by a court are a *change in the financial resources or ability to pay on the part of the parent obligated to pay support*, needs of the child or children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction of income, and the duration of the change, namely, whether the change is temporary or permanent. See 24 Am. Jur. 2d *Divorce and Separation* §§ 1082-1088 (1983). Alteration and passage from one condition to another is essential for a material change in circumstances.

(Emphasis supplied.)

We also note *Pfeiffer v. Pfeiffer*, 201 Neb. 56, 266 N.W.2d 82 (1978), where a change in support obligations was partially justified by the increase in the father's salary, and *Meyers v. Meyers*, 222 Neb. 370, 383 N.W.2d 784 (1986), where this court stated that the determination of whether a material change in circumstances occurred involves, among other things, a consideration of whether a change in the financial resources of the parents has occurred.

The record does not contain specific notations which indicate that the parties anticipated this significant increase in the appellant's income. *Wagner v. Wagner, ante* p. 155, 396 N.W.2d 282 (1986). We find, therefore, that the appellant's increase in income, along with the increased ages of the children and the inability of the appellee to afford to pay the children's bills on the current support payments, meets the requirement of a material change in circumstances and permits the modification of support payments. We find no abuse of discretion in the lower court's actions.

Appellant's final assignment of error involves the failure of the trial court to provide for holiday visitation in the final order. In *Manewal v. Manewal*, 220 Neb. 867, 868, 374 N.W.2d 39, 40 (1985), this court stated:

> We hold that determinations as to visitation rights in a

> dissolution of marriage case are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion; keeping in mind, however, that the trial judge observed and heard the witnesses at some point in the trial and accepted one version of the facts rather than the other.

Our review of the record reveals no reason why the appellant was not granted visitation with his children on holidays, especially in light of the fact that the appellant had visitation in the past. We find that the trial judge abused his discretion in failing to provide appellant holiday visitation with his children.

We will now set out the holiday visitation schedule which will govern the parties to this case. Holiday visitation will include only the following holidays. (1) *Easter*. The Easter holiday will include that period of time during which the children are excused from school for the Easter holiday, including Easter Sunday, and shall commence at 8:30 a.m. on the day after the children are released from school and end at 7 p.m. on the day before the children return to school. (2) *Memorial Day weekend*. This holiday shall include only that weekend when Memorial Day is nationally recognized and shall commence at 8:30 a.m. on Saturday and conclude at 7 p.m. on Monday, Memorial Day. (3) *Fourth of July*. The Fourth of July shall include only the day on which Independence Day is nationally recognized and shall commence at 8:30 a.m. and conclude at 7 p.m. (4) *Labor Day weekend*. This holiday shall include only that weekend on which Labor Day is nationally recognized and shall commence at 8:30 a.m. Saturday and conclude at 7 p.m. on Monday, Labor Day. (5) *Thanksgiving*. This holiday shall be defined as that period of time during which the children are excused from school for the Thanksgiving holiday, including Thanksgiving, and shall commence at 8:30 a.m. on the day after the children are released from school and conclude at 7 p.m. on the day before the children return to school. (6) *Christmas*. The Christmas holiday shall be defined as that time during which the children are excused from school for the Christmas holiday and shall commence at 8:30 a.m. on the day after the children are released from school and conclude at

noon on December 31. (7) *New Year's Day*. The New Year's Day holiday shall commence at noon on December 31 and conclude at 7 p.m. on the day before school is to begin.

The children shall be returned to the custodial parent at the conclusion of each holiday. In even-numbered years the mother shall have the children for the even-numbered holidays, and Mr. Wilson shall have the children on the odd-numbered holidays. In odd-numbered years the children shall remain with their mother for odd-numbered holidays and spend the even-numbered holidays with the appellant. The children will spend Mother's Day with their mother and Father's Day with their father. For Mother's Day and Father's Day only, the holiday will commence at 8:30 a.m. and conclude at 7 p.m. on the Sunday on which these holidays are nationally observed. This holiday visitation schedule shall supersede the regular weekend visitation schedule. The regular weekend visitation schedule will continue with the parent who did not have the children on the previous holiday and continue on from that point, alternating between the parents every other weekend. We affirm as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. DARRYL W. HUNT, APPELLANT.
399 N.W.2d 806

Filed January 23, 1987. No. 86-344.

1. **Convictions: Directed Verdict.** A trial court is justified in directing a verdict of not guilty in favor of a defendant in a criminal case only where there is a total failure of competent proof to support a material allegation in the information or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained.
2. **Convictions: Circumstantial Evidence.** Circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish defendant's guilt beyond a reasonable doubt.

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

James Martin Davis and John William Davis, for appellant.

Robert M. Spire, Attorney General, Laura L. Freppel, and Lisa D. Martin-Price, for appellee.

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

GRANT, J.

The defendant, Darryl W. Hunt, appeals his conviction in the district court for Douglas County. The defendant was convicted, after jury trial, of possession with intent to distribute, deliver, or dispense a controlled substance, marijuana, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1985). He was sentenced to imprisonment in the Nebraska Penal and Correctional Complex for a period of not less than 3 nor more than 5 years. In his appeal defendant alleges only that the district court erred in overruling defendant's motion for a directed verdict in that the evidence was insufficient as a matter of law to sustain the conviction. For the reasons hereinafter stated, we affirm.

The record discloses that on the afternoon of September 16, 1985, officers of the Omaha Police Department, pursuant to a valid search warrant, conducted a search of apartment E at 6606 North 51st Plaza, Omaha, Nebraska. The apartment was leased to Denise Abram. When the police entered the apartment, Denise Abram and two of her minor children were there, as well as defendant Darryl Hunt. As a result of the search, a quantity of marijuana was seized, as well as a pad of unused, printed bank checks with the defendant's name and the address of "6606 N. 51st Plaza, No. E," on them; an envelope from a different bank addressed to the defendant at that address and postmarked April 15, 1985; $376 in cash; and a slip of paper with a list of names and amounts owed. The defendant was placed under arrest and subsequently charged with possession of a controlled substance, marijuana, with intent to deliver.

We first note that this court has held that a trial court is justified in directing a verdict of not guilty in favor of a defendant in a criminal case only where there is a total failure of competent proof to support a material allegation in the information or where the testimony adduced is of so weak or

doubtful a character that a conviction based thereon could not be sustained. *State v. Kane, ante* p. 245, 397 N.W.2d 628 (1986); *State v. Bridger,* 223 Neb. 250, 388 N.W.2d 831 (1986). While the evidence presented against the defendant in the case at bar is largely circumstantial, circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish defendant's guilt beyond a reasonable doubt. *State v. Kane, supra; State v. Ellis,* 223 Neb. 779, 393 N.W.2d 719 (1986); *State v. Buchanan,* 210 Neb. 20, 312 N.W.2d 684 (1981). Further, it is not the responsibility of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. That task is for the jury, and its verdict of guilty must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Kane, supra.* See, also, *State v. Joy,* 220 Neb. 535, 371 N.W.2d 113 (1985).

An examination of the record, with those standards in mind, discloses the following. Abram testified that defendant was not a resident of her apartment, and other witnesses testified that defendant lived at a residence other than 6606 North 51st Plaza, apartment E. The State adduced other evidence which, if believed by the jury, established that defendant's residence was the apartment in question. Such evidence included the undisputed facts that at the time the police entered the apartment defendant was bathing in the bathtub in the apartment and that clothing belonging to him was piled in the middle of the floor in the master bedroom. Other evidence showed that, in the presence of defendant, Abram told the police lieutenant in charge of the search party that the master bedroom was messy because "That's not my room, that's his room, he lives there," referring to defendant. Other undisputed evidence showed that defendant was the father of three of Abram's four children. In addition, as set out above, the police search of the apartment disclosed imprinted blank checks bearing defendant's name and the address of the apartment in question, as well as mail directed to defendant at the apartment address.

Defendant argues that he was merely present in the

apartment and that under the rule this court set out in *State v. Faircloth*, 181 Neb. 333, 148 N.W.2d 187 (1967), and quoted with approval in *State v. Klutts*, 204 Neb. 616, 284 N.W.2d 415 (1979), his mere presence is not sufficient evidence to establish that he was a resident of the apartment or, in any event, that the evidence did not show that he had sufficient knowledge of the presence of the marijuana to have intent to possess it.

In the case at bar, the evidence showed more than mere presence at the apartment. Defendant's bathing in the apartment at 4 p.m., together with the other facts as set out above, affords sufficient evidence to support a determination that defendant was a resident of the apartment in question. Once that fact is established, it is a reasonable inference for the jury to believe that an occupant of the apartment was aware of the presence of such quantities of marijuana and cash, and therefore had the intent to possess such items. The evidence further furnished a reasonable inference that a person of the established limited economic means of Abram could not alone own such a quantity of cash and marijuana as found in the apartment.

We hold that the evidence in the case at bar was sufficient, when taken as a whole, to establish beyond a reasonable doubt that defendant was a resident of the apartment, knew of the presence of the marijuana, and had the intent to possess that marijuana.

Insofar as defendant argues that in any event the evidence was not sufficient, as a matter of law, to support a finding of guilt of possession with intent to deliver, we determine that argument is without merit. The marijuana seized during the search was packaged in sandwich bags with a seal across the top, referred to as "nickel" and "dime" bags. At trial, Lieutenant Crowley of the Omaha Police Department testified that, when packaged for street sale, marijuana is normally placed in small sandwich bags in quantities of approximately 1/2 ounce (a "nickel" bag of a value of approximately $5) and approximately 1 ounce (a "dime" bag with a value of approximately $10). The jury could have properly drawn an inference that the marijuana found in the apartment was packaged for street sale. Such an inference is further supported

by the finding of a sack containing 42 "nickel" bags and 25 "dime" bags, together with $376 in bills and coins, located under the sink in the kitchen. In a closet, the police also found an "I.O.U. Sheet" containing names and dates listed as "Date got," "Amount," and other dates listed as "D.B. Back," as well as an additional 11 "nickel" bags and 4 "dime" bags. We determine the evidence was sufficient to support the jury's finding of guilty of possession of marijuana with intent to deliver. The judgment of the district court is affirmed.

AFFIRMED.

THOMAS H. GLOCKEL, PLAINTIFF, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A FOREIGN CORPORATION, DEFENDANT.

400 N.W.2d 250

Filed January 23, 1987. No. 86-361.

1. **Insurance: Rescission: Words and Phrases.** The cancellation of an insurance policy is not a rescission, since a rescission avoids the contract ab initio. A cancellation merely terminates the policy as of the time when the cancellation becomes effective.
2. **Insurance: Statutes.** Unless a cancellation statute is manifestly all-inclusive, a statute specifying the instances under which a party to an insurance contract may cancel it does not make cancellation the exclusive remedy, and it is not in derogation of other remedial rights which are recognized and implemented by other provisions of law.
3. **Insurance: Rescission: Fraud.** Neb. Rev. Stat. §§ 44-515 to 44-521 (Reissue 1984) do not prevent an insurer from rescinding an automobile liability insurance policy for material misrepresentations made by the insured in the application for the policy.
4. _____: _____: _____. Neb. Rev. Stat. § 44-358 (Reissue 1984) limits but does not eliminate the right of an insurer to rescind an automobile liability insurance policy for fraud in the application.
5. _____: _____: _____. An accident resulting in injury or damage to a third person does not destroy the right of an insurer to rescind an automobile liability insurance policy for fraud in the application.

Certified Questions from the U.S. District Court for the District of Nebraska. Judgment entered.

Peter J. Peters, P.C.; Warren C. Schrempp and Peter J. Hoagland; and Wallace Hopkins, P.C., and Steven M. Watson of Marks, Clare, Hopkins, Rauth, Cuddigan, Offner & Watson, for plaintiff.

Joseph K. Meusey and Joseph E. Jones of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for defendant.

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

BOSLAUGH, J.

This case is before the court a second time on a certification of questions of law from the U.S. District Court for the District of Nebraska, pursuant to Neb. Rev. Stat. §§ 24-219 to 24-225 (Reissue 1985).

In 1985 the following three questions were certified to us:

> 1. Whether the *exclusive* method of terminating an automobile liability insurance policy is controlled by [Neb. Rev. Stat. §§ 44-515 to 44-521 (Reissue 1984)].
>
> 2. Whether, because of the provisions of [§ 44-515(1)(b)], an automobile liability insurance policy can only be *cancelled* for "material misrepresentations" once a policy of insurance has been issued.
>
> 3. Whether [Neb. Rev. Stat. § 44-358 (Reissue 1984)] is inapplicable to an automobile liability insurance policy.

(Emphasis in original.) *Glockel v. State Farm Mut. Auto. Ins. Co.*, 219 Neb. 222, 225, 361 N.W.2d 559, 561 (1985) (hereinafter referred to as *Glockel I*).

In *Glockel I, supra*, the first certified question was answered "Yes," and this court stated that "the only way to cancel the automobile liability policy represented by Glockel's application, Glockel's premium payment, and State Farm's binder (assuming that the policy is one described in § 44-514) is to follow the procedures set out in §§ 44-515 and 44-516." 219 Neb. at 229, 361 N.W.2d at 564. Neb. Rev. Stat. § 44-515 (Reissue 1984) limits the grounds for cancellation of policies of the type defined in Neb. Rev. Stat. § 44-514 (Reissue 1984). Among the grounds upon which cancellation may be based is

"fraud or material misrepresentation affecting the policy or in the presentation of a claim thereunder . . . ." § 44-515(1)(b). Neb. Rev. Stat. § 44-516 (Reissue 1984) provides in relevant part: "(1) No notice of cancellation of a policy to which section 44-515 applies shall be effective unless mailed by registered or certified mail to the named insured at least thirty days prior to the effective date of cancellation . . . ."

The second question certified in *Glockel I, supra*, was answered "No" because a § 44-514 type of automobile liability policy can be canceled for reasons other than material misrepresentation, which additional reasons are set out in § 44-515(1)(a) and (c).

The third question certified in *Glockel I, supra*, was answered "Yes"; that is, Neb. Rev. Stat. § 44-358 (Reissue 1984) was held to be inapplicable to automobile liability policies insofar as it conflicts with Neb. Rev. Stat. §§ 44-514 et seq. (Reissue 1984). Section 44-358 provides:

> No oral or written misrepresentation or warranty made in the negotiation for a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation or warranty deceived the company to its injury. The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding.

After the U.S. District Court had received a certified copy of our opinion in *Glockel I*, Glockel moved for summary judgment on grounds that State Farm had no right, as a matter of Nebraska law, to rescind or terminate his policy ab initio after the loss. In support of this motion, Glockel relied solely on the answers to the certified questions in *Glockel I, supra*. He interpreted those answers to mean "that an insurer has no right, under the statutes of Nebraska, to rescind a liability binder policy after it is issued."

The U.S. District Court concluded that, while we had determined that §§ 44-515 to 44-521 provided the exclusive

methods for cancellation of this class of automobile liability insurance policies, "the ultimate issue . . . dealing with an insurance carrier's right to rescind a policy was not addressed." This conclusion was based on the fact that the *Glockel I* court had strictly limited itself to answering the certified questions presented and that nowhere in the questions themselves was the term rescission mentioned.

In the memorandum and order, filed December 23, 1985, the district court stated:

> In short, the crucial issue in this action is whether an insurance company has the right to rescind a policy under Nebraska law after an insured has suffered a loss or a third party has been injured by the insured.
>
> This Court's reading of the Nebraska Supreme Court's opinion in Glockel leads it to conclude that the crucial issue in this case was not squarely addressed by the Nebraska court's answers to the certified questions. This was probably due to the framing of the questions, none of which went to the heart of the relevant issue. Due to the limited review that the court has of certified questions, as opposed to reviewing "the matter as an appeal from a specific judgment or ruling of a trial court", Glockel, 219 Neb. at 227, 361 N.W.2d at 563, it appears that the Nebraska Supreme Court chose not to stray from the questions presented. The crucial question, therefore, was never answered by the court.
>
> This conclusion is supported by statements made by the court in the Glockel opinion. The court noted: "While the parties brief what seems to be the real issue in the case - that is, when does a purported rescission or cancellation take place? - that question is not submitted to us for answer. . . . Indeed, the question whether rescission and cancellation signify the same concept or have the same or different meanings under Nebraska law is not submitted on this point. * * * Various jurisdictions take differing positions on the question. Since the question is not submitted to us, we will answer the certified questions assuming that it does not make any difference in our answers which concept is applicable in Nebraska." Id. at

227, 361 N.W.2d at 563. The court also noted the ambiguity of the second question posed problems in the formulation of an answer, when it stated: In the [second] question the word "cancelled" is underlined, which seems to indicate that canceled means something different than some unexpressed concept. It would be a gratuitous assumption on our part to answer that the parties seek to have us differentiate between cancellation and rescission, so our answer will assume, for purposes of this answer only, that the two terms mean the same. Id. at 230, 361 N.W.2d at 564.

Looking at the certified questions themselves, nowhere is the term "rescission" mentioned. Rather, the questions revolve around the Nebraska statutes governing automobile insurance policies and their respective cancellation requirements. The Nebraska Supreme Court noted that the exclusive methods for cancellation of an automobile liability insurance policy are set forth in Neb.Rev.Stat. Sections 44-515 to 44-521 (Reissue 1984), however, the ultimate issue in this case dealing with an insurance carrier's right to rescind a policy was not addressed.

The Nebraska Supreme Court's reluctance to distinguish between "cancel" or "rescind" is evident when it stated: It appears to us that the questions presented seek to determine if an automobile liability insurance policy can be either "canceled," "rescinded," or "terminated" ab initio, rather than prospectively. In answering the questions certified to us, it is really of no concern at this point whether the words "rescission" or "cancellation" mean the same or not. Indeed, if defendant's contention is that recission [sic] is the only way to avoid a contract ab initio, then ab initio rescission is not available under Sections 44-515 to 44-521 because the term "rescission" is not used in any way in such sections. 219 Neb. at 228, 361 N.W.2d at 563.

The district court determined that *Glockel I, supra,* clearly held that an insurance carrier could not rescind a policy ab initio under §§ 44-515 to 44-521. Nevertheless, the district court

concluded that *Glockel I* did not indicate "whether an insurance carrier can 'rescind' a policy ab initio in a manner other than that dictated by statute, such as a common law right advocated by State Farm." The district court overruled Glockel's motion for summary judgment because the *Glockel I* opinion failed to address the question as to whether there is a right to rescind an insurance policy ab initio after a loss.

On April 24, 1986, State Farm's motion to certify additional questions of law to this court was sustained. The certified questions that have been submitted to us are:

> 1. Assuming Glockel's Application for a [Neb. Rev. Stat. § 44-514 (Reissue 1984)] type of automobile liability insurance policy was fraudulent, did State Farm have the right to declare its binder void from its inception under Nebraska statutory law or common law or both.
>
> 2. Did the right exist even though a loss occurred which caused damage to Leon J. Skank, who is not a party to the insurance contract.

In answering these questions we are required to assume the following facts are true:

> "Plaintiff, Thomas H. Glockel (hereinafter referred to as Glockel), applied to defendant, State Farm Mutual Automobile Insurance Company (hereinafter referred to as State Farm), for an automobile liability insurance policy on April 29, 1980. Glockel signed the application and paid $54.98 for the first 2 months' coverage. In his application, Glockel listed one traffic violation, a stop sign infraction in October of 1979. State Farm's agent bound coverage on April 29, 1980, and, on or about the same day, forwarded the application to State Farm's regional office in Lincoln, Nebraska. The policy was issued to Glockel and his father.
>
> Four days later, on May 3rd, 1980, Glockel was involved in an automobile accident that caused extremely serious injuries to one Leon Skank. At some point, the Lincoln underwriting office discovered that Glockel's Nebraska motor vehicle record revealed two traffic violations instead of just one. On May 7, 1980, Glockel gave a recorded statement to a State Farm investigator

admitting that he had received "two or three" speeding tickets in Council Bluffs, Iowa between June and August of 1979. State Farm thereafter convened a "claim committee" to evaluate the status of Glockel's policy. The claim committee determined that Glockel had made a material misrepresentation concerning his driving record. In a June 9, 1980, letter addressed to plaintiff, Glockel and his father, State Farm advised that, because of Thomas Glockel's misrepresentations, it was rescinding the binder of insurance and declaring it void at its inception. State Farm also returned Glockel's $54.98 premium payment.

Kandis K. Skank, as Conservator for her husband, Leon, filed suit in the District Court of Douglas County, Nebraska, against Thomas Glockel alleging negligence in the May 3, 1980 operation of his motor vehicle. Her attorneys sent written offers to Glockel's attorneys to settle the lawsuit for the $15,000 limit of Glockel's policy. Glockel's attorney communicated the offers to State Farm and demanded settlement. State Farm rejected the offers and refused to settle on the basis of its June 9, 1980 letter of rescission. The jury returned a verdict against Thomas Glockel substantially in excess of the policy limits.

Glockel's complaint in the United States District Court alleges negligence and bad faith by State Farm for refusing to settle the underlying lawsuit within the $15,000 policy limit. Mr. Glockel seeks a judgment against State Farm for the $15,000 insurance coverage and the amount by which the state court judgment exceeds the policy limit, plus interest and attorneys' fees. He further requests damages for mental and emotional distress, unfavorable publicity, and injury to his credit and reputation. State Farm, by affirmative defense, alleges that Glockel misrepresented material facts regarding his driving record in his application for insurance and that, under Nebraska law, State Farm may therefore rescind the policy and declare it void ab initio."

QUESTION NO. 1

A careful review of the applicable statutes, legislative history, *Glockel I, supra*, and related case law demonstrates that the

answer to question 1 is Yes, State Farm did have the right to declare its binder void from its inception under both Nebraska statutory and common law.

At first glance, the answer to the first certified question in *Glockel I* suggests a contrary result. But in holding that §§ 44-515 to 44-521 provided the exclusive method of terminating an automobile liability insurance policy, we made no attempt to distinguish between the concepts of cancellation, termination, or rescission.

In 17 G. Couch, Couch Cyclopedia of Insurance Law § 67:35 at 487 (rev. ed. 1983), the text states that "[t]he cancellation of an insurance policy is not a rescission, since a rescission avoids the contract ab initio whereas a cancellation merely terminates the policy as of the time when the cancellation becomes effective."

In *Gov't Employees Ins. Co. v. Chavis*, 254 S.C. 507, 516, 176 S.E.2d 131, 135 (1970), the Supreme Court of South Carolina wrote that

> cancellation refers to the termination of the policy prior to the end of the policy period, and termination refers to the expiration of policy by the lapse of the policy period. Rescission is not merely a termination of contractual obligation but is abrogation or undoing of it from the beginning, which seeks to create a situation the same as if no contract ever had existed. [Citation omitted.] The cancellation of a liability insurance policy operates prospectively and is to be distinguished from rescission which destroys the policy *ab initio*. In the case of *Ray v. Beneficial Finance Co.*, 92 N. J. Super. 519, 224 A. (2d) 143, it was held that "rescission" contemplates return to *status quo ante*.

See, also, *United Security v Ins Comm'r*, 133 Mich. App. 38, 348 N.W.2d 34 (1984).

Section 44-358, while not expressly using the term rescission, has been interpreted by this court to recognize the right to avoid a policy under certain circumstances in the case of material misrepresentations by an insured. See, *White v. Medico Life Ins. Co.*, 212 Neb. 901, 327 N.W.2d 606 (1982); *MFA Mut. Ins. Co. v. Meisinger*, 183 Neb. 285, 159 N.W.2d 829 (1968). The

remedy in the former case was in the nature of rescission because the successful insurer avoided liability on the policy as if it had never existed.

In other cases, this court has recognized the right to void or rescind an automobile liability policy ab initio for material misrepresentations, without express reference to § 44-358. *Dairyland Ins. Co. v. Kammerer*, 213 Neb. 108, 327 N.W.2d 618 (1982); *Reserve Ins. Co. v. Aguilera*, 181 Neb. 605, 150 N.W.2d 114 (1967).

In the *Kammerer* case, the insurer attempted to rescind the policy for fraud in the application, but failed to return the entire premium it had received. In that case we said:

> When learning of the alleged fraud, Auto-Owners had two choices. Either it could determine that, because of the alleged fraudulent statements made to it, it wished to cancel the policy from its inception and return to Popish the entire premium, on the theory that the policy never came into existence, or it could waive the alleged fraud, keep the premium earned to date of cancellation, and accept responsibility under the policy. If Auto-Owners elected to rescind the policy from its inception, it must place Popish back in the same position Popish was in before the policy was issued, including returning to her all of the premium. But Auto-Owners chose not to do so. Both by its notice of cancellation and by its retention of a portion of the premium, Auto-Owners elected to recognize the existence of the policy from the date of its issuance on March 5, 1980, until the date of its declared cancellation on April 22, 1980. Having made that choice, Auto-Owners acknowledged that the policy was in effect on the date of the accident, March 27, 1980, and it therefore became liable under the policy. Auto-Owners could not, on the one hand, recognize the existence of the policy and retain a portion of the premium and, on the other hand, deny the coverage afforded by the policy because of alleged fraudulent misrepresentations.

213 Neb. at 110-11, 327 N.W.2d at 620.

The use of the word "cancel" in the second sentence of the paragraph quoted above was unfortunate. The proper term was

rescind. However, the meaning is clear from the context and any possible confusion as to the meaning may be eliminated by substituting the word "rescind" for the word "cancel" in the second sentence of the paragraph quoted.

While these cases suggest a common-law right to rescission, that right appears to be subject to the limitations imposed by § 44-358. See *Zimmerman v. Continental Cas. Co.*, 181 Neb. 654, 150 N.W.2d 268 (1967) (setting out interpretation of requirements of § 44-358). Perhaps it is most accurate to state that in Nebraska there is a common-law right to rescind or avoid insurance policies for material misrepresentations, which is recognized in and limited by § 44-358.

In a recent case involving an insurer's attempt to rescind an automobile insurance binder on grounds of material misrepresentation, the Michigan Court of Appeals rejected the argument that the subsequent enactment of a statute controlling cancellation of such policies implied an intent to preclude rescission ab initio. *United Security v Ins Comm'r*, 133 Mich. App. 38, 348 N.W.2d 34 (1984). The court noted: "Rescission is insufficiently similar to cancellation to support the conclusion that the Legislature's enactment of a statute controlling cancellation of an automobile insurance policy without mentioning rescission demonstrates the Legislature's intent to preclude rescission." *Id.* at 42, 348 N.W.2d at 35.

Recognizing the distinctions between the remedies, it cannot be said that a statute controlling the methods of and reasons for cancellation or termination of an automobile liability policy precludes rescission.

The answer to the third certified question in *Glockel I*, however, also seems to suggest that there is no longer a right to rescission in a case such as this. The answer was based on the fact that § 44-358 is a general statute while §§ 44-514 et seq. are special provisions relating to a particular subject. *Glockel I, supra*. Such special provisions are usually interpreted to prevail over general ones to the extent they conflict. *Glockel I, supra*. Consistent with this rule of statutory construction, the court held that "[s]ection 44-358 is inapplicable to automobile liability policies insofar as it conflicts with §§ 44-514 et seq." *Glockel I*, 219 Neb. 222, 232, 361 N.W.2d 559, 565 (1985). We

did not, however, indicate the extent, if any, of the conflict between the two provisions.

In *SID No. 1 v. County of Adams*, 209 Neb. 108, 306 N.W.2d 584 (1981), this court indicated that where a general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act is considered an exception to the general statute.

In the present case, the provisions in question relate to different matters: cancellation or termination, on the one hand, and rescission, on the other. As such, the provisions do not conflict.

Unless a cancellation statute is

> manifestly all-inclusive, it is held that a statute in specifying the instances under which a party to an insurance contract may cancel it does not make such cancellation the exclusive remedy, and it is not in derogation of other remedial rights which are recognized and implemented by other provisions of law.

17 G. Couch, Couch Cyclopedia of Insurance Law § 67:54 at 500-01 (rev. ed. 1983).

A review of the legislative history of §§ 44-514 to 44-521 shows that cancellation was not intended to be the exclusive remedy for material misrepresentations made by an insured, but that the reasons for and the methods of cancellation were meant to be limited by the relevant provisions. The statement of purpose as to the bill later enacted as §§ 44-514 et seq. indicates that "LB 1396 is an act relating to automobile liability insurance. It prescribes the conditions for cancellation and nonrenewal of liability coverages, provides for written notice of such cancellation or nonrenewal, and defines certain pertinent terms." Statement of Purpose, L.B. 1396, Banking, Commerce and Insurance Committee, 82d Leg., 2d Sess. (Feb. 2, 1972). Nowhere in the legislative history or statutes themselves is there language mentioning rescission or avoidance nor indicating that those remedies were to be eliminated by enactment of the statutory cancellation scheme. Instead, the purpose of the statutes was to ensure that notice is given when cancellation is the remedy utilized and to limit the circumstances under which cancellation may be had. Banking, Commerce and Insurance

Committee Hearing, L.B. 1396, 82d Leg., 2d Sess. (Feb. 15, 1972). See, generally, *Glockel I, supra*.

In light of these facts, it is evident that § 44-358 and §§ 44-514 to 44-521 relate to different matters and are therefore not in conflict. As such, the right to rescission as limited by § 44-358 is still available to an insurer regarding policies of the type defined in § 44-514.

QUESTION NO. 2

The answer to question 2 is Yes, the right to rescind did exist even though a loss occurred which caused damage to Leon Skank, who was not a party to the insurance contract.

The only Nebraska case which appears to have directly touched on this issue is *Reserve Ins. Co. v. Aguilera*, 181 Neb. 605, 150 N.W.2d 114 (1967). That case arose prior to the enactment of the cancellation statutes embodied in §§ 44-514 to 44-521. In *Aguilera*, the plaintiff insurance company sought a judicial determination that an automobile liability policy issued to the defendant insured was void ab initio because it was obtained by misrepresentation in the application for the policy. The action arose after the insured was involved in an automobile accident which resulted in the death of a third party, whose widow was an intervenor in the case. One of the contentions on appeal from the judgment for the insurer was that under Neb. Rev. Stat. § 60-538 (Reissue 1984) of the Motor Vehicle Safety Responsibility Act, the liability of the insurer became absolute when the accident occurred. That statutory provision provided then, as it does now:

> (1) The liability of the insurance carrier with respect to the insurance required by sections 60-501 to 60-569 shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs . . . no statement made by the insured or on his behalf . . . shall defeat or void said policy . . . .

§ 60-538.

In affirming the judgment this court determined that "[t]he first accident is not within the purview of the Motor Vehicle Safety Responsibility Act, nor does the act have any application to an insurance policy which has not been used as proof of financial responsibility in the future." *Aguilera, supra* at 607,

150 N.W.2d at 117.

A survey of the case law in other jurisdictions reveals a division of authority as to whether an injury to a third party eliminates the insurer's right to rescind the policy on the basis of material misrepresentations by the insured.

In the cases holding that the right to rescind is cut off by injury to a third party, the courts have generally recognized some underlying policy in their respective insurance statutes which aims to protect the rights of the innocent third-party victims of automobile accidents. In several of the cases the insurer's liability was determined on the basis of whether the policy was or should have been issued in accordance with a financial responsibility law. *Century Indemnity Co. v. Simon*, 77 F. Supp. 221 (D.N.J. 1948) (insurer liable to third party, but not insured, because policy was issued under New Jersey's financial responsibility law and beneficiaries of the law are the members of the public who may be injured in motor accidents); *Richard v. Fliflet*, 370 N.W.2d 528 (N.D. 1985) (insurer could not rescind policy after injury to third party, where the insurance policy, although voluntary, was purchased to avoid sanctions of financial responsibility law and purpose of law is to protect innocent victims of automobile accidents from financial disaster); *Nationwide Mut. Ins. Co. v. Conley*, 156 W. Va. 391, 194 S.E.2d 170 (1972) (insurer not liable to insured or injured third party because policy was issued voluntarily and not under the compulsion of an assigned risk or financial responsibility law); *Safeco v. Gonacha*, 142 Colo. 170, 350 P.2d 189 (1960) (insurer not liable to insured or injured third parties where policy was a voluntary as opposed to a mandatory one as required by financial responsibility law, and where Colorado had no compulsory insurance law); *Mollihan v. Stephany*, 52 Ill. App. 3d 1034, 368 N.E.2d 465 (1977) (insurer not liable to injured third party because policy not subject to financial responsibility law making liability absolute after loss, when policy not certified as required by act); *State Farm Mut. Auto. Ins. Co. v. Wall*, 92 N.J. Super. 92, 222 A.2d 282 (1966) (insurer liable to third parties although policy not certified under financial responsibility law, but where director could have demanded such proof).

In other cases the courts have recognized a policy protecting third party rights in the state's overall statutory insurance scheme, compulsory insurance requirements, or statutes precluding certain exclusions in automobile insurance policies. *State Farm Ins v Kurylowicz*, 67 Mich. App. 568, 242 N.W.2d 530 (1976) (court indicated that it was questionable whether an automobile liability policy could ever be rescinded ab initio after accident, in light of legislative enactments which, when read in pari materia, suggested policy that persons suffering loss in traffic accidents have a source of recovery); *Allstate Insurance Co. v. Sullam*, 76 Misc. 2d 87, 349 N.Y.S.2d 550 (1973) (no rescission as to compulsory insurance policy after injury to third party, because purpose of compulsory insurance is to protect travelers on roadways by providing compensation for injury resulting from automobile accident); *Rauch v. American Fam. Ins. Co.*, 115 Wis. 2d 257, 340 N.W.2d 478 (1983) (insurer liable to third party despite insured's misrepresentations, because driver of insured's car at time of accident was member of class precluded by statute from being excluded from coverage under policy; since purpose of statute was to protect innocent third parties, purpose would be frustrated if such third parties were denied compensation because of insured's misrepresentations).

Yet, others have denied third-party recovery on the basis of misrepresentations by the insured without mention of any underlying statutory policy. *Gov't Employees Ins. Co. v. Chavis*, 254 S.C. 507, 176 S.E.2d 131 (1970); *Sentry Indemnity Co. v. Brady*, 153 Ga. App. 168, 264 S.E.2d 702 (1980); *State Farm Mut. Auto. Ins. Co. v. Price*, 181 Ind. App. 258, 396 N.E.2d 134 (1979); *Miller v. Plains Insurance Company*, 409 S.W.2d 770 (Mo. App. 1966).

Nebraska has recently enacted legislation making automobile liability insurance compulsory. See Neb. Rev. Stat. §§ 60-302 (Supp. 1985) and 60-570 (Cum. Supp. 1986).

These enactments might be said to support the argument that Nebraska's statutes evidence a policy of protecting the innocent victims of automobile accidents from financial ruin. However, these provisions did not become operative until January 1, 1986, and, thus, were not in force when the policy in question

was issued nor when the loss occurred. The statutes may not be read retroactively in violation of vested rights under the policy. See *Farm Bureau Ins. Co. v. Adams*, 145 Ind. App. 516, 251 N.E.2d 696 (1969) (cancellation statute may not be interpreted retroactively in violation of vested rights in policy's cancellation clause, which permitted cancellation without reason).

Glockel argues that the policy behind the cancellation statutes, §§ 44-514 to 44-521, requires that the insurer not be permitted to rescind the policy, at least as to an injured third party. Clearly, the policy behind those sections is to provide the insured with notice of cancellation, when that is the remedy utilized by an insurer. *Glockel I.*

It is also clear, however, that this was a "voluntary" policy of insurance which was not issued under the financial responsibility law, a compulsory insurance law, nor an assigned risk plan. Under the Nebraska insurance statutes in effect at the time of the policy's issuance, State Farm's right to rescind was not cut off by injury to a third party.

Although the Nebraska automobile insurance statutes do evidence a policy of seeking to protect the innocent victims of automobile accidents, this policy is not of sufficient magnitude to override an insurer's rescission rights, unless the policy is issued pursuant to a statute enacted to protect such third-party rights. *Reserve Ins. Co. v. Aguilera*, 181 Neb. 605, 150 N.W.2d 114 (1967). Since the policy in the present case was not issued pursuant to such a provision, State Farm retained its right to rescission on the ground of material misrepresentations by the insured.

JUDGMENT ENTERED.

STATE OF NEBRASKA, APPELLEE, V. GREGORY C. LAFLER, APPELLANT.

399 N.W.2d 808

Filed January 23, 1987. No. 86-536.

1. **Criminal Law: Right to Counsel: Words and Phrases.** Indigency, as used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), means the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family.
2. **Criminal Law: Right to Counsel.** In determining whether a criminal defendant is indigent as the term is used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), a court is to consider the seriousness of the offense; the defendant's income; the availability to the defendant of other resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits; normal living expenses; outstanding debts; and the number and age of dependents.
3. **Constitutional Law: Criminal Law: Due Process: Jury Trials.** The U.S. Constitution, through the due process clause of the 14th amendment, requires the states to provide a trial by jury whenever the 6th amendment would so require if the case were in federal court.
4. **Constitutional Law: Criminal Law: Sentences: Jury Trials.** An offense for which the maximum penalty is imprisonment for more than 6 months is a serious offense for which the accused is constitutionally entitled to a jury trial.
5. **Constitutional Law: Jury Trials: Waiver.** A waiver of the constitutional right to a jury trial cannot be presumed from a silent record.
6. **Jury Trials: Waiver.** A demand is required to invoke the statutory right to a jury trial for a petty offense in county court. A failure to file a timely request in accordance with the rules of court constitutes a waiver of the statutory right to a jury trial.

Appeal from the District Court for Cheyenne County: JOHN D. KNAPP, Judge. Judgments on counts I, II, and III reversed, and the cause remanded for a new trial on those counts. Judgment on count IV affirmed.

Paul D. Merritt, Jr., of McGinley, Lane, Mueller, O'Donnell, Merritt & Williams, P.C., for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and GRANT, JJ., and CAMP, D.J.

BOSLAUGH, J.

The defendant was convicted of three counts of assault in the third degree and one count of criminal mischief. He was sentenced to 30 days in jail on each of the assault counts, the sentences to run concurrently, and fined $10 on the criminal mischief count.

The charges arose out of a dispute concerning a road in Lorenzo, Nebraska. On April 9, 1984, several men were erecting a fence on the north side of the roadway, away from the traveled portion of the road. Several fenceposts had been installed, and the men were standing near the upright posts when the defendant, who was driving a truck, appeared. The defendant drove directly toward the three men, causing them to scramble out of his way. The defendant then knocked down the posts, breaking a brace post. The defendant was arrested and charged with assault for threatening the men in a menacing manner and criminal mischief for destroying the post.

Upon the first appeal to the district court, the cause was remanded for a hearing to determine whether the defendant was indigent under the standard set out in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985).

Upon remand, the county court found that the defendant was not indigent and had the ability to retain legal counsel without prejudicing his financial ability to provide economic necessities for himself. Upon appeal to the district court the judgments on all of the counts were affirmed.

The defendant has now appealed to this court and contends that the trial court erred in failing to afford him a jury trial and in failing to find that he was entitled to court-appointed counsel.

On April 25, 1984, the defendant appeared in the county court, without counsel. He had filed an affidavit concerning his financial condition and requesting the appointment of counsel. The county court advised the defendant that he had a right to retain counsel of his own choosing but that if he was "an absolute indigent person, poverty stricken, the Court could, upon a proper showing, appoint counsel . . . ." He was further advised that he had a right to a jury trial "if a proper demand" was made.

When the defendant declined to enter any pleas until he had obtained counsel, the county court entered pleas of not guilty to all counts. The court then held an evidentiary hearing on the issue as to whether the defendant was indigent. At the conclusion of the hearing the court refused to appoint counsel for the defendant. After a second hearing, on June 6, 1984, the court again denied the defendant's request for appointed counsel.

Trial was had on June 8, 1984, the defendant appearing pro se. At the close of the evidence the defendant was found guilty and sentenced.

With respect to the defendant's second assignment of error, § 29-1804.04 defines indigent as "the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family."

Neb. Rev. Stat. § 29-1804.05 (Reissue 1979) requires the court to make a "reasonable inquiry to determine [a defendant's] financial condition." *State v. Richter*, 221 Neb. 487, 378 N.W.2d 175 (1985). In determining whether a criminal defendant is indigent as the term is used in § 29-1804.04, the trial court must consider the seriousness of the offense; the defendant's income; the availability to the defendant of other resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits; normal living expenses; outstanding debts; and the number and age of dependents.

In *State v. Radford*, 202 Neb. 440, 441, 276 N.W.2d 82, 83 (1979), the defendant was denied court-appointed counsel, even though his earnings were "about 116 every four days." The defendant was single, had no cash or bank accounts, and owned property consisting of one automobile on which the debt was greater than its value. Although categorizing the case as borderline, this court sustained the county court's finding that without a further showing of inability to obtain counsel, the defendant was not eligible for court-appointed counsel.

The case at bar is similar to *State v. Radford*. The defendant is single, has no dependents, and has some income. Unlike *State v. Radford*, however, the defendant here owns unencumbered real property valued at more than $9,000 and an inventory

valued at approximately $4,500. The trial court made extensive inquiries as to the defendant's assets and liabilities and examined the defendant's affidavit of indigency. This was a reasonable inquiry to determine the defendant's financial ability to obtain counsel.

Although the defendant stated that he had talked with several lawyers who requested retainers of $2,000 to $3,000, no evidence was presented as to what the cost of representation in this case would be. The record, in its present state, supports the findings and fails to show an abuse of discretion in the refusal to appoint counsel.

As to the first assignment of error, the county court was in error in advising the defendant that a demand for a jury trial was required for the assault counts. Assault in the third degree is a Class I misdemeanor, which carries a maximum penalty of imprisonment for 1 year, or a $1,000 fine, or both. Neb. Rev. Stat. § 28-106 (Reissue 1985). It is a "serious" crime for which a jury trial is constitutionally required, unless expressly and intelligently waived by the defendant. *State v. Bishop, ante* p. 522, 399 N.W.2d 271 (1987). A waiver of this right cannot be presumed from a silent record. *State v. Predmore,* 220 Neb. 336, 370 N.W.2d 99 (1985).

The record does not show the defendant waived his right to a jury trial on the assault charges. Instead, the defendant's request for a jury trial was denied solely on the ground the request was not made in a timely or proper manner. Since the record does not show the defendant knowingly and intelligently waived his right to a jury trial on the assault charges, the judgments on counts I, II, and III are reversed and the cause remanded for a new trial on those counts.

The judgment on count IV, a charge of criminal mischief pursuant to Neb. Rev. Stat. § 28-519(4) (Reissue 1985), alleging the defendant damaged property in the amount of $100 or less, is affirmed. This was a petty offense for which the defendant did not have a constitutional right to a jury trial. *State v. Bishop, supra.* The defendant did, however, have a statutory right to a jury trial.

Neb. Rev. Stat. § 24-536 (Reissue 1985) provides that a jury trial in county court may be demanded by either party in any

ordinances and certain traffic infractions. A demand is required to invoke this statutory right. *State v. Vernon*, 218 Neb. 539, 356 N.W.2d 887 (1984). Failing to file a timely request for a jury trial in accordance with the rules of court constitutes waiver of this statutory right.

A request for a jury trial pursuant to § 24-536 may be made orally at the time of arraignment or by written request prior to trial in accordance with the rules of the court. *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980). A defendant who appears pro se must make a proper demand for a statutorily provided jury trial or that right will be deemed to have been waived. *State v. Vernon, supra; State v. Mangelsen*, 207 Neb. 213, 297 N.W.2d 765 (1980).

The defendant was not represented by counsel at the arraignment and elected to proceed without counsel when his request for court-appointed counsel was denied. The failure to make a timely request for a jury trial on count IV constituted a waiver of the right to a jury trial on that charge. The conviction and sentence on that charge are affirmed.

The judgments on counts I, II, and III are reversed and the cause remanded for a new trial on those counts. The judgment on count IV is affirmed.

JUDGMENTS ON COUNTS I, II, AND III REVERSED, AND THE CAUSE REMANDED FOR A NEW TRIAL ON THOSE COUNTS. JUDGMENT ON COUNT IV AFFIRMED.

LEASE NORTHWEST, INC., APPELLEE, V. MARGARET DAVIS, APPELLANT.

400 N.W.2d 220

Filed January 30, 1987. No. 85-519.

1. **Guaranty: Security Interests: Actions.** A guarantee who holds an unconditional guaranty has no obligation to proceed against the security prior to seeking recovery under the guaranty contract.
2. **Pleadings.** An affirmative defense must be specifically pled to be considered.
3. **Contracts: Pleadings.** Matters which seek to avoid a valid contract are

affirmative defenses.

4. **Guaranty: Liability: Pleadings.** The modification of a guaranty of such a nature as would substantially change the liability of the parties is an affirmative defense which must be pled.
5. **Evidence: Words and Phrases.** A demurrer ore tenus is an objection to the receipt of evidence.
6. **Prejudgment Interest.** Prejudgment interest is interest due, pursuant to statute, prior to the rendition of a judgment. In the case of a written instrument, it is allowed on liquidated claims pursuant to the provisions of Neb. Rev. Stat. § 45-104 (Reissue 1984).
7. **Contracts: Interest.** Where the parties have contracted for the payment of a particular lawful rate of interest, such contract controls and the rate thus fixed is recoverable in accordance with the terms of the contract.

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

Donn E. Davis and Gregory B. Bartels of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Gary L. Dolan and Trev E. Peterson of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

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

PER CURIAM.

The plaintiff-appellee, Lease Northwest, Inc., a corporation, sued the defendant-appellant, Margaret Davis, on her written promise to guaranty the obligations of Davis Distributing Co., Inc. (Davis company), a corporation, and of Thomas Davis. Margaret Davis appeals from the judgment of $131,845 plus prejudgment interest entered against her, and assigns seven errors which present three issues: Whether the trial court erred in (1) preventing her from adducing certain evidence, (2) striking a defense, and (3) granting prejudgment interest. We affirm.

Lease Northwest alleged, in essence, that Margaret Davis guarantied the debts of Thomas Davis to it and of the Davis company to it and its predecessor, NBC Leasing Co., a corporation; that NBC Leasing conveyed all its right, title, and interest in and to the guaranty of Margaret Davis to Lease Northwest; that the Davis company and Thomas Davis failed

to make the payments required of them; and that as a consequence Margaret Davis owed Lease Northwest the aforesaid principal sum plus interest in accordance with the agreed terms.

Margaret Davis generally denied Lease Northwest's allegations and further alleged, insofar as is relevant to the issues presented by her assignments of error, that Lease Northwest and NBC Leasing took a security interest in the Davis company's assets, including an assignment of its accounts receivable; that Lease Northwest "negligently and wrongfully" failed to protect its security interests and "failed to take reasonable action" to collect the Davis company's accounts receivable; and that as a consequence Lease Northwest failed to mitigate its damages.

So far as is relevant to the issues raised by the assignments of error, the trial judge's "pretrial notes" identified Margaret Davis' issue to be "mitigation of damages." The pretrial notes also permitted Margaret Davis to depose Fred Silman, an employee of Lease Northwest, if he could be found.

Lease Northwest adduced evidence that on June 14, 1974, the Davis company entered into a "Master Lease" agreement with NBC Leasing whereunder NBC Leasing purchased equipment from the Davis company and leased the equipment back to the company, which then subleased the equipment to others. The master lease was executed on behalf of the Davis company by Thomas Davis, its president, whose signature was attested by his mother and secretary of the corporation, Margaret Davis. Thomas Davis and his wife, Marilyn, also signed a guaranty, which provides:

> The undersigned guarantors jointly and severally unconditionally guarantee the prompt payment when due of each monthly rental payment due and payable under the foregoing Lease Agreement, and to enforce the liability of guarantors hereunder, Lessor shall not be required, first to (a) give guarantors notice of Lessee's default; (b) repossess the equipment; or (c) attempt to enforce the liability of Lessee under the Lease Agreement. Lessor may from time to time accept late payments of rental and may extend the term of this Lease without

> defeating or diminishing this continuing guaranty. This is a guarantee of payment and not of collection.

Certain sublessees defaulted on their payments owed to the Davis company, which in turn defaulted on the payments it owed to NBC Leasing. As a consequence, on March 1, 1979, NBC Leasing and the Davis company renegotiated their arrangement, and Margaret Davis executed an agreement which identified her as a guarantor and recognized that "the Guarantors have guaranteed payment of all obligations of the Lease," and under which she agreed that all provisions of the master lease not otherwise modified "and any related agreements shall remain in full force and effect," and that guarantors agreed "that the foregoing shall not affect the continuing guaranty of each of them of the Lease, or of [the Davis company's] obligations thereunder."

The Davis company was later dissolved, after which Thomas Davis continued to do business individually as Davis Distributing. Thomas Davis' sublessees continued to experience financial distress, and in July or August of 1980 "Thomas Davis, d/b/a Davis Distributing Company" filed for some type of relief under the provisions of the federal bankruptcy act.

In October of 1980 NBC Leasing sold and assigned its lease portfolio to Lease Northwest. On January 13, 1981, Lease Northwest negotiated a new agreement which allowed Thomas Davis to defer a portion of each monthly payment due Lease Northwest, and obligated him to pay interest at the rate of 16 percent per annum "from and after the due date of each deferred amount until paid." A representative of Lease Northwest testified that it would not have restructured Thomas Davis' debt without the signature of Margaret Davis as a continuing guarantor, even though Lease Northwest continued to hold a mortgage lien against real property and acquired a security interest in all of Thomas Davis' accounts receivable and general intangibles, and notwithstanding the fact that ownership of the equipment purchased from and leased back to the Davis company remained with either Lease Northwest or NBC Leasing. Lease Northwest was so insistent upon Margaret Davis' guaranty that it refused to apply to Thomas Davis' debt

two payments, totaling $8,715, until after May 7, 1981, when Margaret Davis signed an "Acknowledgement" to the January 13, 1981, agreement between it and Thomas Davis. The acknowledgment provides:

> The undersigned, respective Guarantors of all of the obligations of the Lessee under the terms of the Lease Agreements, hereby acknowledge the execution of the foregoing Agreement, and of the Master Lease, and agree that such execution shall not alter or affect their continuing guarantee of said obligations, and, in addition, said guarantee shall apply to all obligations of the Debtor [Thomas Davis doing business as Davis Distributing] set forth herein and in said Master Lease.

The principal amount due Lease Northwest from Thomas Davis under the provisions of the 1981 agreement is established to be $131,845.

After Lease Northwest rested, Margaret Davis attempted to prove certain conversations had between Thomas Davis and Fred Silman. At this point Lease Northwest moved in limine for an order prohibiting the introduction of any evidence relating to any agreement by Lease Northwest to collect the accounts receivable or repossess any property and demurred ore tenus to the mitigation of damages defense. The trial court sustained the motion and demurrer ore tenus and struck the mitigation of damages defense.

Thereafter, Margaret Davis, outside the presence of the jury, offered to prove that in the spring of 1982 Lease Northwest, through its employee, Fred Silman, instructed Thomas Davis not to attempt to collect any accounts receivable or take possession of the leased property, as Lease Northwest was a tough, experienced, and successful collector and would undertake those efforts. As a result, she understood that Lease Northwest would gather all of the leased equipment, collect all of the accounts receivable, and apply the proceeds to the debt, and, therefore, neither she nor Thomas Davis attempted to make any effort to recover any of the security. Thus, when the sublessees called Thomas Davis about their bills, he told them to wait until they heard from Lease Northwest. Lease Northwest in fact did nothing, and, as a consequence,

$166,366.27 worth of security was lost.

After objections to the foregoing offers were sustained, the trial court sustained Lease Northwest's motion for a directed verdict.

At a subsequent hearing the trial court awarded Lease Northwest "prejudgment interest from and after December 30, 1982 [the date Lease Northwest's petition was filed], at the statutory rate pursuant to Section 45-104, Revised Statutes of Nebraska, as amended."

In arguing the first issue, that the trial court erred in preventing her from adducing certain evidence, and the second issue, that the trial court erred in striking her mitigation of damages defense, Margaret Davis urges that even under an unconditional guaranty Lease Northwest would have had the ordinary contractual duty to mitigate its damages, but that, in any event, the original terms of the guaranty were modified such as to render it conditional and thus obligate Lease Northwest to mitigage its damages. She does not contend that she did not become a party to the 1974 guaranty or that the guaranty as written is other than unconditional.

Whatever may be the general contract mitigation of damages rule, it does not answer the question of whether the holder of an unconditional guaranty has a duty to realize on its security before seeking recovery from the guarantor. *Home Savings Bank v. Shallenberger*, 95 Neb. 593, 146 N.W. 993 (1914), *on appeal after remand* 82 Neb. 507, 118 N.W. 76 (1908), and *aff'd after retrial* 100 Neb. 113, 158 N.W. 455 (1916), presented a suit on an unconditional guaranty in connection with which the guarantee bank had permitted a lien on cattle securing the loan to expire, thus destroying the guarantor's subrogation rights. In remanding the cause for a new trial, the *Shallenberger* court stated that the trial court erred in failing to instruct the jury that the bank's negligence or failure to collect on its security was not a defense available to the guarantor. *First State Bank v. Peterson*, 205 Neb. 814, 290 N.W.2d 634 (1980), held that notwithstanding the provisions of Neb. U.C.C. § 9-504(3) (Reissue 1980), the failure to notify the guarantor of the sale of collateral was not a defense to the suit on the guaranty. In reaching its decision the *Peterson* court relied both on the

Shallenberger rule and on the fact that no security was contemplated or taken at the time the unconditional guaranty was given. Thus, a guarantee who holds an unconditional guaranty has no obligation to proceed against the security prior to seeking recovery under the guaranty contract. Margaret Davis' citations to conditional guaranty cases are inapposite, as is her citation to Neb. U.C.C. § 9-502(2) (Reissue 1980), for her liability is not based on Lease Northwest's security interest in any property.

However, this court discharged an unconditional guarantor to the extent she was damaged by her reliance on statements made by the guarantee after the guaranty contract came into existence. *McAllister v. Pitts*, 58 Neb. 424, 78 N.W. 711 (1899).

Lease Northwest argues, however, that the modification of a guaranty is an affirmative defense. Such a defense must be specifically pled to be considered. *Columbus Bank & Trust Co. v. High Country Stable*, 202 Neb. 724, 277 N.W.2d 81 (1979); *Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co.*, 195 Neb. 658, 240 N.W.2d 28 (1976). Thus, the questions become whether the modification of a guaranty is an affirmative defense and, if so, whether the allegations of Margaret Davis' answer plead the defense.

Columbus Bank & Trust Co. v. High Country Stable, supra, suggests that matters which would controvert the plaintiff's allegations of the amount due under a promissory note and guaranty are affirmative defenses. More specifically, it has been said that matters which seek to avoid a valid contract are affirmative defenses. *Honey v. Barnes Hosp.*, 708 S.W.2d 686 (Mo. App. 1986).

Thus, the modification of a guaranty of such a nature as would substantially change the liability of the parties, as is the situation claimed in the present case, is an affirmative defense which must be pled.

Margaret Davis argues that the allegations of her answer, particularly when coupled with the pretrial notes permitting her to depose Fred Silman, plead a modification defense with sufficient adequacy to survive the challenges presented by Lease Northwest's demurrer ore tenus and motion in limine.

In so arguing, she relies on *Newman Grove Creamery Co. v.*

Deaver, 208 Neb. 178, 302 N.W.2d 697 (1981), a suit on a promissory note in which the answer alleged duress as a defense. After the plaintiff therein rested, it demurred ore tenus to defendants' answer on the ground it alleged no facts to support the conclusion that duress had been present in the execution of the note. In overruling the sustainment of that demurrer, this court recognized a demurrer ore tenus as an objection to the receipt of evidence, but concluded that the defect in the answer did not prejudice the plaintiff. In its discussion the court noted that the pretrial order required that motions be filed 10 days before trial and observed that pretrial conferences are held to simplify the issues and that, to avoid traps and surprises, counsel cannot sit idly by and then for the first time interpose objections at trial. Notwithstanding those reflections, however, the *Newman Grove* court expressed doubt that the pretrial order covered a demurrer ore tenus. Thus, the court's decision rested on the fact that while the defendants pled no facts, their answer nonetheless put plaintiff on notice that duress was an issue and therefore fulfilled its purpose as a pleading: to frame and limit the issues upon which a cause is to be tried. *Circle 76 Fertilizer v. Nelsen*, 219 Neb. 661, 365 N.W.2d 460 (1985).

Thus, the controlling inquiry is whether it can reasonably be said that alleging a negligent or wrongful failure on the part of Lease Northwest to collect accounts receivable and protect its other security interests pleads a modification of the guaranty. It cannot be so said, even taking into account that the timing of the objection to the modification evidence requires that Margaret Davis' answer be liberally construed. *Newman Grove Creamery Co. v. Deaver, supra.* There is nothing in her answer which suggests that Margaret Davis claims the original terms of the guaranty were altered by any statements made by Lease Northwest after the guaranty came into existence. The allegations relate to Lease Northwest's perceived but nonexistent contractual duty to mitigate its damages by first recovering from its security. The fact that Margaret Davis was granted permission to depose Fred Silman, from whom no deposition was offered, does not alter that fact, whatever it might have been assumed he would say.

The crucial distinction between *Newman Grove* and the present case is that in the former the duress defense was pled, although improperly so by conclusion rather than by facts. *Moore v. Puget Sound Plywood*, 214 Neb. 14, 332 N.W.2d 212 (1983). In the present case the answer makes no reference whatsoever to the modification defense. The failure of the *Newman Grove* plaintiff to move for a more definite and certain statement of the defense waived its right to later object to the reception of evidence relevant to the duress issue. There can, however, be no waiver of the right to object to evidence relevant to a defense not pled in any form.

We must therefore conclude that the trial court correctly sustained Lease Northwest's demurrer ore tenus and motion in limine and properly struck Margaret Davis' mitigation of damages defense. The first and second issues must therefore be resolved adversely to Margaret Davis.

That being so, reasonable minds could draw but one conclusion from the evidence, that Lease Northwest was entitled to recover, and the trial court thus properly resolved the controversy as a matter of law. *Vice v. Darm Corp., ante* p. 1, 395 N.W.2d 524 (1986).

In connection with the third and last issue, that the trial court erred in allowing prejudgment interest, Lease Northwest correctly points out that the question is properly one concerning contractual, not prejudgment, interest. Prejudgment interest is interest due, pursuant to statute, prior to the rendition of a judgment. In the case of a written instrument, it is allowed on liquidated claims pursuant to the provisions of Neb. Rev. Stat. § 45-104 (Reissue 1984). However, where the parties have contracted for the payment of a particular lawful rate of interest, such contract controls and the rate thus fixed is recoverable in accordance with the terms of the contract. *First Nat. Bank v. Bolzer*, 221 Neb. 415, 377 N.W.2d 533 (1985).

In the present case Thomas Davis obligated himself, under the 1981 agreement, to pay interest at the rate of 16 percent per annum. Margaret Davis, by guarantying Thomas Davis' debts, contractually obligated herself to pay the aforesaid lawful rate of interest. The trial court misperceived the issue and only

awarded interest at the rate of 12 percent from and after the filing of Lease Northwest's petition, rather than 16 percent in accordance with the terms of the agreement Margaret Davis guarantied. However, since Lease Northwest did not cross-appeal, the trial court's judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF D.R. AND A.D., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLANT, V. A.D. AND L.D., APPELLEES.
399 N.W.2d 812

Filed January 30, 1987. No. 85-761.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Steven J. Moeller and Mark J. Young, Deputy Hall County Attorneys, for appellant.

Thomas A. Wagoner, for appellee A.D.

John B. McDermott of McDermott, Depue & Zitterkopf, guardian ad litem.

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

PER CURIAM.

This appeal involves the question of whether parental rights to two minor children should be terminated. The county court for Hall County, Nebraska, terminated the parental rights. On appeal to the district court, the order of the county court terminating the rights of the natural mother was affirmed, but the order terminating the parental rights of the father was reversed and the matter was remanded to the county court for further proceedings. We have reviewed the matter now on appeal and conclude that the order of the district court should be affirmed.

For that reason the judgment of the district court reversing the judgment of the county court is affirmed.

AFFIRMED.

PONDEROSA VILLA, CITY OF CRAWFORD, APPELLEE, V. IRENE HUGHES, APPELLANT, RONALD E. SORENSEN, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLEE.

399 N.W.2d 813

Filed January 30, 1987. No. 86-175.

1. **Employment Security Law.** Neb. Rev. Stat. § 48-627 (Cum. Supp. 1986) describes the weekly requirements for continuing to be eligible for unemployment compensation benefits. It is not concerned with reasons why a claimant became unemployed or with threshold questions of eligibility.
2. _____. The result of finding a claimant "unavailable for work" under Neb. Rev. Stat. § 48-627(c) (Cum. Supp. 1986) is to disqualify the claimant from unemployment benefits only for the week he or she was unavailable.
3. _____. Neb. Rev. Stat. § 48-628(c) (Cum. Supp. 1986) applies when an unemployed person refuses an offer of suitable work and chooses to remain unemployed, and is not applicable when an employed person voluntarily leaves over a change in working conditions.
4. **Employment Security Law: Good Cause.** The correct inquiry when an employed person refuses a demotion and leaves is whether good cause existed to voluntarily sever the employment relationship. Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1986).
5. **Employment Security Law: Appeal and Error.** In appeals under Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1986), we review the causes de novo on the record, retry the issues of fact, and come to independent conclusions regarding the findings challenged.
6. **Employment Security Law: Proof: Good Cause.** To avoid disqualification under Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1986), the employee who voluntarily severed the employment relationship has the burden of proving that the leaving was with good cause.
7. **Employment Security Law: Good Cause.** Where the terms of a demotion, not the result of employee misconduct, substantially changed almost every aspect of an employee's job to her detriment, good cause existed to leave.

Appeal from the District Court for Dawes County: PAUL D. EMPSON, Judge. Reversed.

Terry Curtiss of Curtiss, Moravek, Danehey & Curtiss, P.C., for appellant.

H.W. Snyder, for appellee Ponderosa Villa.

Laureen Van Norman, for appellee Sorensen.

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

WHITE, J.

Irene Hughes, the claimant, appeals from the decision of the district court for Dawes County reversing the Nebraska Appeal Tribunal and denying Hughes unemployment compensation benefits. We reverse.

Hughes, a licensed practical nurse, was health service supervisor of nursing services (HSS) at Ponderosa Villa nursing home at the time the Legislature passed 1985 Neb. Laws, L.B. 253. The bill changed Neb. Rev. Stat. § 71-2017.01(11) (Reissue 1986) to require that the position of supervisor be held by a registered nurse. As a result Hughes was no longer qualified for her job as HSS.

On May 16, 1985, Dixie Moody, administrator for Ponderosa Villa, informed Hughes of the legislative change and offered to demote her to a position as a staff nurse, full time, on a "4-2" schedule. This was the same position she held prior to her promotion to HSS. On July 26, 1985, Hughes resigned.

Hughes applied for benefits with the Department of Labor's division of employment on August 20, 1985. On August 27 the Department of Labor notified her that she was eligible for benefits and that "it is determined this leaving was with good cause." Ponderosa Villa, City of Crawford, appealed to the Nebraska Appeal Tribunal. The notice of hearing before the tribunal stated: "NOTICE IS HEREBY GIVEN that a hearing will be held on the issue(s) marked below . . . . Whether the claimant voluntarily left his/her employment without good cause or was discharged for misconduct connected with his/her work." After the hearing the Nebraska Appeal Tribunal affirmed the decision of the claims deputy, finding that Hughes left her job with good cause.

Ponderosa Villa appealed the decision of the Nebraska Appeal Tribunal to the district court for Dawes County. The

district court reversed, setting forth its findings and rationale as follows:

> The Court being fully advised in the premises finds that the legislature made it mandatory that Claimant-Respondent is not qualified for her most recent job with Employer-Appellant or for any similar position. She is qualified for the job she previously held with Employer-Appellant, which is materially the same job she was offered after her disqualification. There is no evidence that the employment offered was not on as good terms as could be expected for the profession in that place at that time. She was not entitled to refuse the offer of employment and she is and was, from the time of her refusal, unavailable for work.

The appellant sets forth two assignments of error. The first is that the court erred in finding the appellant "unavailable for work," and second, that it incorrectly disqualified the appellant from benefits, in that the appeal tribunal was correct in determining that the appellant left voluntarily, but with good cause. We find merit in both assignments of error and reverse the district court's decision.

Although no express reference to statutory authority for the disqualification of Hughes was made, the language the district court used in the formulation of its findings seems to intimate that Hughes failed to meet the qualifications spelled out in either Neb. Rev. Stat. § 48-627(c) (Cum. Supp. 1986) or Neb. Rev. Stat. § 48-628(c) (Cum. Supp. 1986).

The district court specifically found Hughes to be "unavailable for work" and therefore to be ineligible for benefits absolutely. Section 48-627(c) requires the employee to be found to be available for work in order to be eligible for benefits for any given week. The result of being "unavailable for work" is to make the unemployed individual ineligible for benefits for the week in which he or she is unavailable. This statute clearly was incorrectly applied to the case at hand for two reasons. First, § 48-627 does not address the reasons why a person became unemployed, nor is it concerned with the threshold questions of eligibility. Section 48-627 describes the weekly requirements for continuing to be eligible for benefits.

See *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985). After a person becomes unemployed, he or she must remain able to work to receive benefits. *Heimsoth v. Kellwood Co.*, 211 Neb. 167, 318 N.W.2d 1 (1982). In the case before us we are concerned only with whether Hughes left her job with or without good cause, not whether she was unavailable for work in any certain week after becoming unemployed. Second, the result of finding a claimant "unavailable for work" is to disqualify the claimant only for the week in which he or she was unavailable. The district court decided an issue not before it, and any decision thereon was void.

The district court also found that Hughes was not entitled to refuse the offer of employment because she failed to prove the job "was not on as good terms as could be expected for the profession in that place at that time." Such proof is relevant when the claimant may be disqualified under § 48-628(c). This section disqualifies persons refusing "suitable" employment. Under § 48-628(c), whether work is "suitable" or not is determined by looking at such things as training, experience, past earnings, and prospects for work in one's customary occupation. However, § 48-628(c) does not apply to someone when the refusal of a change in position results in a voluntary leaving. In *Norman v. Sorensen*, 220 Neb. 408, 370 N.W.2d 147 (1985), the claimant was transferred to another position. Her duties were altered, although her salary remained the same. The claimant quit and attempted to argue that the quit should be characterized as refusing an offer of unsuitable work under § 48-628(c). We rejected that argument, explaining that subsection (c) "states an additional reason for disqualification from benefits when an *unemployed* person refuses an offer of 'suitable' work and chooses to remain unemployed." (Emphasis supplied.) 220 Neb. at 412, 370 N.W.2d at 150. The claimant was determined to have left without good cause and therefore was disqualified under § 48-628(a)(1).

In this case Hughes was an employed person who refused a demotion and left. The correct inquiry for the district court was whether the leaving was with or without good cause. § 48-628(a)(1). The district court's finding that the claimant failed to prove the terms of the offer unsuitable misconceived

the issue.

In appeals under § 48-628(a)(1), we review the causes de novo on the record, retry the issues of fact, and come to independent conclusions regarding the findings challenged. *Stackley v. State*, 222 Neb. 767, 386 N.W.2d 884 (1986). To avoid disqualification under § 48-628(a)(1), the employee who voluntarily severed the employment relationship has the burden of proving that the leaving was with good cause. *Id.* We find that Hughes proved that she had good cause to quit and is eligible for benefits.

The demotion, if accepted, would have changed to Hughes' disadvantage almost every aspect of her employment. As HSS, Hughes received a monthly salary of $1,168, had a 5-day workweek, had 50 to 90 percent of her weekends off, and had holidays off unless needed. Her demotion to a staff nurse would have resulted in a wage cut to $5.90 per hour and, due to a 4-2 schedule, a decrease in the average number of hours worked per week, resulting in a substantial reduction of her earnings. The "4-days on, 2-days off" work schedule would result in Hughes' having only one weekend off (Saturday and Sunday off) every 7 weeks, as opposed to having the majority of her weekends off as HSS. Ponderosa Villa refused to negotiate alternative scheduling. Her duties would be reduced; she, who once held the position of supervisor, would now join the ranks of those she previously supervised. She would lose her paid holidays. All of these changes are related to employment conditions and are not personal in nature. See, *Stackley v. State, supra; Glionna v. Chizek*, 204 Neb. 37, 281 N.W.2d 220 (1979).

All of the changes resulting from the demotion, when taken together, are clearly not trivial. They are tangible and substantial and constitute good cause for Hughes to sever her employment with Ponderosa Villa.

Having found good cause, we determine that the disqualification under § 48-628(a)(1) does not apply, nor does any other disqualification apply. The decision of the district court is reversed.

REVERSED.

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

I agree that whether Hughes is available for work is not an issue. I must, however, dissent from that part of the opinion which concludes that Hughes did not leave her work "voluntarily without good cause" as contemplated by Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1986). I would factually find that one who must be demoted because of legislative action and who refuses to accept the best job available for which she is qualified does not have good cause to terminate her employment.

BOSLAUGH, J., joins in this concurrence and dissent.

TIMOTHY W. TURNER AND JEANNIE L. TURNER, APPELLANTS AND CROSS-APPELLEES, V. RODNEY ALBERTS, APPELLEE AND CROSS-APPELLANT.

399 N.W.2d 817

Filed January 30, 1987. No. 86-184.

1. **Breach of Contract: Real Estate: Damages.** The general measure of damages for a breach of contract to convey land is the difference between the market value of the land at the time of the breach and the price set out in the contract.
2. _____: _____: _____. The exception to the general rule is that where it appears that special damages have also arisen from the breach, the damages recoverable are such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time the contract was made.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Reversed and remanded with directions.

John F. Simmons of Wright, Simmons & Selzer, for appellants.

Richard A. Douglas of Winner, Nichols, Douglas, Kelly and Arfmann, for appellee.

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

GRANT, J.

This is an appeal from an order of the district court for Scotts Bluff County affirming the judgment of the county court. Plaintiffs-appellants, Timothy W. and Jeannie L. Turner, husband and wife (hereinafter collectively referred to as Turner), brought an action in county court seeking damages of $8,741.10 in connection with the sale of their residence to defendant-appellee, Rodney Alberts. After a trial to the court, the county judge found for Turner and awarded damages of $1,716.62. Turner appealed to the district court, where the judgment and amount of damages were affirmed. Turner timely appealed to this court, and Alberts has cross-appealed.

Turner assigns as error the action of the trial court, affirmed by the district court, in failing to allow certain late charges as damages and in determining the evidence did not permit the court to ascertain which portion of the mortgage payments made by Turner after Alberts defaulted constituted recoverable damages. Alberts, in his cross-appeal, assigns as error the action of the district court in affirming the county court's judgment, which failed to find that Turner's exercise of a forfeiture right was an exclusive right, thereby precluding an action for damages. For reasons hereinafter stated, the order of the district court is reversed.

Evidence adduced at trial reveals the following. On August 20, 1981, Turner and Alberts entered into a written agreement under which Turner agreed to sell the Turner residence to Alberts for the sum of $65,000. No real estate agent was engaged in connection with this contract. The contract called for a downpayment in the amount of $4,000, due at the time of execution of the contract. The remaining balance was to be paid in 36 monthly installments equaling Turner's monthly mortgage payments, including escrow payments for taxes and insurance, plus a balloon payment on September 1, 1984, of "the entire remaining principal balance, with accumulated interest . . . ." The contract also contained a forfeiture clause, which provided that in the event Alberts failed to make the monthly payment within 7 days of the date when it was due, Turner would be entitled to declare a forfeiture of the Alberts interest in the property, and a further clause stating, "In addition to the rights

specified hereunder, TURNER shall have all other rights allowable in law or equity."

Pursuant to the contract, at the time of conveyance Turner delivered to the escrow agent a warranty deed conveying the property from Turner to Alberts, and at the same time Alberts delivered to the agent a quitclaim deed which would reconvey the property to Turner in the event Alberts did not make the payments due and Turner declared a forfeiture. The contract further provided, "All payments made by ALBERTS under this contract under such circumstances shall be considered as rent of the property and shall not be refunded to him [Alberts]."

Alberts made the $4,000 downpayment as called for in the contract and took possession of the residence. Payments for the months of September 1981 through March 1982 were made without incident. In late March of 1982, Alberts was notified by Turner that his monthly payment would be increasing due to an increase in insurance premiums. Shortly thereafter, on April 7, 1982, Alberts decided to move out of the house. At this time the Turners were living in Omaha, Nebraska. Mrs. Turner was visiting Scottsbluff when she heard Alberts was leaving the house. When Mrs. Turner questioned Alberts concerning leaving the house, he replied, "I'm moving. I'm gonna let the house — I'm just gonna let it go." Alberts moved from the residence without making the April 1982 payment.

On April 13, 1982, after the 7-day deadline of the forfeiture provision had passed, Turner sent a letter to the escrow agent notifying it of their intention to declare a forfeiture. The letter read in part, "This letter is notice to you that we have elected to declare such a forfeiture." The letter also demanded that the escrow agent deliver both deeds to Turner's attorney pursuant to the declaration of a forfeiture. The deeds were returned to the attorney.

Turner resumed making the monthly payment to the mortgage holder. The April, May, June, and July 1982 payments were made promptly. Turner failed to make the August, September, and October payments until the house was resold in November of 1982. In addition, as a result of these payments' being late, penalty charges were assessed Turner.

The house was resold in November of 1982, for $65,500. In addition to resuming the monthly payments, Turner paid the utilities during the interval before resale, as well as certain repair charges which Turner alleged were required because of damages Alberts caused to the house.

After the resale, Turner brought this action in county court alleging that damages of $12,741.10 had occurred as a result of Alberts' not completing the purchase. That sum included the real estate commission on the resale, mortgage payments, late charges on mortgage payments, electricity and water bills, real estate taxes, additional interest, telephone bills, a telegram, "House Clean Up," and "Labor and Materials in Clean Up." Turner also pled that Alberts was "entitled to a credit for the $4,000.00 down payment which the Defendant made and which the Plaintiffs retained," and prayed for $8,741.10 as damages. Alberts answered by a general denial and the affirmative defense that Turner had waived any right to recover damages by electing "to utilize the quitclaim deed held in escrow."

After trial, the county court found for Turner and allowed as damages the repair and labor costs, realtor's fees and title insurance incurred in the resale, utility costs, and additional interest, totaling $6,216.62. Damages for the mortgage payments were denied, with the court reasoning that it was not properly shown what part of the mortgage payments constituted recoverable interest payments versus nonrecoverable reduction on principal. After the court calculated the damages, the court applied the credits of $4,000 for the downpayment (as pled by Turner) and $500 "for the reason that Plaintiff resold the property for $65,500," and entered judgment for Turner in the amount of $1,716.62. Turner appealed to the district court for Scotts Bluff County, where the decision of the county court was affirmed.

The general measure of damages for a breach of contract to convey land is the difference between the market value of the land at the time of the breach and the price set out in the contract. *Kerrey Constr. Co. v. Hunt*, 213 Neb. 776, 331 N.W.2d 519 (1983); *Hahn v. International Management Services, Inc.*, 207 Neb. 229, 298 N.W.2d 140 (1980); *Oman v. City of Wayne*, 152 Neb. 341, 40 N.W.2d 916 (1950). That

general rule, as shown by the cited cases, applies to situations where either the vendor or the vendee seeks damages after a breach.

In *Kerrey Constr. Co. v. Hunt, supra*, a case in which the vendee sought damages after the vendors' breach, an exception to that general rule was stated at 780-81, 331 N.W.2d at 521: "The exception to this rule is that where it appears that special damages have also arisen from the breach, the damages recoverable are such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time the contract was made." We hold that that exception to the general rule should also apply to cases where the vendor seeks damages after a vendee's breach, such as in this case.

Applying the rules, however, in the case at bar results in some difficulty. If the general rule is to be applied, Turner is entitled to no damages. Turner did not plead nor was there any direct evidence offered as to the value of the property at the time of Alberts' breach of contract. The evidence showed, however, and the court found, that the property was sold 7 months after the breach, for an amount $500 in excess of the contract price. It is clear that application of the general rule would not result in the award of any damages to the plaintiff.

Application of the exception to the general rule avails Turner little more. Plaintiff did not prove that the special damages sought could "fairly and reasonably be supposed to have been in the contemplation of the parties at the time the contract was made." The contract itself, however, shows that responsibility for repairs to the house was that of Alberts, and therefore, clearly, damages for repairs were in the contemplation of the parties. In that connection, the contract provided, in § 6 thereof:

> ALBERTS will keep the premises in good condition, will make all repairs seasonable, and will undertake no action which will create a lien upon the premises. ALBERTS will make no structural modifications to the premises without the prior written consent of TURNER. The parties recite that the house located on the premises contains radiant heat in the ceiling and that any fixtures attached to the ceiling might cause damage to the house.

The trial court found that the costs of repair were $586.34. The evidence clearly supports that amount, and it was properly allowed to Turner as damages.

With regard to the other damages allowed, as stated above, there was no evidence that such damages were in the contemplation of the parties when the contract was signed. Instead, the contract set out a precise method whereby Turner would legally obtain Alberts' quitclaim deed and thus return Turner to the position of owner of the premises and remove the claim of Alberts to the property. The contract required that Alberts, in the event of any failure to make the required payments and at the demand of Turner, would "peaceably vacate the premises immediately." Alberts did so. At that point, Turner had title to, and possession of, the house. It was Turner's to do with as they wished. In the absence of any other showing, Alberts had no right in the premises and no obligation other than that imposed on him by the contract between the parties. Under the facts as pled and proved by plaintiffs, the evidence not only does not support any additional damages for Turner on this appeal but shows directly that since Turner has pled that Alberts is entitled to a credit for his $4,000 downpayment, Turner is certainly not entitled to any further damages from Alberts in this lawsuit. The judgment for an additional $1,716.62 in Turner's favor must be set aside.

Alberts, at the trial of this matter, testified, with regard to his $4,000 downpayment, that he was agreeable to forfeiting that amount "as a liquidated damage." His pleadings supported that approach, and he sought the disposition of the case on that basis. Since the case is disposed of in the manner which Alberts sought, we need not determine the issues presented by Alberts' cross-appeal, which seeks the same result.

The cause is remanded to the district court with directions to return the case to the county court, where judgment should be entered for defendant Alberts on Turner's amended petition. Costs are taxed to appellants Turner.

REVERSED AND REMANDED WITH DIRECTIONS.

KRIVOSHA, C.J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. ROSEY KENNY, ALSO KNOWN AS ROSEY KENNEY, ALSO KNOWN AS JIM KENNEY, ALSO KNOWN AS JAMES KENNEY, APPELLANT.

399 N.W.2d 821

Filed January 30, 1987. No. 86-185.

1. **Constitutional Law: Search and Seizure.** Fourth amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.
2. _____: _____. A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his fourth amendment rights infringed.
3. **Rules of Evidence: Other Acts.** It is well established that Neb. Rev. Stat. § 27-404(2) (Reissue 1985) is an inclusionary rule permitting the use of relevant other crimes, wrongs, or acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character.
4. **Sentences: Appeal and Error.** A sentence which is within the range of the statute will not be disturbed, absent an abuse of discretion.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

Steven J. Reisdorff of The Law Office, P.C., for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

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

KRIVOSHA, C.J.

The appellant, Rosey Kenny, also known as Rosey Kenney, also known as Jim Kenney, also known as James Kenney, was charged by information in the district court for Saline County, Nebraska, with possession of a controlled substance other than marijuana, to wit: lysergic acid diethylamide (LSD), schedule I, in violation of Neb. Rev. Stat. § 28-416(3) (Reissue 1985). This is a Class IV felony, punishable by imprisonment of up to 5 years, or a fine of $10,000, or both imprisonment and fine. Following trial to a jury, Kenny was found guilty. Thereafter, the district court sentenced Kenny to incarceration in the Nebraska Penal and Correctional Complex for a term of not to exceed 3 years. It is from this conviction and sentence which he

now appeals.

While Kenny enumerates four assignments of error, in fact there are but three. The assignments of error are: (1) The court erred in overruling Kenny's motions to suppress; (2) The court erred in admitting, over objection, testimony concerning prior bad acts of Kenny; and (3) The sentence was excessive. We have reviewed the record in light of these assignments of error and find that they are without merit. For that reason the conviction and sentence are affirmed.

The record discloses that on September 9, 1985, a search warrant was issued authorizing Saline County authorities to seize a brown manila envelope which was addressed to Kenny and expected to arrive at the Dorchester, Nebraska, post office on that day, and to search the person who attempted to pick up the envelope. Pursuant to the search warrant, Saline County Sheriff Byron Buzek located himself at the rear of the post office where he could observe the post office boxes, including the box issued to Kenny. At approximately 2:30 p.m., Kenny arrived at the post office, removed the envelope, and walked out. As he walked across the street to a filling station, he threw the unopened envelope into an automobile. The sheriff followed Kenny into the filling station and arrested him.

The envelope was taken, pursuant to the warrant, and subsequently opened by Sgt. Vincent Brehm of the Saline County sheriff's office. Sergeant Brehm found inside two small plastic bags containing off-white paper with pictures of flowers on it, sectioned into 200 squares approximately one-fourth inch by one-fourth inch. The contents of the envelope were later tested by the Nebraska State Patrol laboratory and determined to consist of LSD.

Kenny's contention with regard to his first assignment of error is that the search warrant was obtained as the result of an earlier illegal search and seizure of a third person in California, and therefore, while the information contained in the affidavit used to obtain the search warrant was correct, it was the "fruit of a poisonous tree."

The record establishes that on July 5, 1985, an officer of the Santa Cruz County narcotics unit in Santa Cruz, California, seized property belonging to a Joe Hurley. Included in that

material seized was a letter from the appellant, ordering illicit drugs. It was as a result of this letter that the mail of Kenny was watched until a 9 1/4-inch by 6 3/4-inch brown envelope was mailed by Hurley to Kenny. The case against Hurley was dismissed by the California court, in part because the particular letter sent by Kenny to Hurley was held to be inadmissible as against Hurley. The letter, however, was received in evidence in the instant case, and Kenny's motion to suppress the letter and its envelope was denied. Officer Otis Pogue, a criminal investigator with the Santa Cruz County, California, district attorney's office, testified that on the afternoon of July 5, 1985, he arrested Hurley. He further testified that the letter and envelope, postmarked June 21, 1985, from Kenny, were in Hurley's possession at the time of his arrest. Pogue testified that he mailed the letter and envelope to Sheriff Buzek.

Kenny's claim that *his* fourth amendment rights were violated is simply misplaced. Kenny had no fourth amendment rights in the letter in Hurley's possession. To begin with, it has long been the rule that fourth amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. In *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978), the U.S. Supreme Court was asked to hold that evidence seized by police during the search of an automobile in which the petitioner was a passenger but not an owner should be suppressed on the basis of the petitioner's fourth amendment rights. In rejecting that argument, the U.S. Supreme Court said in *Rakas, supra* at 133-34:

> We decline to extend the rule of standing in Fourth Amendment cases in the manner suggested by petitioners. . . . A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed.

This view is wholly consistent with the earlier view expressed by the U.S. Supreme Court in the case of *Alderman v. United States*, 394 U.S. 165, 174, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969), wherein it was said: "We adhere to these cases and to the general rule that Fourth Amendment rights are personal rights which,

like some other constitutional rights, may not be vicariously asserted."

Nor can Kenny contend that he had any expectation of privacy in letters which he posted in a public mailbox and sent through the mail, thereby losing complete control. In the case of *Ray v. United States Dept. of Justice*, 658 F.2d 608, 610-11 (8th Cir. 1981), the U.S. Court of Appeals for the Eighth Circuit, in discussing the question as to whether one had an expectation of privacy in a posted letter, said:

> The district court, relying on *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), held that Ray lacked standing to raise a Fourth Amendment claim for damages because the search and seizure involved the property and premises of another, Jerry Ray. *Ray v. United States Department of Justice, supra*, 508 F.Supp. at 726. The district court apparently concluded that James' letters to Jerry Ray became Jerry's property upon receipt and that James accordingly lost any expectations of privacy that he had in the letters. *Id.*

The court then went on to say, further, at 611:

> Although not cited by the district court, *United States v. Hubbard*, 493 F.Supp. 209 (D.D.C.1979), supports its conclusion. *Hubbard* involved the attempts of criminal defendants to suppress evidence, but its analysis of Fourth Amendment standing seems equally relevant here. *Hubbard* states that the test for Fourth Amendment standing is whether an individual, based on the facts and circumstances presented by that individual, has a legitimate expectation of privacy in the invaded place. *Id.* at 213-214 (citing *Rakas v. Illinois, supra*). Significantly for this appeal, the district court in *Hubbard* was "unable to understand how *sending* letters to a third party would form a basis for a legitimate expectation of privacy after their delivery. The reasonableness of one's privacy expectations would certainly be undermined by the act of relinquishing control." [Citation omitted.]

The reasoning of both the *Ray* decision, *supra*, and *United States v. Hubbard*, 493 F. Supp. 209 (D.D.C. 1979), appears to us to be valid and conclusive of the question raised here. Once

Kenny placed the letter in the mail, he lost control over the letter. He had no way of knowing who else might see the letter or what the recipient of the letter might do with it, once received. He may have hoped for privacy, but he had no "expectation of privacy" as contemplated by the fourth amendment to the U.S. Constitution. Having relinquished physical control over both the letter and the recipient, the most Kenny may have had were "high hopes." "High hopes" do not, however, constitute a "reasonable expectation of privacy." Having, therefore, no reasonable expectation of privacy and no independent fourth amendment rights in the mailed letter, he acquired no standing to claim a fourth amendment violation with regard to the illegal search and seizure of Hurley's premises. The letter therefore was properly used as the basis of the search warrant and properly received in evidence at Kenny's trial.

Kenny's second contention is that the court erred in permitting the introduction of the letter of June 21, 1985, as evidence of "prior bad acts." Brief for Appellant at 13. He argues that in order for the letter to have been introduced in evidence it must show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. He cites to us in support of his position that the letter was not relevant the case of *State v. Coca*, 216 Neb. 76, 341 N.W.2d 606 (1983). We believe that Kenny is in error in his interpretation of that case.

The provisions of Neb. Rev. Stat. § 27-404(2) (Reissue 1985) are not exclusive. While first providing that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person, the act then provides: "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.) The language of the statute is clear and unambiguous. The list which follows the introductory language is one of examples, and not restrictions. Evidence of other bad acts may be introduced under § 27-404(2) whenever the evidence is relevant, so long as it is offered to prove something other than the character of a person in order to show that he or she acted in conformity therewith.

In the case of *State v. Kern, ante* p. 177, 185, 397 N.W.2d 23, 29 (1986), we recently examined that entire issue, and said:

> It is well established that § 27-404(2) is an inclusionary rule permitting the use of relevant other crimes, wrongs, or acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character. Thus, § 27-404(2) permits evidence of other crimes, wrongs, or acts if such is relevant for any purpose other than to show defendant's propensity or disposition to commit the crime charged. [Citations omitted.]

We then went on further in *Kern, supra* at 185, 397 N.W.2d at 29, to say:

> We have also observed that the admissibility of evidence concerning other conduct must be determined upon the facts of each case and that no exact limitation of time can be fixed as to when other conduct tending to prove intent to commit the offense charged is remote.

See, also, *State v. Robb, ante* p. 14, 395 N.W.2d 534 (1986).

The letter of June 21, 1985, was offered to show that Kenny intended to order and receive LSD and that the envelope received on September 9, 1985, was not an unsolicited package received by Kenny without his knowledge.

The relevancy of the letter of June 21, 1985, in which Kenny earlier ordered material from Hurley, is best established by Kenny's own brief. As one of Kenny's propositions of law he argues that the evidence was insufficient to establish beyond a reasonable doubt the elements of the crime. Specifically, he argues:

> The simple truth herein is that Defendant was in possession of a brown manila envelope (Exhibit 14) for a few brief seconds and it was later discovered that the envelope contained Lysergic Acid Diethylamide (Exhibit 19).
>
> There is no evidence introduced at the trial that indicated that the Defendant at anytime knew what was in the envelope. The only thing that Mr. Kenney did was simply go and get his mail on the date in question.
>
> Without the alleged "prior bad act" letter there would

> have been not [sic] evidence whatsoever that the Defendant had ever had any contact with any one in Santa Cruz, California.

Brief for Appellant at 16-17.

Without conceding that the case against Kenny could not have been established absent the letter, we do concede, as apparently does Kenny, that the letter was extremely relevant to establish that Kenny was not simply the recipient of an unsolicited letter from an unknown sender. The letter was extremely relevant to show prior course of conduct disclosing knowledge, to wit: an earlier ordering of LSD from the very same person who subsequently sent an envelope containing LSD. Our examination of the record leads us to the conclusion that the letter of June 21, 1985, was extremely relevant to establish knowledge and intent on the part of Kenny and was admissible as evidence of other prior bad acts under § 27-404(2).

That leaves us, then, only with the claim that the sentence imposed was excessive. We have repeatedly held that a sentence which is within the range of the statute will not be disturbed, absent an abuse of discretion. See, *State v. Bovill*, 223 Neb. 764, 393 N.W.2d 715 (1986); *State v. Whitehurst, ante* p. 174, 396 N.W.2d 288 (1986).

As we have noted, in the instant case the crime charged was a Class IV felony, punishable by a maximum of 5 years' imprisonment, or a fine of $10,000, or both imprisonment and fine. Thus, Kenny's sentence was well within the statutory limits.

An examination of the presentence investigation discloses no abuse of discretion, and therefore the sentence must stand. The verdict and judgment are therefore, in all respects, affirmed.

AFFIRMED.

THOMAS G. HARPER, PLAINTIFF, V. NORBERTO R. SILVA, M.D., ET AL., DEFENDANTS.
399 N.W.2d 826

Filed January 30, 1987. No. 86-273.

Medical Malpractice. The Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§ 44-2801 to 44-2855 (Reissue 1984), does not have application to acts of negligence committed by otherwise qualified health care providers outside the boundaries of this state.

Certified Questions from the U.S. District Court for the District of Nebraska. Judgment entered.

Debra R. Nickels of Welsh, Sibbernsen & Roach, Gary D. McCallister, and Philip A. Burdick, for plaintiff.

John P. Grant and Robert G. Lange and, on brief, Robert M. Spire, Attorney General, and Martel J. Bundy, for defendant Excess Liability Fund.

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

WHITE, J.

Finding no controlling precedent, the U.S. District Court for the District of Nebraska has certified three questions of law, pursuant to Neb. Rev. Stat. § 24-219 (Reissue 1985), to this court. The facts giving rise to the controversy in this case have been recited to us as follows.

The parties to the action in the U.S. District Court are plaintiff, Thomas G. Harper, and defendants Dr. Norberto R. Silva and Falls City Surgical Associates. The State of Nebraska Excess Liability Fund was originally impleaded as a third-party defendant, then later named as a defendant in a separate complaint. At all times relevant to this action Dr. Silva was a resident of Nebraska and employed by Falls City Surgical Associates. Both Dr. Silva and his employer are qualified health care providers under Nebraska statutes.

At the time of the alleged negligent acts, Dr. Silva was licensed to practice medicine in both Nebraska and Kansas. The parties agree that Dr. Silva, while acting within the scope of his employment, departed from the normal standard of care. As a

result the plaintiff required additional treatment and medical care. All acts of negligence occurred in Kansas. The negligence of Dr. Silva is imputed to his employer, Falls City Surgical Associates, on the theory of respondeat superior. The net damages suffered by the plaintiff total $215,000, of which $100,000 has been paid by the defendants' insurer. The U.S. District Court has addressed the following questions to this court:

> 1. Whether the Nebraska Excess Liability Fund created by [Neb. Rev. Stat. § 44-2829 (Reissue 1984)], may be liable for negligent acts of qualified doctors which are committed outside the boundaries of the State of Nebraska.
>
> 2. Whether, when a plaintiff sues both a physician and the professional corporation with which he is associated, both of whom are qualified health care providers under the Act, each must separately pay $100,000.00 before the Excess Liability Fund may be called upon to pay damages.
>
> 3. Whether, in the circumstances of this case, interest should be payable to the plaintiff from the date of the stipulation between the plaintiff and the Fund as to the amount of plaintiff's damages.

Addressing the first question of whether the Nebraska Excess Liability Fund is liable for the negligent acts of qualified physicians which are committed outside the boundaries of the State of Nebraska, the plaintiff bases his argument that the fund is liable on two grounds: first, that the relationship between the defendant Dr. Silva and the State of Nebraska is sufficient to bring this case under the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§ 44-2801 to 44-2855 (Reissue 1984); and, second, that it is the intent of the act to cover acts of negligence committed by qualified physicians outside the boundaries of the state. We agree with neither contention.

The plaintiff argues that the issues presented by the case at hand are very similar to the issues presented to the Supreme Court of Michigan by the case of *Sexton v Ryder Truck Rental*, 413 Mich. 406, 320 N.W.2d 843 (1982). In this case the Michigan Supreme Court faced the issues of whether the

doctrine of lex loci delicti was still viable in that state and whether Michigan's owners' liability statutes have extraterritorial applicability. *Sexton* consolidated two cases brought under Michigan's owners' liability statutes. The first was a case in which a Ryder rental truck, rented in Michigan by Michigan residents, was involved in a one-vehicle accident in Virginia. Sextons sued Ryder for damages. The second case involved an aircraft rented in Michigan by a Michigan corporation, which crashed in Ohio and killed the pilot and a passenger. The survivors of the passenger sued the leasing company. In both cases the only contact with the state in which the accident occurred was that the accident occurred there. In *Sexton* neither plaintiff had any connection with the state in which the accident occurred, nor was there any damage to the property or residents of Virginia or Ohio.

Applying what appears to be a traditional sufficiency of the contacts analysis, the Michigan Supreme Court held that the application of the Michigan owners' liability statutes to these cases was not extraterritorial, since the owner-operator relationship took place exclusively in Michigan. In each case the only contact with the place of the accident was that the accident occurred there. All other contacts were between the parties and the State of Michigan. The plaintiff now argues that in the case at hand, under the *Sexton* theory, the application of the Nebraska Hospital-Medical Liability Act to this case would not be an extraterritorial application of that act.

There are substantial differences between the case at bar and the facts of the cases involved in *Sexton*. This case involves more contact with the state in which the injury occurred than simply that the injury occurred there. Dr. Silva was licensed to practice in Kansas, and the injury occurred in Kansas to a Kansas resident. Any analogy that the plaintiff attempts to draw between this case and *Sexton* fails in view of these differences.

Additionally, Nebraska appears to follow the approach of Restatement (Second) of Conflict of Laws, which provides:

> In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the

> particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Restatement (Second) of Conflict of Laws § 146 at 430 (1971). See, e.g., *Crossley v. Pacific Employers Ins. Co.*, 198 Neb. 26, 251 N.W.2d 383 (1977). From a traditional balancing of contacts approach, the *Sexton* court logically concluded that the State of Michigan would have more interest in the cases involved than either Ohio or Virginia. We cannot, under these facts, conclude that there are more contacts with the State of Nebraska than with the State of Kansas. Clearly, the State of Kansas here has a far more significant interest in this case in view of the relationship it has to the parties involved.

The plaintiff next argues that the legislative intent of the Nebraska Hospital-Medical Liability Act is to provide for extraterritorial application of the act, citing in support several cases from other states which have permitted extraterritorial application of workers' compensation statutes and dramshop acts. Again, we cannot accept the plaintiff's contention. The general rule governing the issue of extraterritorial application is that statutes enacted by a state legislature apply to all rights which, and all persons who, come within the limits of the state. 73 Am. Jur. 2d *Statutes* § 356 (1974). From our examination of the language of the act itself and its legislative history, we can find nothing which either specifically limits the act to this state or provides for application of the act beyond the boundaries of this state.

The first section of the act provides:

> (1) The Legislature finds and declares that it is in the public interest that competent medical and hospital services be available *to the public in the State of Nebraska at reasonable costs*, and that prompt and efficient methods be provided for eliminating the expense as well as the useless expenditure of time of physicians and courts in nonmeritorious malpractice claims and for efficiently resolving meritorious claims. It is essential in this state to assure continuing availability of medical care and to encourage physicians to enter into the practice of medicine

> in Nebraska and to remain in such practice as long as such physicians retain their qualifications.
>
> (2) The Legislature further finds that at the present time under the system in effect too large a percentage of the cost of malpractice insurance is received by individuals other than the injured party. The intent of sections 44-2801 to 44-2855 is to serve the public interest by providing an alternative method for determining malpractice claims in order to improve the availability of medical care, to improve its quality and to reduce the cost thereof, and to insure the availability of malpractice insurance coverage at reasonable rates.

(Emphasis supplied.) § 44-2801. This language only suggests that the intent of the Legislature in enacting the Nebraska Hospital-Medical Liability Act was to ensure that hospital and medical care be available to the people of Nebraska, but does not expressly limit the application to citizens of Nebraska and, more importantly, does not provide for extraterritorial application.

It is a settled principle of statutory construction that when ambiguity exists, recourse should be had to legislative history to determine the intent of the lawmakers. *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985). The introducer's statement of purpose during the committee hearings for L.B. 703 reads:

> This Bill relates to the problem which confronts hospitals, members of the medical profession and citizens of this state as a result of the great increase in malpractice litigation and the cost of such litigation as well as the great increase in the cost of malpractice insurance and the questionable availability of such insurance in the future.
>
> . . . .
>
> Failure to enact this type of legislation could result in the loss of professional services that are presently available to the citizens of this state. It is imperative that the Legislature act now in order that insurance coverage will continue to be available to all members of the medical profession.

Statement of Purpose, L.B. 703, Public Health and Welfare

Committee, 84th Leg., 2d Sess. (Jan. 27, 1976).

Later, in the committee hearing, Senator Cavanaugh stated, "The ultimate goal here is to continue the best quality health care to the citizens of the state of Nebraska, and to devise some method to arrest the cost that [sic] health care due to escalating malpractice." Public Health and Welfare Committee Hearing, L.B. 703, 84th Leg., 2d Sess. 22-23 (Jan. 27, 1976). L.B. 703 was enacted in substance as 1976 Neb. Laws, L.B. 434.

In view of the language of the legislative history and the statement of the purpose of the act found in the first section of the Nebraska Hospital-Medical Liability Act, we conclude that the act was intended to cover only those qualified health care providers practicing within the boundaries of this state. The legislative history clearly states that the intent of the Nebraska Hospital-Medical Liability Act is to protect and encourage health care within the State of Nebraska and does not apply to an instance such as the one presented in the case before us involving injury to a Kansas citizen being operated on in the State of Kansas. By so finding, we need not address the second and third questions certified to this court.

JUDGMENT ENTERED.

STATE OF NEBRASKA, APPELLEE, V. TODD SCHRECK, APPELLANT.
399 N.W.2d 830

Filed January 30, 1987. No. 86-557.

1. **Aiding and Abetting.** A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender.
2. _____. Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient.

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

Avis R. Andrews, for appellant.

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

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

BOSLAUGH, J.

After trial to a jury the defendant was found guilty of aiding and abetting Cynthia Capps to deliver marijuana in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1985). The defendant was sentenced to imprisonment for 3 to 10 years, the sentence to run concurrently with a sentence for forgery, which the defendant was then serving.

The defendant has appealed and contends (1) the verdict is contrary to law, (2) the verdict is not supported by sufficient evidence, and (3) the sentence imposed was excessive and constituted an abuse of discretion by the district court.

The offense occurred when Capps, a friend of the defendant, brought two marijuana cigarettes concealed in a pair of socks to the jail in Dodge County, Nebraska. The socks were to be delivered to the defendant, who was then an inmate of the jail. The marijuana cigarettes had been given to Capps by the defendant's brother for delivery to the defendant. In a telephone conversation the defendant had instructed Capps on how she was to pass the marijuana cigarettes to him during a sentencing hearing on a probation violation. Fearing that she would be caught, Capps did not follow through with that plan.

After the hearing, the defendant again telephoned Capps. The defendant was angry that Capps had not delivered the marijuana and gave her instructions on how to deliver it to him in jail by concealing it in his socks. When Capps acted concerned about doing this, the defendant told her she would not be caught because the items would not be searched. Capps testified that she took the cigarettes to the jail with the intent of delivering them to the defendant, knowing or believing the substance to be marijuana.

Upon her arrival at the jail the socks were delivered to a corrections officer, who discovered the cigarettes concealed in

the socks. Upon being questioned, both Capps and the defendant admitted the offense had been committed.

As to the first two assignments of error, the defendant argues that a suggestion incapable of being taken seriously by a reasonable person cannot be a basis for a charge of aiding and abetting a crime.

Under Neb. Rev. Stat. § 28-206 (Reissue 1985), "A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender."

Recently, in *State v. Bennett*, 219 Neb. 601, 606, 365 N.W.2d 423, 426-27 (1985), we stated:

> Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient.

There is no requirement that the defendant participate in a criminal act that is likely to succeed without the perpetrators getting caught.

In regard to a similar earlier statute, we said:

> Aiding and abetting involves some participation in the criminal act or involves some conscious sharing in the criminal act, as in something that the accused wishes to bring about, in furtherance of a common design, either before or at the time the criminal act is committed, and it is necessary that he seeks by his action to make it succeed.

State v. Foster, 196 Neb. 332, 336, 242 N.W.2d 876, 879 (1976). While this language may suggest that the defendant's participation must amount to an effort to see the crime through to fruition, it does not support a view that encouraging a criminal act that involves a high risk of getting caught is an innocent act.

The evidence was more than sufficient for the jury to find the defendant guilty beyond a reasonable doubt, and the verdict was not contrary to law.

Finally, the defendant maintains that his sentence is excessive because it is disproportionate to the crime committed. The

defendant was convicted of a Class III felony, which, pursuant to Neb. Rev. Stat. § 28-105(1) (Reissue 1985), carries a maximum penalty of 20 years' imprisonment, or a $25,000 fine, or both, and a minimum sentence of 1 year's imprisonment. See, also, § 28-416(2)(b). The defendant was sentenced to imprisonment for 3 to 10 years, to be served concurrently with a sentence of 20 months to 5 years imposed in April 1985 on a forgery charge.

The defendant is 21 years old. His prior record includes a 1985 Class IV felony forgery conviction, a 1985 probation revocation arising out of a conviction for resisting arrest, and convictions on two counts of criminal attempt in 1983. The defendant's life has been disrupted and unstable since he was 11 years of age. He admits having drug and alcohol problems. Earlier, his participation in an inpatient treatment program for drugs and alcohol was terminated for inappropriate behavior.

In imposing the sentence, the trial court noted that the defendant had a long history of involvement with the law and was incarcerated on another charge at the time of sentencing. The court concluded that the defendant had continually failed to show respect for the judicial system and the laws of this State, as evidenced by his attempt to smuggle marijuana into jail.

Although severe, the sentence was not excessive in view of the defendant's record and the circumstances of the case. There was no abuse of discretion.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT P. FREDERIKSEN, APPELLANT.

400 N.W.2d 225

Filed January 30, 1987. No. 86-577.

Evidence: Proof. A photocopy of a writing is admissible in evidence to the same extent as the original unless a genuine question is raised as to the authenticity of the original or, under the circumstances, it would be unfair to admit the duplicate in

lieu of the original. The burden of raising an issue as to the authenticity of the original or the unfairness of the circumstances is on the party opposing admission.

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

Thomas J. Young of Young, LaPuzza & Stoehr, for appellant.

Robert M. Spire, Attorney General, and Laura L. Freppel, for appellee.

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

HASTINGS, J.

The defendant appeals the affirmance by the district court for Douglas County of his conviction in the county court for Douglas County for second offense driving while intoxicated.

On October 15, 1985, the defendant consumed four or five beers at a friend's house. On the way home the defendant had to take evasive action to avoid an oncoming car and in so doing struck a tree. He hit his head against the windshield and was in a daze after the accident.

The officer who arrived at the scene testified that he detected a moderate odor of alcohol coming from the defendant and that the defendant was unsure of his footing. The officer asked the defendant to perform field sobriety tests. The defendant responded that he had multiple sclerosis and could not accomplish the tests. The officer took the defendant to his cruiser and asked him to perform verbal sobriety tests. Based on his observations of the defendant, the officer concluded the defendant was under the influence of alcohol to a sufficient extent to impair his ability to operate a motor vehicle. On cross-examination, however, the officer did admit that the defendant's inability to pass the sobriety tests could have been caused by the injury he sustained in the accident.

The defendant was taken to the police station, where a breath test was performed during the early morning hours of October 16. The reading was .214 percent weight by volume. At trial the defendant objected to the admission of photocopies of

documentary evidence relating to the testing and maintenance of the Intoxilyzer machine and the license possessed by the person who performed the test.

On appeal the defendant contends the county court erred when it allowed photocopies of that documentary evidence to be admitted into evidence without first requiring the State to have brought the originals to trial for inspection by the defendant. Because that documentary evidence provided the foundation for the admission of the breath test, the defendant also contends the county court erred when it admitted the breath test result into evidence. Finally, the defendant contends that, because the breath test was improperly admitted, the county court erred when it found the defendant guilty of violating Neb. Rev. Stat. § 39-669.07(2) (Reissue 1984). We affirm the district court's determination that the county court did not err.

Neb. Rev. Stat. § 27-1002 (Reissue 1985) governs the introduction of documents into evidence. That section provides in part: "To prove the content of a writing . . . the original writing . . . is required, except as otherwise provided in these rules . . . ." One of the exceptions to this rule is that found in Neb. Rev. Stat. § 27-1003 (Reissue 1985). That section provides: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Neb. Rev. Stat. § 27-1001(4) (Reissue 1985) in pertinent part defines "duplicate" as "a counterpart produced . . . by means of photography . . . or by other equivalent techniques which accurately reproduce the original." Thus, in order to be a duplicate, a photocopy must be an accurate reproduction of the original document. Here, the witnesses who supplied the foundation for the documentary evidence testified the photocopies were exact copies of the originals. Therefore, the State properly established that the copies introduced were "duplicates" of the original documents and were properly admissible unless "(1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

§ 27-1003.

The burden of raising an issue as to the authenticity of the original is on the party opposing admission. *United States v. Georgalis*, 631 F.2d 1199 (5th Cir. 1980); *United States v. DiMatteo*, 716 F.2d 1361 (11th Cir. 1983). See *State v. Costello*, 199 Neb. 43, 256 N.W.2d 97 (1977). It follows then that it is also the defendant's burden to show how in the circumstances it would be unfair to admit the duplicate.

At trial the defendant did not question the authenticity of the originals. Instead, he merely argued that the State should have produced the originals at trial so he could review them. With reference to at least one exhibit, defendant indicated that he would not have objected to the State's withdrawing the original and substituting a copy. Although not articulated as such, the defendant's argument is basically one of "unfairness." He believes it is unfair to admit duplicates of available original documents in the control of the State when he has not had a chance to make sure the originals actually exist and to compare them to the duplicates.

In support of this argument the defendant cites *State v. Costello, supra*. In that case, to prove an insufficient funds charge, the State was allowed to introduce photocopies of the checks in question. One of the reasons this court affirmed the district court's admission of those checks into evidence was because the originals had been returned to either the payees or the defendant. The defendant in this case believes that was the only reason the admission of those checks in *Costello* was proper. That is not the case. As we stated:

> In this case there is no genuine question raised at trial as to the authenticity of the original checks received by the Wisconsin bank. . . . Contrary to defendant's contention, the photocopies are legible such that the signatures of the drawer and payee, and the amount and date of each check are discernible. The officer of the Wisconsin bank testified to the fact that the photocopies are accurate representations of the originals, and he had personally reviewed the originals before they were photocopied and returned unpaid. Under the circumstances of the case, it was not unfair to admit the duplicates in lieu of the

originals.

Id. at 55-56, 256 N.W.2d at 105.

Similarly, the defendant in this case did not meet his burden of showing the "unfairness" of introducing the photocopies into evidence. First, the record does not indicate that, prior to trial, the defendant ever asked to review the documents in question or that the State refused to comply with any such requests. Second, the witnesses who supplied the foundation for the documentary evidence testified the photocopies were exact copies of the originals. If the defendant had wanted to cast doubt on this testimony and thereby show why the admission of the photocopies would be unfair to the defendant, he could have questioned the witnesses as to the foundation for their statements. This the defendant did not do. Thus, he failed to make a sufficient showing of why it would be unfair to introduce the photocopies into evidence without him first having had a chance to review the originals.

The defendant next contends that the result of the breath test performed on him was improperly admitted into evidence for two reasons. First, he contends the test result was improperly admitted because the necessary foundation for the admission of that test result as set forth in *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980), the documentary evidence previously discussed, was improperly admitted. Because we have determined the documentary evidence was properly admitted, this contention has no merit.

Second, the defendant contends the test result was improperly admitted into evidence because the 190-day percent deviation check of the Intoxilyzer performed by the Department of Health on October 16, 1985, exhibit 7, was based on a calculation at the testing site made on December 21, 1984, exhibit 5, and therefore could not have been the basis for the October 16 deviation check. In making this argument the defendant misconstrues the purpose of the operation performed on December 21, 1984.

Neb. Admin. Code tit. 177, ch. 1, § 007.06B (1984) provides: "Testing devices used for direct breath testing shall have been checked within 190 days prior to an analysis by a person responsible for maintenance and calibration." (Emphasis

omitted.) Section 007.06B1 then details how that check shall be made. Basically, the person responsible for maintenance at a site shall request from the Department of Health a simulator check sample. That sample is then tested at the site and the results forwarded to the Department of Health, which will then compare the test result received with the known value of the sample to determine that the percent deviation is within the allowable plus or minus 10-percent figure. The test at the site was performed on October 2, 1985, well within the 190-day requirement when compared to the analysis of the defendant's breath on October 16, 1985.

However, the defendant insists that the verification and certification of reference standards required by Neb. Admin. Code tit. 177, ch. 1, § 007.04C (1984), which standards are used for checking direct testing devices, and which verification was made on December 21, 1984, must also be done within the 190-day period. This is not true.

Section 007.04C states as follows:

> Certain reference standards used . . . for calibration and for verification of direct breath testing devices which are approved for use are:
>
> . . . .
>
> 007.04C2 Intoxilyzer reference standard, manufactured by CMI, Inc., and consisting of a beam attenuatory accessory is an approved standard provided the target value of the reference standard has been verified according to the following steps and certified prior to placement into service at a testing site.

(Emphasis omitted.) There then follow instructions for determination of the assigned target value of the reference standard for that beam attenuatory accessory.

Although the State has done less than a satisfactory job of explaining the nature of a beam attenuatory accessory, we conclude from the testimony of the person certified as the onsite maintenance and calibration person that it is a lens-like object, identified specifically by a serial number, which is inserted into the particular testing device as a reference standard to ensure that the calibration of the testing device is correct. In other words, as we view the record, the beam

attenuatory accessory is not a mechanical device which needs testing and adjusting from time to time, but rather amounts to a fixed standard, which target value once determined does not change. There is no reason for nor is there anything in the rules and regulations which would require a redetermination of that target value of the beam attenuatory accessory.

Exhibits 5 and 7 and the Intoxilyzer test of the defendant's breath properly were admitted in evidence.

The defendant's final contention is that the court erred in finding the defendant guilty of violating § 39-669.07(2) because the breath test was improperly admitted. We have determined the breath test was properly admitted, that test showing a .214-percent reading. Section 39-669.07, the statute prohibiting driving while intoxicated, provides that such offense may be committed by being under the influence of alcoholic liquor or having ten-hundredths of one percent or more by weight of alcohol in the body fluid. *State v. Hilker*, 210 Neb. 810, 317 N.W.2d 82 (1982). Because the defendant was above the .1-percent statutory limit, he properly was found guilty of the offense charged. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHRIS B. GONZALES, APPELLANT.

399 N.W.2d 832

Filed January 30, 1987. No. 86-662.

1. **Sentences: Appeal and Error.** Generally, a sentence imposed within the statutorily set limits will not be overturned on appeal, absent an abuse of discretion on the part of the sentencing court.
2. **False Reporting: Intent.** To commit the crime of false reporting one need not actually impede a police investigation, but must furnish false information with the intent to impede the investigation of a criminal matter.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Richard Biggs of Winner, Nichols, Douglas, Kelly and Arfmann, for appellant.

Robert M. Spire, Attorney General, and Lisa D. Martin-Price, for appellee.

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

WHITE, J.

This is an appeal from the Scotts Bluff County District Court's order affirming the Scotts Bluff County Court's conviction and sentence of the appellant, Chris B. Gonzales. The appellant was charged with and pled guilty to one count of driving without a valid driver's license, in violation of Neb. Rev. Stat. § 60-403 (Reissue 1984); one count of leaving the scene of an accident, in violation of Neb. Rev. Stat. § 39-6,104.02 (Reissue 1984); and one count of giving false information to a police officer, in violation of Neb. Rev. Stat. § 28-907(1)(a) (Reissue 1985). The appellant was sentenced to 1 month's imprisonment for count I, fined $100 for count II, and sentenced to 1 year's imprisonment for count III, to be served concurrently with his sentence for count I.

Gonzales appealed the county court's judgment to the Scotts Bluff County District Court, alleging as error that the 1-year term of imprisonment imposed for count III was excessive and that the county court judge did not have an adequate factual basis upon which to accept his plea of guilty to false reporting. The district court affirmed the county court, and this appeal followed. Gonzales again alleges as error that the 1-year term of imprisonment imposed for count III is excessive and that the county judge did not have an adequate factual basis upon which to accept the appellant's plea of guilty to giving false information to a police officer. We affirm.

Generally, a sentence imposed within the statutorily set limits will not be overturned on appeal, absent an abuse of discretion on the part of the sentencing court. *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986). False reporting to a police officer is a Class I misdemeanor, punishable by a $1,000 fine, or 1 year's imprisonment, or both. Gonzales was sentenced to 1

year's imprisonment for this count, to be served concurrently with the 1-month term of imprisonment imposed for his driving without a valid license conviction. While this sentence is the maximum allowable by the statute, it is within the statutorily set limits, and the record reveals no abuse of discretion on the part of the sentencing court. We find this assignment of error to be meritless.

The appellant next assigns as error that there was no factual basis established upon which the sentencing court could have accepted the appellant's plea of guilty to count III. The factual basis for all three charges was presented to the sentencing court as follows:

> MR. SILVERMAN: In regard to all three counts, Your Honor, there was an accident within the city of Scottsbluff. Scottsbluff officers went to investigate that accident. The vehicle had hit a parked car, had left the scene of the accident. The officers found that vehicle parked in an alley between 8th Street and 9th Street in Scottsbluff. They contacted the defendant; the defendant told them the car had been there all day and had never been moved. They checked the car and saw that the car had been involved in the accident and also had been involved in the accident that they were investigating, so they knew that was a lie.
>
> They contacted another individual who was in the car at the time. That individual informed them that Chris was, in fact, the driver of the vehicle when it had the wreck. He was told to stop, but he didn't. And when they checked his operator's license, his operator's license was expired. So that's factual basis for all three counts.

Although this was the factual basis for the appellant's pleas of guilty to all three counts, Gonzales challenges only the sentencing court's acceptance of his guilty plea to count III.

Section 28-907(1)(a) provides:

> (1) A person commits the offense of false reporting if he or she:
>
> (a) Furnishes information he or she knows to be false to any peace officer or other official with the intent to instigate an investigation of an alleged criminal matter or

> to impede the investigation of an actual criminal matter
> . . . .

Gonzales argues that the factual basis offered to the county court judge fails to show that his misstatements actually impeded the investigation of the accident. The appellant contends that impeding the investigation is an element of the crime of giving false information to a police officer, and, without it, no crime has been committed. We can find no support for the appellant's contentions in the applicable case law. In *State v. Ewing*, 221 Neb. 462, 378 N.W.2d 158 (1985), the elements of the crime of false reporting were set out as (1) giving false information to a peace officer, (2) with the intent to impede an investigation of (3) an actual criminal matter. Nowhere is it said that actual impediment of an investigation is an element of this crime. See *In re Interest of McManaman*, 222 Neb. 263, 383 N.W.2d 45 (1986).

From the record it is evident that an adequate factual basis existed upon which the county court judge could have accepted the appellant's guilty plea. The appellant gave a false statement to the police officer conducting the investigation, from which the fact finder could infer that the appellant intended to prevent the police officers from discovering that he was the driver of the car involved in the accident. Finally, a traffic offense is a criminal offense, thereby satisfying the third element of the crime of false reporting. *State v. Knoles*, 199 Neb. 211, 256 N.W.2d 873 (1977). From this factual basis the county court was able to determine that the appellant was guilty of the crime charged. We find this assignment of error to be also without merit.

AFFIRMED.

CAROL BEATTY, APPELLEE, V. EMMALINE DAVIS, DECEASED, APPELLEE, AND ORNAN DAVIS, APPELLANT.

400 N.W.2d 850

Filed February 13, 1987. No. 85-453.

1. **Negligence: Evidence.** The doctrine of res ipsa loquitur is that where the instrumentality causing the injury is shown to be under the defendant's exclusive control and management and the accident is one that in the ordinary course of things does not occur if those who have its management or control use proper care, reasonable evidence is afforded, in the absence of an explanation by the defendant, that the accident arose from want of proper care.
2. _____: _____. If specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of res ipsa loquitur is not applicable.
3. **Damages: Jury Instructions.** Where the plaintiff claims damages for lost wages, and the trial court instructs the jury that the plaintiff can recover damages for wages lost due to the inability of the plaintiff to work, it is not error to refuse to instruct that the plaintiff has a duty to mitigate damages.
4. **Jury Instructions.** Counsel has the duty of tendering a more specific instruction where one is desired.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

J.L. Zimmerman, for appellant.

Robert W. Mullin of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

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

BOSLAUGH, J.

This was an action by the plaintiff, Carol Beatty, to recover damages for the personal injuries she sustained on November 2, 1981, when the defendants' automobile ran over her.

The plaintiff and the defendants, Emmaline Davis and Ornan Davis, were neighbors living in a trailer court in Scottsbluff, Nebraska. On the day of the accident Emmaline Davis, intending to go shopping, started their 1977 Pontiac Bonneville automobile, which was parked in front of their trailer. Realizing that she had forgotten her glasses, Mrs. Davis left the engine running and returned to the trailer. Later, Mrs. Davis told an investigator that she left the gearshift in park

position. After retrieving her glasses and talking with her husband, she returned and found the vehicle traveling in a reverse circular path at idling speed.

At about this time the plaintiff was working in a flowerbed at the rear of her mobile home. When she heard some noise, she came around to the front of her home and discovered the Davis vehicle had struck a yard light near her trailer and was still moving, with no one in control. Seeing the driver's-side door open, the plaintiff attempted to jump in and stop the vehicle. The plaintiff testified that she did so at Mrs. Davis' request and because the plaintiff thought the vehicle might hit Mrs. Davis and her own trailer home. Mrs. Davis denied asking the plaintiff to stop the car.

The plaintiff was able to grasp the steering wheel, but was struck by the open car door, which caused her to fall to the ground. The vehicle then ran over her left knee and lower right leg. She crawled to the safety of the Davis lawn, as the vehicle struck a concrete block wall and finally came to a stop when a block from the wall lodged behind one of the wheels.

The second amended petition alleged that Mrs. Davis' general negligence, the specific acts of which were unknown, was the direct and proximate cause of the accident and the plaintiff's injuries. Mrs. Davis' negligence was alleged to be imputed to her husband, the defendant Ornan Davis, because the automobile was a family purpose automobile. The plaintiff prayed for $8,157.78 in special damages for medical expenses, damages for lost income, and general damages.

The answer denied that Mrs. Davis had put the vehicle in reverse gear or that the defendants had been negligent in any way. The answer also alleged that the plaintiff had assumed the risk as a volunteer and had committed acts of contributory negligence which were more than slight. The defendants also claimed a setoff of $5,099.89 because of medical payments made by their insurance carrier.

Mrs. Davis died prior to trial. The jury returned a general verdict for the plaintiff in the amount of $84,811.20. The defendant Ornan Davis has appealed.

On appeal the defendant contends the trial court erred (1) in overruling his motion for a directed verdict or, alternatively, by

failing to order a mistrial; (2) in failing to give his requested instructions on the duty to mitigate damages and on the duty of a volunteer; (3) in giving instruction No. 9, because it failed to state the necessary elements of the rescue doctrine; and that (4) the judgment is not sustained by sufficient evidence.

The first issue concerns whether the plaintiff's proof went too far in proving specific acts of negligence and therefore eliminated res ipsa loquitur as a means of proving her case.

The doctrine of res ipsa loquitur is that where the instrumentality causing the injury is shown to be under the defendant's exclusive control and management and the accident is one that in the ordinary course of things does not occur if those who have its management or control use proper care, reasonable evidence is afforded, in the absence of an explanation by the defendant, that the accident arose from want of proper care. *Nownes v. Hillside Lounge, Inc.*, 179 Neb. 157, 137 N.W.2d 361 (1965); *Sober v. Smith*, 179 Neb. 74, 136 N.W.2d 372 (1965).

When applicable, the essence of the doctrine is that an inference of negligence arises without further proof, and the facts speak for themselves. *McCall v. St. Joseph's Hospital*, 184 Neb. 1, 165 N.W.2d 85 (1969); *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.*, 157 Neb. 923, 62 N.W.2d 127 (1954). Liability then becomes an issue for the jury. *Security Ins. Co., supra.*

In Nebraska it is clear that if specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of res ipsa loquitur is not applicable. See, *Lund v. Mangelson*, 183 Neb. 99, 158 N.W.2d 223 (1968); *Nekuda v. Allis-Chalmers Manuf. Co.*, 175 Neb. 396, 121 N.W.2d 819 (1963); *Security Ins. Co., supra; Miratsky v. Beseda*, 139 Neb. 229, 297 N.W. 94 (1941); *Knies v. Lang*, 116 Neb. 387, 217 N.W. 615 (1928). The doctrine is applicable only where the plaintiff is unable to allege or prove the particular act of negligence which caused the injury. *Security Ins. Co., supra.*

In the present case no specific acts of negligence were alleged in the petition. Instead, the defendant complains that the specific act of negligence resulting in the injury, i.e., Mrs. Davis' leaving the vehicle in reverse gear, was clearly proved at

trial.

In *Knies v. Lang, supra*, this court indicated that res ipsa loquitur would not apply in a case where the evidence showed the "precise" cause of the accident. The court in *Knies* also made reference to the discussion of the doctrine in *McAnany v. Shipley*, 189 Mo. App. 396, 176 S.W. 1079 (1915). In that case the court reasoned that while the doctrine is unavailable where the *precise* cause is shown, the plaintiff does not lose the benefit of the doctrine by introducing evidence of specific acts of negligence, where the evidence leaves the cause of the accident in doubt or does not clearly show the cause. *McAnany v. Shipley, supra.*

Also, in *Security Ins. Co. v. Omaha Coca-Cola Bottling Co., supra* at 928, 62 N.W.2d at 131, we stated:

> "[A]n unsuccessful attempt on the part of plaintiff to show the specific negligent act which caused his injury does not weaken or displace the presumption of negligence on the part of the defendant arising from the facts of the case by virtue of the rule of res ipsa loquitur."

Quoting 65 C.J.S. *Negligence* § 220(6) (1950).

Finally, in *Nuclear Corporation of America v. Lang*, 480 F.2d 990, 992 (8th Cir. 1973), the U.S. Court of Appeals for the Eighth Circuit, while interpreting the doctrine as applied in Nebraska law, indicated:

> [I]t is quite generally agreed that the introduction of some evidence which tends to show specific acts of negligence on the part of the defendant, but which does not purport to furnish full and complete explanation of the occurrence does not destroy the inferences which are consistent with the evidence, and so does not deprive the plaintiff of the benefit of res ipsa loquitur. W. Prosser, Law of Torts 236 (3d ed. 1964).

The plaintiff's evidence of which the defendant complains consists of expert testimony by an experienced automobile mechanic that he had never heard of the type of transmission on the Bonneville's jumping into reverse; the plaintiff's testimony that after the accident Mrs. Davis told the plaintiff that she (Mrs. Davis) must have hit the gearshift lever with her purse as she left the car; Mr. Davis' deposition statements that the

vehicle had never jumped out of gear either before or since the time of the accident; and the plaintiff's testimony that Mrs. Davis was the only person she saw in the area when the plaintiff first discovered the runaway car.

The defendant makes no reference to the fact that the plaintiff introduced evidence that Mrs. Davis told an investigator at the scene that she had left the vehicle running and in park and that later, in a deposition, Mrs. Davis stated that she did not believe she had left the car in reverse or that she had struck the shift lever with her purse.

Considering the plaintiff's evidence, it can hardly be said that the cause of the accident was clearly shown. Mrs. Davis' statement that she must have hit the shift lever with her purse was thrown into doubt by her later statement that she did not think she had struck the shift lever or had left the vehicle in reverse. The evidence also fails to show that anyone actually witnessed what caused the vehicle to begin to move in reverse.

In considering a motion for a directed verdict, the trial court must resolve all controverted facts in favor of the nonmoving party and must give that party the benefit of any reasonable inference that can be drawn from the evidence. *Weiss v. Autumn Hills Inv. Co.*, 223 Neb. 885, 395 N.W.2d 481 (1986). The case may not be decided as a matter of law if there is any evidence which will sustain a finding for the nonmoving party. *Weiss v. Autumn Hills Inv. Co., supra.*

The evidence in the instant case, when viewed most favorably to the plaintiff, did not fully or completely establish the cause of the accident. Instead, it tended to show that no one really knew what caused the vehicle to begin to propel itself backward.

The fact that the plaintiff introduced evidence tending to show that Mrs. Davis had the best opportunity to place the gearshift in reverse did not fully explain what happened. In fact, in order for the doctrine to apply, the plaintiff was required to prove facts that were more consistent with negligence on the part of the defendants than with a mere accident or third-party intervention. See, *Knies v. Lang*, 116 Neb. 387, 217 N.W. 615 (1928); *Buzzello v. Sramek*, 110 Neb. 262, 193 N.W. 743 (1923). See, also, Restatement (Second) of Torts § 328 D, comment *f* (1965); Prosser and Keeton on the

Law of Torts, *Negligence: Proof* § 39 (5th ed. 1984).

The trial court did not err in refusing to direct a verdict, nor did it abuse its discretion in refusing to grant a mistrial. See *Kenyon & Larsen v. Deyle*, 205 Neb. 209, 286 N.W.2d 759 (1980).

The defendant next contends that the trial court erred in refusing to give his requested instruction on the duty to mitigate damages. That instruction read: "A person has the duty to take such reasonable steps under the circumstances as will minimize for [sic] injuries and damages. Any damages resulting from a failure to take such reasonable steps cannot be recovered."

There was evidence that the plaintiff had been advised by one of her doctors to return to lighter work on March 3, 1982. The plaintiff had not worked at a full-time job for more than a year before the accident, due to the death of her husband. Sometime after the accident, she was offered employment as a kitchen helper but declined the offer because her injuries made it impossible to stand all day.

The defendant cites no Nebraska authority, and we have found none, in which a duty to mitigate damages has been applied to a claim for lost wages on grounds that the plaintiff could have returned to some type of work. Cases from other jurisdictions have recognized such a duty in this context. *Kubista v. Romaine*, 87 Wash. 2d 62, 549 P.2d 491 (1976); *Bell v. Shopwell, Inc.*, 119 A.D.2d 715, 501 N.Y.S.2d 129 (1986).

The duty to mitigate damages arises out of the rule of avoidable consequences. C. McCormick, Handbook on the Law of Damages § 33 (West 1935). See, also, *Tetherow v. Wolfe*, 223 Neb. 631, 392 N.W.2d 374 (1986). The rule evolves from the general principle:

> Legal rules and doctrines are designed not only to prevent and repair individual loss and injustice, but to protect and conserve the economic welfare and prosperity of the whole community. Consequently, it is important that the rules for awarding damages should be such as to discourage even persons against whom wrongs have been committed from passively suffering economic loss which could be averted by reasonable efforts, or from actively increasing such loss where prudence would require that

> such activity cease. The machinery by which the law seeks to encourage the avoidance of loss is by denying to the wronged party a recovery for such losses as he could reasonably have avoided, and by allowing him to recover any loss, injury, or expense incurred in reasonable efforts to minimize his injury.

C. McCormick, *supra* at 127.

Some authorities, however, consider the rule and the duty to mitigate damages arising out of it "as but an application of the principle which denies liability for injurious consequences which are not proximately caused by the defendant's wrongdoing." C. McCormick, *supra* at 128. A criticism of this characterization has been that stated in terms of proximate causation, the jury is likely to become confused, i.e., it may tend to award damages for injuries which the plaintiff could have avoided, because it is instructed to compensate for all injuries which in natural and continuous sequence, unbroken by an efficient intervening cause, flowed from the defendant's acts. J. Stein, Damages and Recovery: Personal Injury and Death Actions § 126 (1972).

In the present case the trial court instructed the jury as follows:

> If you find for the Plaintiff on the issue of liability, you must fix the amount of money which will fairly and reasonably compensate her for any of the following elements of damage proven by a preponderance of the evidence to have proximately resulted from the negligence of the Defendant:
>
> . . . .
>
> 4. The value of wages or salaries lost due to her inability or her diminished ability to work
>
> (a) to date
>
> (b) reasonably certain or reasonably probable to be experienced in the future.

In our view the policy considerations encompassed in the doctrine of avoidable consequences were adequately protected by the instruction given. Because the instruction limited recovery for lost wages to those proximately caused by Davis' negligence *and* due to Beatty's inability or diminished ability to

work, the jury was not permitted to award any amounts which may have arisen from an unreasonable refusal to return to work. Thus, the instruction was adequate to fairly submit the case and could not have misled the jury. See *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985). There was no prejudice in refusing to instruct the jury on the duty to mitigate damages.

Davis contends the trial court erred in submitting instruction No. 9 because it failed to advise the jury how to weigh the extent of risk which a volunteer may assume as compared to the danger to be met.

Instruction No. 9 provides: "It is not contributory negligence for the Plaintiff to expose herself to danger in an effort to save herself or others from injury to their person or property, unless the effort itself is an unreasonable one or the Plaintiff acts unreasonably in the course of it." As Davis acknowledges, a substantially similar instruction was given in *Lave v. Neumann*, 211 Neb. 97, 317 N.W.2d 779 (1982). The issue in that case involved the standard of care owed by the defendant to the plaintiff police officer. The court ultimately determined that the rescue doctrine embodied the appropriate standard and that the trial court had not erred in refusing to submit an instruction on the "fireman's rule" to the jury.

The court in *Lave, supra* at 101, 317 N.W.2d at 782, also elaborated on the meaning of the rescue doctrine:

> Under the rescue doctrine it is not contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save a third person or the property of a third person from harm. The extent of the risk which the volunteer is justified in assuming under the circumstances increases in proportion to the imminence of the danger and the value to be realized from meeting the danger and attempting to remove or eliminate the hazard; that is, the less the danger to the third party, the less the risk the volunteer is justified in taking. *Buchanan v. Prickett & Son, Inc., supra.*

Davis complains that absent the language of the second sentence in the above quote, the jury was without guidance as to how to weigh the magnitude of the danger in relation to the

reasonableness of the attempted rescue. Further, he contends that with the benefit of this more precise instruction, the jury could have found that the plaintiff was only justified in taking minor risks to stop the vehicle.

At the trial, the defendant requested that the court submit to the jury his proposed instruction No. 7. That instruction in essence provided that a rescuer is not contributorily negligent unless her conduct involving a risk of harm is reckless. The instruction then defined reckless conduct as an act or acts which a reasonably prudent person would not commit under the circumstances existing at the time of the rescue. This instruction was very similar to that given by the trial court, and went no further than the instruction given by the trial court in providing the jury with guidance for determining the reasonableness of the attempted rescue. Counsel has the duty of tendering a more specific instruction where one is desired. *Erickson v. Monarch Indus.*, 216 Neb. 875, 347 N.W.2d 99 (1984).

Furthermore, the instruction which was given set forth the rescue doctrine essentially as defined in the Restatement (Second) of Torts § 472 (1965) was sufficient to fairly and fully instruct the jury on the law of the case, and could not have misled a jury. See *Maloney v. Kaminski, supra.* In previous cases, this court has recognized that reasonableness, as a standard applied in other contexts, provides adequate guidance to persons of ordinary intelligence when applied to specific circumstances. See *Fulmer v. Jensen*, 221 Neb. 582, 379 N.W.2d 736 (1986). There was no error in submitting instruction No. 9 to the jury.

The defendant's assignments of error regarding the trial court's alleged failure to instruct on the duty of a volunteer and regarding the sufficiency of the evidence to support the verdict were not briefed. Consideration of a case on appeal to this court is limited to errors assigned and discussed. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986). See, also, *In re Interest of J.S., S.C., and L.S., ante* p. 234, 397 N.W.2d 621 (1986). Nevertheless, our review of the record shows there was sufficient evidence for the jury to find for the plaintiff. The verdict was not clearly wrong. See *Vacek v. Ames*, 221 Neb. 333, 377 N.W.2d 86 (1985).

There being no error, the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARVIN E. COPPLE, APPELLANT.

401 N.W.2d 141

Filed February 13, 1987. No. 85-470.

1. **Constitutional Law: Statutes.** A statute which is clear and precise, and therefore not vague, may nonetheless fail to pass constitutional muster by virtue of being overbroad in the sense that it prohibits the exercise of constitutionally protected conduct.
2. **Constitutional Law: Statutes: Standing.** Irrespective of standing to challenge a statute for vagueness, an individual may have standing to assert that a statute is overbroad when such statute reaches a substantial amount of constitutionally protected conduct.
3. _____: _____: _____. In determining whether standing exists for a facial challenge to a statute as overbroad, a court must first determine whether the statute reaches a substantial amount of constitutionally protected conduct. If the statutory proscription does not reach a substantial amount of constitutionally protected conduct, there is no standing to challenge a statute on the basis that the statute is overbroad, and such challenge must fail.
4. _____: _____: _____. In order to have standing 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 a law as applied to the conduct of others.
5. **Criminal Law: Statutes: Constitutional Law: Due Process.** An essential purpose of a penal statute is to provide notice to the ordinary person concerning conduct which is proscribed as criminal. When a penal statute supplies an ordinary person with notice concerning conduct forbidden as criminal, such statute meets the constitutional standard of due process.
6. **Criminal Law: Evidence: Witnesses: Immunity.** At a hearing to determine whether the State had violated its agreement for immunity and restricted evidence or information, the State must present a prima facie case that it has fulfilled its agreement with the defendant, that is, demonstrate that the State's evidence, to be adduced at the defendant's trial, was obtained from a source or sources independent of the defendant and not by direct or indirect use of information obtained from the defendant as the result of defendant's agreement for immunity and restricted evidence or information.
7. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous.
8. **Trial: Rules of Evidence: Hearsay: Words and Phrases.** "(1) A statement is (a) an oral or written assertion or (b) nonverbal conduct of a person if it is intended by him as an assertion. . . . (3) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Neb. Evid. R. 801 (Neb. Rev. Stat. § 27-801 (Reissue 1985)).
9. **Words and Phrases.** *Conceal* means to hide, secrete, or withhold from

knowledge of others; to withhold from utterance or declaration; to cover or keep from sight; to hide or withdraw from observation, cover or keep from sight, or prevent discovery. The word *conceal* pertains to affirmative action likely to prevent or intended to prevent knowledge of a fact and has reference to some advantage to the concealing party or a disadvantage to some interested party from whom the fact is withheld.

10. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Evid. R. 401 (Neb. Rev. Stat. § 27-401 (Reissue 1985)).
11. **Conspiracy.** The principal element of a conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. The very nature of a conspiracy requires an element of intent.
12. **Conspiracy: Circumstantial Evidence.** Circumstantial evidence may establish existence of a conspiracy or the criminal intent necessary for a conspiracy.
13. **Conspiracy.** When a conspiracy has been proved, a conspirator's acts and declarations, in furtherance of the conspiracy, are the acts and declarations of all conspirators and are admissible evidence against the coconspirators.
14. _____. An overt act, as something done pursuant to a conspiracy, tends to show a preexisting conspiracy and manifests an intent or design toward accomplishment of a crime. An overt act, by itself, need not have the capacity to accomplish the conspiratorial objective and does not have to be a criminal act.
15. _____. Silence, which is designed to conceal, may indicate an intention to conspire and, if intended to facilitate the conspiracy, may be an overt act pursuant to the conspiracy.
16. **Trial: Evidence: Proof.** Prima facie proof of a case is less stringent than proof by a preponderance of the evidence. A "prima facie" case requires only enough evidence to take the question to the jury, whereas "preponderance of the evidence" requires proof which leads the jury to find the existence of the contested fact is more probable than its nonexistence.
17. **Conspiracy: Proof.** For admission of a coconspirator's act as evidence against a defendant-coconspirator being tried for a crime other than the conspiracy itself, the trial court must first determine whether the State has proved a prima facie case that (1) a conspiracy existed, (2) the defendant and the witness were members of the conspiracy, and (3) the witness' act was done during and in furtherance of the conspiracy.
18. **Conspiracy: Rules of Evidence.** Whether the State has established a prima facie case of conspiracy, thereby constituting anything within execution or furtherance of the common purpose as the act of every coconspirator, is a preliminary question for the trial court concerning admissibility of evidence. Neb. Evid. R. 104(1) (Neb. Rev. Stat. § 27-104(1) (Reissue 1985)).
19. **Conspiracy: Appeal and Error.** A trial court's finding that a prima facie case has been established concerning existence of a conspiracy will be upheld unless such finding is clearly erroneous.
20. **Witnesses: Expert Witnesses: Appeal and Error.** Whether a witness is qualified

as an expert is a preliminary question for a trial court. Neb. Evid. R. 104(1) (Neb. Rev. Stat. § 27-104(1) (Reissue 1985)). Determination of a witness' qualification as an expert is a matter within the sound discretion of a trial court, whose ruling will be upheld unless such ruling constitutes an abuse of discretion.

21. **Appeal and Error.** In order that assignments of error as to the admission or rejection of evidence may be considered, the Supreme Court requires that appropriate reference be made to the specific evidence against which objection is urged. A party who claims error in a proceeding is required to point out the factual and legal basis that shows the error.
22. _____. To be considered by the Supreme Court, errors must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred.
23. **Jury Instructions: Appeal and Error.** Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury. All other instructions must be read together, and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

David L. Herzog, P.C., for appellant.

Robert M. Spire, Attorney General, Laura L. Freppel, and Lynne R. Fritz, for appellee.

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

SHANAHAN, J.

The information in the district court for Lancaster County charged Marvin E. Copple with two counts of theft in violation of Neb. Rev. Stat. § 28-511(1) (Reissue 1985), alleged to have occurred as a result of Copple's receipt of $500,000 from Commonwealth Savings Company in reference to real estate purchased by Commonwealth. A jury found Copple guilty on both counts of theft. We affirm.

Commonwealth is a Nebraska corporation licensed as an industrial loan and investment company with five members of its board of directors. Marvin Copple owned and operated a real estate investment and development company and was also a vice president and director of Commonwealth from 1978 to

1981. During those same years, Marvin's father, S.E. Copple, was Commonwealth's majority shareholder, president, and chairman of the board of directors. S.E. Copple, personally or individually, and Commonwealth had been involved in real estate development in excess of 20 years.

In November 1983 the Nebraska Department of Banking and Finance forced Commonwealth into receivership. As a result of subsequent State investigation of Commonwealth's collapse, the two theft charges were filed against Marvin Copple on January 12, 1984.

On May 10, 1984, acknowledging that Copple was under investigation regarding Commonwealth, the State, the United States, and Copple agreed to dispose of all possible criminal charges as follows: Copple would cooperate in all investigations and would testify truthfully; the federal government would file no charge against Copple; the State would file no additional charge against Copple but was entitled to continue prosecution of the two theft charges pending against Copple; and nothing restricted the State's use of "any relevant evidence within [the county attorney's] possession, providing such evidence was not derived, either directly or indirectly, from information provided by MARVIN COPPLE in performance of the terms of this agreement." On February 19, 1985, Copple filed a motion for a hearing at which the State would be required to demonstrate that all the State's evidence, to be adduced at trial, was derived independently from information supplied by Copple pursuant to the May 10, 1984, agreement with the governments. As authorized by Neb. Rev. Stat. § 29-822 (Reissue 1985), Copple then filed, on February 25, a motion to suppress all evidence "derived either directly or indirectly from the information provided by" Copple. As a basis for his motions, Copple relied on *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972), in which the U.S. Supreme Court held that, after a grant of immunity under 18 U.S.C. § 6002 (1982) (immunity from prosecution of a witness for any offense to which judicially compelled testimony relates), the government must show that its evidence is not tainted, viz, must establish that the prosecution " 'had an independent, legitimate source for the disputed evidence.' " 406

U.S. at 460. The district court determined that a *Kastigar*-type hearing was unnecessary but heard and denied Copple's motion to suppress, finding that "the State has made a prima facie showing that evidence it intends to introduce has been derived from independent sources, and said evidence has not been derived either directly or indirectly from information given the State by the defendant." Trial commenced on March 6, 1985.

In 1974 Phillip Stettinger purchased about 80 acres of land at the southeastern edge of Lincoln. Stettinger's land was zoned as residential property sometime in 1978 or 1979, and there was a preliminary plat approved in 1979 for "Stettinger Addition." Unable to obtain financing for development of the land, Stettinger decided to sell.

In January 1980 Stettinger contacted Bernie Hardesty, a real estate agent, to find a buyer for 67 acres of the Stettinger tract. Hardesty, who had previously sold developable land to Marvin Copple, contacted Copple in January 1980 concerning possible purchase of the Stettinger property. Stettinger delivered a plat of the tract to Copple's office. Several days later, Copple met with Hardesty and orally indicated he would buy the Stettinger property for $600,000. On January 25 Copple contacted Jack Tuma, an engineering consultant, for preliminary engineering work on the Stettinger land. After a second meeting with Hardesty, Marvin Copple called his father, S.E. Copple, to "seek his wisdom and his advice and see what he thought of the deal." Hardesty died on February 20, 1980. Marvin Copple never signed an agreement to purchase the Stettinger property.

Marvin Copple and S.E. Copple discussed prospects for the Stettinger tract. S.E. Copple expressed an interest in buying the property, explaining that he had a prospective purchaser for lots in the area of the Stettinger tract and that "when Marvin told me about [Stettinger's land] I wanted to buy it right away for Commonwealth." Marvin and S.E. Copple testified that they believed profit from the development of the Stettinger tract would exceed $1 million. Although they reached no agreement at their initial conference regarding Stettinger's land, Marvin and S.E. Copple again met a few days later and orally agreed that Marvin Copple, in exchange for Commonwealth's payment of $500,000 to Marvin, would allow Commonwealth

to acquire Marvin's "right" to purchase the Stettinger property. Additionally, Marvin agreed to supervise development of the Stettinger land into "buildable lots." (Apparently, "buildable lots" were those developed to a stage appropriate for construction.) That agreement between Marvin and S.E. Copple was never reduced to writing.

On February 1, 1980, Phillip and Virginia Stettinger and S.E. Copple, as president of Commonwealth, signed an agreement for sale of the Stettinger land to Commonwealth. A "final purchase agreement" was signed on May 3 by Stettingers and Commonwealth. This second agreement did not substantially alter the agreement of February 1, that is, the price and schedule of payments remained the same. The purchase price for Stettinger's 67 acres was $600,000. After Commonwealth bought the Stettinger property, Marvin Copple had some contact with the land, such as deciding where to "push more dirt" on the parcel, but from May 1980 Marvin had no substantial contact with the real estate. In October 1980 Commonwealth, by written agreement, sold 40 of the 67 Stettinger acres to Landco, Inc. S.E. Copple, Marvin, and Commonwealth had no proprietary interest in Landco, which agreed to purchase 131 lots on the former Stettinger tract at a price of $12,500 per lot, or a total price of $1,637,500, after Commonwealth had certified the lots as "buildable." The Landco agreement had an "escape" clause, namely, if Landco was unable or unwilling to purchase the real estate, Commonwealth's sole and exclusive remedy was retention of $1,000 as earnest money paid to Commonwealth by Landco at signing the agreement. The Landco agreement was not entered on Commonwealth's books until January 1981, when S.E. Copple directed that the Landco transaction be entered to show an account receivable in the amount of $1,637,500.

On January 15, 1981, Marvin received a check for $250,000 from Commonwealth, a payment of a "commission" regarding the Stettinger transaction but not authorized by Commonwealth's directors. Between February 17 and March 24, during an annual examination of Commonwealth, bank examiners told S.E. Copple that the $250,000 payment to Marvin should be documented by a written agreement and

approved by Commonwealth's directors. On March 19 S.E. Copple directed that an "adjusted projected gain" be shown on Commonwealth's books regarding the Landco agreement, namely, $746,924. Another Commonwealth check for $250,000 was issued to Marvin Copple on April 2 as payment of a "commission" regarding the Stettinger property. Marvin cashed both checks and reported those receipts on his income tax return for 1981. Those two checks, each for $250,000 as a "commission," are the basis for the thefts alleged in the information filed against Marvin Copple.

The State called several witnesses who testified about transactions associated with Commonwealth's purchase from Stettingers, the Landco agreement, and the method by which transactions were reflected on Commonwealth's books.

Steve Hull, a certified public accountant, testified that the Commonwealth-Landco agreement was not properly recorded on Commonwealth's books, because the anticipated profit on that transaction was not consistent with generally accepted accounting principles. According to Hull, the anticipated profit on the Landco transaction was too remote. In Hull's opinion the only profit which could properly be shown on Commonwealth's books was Landco's $1,000 payment of earnest money.

Ray Hill, city planner for Lincoln, testified about the number of vacant lots on December 31, 1979, near the Stettinger tract purchased by Commonwealth. In 16 developments examined by Hill, the number of vacant lots ranged between 9 percent and 100 percent. Of 1,935 lots in the vicinity of the Stettinger tract, 1,205, or 62 percent, were vacant.

Richard Keith, vice president of a real estate appraisal and consulting firm which rendered financial analyses of subdivisions in Lincoln, conducted a financial analysis of the Stettinger land at February 1, 1980. In his opinion Keith concluded that Commonwealth's proposed development of the Stettinger property was not financially feasible in view of the $500,000 payment to Marvin Copple, because cash-flow on the Stettinger tract showed a net loss exceeding $55,000. Keith also testified that the fair market value of the Stettinger tract on

February 1, 1980, was $600,000.

John Maenner, a licensed realtor and real estate developer from Omaha, testified that, in the real estate development industry on February 1, 1980, profits customarily were not paid at commencement of a development, but were paid when earned during the course of a subdivision's development.

Richard Obert, president of a mortgage banking and real estate financing company, testified that, in accordance with custom and usage throughout the industry in 1980 and 1981, a developer took his share of profits at or near the completion of a land development project. Obert also testified that, throughout the industry, a financial institution's officer or director would not compete directly with that financial institution, and if an officer or director had a business opportunity in an area of business normally conducted by the financial institution, the officer or director had the obligation to turn the property over to the institution and would then receive incentive compensation or a bonus after the institution had received any profit from the opportunity relinquished by the officer or director.

During direct examination of S.E. Copple, called as a State's witness, the prosecutor asked whether S.E. Copple had informed Commonwealth's board of directors about purchase of the Stettinger property and payment of $500,000 to Marvin Copple. On the basis of relevance Marvin Copple objected, and a bench conference was held out of the jury's hearing. In the course of that conference, the court remarked to Marvin Copple's counsel: "You haven't made an objection as to hearsay." Marvin Copple's attorney responded: "Hearsay objection, Your Honor, that would be my objection as long as we're here at the side bar." The court and counsel meticulously reviewed evidence adduced to that point in the trial, and the court concluded that the State had shown a prima facie case that a conspiracy existed between S.E. Copple and Marvin Copple. The court then overruled Marvin's objections, and S.E. Copple testified that he had never informed Commonwealth's board of directors about the agreement to pay Marvin $500,000 in connection with the Stettinger property. S.E. Copple also testified that there was no record of

any directors' meeting reflecting the prospective purchase of Stettinger's property and payment of $500,000 to Marvin.

Copple alleges his conviction is invalid, because: (1) Section 28-511(1) is unconstitutional as an overbroad or vague statute; (2) The trial court should have dismissed the proceedings on account of the State's violation of its agreement concerning information to be used in prosecution of Copple; (3) S.E. Copple's testimony about his withholding information from Commonwealth's board of directors was inadmissible because a conspiracy had not been established to authorize admission of such testimony; (4) The trial court improperly admitted into evidence irrelevant testimony and testimony in the form of an opinion from a person who did not qualify as an expert witness; (5) There was misconduct by the prosecutor; (6) There were erroneous instructions to the jury; and (7) The trial court failed to grant a mistrial.

CONSTITUTIONALITY OF § 28-511

Copple asserts that § 28-511 is unconstitutional because that statute is overbroad and vague in violation of the due process clauses of the U.S. Constitution and the Nebraska Constitution. The State argues that Copple lacks standing to challenge constitutionality of § 28-511.

Section 28-511 states in pertinent part: "(1) A person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof."

We note that "vagueness" is a constitutional vice conceptually distinct from "overbreadth." An overbroad statute need lack neither clarity nor precision, and a vague statute need not reach constitutionally protected activity. See *State v. Sinica*, 220 Neb. 792, 372 N.W.2d 445 (1985) (citing L. Tribe, American Constitutional Law § 12-28 (1978)). We have stated that a statute may be constitutionally infirm if the statute is vague or overbroad. *State v. Frey*, 218 Neb. 558, 357 N.W.2d 216 (1984). "Moreover, an enactment which is clear and precise, and therefore not vague, may nonetheless fail to pass constitutional muster by virtue of being overbroad in the sense that it prohibits the exercise of constitutionally protected

conduct, such as the exercise of first amendment rights." 218 Neb. at 561, 357 N.W.2d at 218-19. In *State v. Frey, supra*, we enunciated the standard to determine whether a party has standing to bring a constitutional challenge based on a statute's overbreadth or vagueness:

> [I]n a facial challenge to the overbreadth and vagueness of a law, that is, in this context, a claim that the law is invalid in toto and therefore incapable of any valid application, our first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. We are to then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, uphold the challenge only if the enactment is impermissibly vague in all its applications. In order to have standing to challenge a vague statute, 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.

218 Neb. at 561-62, 357 N.W.2d at 219.

Irrespective of standing to challenge a statute for vagueness, an individual may have standing to assert that a statute is overbroad when such statute reaches a substantial amount of constitutionally protected conduct. See *State v. Sinica, supra*. In determining whether standing exists for a facial challenge to a statute as overbroad, a court must first determine whether the statute reaches a substantial amount of constitutionally protected conduct. *State v. Sinica, supra; State v. Frey, supra; State v. Groves*, 219 Neb. 382, 363 N.W.2d 507 (1985). If the statutory proscription does not reach a substantial amount of constitutionally protected conduct, there is no standing to challenge a statute on the basis that the statute is overbroad, and such challenge must fail. *State v. Frey, supra; State v. Groves, supra; State v. Merithew*, 220 Neb. 530, 371 N.W.2d 110 (1985). Copple argues that his conduct, as a business transaction wherein he received payment for transfer of his right to purchase and develop real estate or was paid a commission concerning a land transaction, is constitutionally

protected. The liberty to contract, the right to acquire and sell property in a lawful manner, and the right to conduct lawful business are constitutionally protected rights. See, *United States Brewers' Assn., Inc. v. State*, 192 Neb. 328, 220 N.W.2d 544 (1974); *Gillette Dairy, Inc. v. Nebraska Dairy Products Board*, 192 Neb. 89, 219 N.W.2d 214 (1974); *Skag-Way Department Stores, Inc. v. City of Grand Island*, 176 Neb. 169, 125 N.W.2d 529 (1964); *Boomer v. Olsen*, 143 Neb. 579, 10 N.W.2d 507 (1943); *Nelsen v. Tilley*, 137 Neb. 327, 289 N.W. 388 (1939). Consequently, we find that § 28-511(1) does reach a substantial amount of constitutionally protected conduct, and, therefore, Copple does have standing to challenge § 28-511(1) for overbreadth as that statute applies to his transactions with Commonwealth.

Copple argues that § 28-511(1) does not contain the word *unlawfully* as a modifier for *takes*, used in the statute, and, therefore, all conduct, both legal and illegal, falls within the prohibition of the statute and is "swept together in one net." Brief for Appellant at 24. We disagree with Copple's assertion that absence of "unlawfully" renders § 28-511(1) unconstitutionally overbroad. Section 28-511(1) proscribes or condemns only that conduct in which criminal intent is present, distinguishing theft from activity which is otherwise permissible as noncriminal conduct. Under § 28-511(1) the prohibited taking or exercising control relates to "movable property of another with the intent to deprive him or her thereof." Such statutory prohibition of § 28-511(1) must be read with other pertinent parts of the Nebraska Criminal Code. Neb. Rev. Stat. § 28-509 (Reissue 1985), the definitional statute pertaining to the crime of theft, in pertinent part provides:

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

> (6) Property of another shall mean property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. . . .

Also, § 28-511(1) must be read with Neb. Rev. Stat. § 28-510 (Reissue 1985): "Conduct denominated theft in sections 28-509 to 28-518 constitutes a single offense embracing the separated offenses heretofore known as larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like." Section 28-511(1), when read with §§ 28-509 and 28-510, clearly condemns only conduct in which criminal intent is present and does not condemn any conduct where criminal intent is absent. Of further interest is Neb. Rev. Stat. § 28-518 (Reissue 1985), which defines the grade of various offenses classified as theft, especially subsection (1) of § 28-518: "Theft constitutes a Class III felony when the value of the thing involved is over one thousand dollars." Section 28-518 then distinguishes other grades of theft, ranging from a Class IV felony to a Class II misdemeanor, depending on the "value of the thing involved." See § 28-518(2), (3), and (4). The designation of theft as either a felony or a misdemeanor denotes unlawful conduct. Copple does not indicate any provision in the Nebraska Criminal Code which recognizes a lawful felony or a lawful misdemeanor. We suspect there is probably none. We find that the provisions of § 28-511, when read with §§ 28-509 and 28-510, clearly distinguish unlawful or criminal conduct from conduct which is lawful. Therefore, § 28-511(1) is not unconstitutionally overbroad.

We turn to Copple's contention that § 28-511(1) is vague and, therefore, unconstitutional. To challenge § 28-511(1) on the ground of vagueness, Copple must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others. See *State v. Frey*, 218 Neb. 558, 357 N.W.2d 216

(1984). Rather, Copple is entitled to show that the statute, when applied to his particular activity, is vague. We cannot state that business activity involving payment of a commission or for disposition of a right to purchase and develop real estate is clearly proscribed by § 28-511(1). Therefore, Copple does have standing to challenge § 28-511(1) on the ground of vagueness insofar as that statute condemns Copple's conduct as criminal.

> In order to meet constitutional standards of due process, a penal statute must be sufficiently clear so that a person of ordinary intelligence has fair notice of what exactly is forbidden conduct under the act. . . . [I]n construing a penal statute this court will give it an interpretation which meets constitutional requirements if it can reasonably be done. . . . A statute is presumed to be constitutional and unconstitutionality must be clearly established before this court is authorized to declare it void.

State v. Neal, 187 Neb. 413, 416, 191 N.W.2d 458, 460 (1971).

In *State v. Sailors*, 217 Neb. 693, 695, 352 N.W.2d 860, 862 (1984), this court stated:

> The test for determining whether a statute is vague is whether it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . . A statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding. . . . In determining whether a statute is vague and therefore does not give a defendant adequate notice that his conduct is proscribed, the statute must be examined in light of the conduct with which the defendant is charged. . . .
>
> . . . The prohibition against vagueness does not invalidate a statute simply because it could have been drafted with greater precision. The test is whether the defendant could reasonably understand that his conduct was proscribed by the statute.

As was the basis for his claim that § 28-511(1) is overbroad as the result of "unlawfully" being absent from the statute, Copple contends that § 28-511(1) is vague because the word *unlawfully* is not contained in the body of the questioned

statute. We again disagree with Copple and find that § 28-511(1) is not unconstitutionally vague. Section 28-511(1) employs ordinary language which is found in common usage, easily understood by a person of ordinary intelligence. The term "theft" is commonly used and understood to mean the act of stealing. "Deprive" is another commonly used word and is adequately defined in § 28-509(1). The phrase "property of another" can hardly be misunderstood, especially in view of the definition expressed in § 28-509(6). An essential purpose of a penal statute is to provide notice to the ordinary person concerning conduct which is proscribed as criminal. *State v. Carlson*, 223 Neb. 874, 394 N.W.2d 669 (1986). When a penal statute supplies an ordinary person with notice concerning conduct forbidden as criminal, such statute meets the constitutional standard of due process. See *State v. Neal, supra*. Apparently Copple views the Nebraska Criminal Code as absolutely unrelated statutes which, by design or chance, have been collected in chapter 28 of the Revised Statutes of Nebraska. However, the Nebraska Criminal Code is a systematic statutory statement, defining criminal offenses and prescribing penalties for commission of crimes. All facets of a criminal offense need not be embodied in one statute and that statute alone. Characteristic elements of some, but not all, criminal offenses are specified in a statute within the Nebraska Criminal Code, while another statute within the code may specify a meaning assigned to certain elements of a particular crime, and still other statutes prescribe penalties which may be imposed on conviction of a criminal offense. The result is a statutory synergism, supplying information to the ordinary person about conduct condemned as criminal and punishable in a prescribed form. The statutes contained in the Nebraska Criminal Code no more exist in individual isolation than do the people governed by that code. To an ordinary person, § 28-511(1) supplies fair notice concerning conduct which is condemned as criminal and, therefore, prohibited by the Nebraska Criminal Code. If Marvin Copple intended to deprive Commonwealth of its property, then § 28-511(1) provided adequate and clear notice that Copple's contemplated conduct was forbidden as a criminal act. The question whether

Copple had such criminal intent was, of course, for the jury's determination. *State v. Siers*, 197 Neb. 51, 248 N.W.2d 1 (1976) (intent as an essential issue and question of fact for the jury in an embezzlement trial). See, also, *Escher v. State*, 140 Neb. 633, 1 N.W.2d 322 (1941) (felonious intent regarding a conspiracy to embezzle corporate funds, "looting" the corporation; fact question for jury).

We hold that § 28-511(1) is neither overbroad nor vague and is, therefore, constitutional.

KASTIGAR HEARING

Copple claims the proceedings should have been dismissed because the State used evidence obtained, directly or indirectly, from Copple's information supplied pursuant to the agreement of May 10, 1984.

To support his claim, Copple relies on *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972), where the U.S. Supreme Court considered the question whether the U.S. government can compel testimony from an unwilling witness who has invoked the fifth amendment privilege against compulsory self-incrimination after the government had obtained immunity for such witness pursuant to 18 U.S.C. §§ 6002 and 6003 (1982). The *Kastigar* Court reasoned:

> "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." . . . This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

406 U.S. at 460.

The Nebraska counterpart to 18 U.S.C. §§ 6002 and 6003 is Neb. Rev. Stat. § 29-2011.02 (Reissue 1985):

> Whenever a witness refuses, on the basis of the privilege against self-incrimination, to testify or to provide other

> information in a criminal proceeding before a court or grand jury, the court, on motion of the county attorney or other prosecuting attorney, may order the witness to testify or to provide other information. The witness may not refuse to comply with such an order of the court on the basis of the privilege against self-incrimination, but no testimony or other information compelled under the court's order, or any information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case, except in a prosecution for perjury, giving a false statement, or failing to comply with the order of the court.

Copple also relies on *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982), where this court construed § 29-2011.02 and expressed: "It is clear that immunity statutes are designed to serve as substitutes for the fifth amendment right not to incriminate oneself. Without such statutes no person in a criminal case can constitutionally be compelled to testify." 213 Neb. at 13, 328 N.W.2d at 174.

Copple has misplaced reliance on *Kastigar v. United States, supra*, and *State v. Jones, supra*, which involve statutorily granted immunity. In Copple's case there has been no privilege against self-incrimination invoked by Copple during a criminal proceeding before a court or grand jury. Copple was not judicially compelled to testify but, rather, voluntarily bargained for and entered into an agreement with the State. As observed in *Butler v. State*, 55 Md. App. 409, 418, 462 A.2d 1230, 1234 (1983):

> We should meticulously keep separate and apart the subjects of (1) the conferral of immunity, (2) a plea bargain, and (3) some other bargain involving something other than a plea to a criminal charge. The sources of authority are different. The social purposes are different. The legal incidents are different. The procedural rules are different. Other than the very general notion of some "*quid pro quo*," the three phenomena are distinct. We only do the law a disservice when we heedlessly blur those distinctions.
>
> The conferral of immunity, which involves no

> bargaining, is further removed conceptually from the two types of bargains than they are from each other. To compare immunity to bargaining is truly to compare apples with oranges . . . .

However, the absence of statutorily granted immunity does not mean that the State is exempt from compliance with its agreement regarding immunity and restricted evidence or information.

In *Rowe v. Griffin*, 676 F.2d 524, 527-28 (11th Cir. 1982), the court said:

> We note that, under the self-incrimination clause of the fifth amendment, evidence of guilt induced by a government promise of immunity is "coerced" evidence and may not be used against the accused. [Citation omitted.] For purposes of compelling testimony which otherwise would be privileged by the fifth amendment, all that is constitutionally required is a grant of use immunity. [Citation omitted.] . . . We believe that, as a matter of fair conduct, the government ought to be required to honor such an agreement when it appears from the record that: (1) an agreement was made; (2) the defendant has performed on his side; and (3) the subsequent prosecution is directly related to offenses in which the defendant, pursuant to the agreement, either assisted with the investigation or testified for the government.

As stated in *United States v. Carpenter*, 611 F. Supp. 768, 774-75 (N.D. Ga. 1985):

> However, the courts have developed a concept of "nonstatutory" immunity whereby the courts will enforce informal or procedurally flawed grants of immunity on equitable grounds. . . . These cases indicate that where the government has entered into an agreement with a prospective defendant and the defendant has acted to his detriment or prejudice in reliance upon the agreement, "as a matter of fair conduct, the government ought to be required to honor such an agreement." [Citing *Rowe v. Griffin, supra.*]

At the hearing on Copple's motion to suppress, the State presented evidence from the special prosecutor who had signed

the May 10 agreement and an officer of the Lincoln Police Department assigned to investigate Commonwealth matters. According to the officer, he was one of four officers who investigated Commonwealth's insolvency. The investigators familiarized themselves with the accounting system utilized by Commonwealth and discussed the system with Commonwealth's comptroller. The investigative task force also subpoenaed Marvin Copple's checking accounts for information pertaining to the Stettinger transaction. The foregoing investigative activity occurred in December 1983 and January 1984, months before Copple signed the agreement with the governments. At a preliminary hearing on February 14, 1984, Copple testified in his own behalf and offered an explanation for the "commission" checks received from Commonwealth. Before Copple signed the agreement of May 10, the State had acquired considerable information regarding various aspects of real estate development. No representative of the State discussed the Stettinger transaction with Marvin Copple.

Under the circumstances, we find that a *Kastigar*-type hearing was not required because there was no statutorily granted immunity as a consequence of judicially compelled testimony, but, at the hearing on Copple's motion to suppress, the district court properly considered the question whether the State had violated its agreement with Copple concerning immunity and restricted evidence. However, we hold that, at such hearing to determine whether the State had violated its agreement for immunity and restricted evidence or information, the State must present a prima facie case that it has fulfilled its agreement with the defendant, that is, demonstrate that the State's evidence, to be adduced at the defendant's trial, was obtained from a source or sources independent of the defendant and not by direct or indirect use of information obtained from the defendant as the result of the defendant's agreement for immunity and restricted evidence or information. In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682

(1986). See, also, *State v. Beard*, 221 Neb. 891, 381 N.W.2d 170 (1986). "In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the 'trier of fact' and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress." *State v. Dixon, supra* at 795, 387 N.W.2d at 687. The district court's decision, overruling Copple's motion to suppress, is correct.

TESTIMONY FROM A COCONSPIRATOR

As defined in the Nebraska Criminal Code:

> (1) A person shall be guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a felony:
>
> (a) He agrees with one or more persons that they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense; and
>
> (b) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy.

Neb. Rev. Stat. § 28-202 (Reissue 1985).

However, the information did not allege a conspiracy in violation of § 28-202, but alleged two counts of theft in violation of § 28-511(1).

Marvin Copple contends S.E. Copple's testimony is inadmissible for two reasons, namely, the testimony violated the hearsay rule and was not relevant.

> (1) A statement is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by him as an assertion;
>
> . . . .
>
> (3) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted; and
>
> (4) A statement is not hearsay if:
>
> . . . .
>
> (b) The statement is offered against a party and is . . . (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Neb. Evid. R. 801 (Neb. Rev. Stat. § 27-801 (Reissue 1985)).

Conceal means to hide, secrete, or withhold from knowledge of others; to withhold from utterance or declaration; to cover or keep from sight; to hide or withdraw from observation, cover or keep from sight, or prevent discovery. *Christopher v. Evans*, 219 Neb. 51, 361 N.W.2d 193 (1985). The word *conceal* pertains to affirmative action likely to prevent or intended to prevent knowledge of a fact and has reference to some advantage to the concealing party or a disadvantage to some interested party from whom the fact is withheld. *Christopher v. Evans, supra.*

S.E. Copple's testimony related to his nonverbal conduct in or the act of concealing information from Commonwealth's board of directors in reference to the Stettinger transaction and payments to Marvin. S.E. Copple's nonverbal conduct was not a declaration asserting or demonstrating that a fact was true. Rather, the testimony was evidence of S.E. Copple's deliberate withholding of information for Commonwealth's directors and was not an out-of-court statement offered to prove the truth of the matter asserted. Because the statements of S.E. Copple were made during his testimony at trial and did not have the characteristics of hearsay, the court correctly overruled Marvin's objection (hearsay).

This brings us to Marvin's contention that S.E. Copple's testimony was not relevant.

"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 1985)).

"The principal element of a conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another." *Hahn & Hupf Constr. v. Highland Heights Nsg. Home*, 222 Neb. 189, 194, 382 N.W.2d 607, 611 (1986). The very nature of a conspiracy requires an element of intent. *United States v. Adderly*, 529 F.2d 1178 (5th Cir. 1976).

Frequently, a conspiracy involves intricate situations and several complex acts which make it difficult to establish, by

direct proof, a conspiracy or conspiratorial intent. Thus, circumstantial evidence may establish existence of a conspiracy or the criminal intent necessary for a conspiracy. See, *State v. McSwain*, 194 Neb. 31, 229 N.W.2d 562 (1975); *State v. Adams*, 181 Neb. 75, 147 N.W.2d 144 (1966).

When a conspiracy has been proved, a conspirator's acts and declarations, in furtherance of the conspiracy, are the acts and declarations of all conspirators and are admissible evidence against the coconspirators. *State v. Adams, supra.* See, also, *State v. Watson*, 182 Neb. 692, 157 N.W.2d 156 (1968). Judge Learned Hand observed: "When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made 'a partnership in crime.' What one does pursuant to their common purpose, all do . . . ." *Van Riper v. United States*, 13 F.2d 961, 967 (2d Cir. 1926).

As we have already noted, a criminal conspiracy requires an "overt act." § 28-202(1)(b). An overt act manifests that a conspiracy is "still at work." *State v. John*, 213 Neb. 76, 328 N.W.2d 181 (1982). Also, an overt act, as something done pursuant to a conspiracy, tends to show a preexisting conspiracy and manifests an intent or design toward accomplishment of a crime. See *State v. John, supra.* An overt act, by itself, need not have the capacity to accomplish the conspiratorial objective and does not have to be a criminal act. See *State v. John, supra.* Silence, which is designed to conceal, may indicate an intention to conspire and, if intended to facilitate the conspiracy, may be an overt act pursuant to the conspiracy. See *United States v. Eucker*, 532 F.2d 249 (2d Cir. 1976).

In *State v. Bobo*, 198 Neb. 551, 253 N.W.2d 857 (1977), the focal point was a coconspirator's hearsay statement and admissibility of such statement under the coconspirator exception to the hearsay rule, that is, admissibility pursuant to Neb. Evid. R. 801(4)(b)(v). In *Bobo* this court stated:

> To be admissible, the statements of the coconspirator must have been made while the conspiracy was pending and in furtherance of its objects; and if the statements took place after the conspiracy had ended, or if merely narrative of past occurrences, they are not admissible. [Citations omitted.] The coconspirator exception to the hearsay rule

> is applicable regardless of whether a conspiracy has been charged in the information or not. [Citation omitted.]
>
> The rule is well established that before the trier of facts may consider testimony under the coconspirator exception to the hearsay rule, a *prima facie* case establishing the existence of the conspiracy must be shown by independent evidence. [Citations omitted.]

(Emphasis supplied.) 198 Neb. at 557, 253 N.W.2d at 861.

Although the coconspirator exception to the hearsay rule is not a determinative issue in Copple's case, we believe the requirement of a "prima facie case," contained in *Bobo* for admissibility of a statement by a coconspirator, is pertinent to the evidential question now before this court: whether S.E. Copple's testimony was admissible as relevant evidence.

The phrase *prima facie* "can probably be defined only in terms of sufficient evidence to permit the trial court reasonably to infer that there existed a conspiracy." *State v. Thompson*, 273 Minn. 1, 17, 139 N.W.2d 490, 503 (1966). See, also, *State v. Daniels*, 380 N.W.2d 777 (Minn. 1986). In *United States v. Trotter*, 529 F.2d 806, 812 n.8 (3d Cir. 1976), a prosecution for conspiracy, the court stated:

> The requirement of prima facie proof is less stringent than that of a preponderance of the evidence. The former requires only enough evidence to take the question to the jury whereas the latter requires "proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence." McCormick, *Evidence* 794 (2d ed. 1972).

We now hold that for admission of a coconspirator's act as evidence against a defendant-coconspirator being tried for a crime other than the conspiracy itself, the trial court must first determine whether the State has proved a prima facie case that (1) a conspiracy existed, (2) the defendant and the witness were members of the conspiracy, and (3) the witness' act was done during and in furtherance of the conspiracy.

We emphasize, however, that there is a distinction between proving conspiracy as a crime, see § 28-202, where proof beyond a reasonable doubt is required, and establishing conspiracy as a prerequisite and a means to achieve admission

of an alleged coconspirator's acts and declarations as evidence, where only a prima facie showing of conspiracy is sufficient.

> The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (a) make the interrogation and presentation effective for the ascertainment of the truth, (b) avoid needless consumption of time, and (c) protect witnesses from harassment or undue embarassment [sic].

Neb. Evid. R. 611 (Neb. Rev. Stat. § 27-611(1) (Reissue 1985)).

Nevertheless, whether the State has established a prima facie case of conspiracy, thereby constituting anything within execution or furtherance of the common purpose as the act of every coconspirator, is a preliminary question for the trial court concerning admissibility of evidence. See Neb. Evid. R. 104(1) (Neb. Rev. Stat. § 27-104(1) (Reissue 1985)). Rule 104(1) was the procedure correctly utilized by the trial court in Copple's case. Presentation of the State's evidence in Copple's case consumed 13 days of trial and is spread over 2,563 of the 3,058 pages of testimony contained in a bill of exceptions consisting of 14 volumes, excluding pretrial and posttrial matters. To adduce that quantity of evidence outside a jury's presence and then require repetition of the same admissible testimony before the jury would unduly and unnecessarily prolong what was already a lengthy trial, as cases involving conspiracy are likely to be. Consequently, the prima facie case of conspiracy may be established as a part of and through the evidence presented to the jury concerning the substantive crime charged against the coconspirator-defendant. We have characterized proof of a prima facie case of conspiracy as a preliminary question for the trial court under Neb. Evid. R. 104(1) and a prerequisite for admissibility of a coconspirator's acts, rather than making relevance depend on proof of another fact to be later established during adduction of evidence, a "connecting up," as authorized by Neb. Evid. R. 104(2), which states: "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." Admission of evidence from a coconspirator, subject to the State's later completing proof of a

prima facie case of conspiracy, presents some procedural problems which may result in unwarranted, or even unfair, prejudice to a defendant, for example, the necessity of a motion to strike evidence conditionally received, a request to withdraw the coconspirator's testimony from consideration by the jury, or an instruction that the jury shall disregard the evidence which has been presented but not linked to a conspiracy. Whatever procedure might seem most appropriate on failure of proof after a conditional admission of evidence, there is an ever-present risk that the court's later instruction may not erase a prejudicial impression on the jury—with the specter of a mistrial. See McCormick on Evidence § 58 (E. Cleary 3d ed. 1984).

At the point in the trial where the State sought introduction of S.E. Copple's testimony about his concealment of or withholding information from Commonwealth's board of directors, there was evidence as follows: S.E. Copple and Marvin were directors and officers of Commonwealth and had reached an agreement in January 1980 regarding Commonwealth's acquisition of the Stettinger real estate, including $500,000 to be paid to Marvin. Marvin's claim on the Stettinger property was, at best, based on an oral contract, and there were no documents embodying any agreement between S.E. Copple and Marvin. Stettinger's property had a market value of $600,000 at the time of sale to Commonwealth on February 1, 1980. Commonwealth's payments to Marvin, that is, the two checks of $250,000 each, were made to Marvin in January and April of 1981. Marvin had minimal contact with the Stettinger property after its acquisition by Commonwealth. The size of the payment to Marvin ($500,000) in relation to the market value of the Stettinger property ($600,000) was an additional circumstance. Finally, there was the collapse of Commonwealth in November 1983, which marked the outer boundary of the conduct contended by the State to be conspiratorial. A trial court's finding that a prima facie case has been established concerning existence of a conspiracy will be upheld unless such finding is clearly erroneous. Cf. *United States v. Posner*, 764 F.2d 1535, 1537 (11th Cir. 1985) (trial court's determination is a "finding of fact which may be

overturned only if clearly erroneous"). Cf., also, *United States v. Arruda,* 715 F.2d 671, 684 (1st Cir. 1983) (in reviewing a trial court's ruling on the showing made by the government for evidence from a coconspirator, "we must accept that court's findings of fact supporting the ruling unless they are clearly erroneous"). In Copple's case there is evidence which supports the district court's finding that the State had established a prima facie case that a conspiracy existed between S.E. Copple and Marvin. The district court's finding of a prima facie case of conspiracy is correct.

When the State established its prima facie case of conspiracy, evidence of S.E. Copple's concealment or withholding information from Commonwealth's board of directors was circumstantial evidence for the jury's consideration in determining whether Marvin Copple, as S.E. Copple's coconspirator, was guilty of theft as charged. See Neb. Evid. R. 401. The admission or exclusion of evidence is a matter within the sound discretion of the trial court, whose ruling on an evidential question will be upheld unless such ruling constitutes an abuse of discretion. *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986). There is no abuse of discretion in the district court's admitting S.E. Copple's testimony as evidence against Marvin.

RELEVANT EVIDENCE AND TESTIMONY BY EXPERTS

Copple believes that the district court committed reversible error by admitting testimony of Ray Hill, Richard Keith, Richard Obert, and John Maenner, contending that testimony from those witnesses was not relevant.

Hill testified about the weakened condition of the Lincoln real estate market in terms of available vacant lots. Keith expressed his opinion concerning the market value of the Stettinger land and the feasibility of its development. Obert and Maenner testified about the customary manner in which a developer was paid for any profit realized on a real estate development. All that testimony has some tendency to establish the fact that the payments to Marvin Copple were, more probably, subterfuge to siphon funds from Commonwealth and

were thefts rather than earned commissions or profits from a legitimate real estate transaction. Such testimony was relevant and admissible. See Neb. Evid. R. 401. The district court did not abuse its discretion in admitting testimony from the witnesses mentioned. See *State v. Bostwick, supra.*

Next, Copple complains that neither Obert nor Maenner was qualified to testify as an expert witness.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Neb. Evid. R. 702 (Neb. Rev. Stat. § 27-702 (Reissue 1985)).

Obert was a graduate accountant, actively engaged in the mortgage banking business and financing for real estate developers. Maenner held a degree in business administration, was a licensed realtor in Nebraska and two other states, and was engaged in the real estate "subdivision development business." Whether a witness is qualified as an expert is a preliminary question for a trial court. Neb. Evid. R. 104(1). Determination of a witness' qualification as an expert is a matter within the sound discretion of a trial court, whose ruling will be upheld unless such ruling constitutes an abuse of discretion. See *Schmidt v. J.C. Robinson Seed Co.*, 220 Neb. 344, 370 N.W.2d 103 (1985). We find no abuse of discretion by the district court in its determination that Obert and Maenner were qualified as expert witnesses.

Copple alludes to other possible errors concerning the trial court's ruling on some of his objections, which we find are at least 593 in number, but does not specify which rulings prejudicially affected any substantial right of Copple. See Neb. Evid. R. 103(1) (Neb. Rev. Stat. § 27-103(1) (Reissue 1985)). In order that assignments of error as to the admission or rejection of evidence may be considered, the Supreme Court requires that appropriate reference be made to the specific evidence against which objection is urged. *Pulliam v. State*, 167 Neb. 614, 94 N.W.2d 51 (1959). "A party who claims error in a proceeding is required to point out the factual and legal basis that shows the error." *Lemmon v. State*, 173 Neb. 387, 391, 113

N.W.2d 525, 528 (1962). We will not speculate about which rulings of the district court Copple contends are erroneous. See *Bohaty v. Briard*, 219 Neb. 42, 361 N.W.2d 502 (1985). See, also, *Fee v. Fee*, 223 Neb. 128, 134, 388 N.W.2d 122, 126 (1986) ("To be considered by this court, errors must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred. See Neb. Ct. R. of Prac. 9D(1)d (rev. 1983)").

INSTRUCTIONS

Copple argues that instruction No. 12 is erroneous because the instruction does not define "bona fide or honest claim of right." Brief for Appellant at 44. However, at the conference on prospective jury instructions, Copple's attorney expressly stated that "[d]efendant has no objection to [instruction No.] 12." "We have frequently held that the failure to object to an instruction after it has been submitted to counsel for review will preclude raising an objection on appeal." *State v. Pope*, 211 Neb. 425, 433, 318 N.W.2d 883, 887 (1982). See, also, *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981); *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981).

Copple also contends that the court erred in giving instruction No. 11:

> A director of a corporation shall perform his or her duties as a director in good faith, in a manner he or she reasonably believes to be in the best interest of the corporation and with such care as an ordinary and prudent person in a like position would use under the same or similar circumstances.
>
> A director or other corporate officer has a fiduciary duty not to acquire an interest adverse to that of the corporation while acting for the corporation or when dealing individually with third persons.

Copple argues that instruction No. 11 provides a civil standard for determination of negligence, which is inapplicable in a criminal case. However, as a proper instruction in a criminal case, this court has upheld use of a jury instruction based on the civil law pertaining to a fiduciary's duty. In *State v. Siers*, 197 Neb. 51, 248 N.W.2d 1 (1976), the defendant was charged with embezzling funds of investors in a limited

partnership in which the defendant was a partner. In *Siers* this court reasoned that, since the defense was predicated on an absence of intent to embezzle, the instruction on fiduciary duties, otherwise applicable in a civil case, was proper to guide the jury's determination regarding the presence or absence of criminal intent. Copple has raised a similar defense in this case: absence of criminal intent in his receipt of funds from Commonwealth. Consequently, we find that instruction No. 11 was proper under the circumstances of this case.

Copple raises several other questions concerning the adequacy of various definitions contained in instruction No. 10. The gist of Copple's complaint is that instruction No. 10 does not contain adequate definitions.

> Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury. . . . " ' "All the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error." ' "

(Citations omitted.) *State v. Dondlinger*, 222 Neb. 741, 749, 386 N.W.2d 866, 871-72 (1986). See, also, *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). We find that Copple's contentions are without merit and that the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues. We find that the jury was properly instructed.

MISCONDUCT BY PROSECUTOR

In view of his numerous and repeated objections, Copple contends that a prejudicial impression was created regarding the jury, thereby denying him a fair trial. As this court reasoned in *State v. Ross*, 220 Neb. 843, 845-46, 374 N.W.2d 228, 230 (1985):

> While the granting of a mistrial is within the discretion of the trial court, "Before it is necessary to grant a mistrial

> due to prosecutorial misconduct, the defendant must show that a 'substantial miscarriage of justice has actually occurred.' " . . . Furthermore, Neb. Rev. Stat. § 29-2308 (Cum. Supp. 1984) provides that "[n]o judgment shall be set aside, or new trial granted . . . for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."
>
> The defendant has failed to show a substantial miscarriage of justice. As this court has stated previously, "Although the prosecutor was less than artful at times, it does not appear that his conduct was meant to, or did, inflame the prejudices or excite the passions of the jury against the defendant." *State v. Tiff*, 199 Neb. 519, 529, 260 N.W.2d 296, 302 (1977).

We find that the reasoning of *State v. Ross, supra*, disposes of Copple's complaint about the prosecutor's conduct in relation to the matter of objections, inasmuch as Copple has failed to show that the frequency of his objections resulted in substantial prejudice or a miscarriage of justice. See Neb. Rev. Stat. § 29-2308 (Reissue 1985). Copple suggests another aspect of misconduct by the prosecutor—a member of the county attorney's office testified at a committee hearing of the Nebraska Legislature regarding possible amendment of § 28-511(1). How that fact caused unfair prejudice to Copple in his trial is problematic to the point of frivolousness and deserves no further comment. There was no prosecutory misconduct.

DENIAL OF MISTRIAL

Copple's final assignment of error relates to the district court's refusal to grant a mistrial. Although such refusal by the district court is assigned as error, in his brief Copple does not give a reason or explanation that any one or all of his 20 motions for mistrial were incorrectly refused by the district court. As stated in *Bohaty v. Briard*, 219 Neb. 42, 46, 361 N.W.2d 502, 505 (1985):

> Because the assignments of error are not supported by accompanying argument in the briefs, but are mere

statements of general dissatisfaction with conclusions reached by the trial court, we will not speculate about the reasoning behind dissatisfaction of the parties. Without argument and authority in support of an advocated position, speculation is unavoidable.

AFFIRMED.

SUSAN M. BOHANNON, APPELLANT, V. GUARDSMAN LIFE INSURANCE COMPANY, AN IOWA CORPORATION, APPELLEE.

400 N.W.2d 856

Filed February 13, 1987. No. 85-648.

1. **Summary Judgment.** The requirements to sustain a motion for summary judgment are the same whether one party or both parties have moved for summary judgment. Those requirements are that there be no genuine issue of material fact, nor any genuine issue regarding the ultimate inferences to be drawn therefrom, and that the moving party is entitled to judgment as a matter of law.
2. **Insurance: Waiver.** Some act or conduct amounting to a recognition of the continued validity of an insurance policy as a binding obligation upon an insurer is necessary to constitute an effective waiver of the policy provision for forfeiture for nonpayment of premiums.
3. _____: _____. An insurer, with full knowledge of the nonpayment of a monthly premium, which nevertheless demands and receives payment of the premium for the succeeding month, may have waived the policy provision for forfeiture for nonpayment of the preceding monthly premium.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded with directions.

Daniel J. Duffy and Kurt F. Tjaden of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Raymond M. Crossman, Jr., of Crossman, Norris & Hosford, for appellee.

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

HASTINGS, J.

Plaintiff appeals an order from the district court for Douglas County sustaining the defendant's motion for summary judgment and denying the plaintiff's motion for summary judgment in a suit seeking payment of the proceeds of a life insurance policy.

On October 22, 1977, the defendant issued a life insurance policy for $100,000 on the life of the decedent, plaintiff's husband, plaintiff being the beneficiary of the policy. A premium of $33.92 was payable on the 22d of each month by preauthorized check, which premium when paid covered the decedent through the 22d of the following month. The policy contained a 31-day grace period, during which time the policy remained in effect in the event a payment was not timely made.

On June 25, 1980, the decedent died. The defendant denied the plaintiff's claim for the proceeds of the policy due to an alleged lapse of the policy for nonpayment of the April 22, 1980, premium. The plaintiff brought suit against the defendant for the proceeds of the policy, but the district court sustained the defendant's motion for summary judgment and denied the plaintiff's motion for summary judgment. The plaintiff appeals.

The plaintiff asserts the district court erred in sustaining the defendant's motion for summary judgment and in denying the plaintiff's motion for summary judgment when it failed to find that (1) by accepting premiums after the alleged lapse of the policy the defendant recognized the continued validity of the policy as a binding obligation upon it, which constituted an effective waiver of forfeiture for nonpayment of premiums; (2) the defendant's acceptance of the plaintiff's tender on August 14, 1980, of the April 22 premium waived the policy provisions regulating mode of payment; and (3) an insurer which gives one reason for its conduct and decision as to a matter involving controversy cannot, after litigation has begun, defend upon another and different ground.

Before we proceed with our disposition of those issues we must set forth the guidelines we follow in cases with this procedural posture, that posture being when the lower court has denied one party's motion for summary judgment and

sustained the other party's motion for summary judgment. "The requirements to sustain a motion for summary judgment are the same whether one party or both parties have moved for summary judgment." *Hiram Scott College v. Insurance Co. of North America*, 187 Neb. 290, 295, 188 N.W.2d 688, 691 (1971). The requirements necessary to sustain a motion for summary judgment are the absence of any genuine issue of material fact or the absence of any genuine issue regarding the ultimate inferences to be drawn therefrom. *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985).

Because we find as a matter of law that the facts as presented constitute waiver by the defendant of any right to declare a forfeiture, we reverse the district court's order sustaining the defendant's motion for summary judgment and remand this cause with directions to enter judgment for the plaintiff.

The additional facts necessary to understand the plaintiff's first assertion of error are as follows: On April 22, 1980, the April premium was due. On that day a preauthorized check was drawn on decedent's account. On May 12 that check was returned to the defendant for insufficient funds. On May 22 the defendant sent a letter to the decedent, stating that the April premium check had been dishonored and requesting a replacement check by June 6, 1980, to keep the policy in force. On June 5 the defendant received a replacement check from the decedent. That check was deposited on June 16 and dishonored by decedent's bank on June 23, 1980. On June 25, 1980, the decedent died.

Meanwhile, on May 22, 1980, the preauthorized check for the May premium was drawn on the decedent's account. This check was deposited by the defendant on June 21 and cleared the decedent's bank on June 25, 1980. That check contained the following language: "This check when paid is a receipt for amounts due on the policies listed. The date of this check indicates the premium due month."

From these facts the plaintiff argues that by accepting the May 22 premium the defendant recognized the continued validity of the policy as a binding obligation upon it and thereby waived any right it had to declare a forfeiture for nonpayment of the April 22 premium. If the plaintiff's argument is accepted,

the May 22 premium payment would have paid the policy through June 22, and the 31-day grace period would have covered the decedent on June 25, the day of his death.

In *Tighe v. Security Nat. Life Ins. Co.*, 191 Neb. 271, 214 N.W.2d 622 (1974), we set forth what a plaintiff must show to prove a case of waiver in a situation such as this. The rule is that "some act or conduct amounting to a recognition of the continued validity of a policy as a binding obligation upon the insurer is necessary to constitute an effective waiver of policy provision for forfeiture for nonpayment of premiums." *Id.* at 275-76, 214 N.W.2d at 625.

Waiver was found in *Central American Life Ins. Co. v. Krause*, 284 S.W.2d 192 (Tex. Civ. App. 1955), a case with facts almost identical to the present case. In that case, Krause had given the insurance company authority to draw drafts on his bank for premiums due on his life insurance policy. The company drew a draft for the premium due April 18, 1953, which was returned unpaid. On May 6, 1953, the company wrote a letter to Krause advising him that the draft had been returned with the notation "account closed." The company then asked for a new draft authorization and the name of the bank with which Krause was doing business. Then, on May 8, the company deposited a draft for the premium due on May 18, which was paid on May 22, 1953. In reviewing these facts the court stated:

> It is material . . . that the appellant company knew the April 18th premium draft had been returned to it unpaid prior to May 8th when it deposited its draft for the premium due May 18th. Although appellant company could not on May 8th assert a forfeiture of the policy [because the policy contained a 30-day grace period], it was put on notice that the draft for the April 18th premium had been returned to it. This fact in conjunction with the further fact that it admittedly received the money for the May premium on May 22nd is sufficient to establish a waiver of the forfeiture of the policy due to non-payment of the April 18th premium prior to May 18th.

Id. at 194.

Although the trial court submitted the issue of waiver to the jury, the appellate court determined the facts were such that the trial court could have resolved the issue as a matter of law based solely on the company's written records. The court explained its finding of waiver as follows:

> It is a sound proposition under the record that appellant company upon the return of the draft for the April 18th premium could have withheld the drawing and deposit of the draft for the May 18th premium until it determined whether the April premium would be paid. But, with full knowledge that the April premium draft had been returned to it, the appellant drew a draft for the May premium which it deposited on May 8th.

Id.

Similarly, in the case before us, the defendant, which had notice of the April dishonor, could have withheld the drawing and deposit of the draft for the May 22 premium until it determined whether the April premium would be paid. This it did not do. By drawing the May premium before it determined whether the April premium would be paid, the defendant did an act amounting to a recognition of the continued validity of the policy as a binding obligation upon it. That act constituted an effective waiver of the right to declare a forfeiture for nonpayment of the April premium.

The defendant asserts, however, that it had a right to draw the May premium and apply it back to the overdue April premium. If one accepts that proposition, the April premium was paid, the May premium was not, and the policy lapsed on June 22, 1980, 3 days before the decedent died. We do not, however, accept that proposition.

The check drawn on May 22, 1980, contained the following language: "This check when paid is a receipt for amounts due on the policies listed. The date of this check indicates the premium due month." The defendant argues that the first sentence means it has the right to apply the May payment to the overdue April premium. This, however, ignores the only logical reason the second sentence was included on the check. That sentence can only mean that a payment drawn during a certain month is to be applied to that month's premium. See *Dickerson*

v. Equitable Life Assur. Soc., 631 F.2d 99 (8th Cir. 1980). Consequently, the May payment could not be applied to the overdue April premium, and the defendant's argument is without merit.

Because we have determined that the defendant waived its right to declare a forfeiture as a matter of law, we need not address the plaintiff's other contentions of error. Accordingly, we reverse the order of the district court sustaining the defendant's motion for summary judgment and remand this cause to the district court with directions to enter judgment sustaining plaintiff's motion for summary judgment, together with a reasonable sum as attorney fees as provided by Neb. Rev. Stat. § 44-359 (Cum. Supp. 1986). The appellee is ordered to pay to the appellant $1,000 for the services of her attorney in this court.

REVERSED AND REMANDED
WITH DIRECTIONS.

GLENN BENDER, APPELLEE, V. NORFOLK IRON & METAL COMPANY, APPELLANT.
400 N.W.2d 859

Filed February 13, 1987. No. 86-095.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the compensation court have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation.** The right of an injured workman to receive vocational rehabilitation benefits depends upon his inability to perform work for which he has previous training and experience.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed.

Lynn A. Melson and Walter E. Zink II of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Vince Kirby, for appellee.

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

PER CURIAM.

This is an appeal in a proceeding under the Workers' Compensation Act. The plaintiff, Glenn Bender, was injured on October 31, 1984, while employed by the defendant, Norfolk Iron & Metal Company, as a shearer and breaker operator. While cutting metal sheets, a 700- to 800-pound section fell upon the toes of the plaintiff's right foot. It is undisputed that the accident arose out of and during the course of the plaintiff's employment. The plaintiff returned to work on April 15, 1985, as a crane operator rather than a shearer. Two weeks later, the employment relationship terminated as a result of a dispute concerning an unrelated issue.

After leaving his employment the plaintiff applied for and received unemployment compensation benefits for 3 to 4 months. During this time, the plaintiff was required to and did look for work. Plaintiff testified that he was still on crutches during this period and received no offers of employment.

After the hearing before a single judge, the plaintiff recovered an award for temporary total disability, medical and hospital expenses, and vocational rehabilitation services.

Upon rehearing, the plaintiff again recovered an award for temporary total disability, medical and hospital expenses, vocational rehabilitation services, and an attorney fee.

Both awards found that the plaintiff had been temporarily totally disabled from the date of the accident until the date of the hearing, except for the 2-week period when the plaintiff returned to work as a crane operator, and would remain temporarily totally disabled for an indefinite time.

The defendant has appealed and has assigned as error the findings that the plaintiff's present disability is causally related to the accident of October 31, 1984, and that the plaintiff is entitled to vocational rehabilitation services.

The plaintiff testified that his return to work on April 15, 1985, as a crane operator was on a trial basis until he left the company on April 29, 1985; that he continued to seek medical treatment after he went back to work; and that he was still

under medical care on the day of the rehearing and contemplated further medical treatment.

The plaintiff further testified that he could not stand on his injured foot for long periods of time because when he did so he experienced throbbing pain. He also reported occasionally experiencing a sharp pain in his foot during the night.

The plaintiff has a high school diploma and is 29 years old. He has had no training for work other than manual labor and testified that he is now unable to lift and cannot bear weight on his right foot for any extended period of time.

The plaintiff was originally treated by Dr. Charles Henkel, an orthopedic surgeon, who referred the plaintiff to Dr. Dwight Frost on June 26, 1985. Dr. Frost testified by deposition that he began treating the plaintiff on June 26. His examination of the plaintiff's foot revealed that there had been an open reduction and fusion of the joint between the knuckle of the toe and the base of the foot and that the incision over the top of the great toe was well healed. Palpation of the forefoot showed the area to be tender, and both active and passive movement of the toes was painful. Movement of the transverse and longitudinal arches was also painful. An x ray revealed the fractures of the second through fourth toes and that the great toe was healing.

Dr. Frost recommended that the plaintiff begin physical therapy, and the plaintiff was instructed to use crutches to avoid putting his weight on the right foot. An anti-inflammatory drug was prescribed.

At the next examination 3 weeks later, the plaintiff's foot was still hypersensitive and he still experienced pain when bearing weight on the right foot. Dr. Frost ordered a custom-made insert for the plaintiff's shoe, to properly support the foot and alleviate the pain. The plaintiff was instructed to continue his medication, the use of crutches, and a less intensive course of physical therapy.

The plaintiff was examined 1 week later to determine the effectiveness of the insert. Dr. Frost concluded the plaintiff was not responding to physical therapy and the insert was not providing the intended relief. Dr. Frost testified that, at that time, he "began to suspect . . . [the plaintiff] had what we call a sympathetic dystrophy, which means a reflex persistence of

pain." He further testified the plaintiff could not do much physical activity at that time, either of a "weight bearing or mobile nature, because he's handicapped both ways." Dr. Frost later testified that "the problem here has become one of this sympathetic dystrophy. And it happens to be involved with pain."

When asked to what extent the autonomic nervous system had affected the plaintiff, Dr. Frost replied, "I think it perpetuates his pain." His prognosis for recovery was "fair to good, depending upon the chronicity." Dr. Frost went on to describe typical responses to this condition as well as various treatments, and testified that he had recommended a sphenopalatine ganglion block to interrupt the plaintiff's sympathetic dystrophy.

Dr. Frost then testified that, in his opinion, the plaintiff could not be involved in any type of activity with mobility, such as lifting or walking, because his condition required the use of crutches. This condition was present at the time of the initial examination and at the time of the rehearing. His prognosis for the plaintiff was guarded and dependent upon his response to the proposed treatment.

On cross-examination Dr. Frost testified that after trying the insert and crutches, he had asked Dr. Henkel to place the foot in a cast for 6 weeks to see if the plaintiff would respond, because "Sometimes these autonomic bouts will subside. And in his case it did not." The defendant's attorney asked Dr. Frost, "[I]s it the sympathetic dystrophy, is that what it is?" to which the doctor responded, "Yes, sir."

The medical evidence which has been summarized is sufficient to support a finding that the plaintiff's present disability is causally related to the accident of October 31, 1984. The findings of fact made by the compensation court have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Hollinger v. Consolidated Motor Freight*, 223 Neb. 449, 390 N.W.2d 518 (1986); *Wilson v. City of North Platte*, 221 Neb. 90, 375 N.W.2d 134 (1985). Further,

> In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's

> Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be drawn therefrom.

Id. at 92, 375 N.W.2d at 137 (citing *Buck v. Iowa Beef Processors, Inc.*, 198 Neb. 125, 251 N.W.2d 875 (1977)).

The compensation court's finding of a causal connection was not clearly wrong. There was sufficient evidence from which the court could find the plaintiff's present disability was the result of the October 31, 1984, accident.

While Dr. Frost's testimony was not as specific as it could have been, it was sufficient for the compensation court to find the sympathetic dystrophy was a result of the accident. Viewing the evidence in the light most favorable to the plaintiff, as we are required to do, the evidence was sufficient to support the compensation court's finding of a causal connection between the plaintiff's present disability and the accident of October 31, 1984.

The defendant's second assignment of error concerns the award of vocational rehabilitation services.

The right of an injured workman to receive vocational rehabilitation benefits depends upon his inability to perform work for which he has previous training and experience. Neb. Rev. Stat. § 48-162.01 (Reissue 1984). See, also, *Smith v. Hastings Irr. Pipe Co.*, 222 Neb. 663, 386 N.W.2d 9 (1986); *Evans v. American Community Stores*, 222 Neb. 538, 385 N.W.2d 91 (1986). This is ordinarily a question of fact for the determination of the compensation court. *Pollock v. Monfort of Colorado*, 221 Neb. 859, 381 N.W.2d 154 (1986). However, when there is insufficient evidence to support an award, this court must modify, reverse, or set it aside. Neb. Rev. Stat. § 48-185(3) (Reissue 1984).

In this case the award of vocational rehabilitation services is premature. Dr. Frost, the sole medical witness presented by the plaintiff, testified that he was unable to determine, at that time, whether the plaintiff would be permanently disabled. Such a determination, he stated, was dependent upon the plaintiff's response to the prescribed treatment. It was his opinion that if

the plaintiff responded to the treatment "the likelihood of his being able to return to the job that he once had is good." This evidence will not support an award of vocational rehabilitation services. That part of the award must be reversed.

The award of vocational rehabilitation services is reversed, and the award is, in all other respects, affirmed.

AFFIRMED IN PART, AND
IN PART REVERSED.

DONALD R. WARD, APPELLANT, V. CITY OF MITCHELL, NEBRASKA, APPELLEE.

400 N.W.2d 862

Filed February 13, 1987. No. 86-160.

1. **Workers' Compensation: Appeal and Error.** Factual determinations of the Workers' Compensation Court will not be set aside on appeal unless they are clearly wrong.
2. _____: _____. We must consider the evidence in the light most favorable to the successful party, when testing the sufficiency of the evidence supporting the Workers' Compensation Court's findings of fact.
3. **Workers' Compensation: Expert Witnesses: Appeal and Error.** When the record presents nothing more than conflicting medical testimony, the Supreme Court will not substitute its judgment for that of the Workers' Compensation Court.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Robert W. Mullin of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellant.

James R. Hancock of Hancock & Denton, P.C., for appellee.

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

WHITE, J.

Donald R. Ward appeals from an order of the Workers' Compensation Court denying him benefits. The only error assigned is that the compensation court erred in finding Ward

had not proved by a preponderance of the evidence that his symptoms were caused by his work-related exposure to polychlorinated biphenyl, also known as PCB. We affirm.

Factual determinations of the Workers' Compensation Court will not be set aside on appeal unless they are clearly wrong. *Beavers v. IBP, Inc.*, 222 Neb. 647, 385 N.W.2d 896 (1986); *Snyder v. IBP, Inc.*, 222 Neb. 534, 385 N.W.2d 424 (1986); *Vredeveld v. Gelco Express*, 222 Neb. 363, 383 N.W.2d 780 (1986). We must consider the evidence in the light most favorable to the successful party, when testing the sufficiency of the evidence supporting the Workers' Compensation Court's findings of fact. *Beavers v. IBP, Inc., supra; Vredeveld v. Gelco Express, supra*. A review of the record shows a sufficient basis in evidence for the compensation court's findings regarding causality.

PCB is a toxic chemical, regulated by the EPA, that used to be added to oil as a fire retardant. The appellant claims that his exposure to PCB while dismantling, transporting, and reassembling a power substation while he was superintendent of utilities for the City of Mitchell caused his illnesses and seven hospitalizations, and now renders him unable to work.

In July of 1981 Ward worked on the substation in Alliance, Nebraska, and came in contact with the regulator. The oil inside the regulator had 1,385 parts per million PCB. Ward's contact with the regulator was brushing away greasy dirt on the outside of the bushings with a gloved hand. A glove, when tested later, showed 2.8 parts per million and 6.8 parts per million of two different isomers of PCB. Later in July, Ward became ill, and attributed it at the time to being bitten by a poisonous spider, although at the rehearing he testified for the first time that he felt this hospitalization was PCB-related.

In early September 1981 Ward returned to Alliance and, with the help of two other people, changed the voltage of the transformer by removing inspection plates and moving bars in the oil to different positions. He and his coworkers were required to put their hands into the oil to move the bars. The transformer oil had 229 parts per million PCB (one-sixth the concentration of PCB measured in the regulator). Neither coworker became ill, although each one's exposure was the

same as Ward's. One coworker testified Ward had his hands in oil for between 15 and 30 minutes, but not more than 30 minutes; Ward testified that he had his hands in the oil for up to 4 hours.

Ward was hospitalized in January 1982 for 3 days and in March 1982 for 5 days for hypertension, hepatitis, gall bladder problems, and liver problems. He was hospitalized in June 1982 due to having inhaled a toxic herbicide, and had three more hospitalizations between then and December 1983. He could only work half days, and in December 1983 he quit his job.

Considering the evidence of Ward's PCB exposure in the light most favorable to the appellee, it is clear that the medical evidence offered by the city supports a finding that Ward's symptoms were not PCB-related. Dr. Teitelbaum, a toxicologist and a witness for the City of Mitchell, testified by deposition that in his opinion Ward's exposure to PCB in the transformer for anywhere from 15 minutes to 2 hours would not have caused his illness. He also testified that the exposure with gloved hands with the regulator bushings would not be sufficient contact to cause PCB poisoning. Dr. Teitelbaum considered Ward's exposure to be short term and of little consequence, noting that only persons subjected to prolonged and significant exposure contracted severe illness. Dr. Teitelbaum also considered the level of PCB in Ward's body fat as being about median for his age and not indicative of any significant exposure, other than the exposure which is the fate of anyone who lives in the central United States. The absence of chloracne and peripheral neuropathy indicated to him that the illnesses are not PCB-related.

Dr. Teitelbaum was of the opinion that Ward's first symptoms were the result of a spider bite and his liver problems were due to the progression of hepatitis originally contracted in 1961 and compounded by toxic insult to the liver that is attributable to the many prescription drugs Ward took for ongoing hypertension, gall bladder problems, and gout; his alcohol intake; and the inhalation of herbicides, rather than to incidental PCB exposure.

The medical witnesses for Ward were of the opinion that PCB caused the symptoms, or at least aggravated the

preexisting hepatitis. A review of Dr. Teitelbaum's deposition shows a sufficient basis in evidence for the Workers' Compensation Court's findings regarding causation. We cannot say the findings are clearly wrong. When the record presents nothing more than conflicting medical testimony, we will not substitute our judgment for that of the compensation court. *Beavers v. IBP, Inc.*, 222 Neb. 647, 385 N.W.2d 896 (1986); *Vredeveld v. Gelco Express*, 222 Neb. 363, 383 N.W.2d 780 (1986). The findings of the compensation court as to causation must stand, and the judgment is affirmed.

AFFIRMED.

SANDRA F. EHRENBERG, APPELLEE, V. DONALD LEE EHRENBERG, APPELLANT.

400 N.W.2d 865

Filed February 13, 1987. No. 86-432.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

Charles W. Balsiger of Jewell, Gatz, Collins & Dreier, for appellant.

Virginia Koerselman of Mitchell & Demerath, for appellee.

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

PER CURIAM.

Donald Lee Ehrenberg appeals from a decree entered by the separate juvenile court of Douglas County, Nebraska. By his action, Ehrenberg sought the custody of the minor children born of the marriage between the appellant and the appellee, Sandra F. Ehrenberg. The custody had earlier been awarded to Ms. Ehrenberg when the marriage of the parties was dissolved. Mr. Ehrenberg further sought to have the separate juvenile court hold appellee in contempt of court for removing the

children of the parties from Nebraska to Arizona without the permission of the separate juvenile court. The separate juvenile court denied all relief to Mr. Ehrenberg. Specifically, Mr. Ehrenberg maintains that the separate juvenile court erred in failing to hold Ms. Ehrenberg in contempt of court and in granting her motion, permitting her to remove the minor children of the parties from the State of Nebraska to the State of Arizona. We have reviewed the record de novo, as we are required to do in cases of this nature, and find that no error was committed by the separate juvenile court in regard to any of the actions or orders taken by it. For that reason the decree of the separate juvenile court of Douglas County, Nebraska, is, in all respects, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH TWEEDY, JR., APPELLANT.
400 N.W.2d 865

Filed February 13, 1987. No. 86-509.

1. **Criminal Law: Prosecuting Attorneys: Evidence: Pretrial Procedure.** If a prosecutor has a duty to disclose a statement in response to a general discovery request, it must derive from the obviously exculpatory character of the evidence.
2. **Criminal Law: Evidence.** In order for an omitted statement to be considered material, it must create a reasonable doubt as to the defendant's guilt that did not otherwise exist. That the evidence "might" influence the outcome is insufficient.
3. _____: _____. Where omitted evidence would have been cumulative and repetitive, the defendant suffered no prejudice because of the omission.
4. **Criminal Law: Convictions: Appeal and Error.** A conviction must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
5. **Criminal Law: Evidence: Intent.** When the sufficiency of the evidence as to criminal intent is questioned, the law is settled that independent evidence of specific intent is not required. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
6. **Sentences: Probation and Parole: Appeal and Error.** Whether to grant probation instead of a jail sentence is a matter left to the trial court's discretion.

Absent an abuse of discretion, a sentence imposed within the statutory limits will be upheld on appeal.

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

Leo J. Eskey, for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai, for appellee.

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

WHITE, J.

The defendant-appellant, Kenneth Tweedy, Jr., was convicted at a bench trial in the district court for Dodge County of one count of first degree assault and one count of using a firearm in the commission of a felony. He was sentenced to 2 to 4 years on each count, to run consecutively, for a total sentence of 4 to 8 years, with credit for 26 days served.

Tweedy urges this court to reverse on two grounds: first, that the defendant was denied a fair trial because the State failed to disclose exculpatory evidence; and, second, that the evidence was insufficient to support the judgment. The appellant also submits that the district court abused its discretion by failing to place him on probation. Having reviewed the record before us and finding no error, we affirm the judgment and sentence of the district court.

Around midnight on the morning of October 20, 1985, Jon Patocka drove his wife, Denise, and the defendant into Fremont, Nebraska, to borrow a spotlight to use while hunting raccoons. The two men had been drinking beer since the afternoon. While in Fremont they stopped to eat at a Burger King restaurant before driving past a Taco John's restaurant. Tweedy thought he recognized someone in the Taco John's parking lot, so the driver circled the block. Tweedy yelled at a group of people on three-wheeled, all-terrain cycles and then realized that he did not recognize anyone in the group of seven people on six cycles.

Brian Wiese was driving the cycle on which David Havranek, the victim, was a passenger. Wiese testified that, after the verbal

exchange, the cycle riders were "motioned" to follow the car. One cycle was on each side of the car, and the car driver and the cycle rider on the left spit food at one another. The car eventually forced the cycle on its left from the road. The cycle on the right, driven by Scott Brown, then passed the car. The Wiese-Havranek cycle was second in line behind Patocka's Monza when the car and cycles began their 60- to 70-mph journey through the streets of Fremont.

When Wiese and Havranek were approximately two blocks behind the car, Wiese heard shots and observed the defendant's head and shoulders out of the window of the car on the passenger side; he was holding the barrel of a rifle outside the window. Wiese was half a block behind the defendant when he observed Tweedy sitting on the car door, head and shoulders above the roof, holding the rifle in normal aiming position.

The lead cycle then pulled into a police station parking lot. The car kept going. The cycle in front of Wiese and Havranek did a 180° turn to head toward the police station. Wiese followed the car to read the license number. Wiese also turned, and when the Wiese-Havranek cycle was proceeding in the opposite direction from the car, David Havranek was shot. Havranek dismounted from the cycle and entered the police station.

Wiese testified that, after the shot, he again observed the defendant sitting on the car door in normal aiming position, and subsequently saw Tweedy move into the car. The victim, David Havranek, also testified that Tweedy fired several shots into the air and eventually aimed at Wiese and him, with the butt of the gun positioned on his shoulder.

Detective Sergeant Tellatin of the Fremont Police Department testified that he identified the defendant, using the car's license number, and took him into custody that morning. He read the defendant his *Miranda* rights and secured two statements. Tweedy admitted firing the gun several times, denied sitting on the window bracing himself, and stated that the gun accidentally discharged as he was climbing back into the car. This remained Tweedy's position throughout the trial. None of the State's witnesses at trial actually observed Tweedy at the very moment Havranek was shot; however, he was

observed just before and after the shot.

Tweedy alleges that he was denied a fair trial due to the prosecutor's failure to disclose the existence of a statement made by Eugene Foster, a bystander. No specific request for the statement appears in the record, although a general request for "[t]he names and addresses of witnesses on whose evidence the charge [was] based" was made in a motion for discovery, which was eventually granted by the district court and does appear in the record. The defendant makes no argument that the charge is based on Foster's statement, and, in fact, Foster stated he would be unable to recognize the defendant.

If the prosecutor had a duty to disclose Eugene Foster's statement to the defendant in response to the general request described above, " 'it must derive from the obviously exculpatory character of [the] evidence in the hands of the prosecutor.' " *State v. Rice*, 214 Neb. 518, 527, 335 N.W.2d 269, 275 (1983) (quoting *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)). In order to be a material omission, the omitted proposed evidence must create a reasonable doubt as to the defendant's guilt that did not otherwise exist. That the evidence "might" influence the outcome is insufficient. *Rice, supra.*

The statement given by Eugene Foster was first reviewed by counsel for the defendant after the trial was had and the judgment rendered, but before sentencing. The statement was found in the presentence report, and its appearance in that document is the only reference regarding Eugene Foster's statement contained in the record before us.

In the transcript of Detective Chamberlain's interview of Eugene Foster in the presentence report, Foster stated he saw a man get out with a rifle, brace himself on the roof of the car, and shoot. Foster was 1 to 2 feet away from Havranek at the time of the shot, and when asked if the man was aiming at the victim, Foster stated, "He was aimin' that way." Foster said the defendant also could have been aiming at him or his friend Darryn Greser, who also stood a few feet away from the victim.

At trial Greser testified that, in his opinion, the defendant was aiming the gun and that the gun had also been pointing in his direction. In the appellant's brief Tweedy argues that "[i]t is

possible that Eugene Foster would have made a similar clarification concerning the word 'aiming' as did Darryn Greser." He makes an improbable argument that this "clarification" would have presented two witnesses from which the trier of fact could conclude the shot was unintentional and that Tweedy was only pointing the gun in a general direction and not truly aiming.

It is our opinion that Foster's statement is not obviously exculpatory. The State was under no duty to disclose it to the defendant. Foster's statement contradicts the defendant's testimony that he never sat on the car window and braced the rifle on his shoulder and contradicts the defendant's story that the gun went off accidentally as he was climbing into the car. Whether considered pointing or aiming, the statement tends to prove, rather than disprove, intent by showing the defendant had control of the gun at the time of the shot. It is important to note that the trial court heard Greser's supposed "clarification" of aiming and still found the shooting intentional. Since the defendant's best hope is that Foster might possibly have testified as Greser did (although Greser and Foster stated the defendant aimed), the evidence would have been repetitive and cumulative. We conclude that the defendant was not prejudiced by the State's nondisclosure of Eugene Foster's statement. He received a fair trial. There is no error in this regard.

Tweedy next challenges the sufficiency of the evidence used to sustain the judgment. Specifically, he contends that there is no evidence regarding the defendant's intent at the moment his rifle discharged the shot injuring Havranek other than his own testimony that the shot was fired accidentally. In *State v. Palmer, ante* p. 282, 289, 399 N.W.2d 706, 714 (1986), we noted that

> in determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the Nebraska Supreme Court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

When the sufficiency of the evidence as to criminal intent is questioned, "the law is settled that independent evidence of specific intent is not required. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident." *State v. Thielen*, 216 Neb. 119, 125, 342 N.W.2d 186, 191 (1983).

Three witnesses testified that, just prior to the shot, the defendant was aiming the gun in the direction of the victim. According to Wiese, Tweedy was still in this same position seconds after the shot. Taking the view most favorable to the State, we conclude that the trier of fact was presented with sufficient evidence of the defendant's acts and of the circumstances surrounding the shooting to infer that the defendant acted intentionally.

The defendant's last assignment of error is that the district court abused its discretion by failing to place the defendant on probation. Whether to grant probation instead of a jail sentence is a matter left to the trial court's discretion. *State v. Kane, ante* p. 245, 397 N.W.2d 628 (1986). Absent an abuse of discretion, a sentence imposed within the statutory limits for the offense will be upheld on appeal. *State v. Gonzales, ante* p. 659, 399 N.W.2d 832 (1987).

Tweedy received two consecutive sentences of 2 to 4 years' imprisonment. The maximum penalty for each offense is 20 years in prison, a $25,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1985). Although these are Tweedy's first felony convictions, we cannot help but note the seriousness of the offenses and the severity of the physical injury suffered by the victim. We note no abuse of discretion by the trial court. The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHNNY E. WILSON, APPELLANT.

400 N.W.2d 869

Filed February 13, 1987. No. 86-522.

1. **Constitutional Law: Attorney and Client: Conflict of Interest: Effectiveness of Counsel.** Multiple representation does not give rise to a denial of the defendant's sixth amendment right to effective assistance of counsel unless an actual conflict of interest exists and that conflict affects the performance of counsel.
2. **Rules of the Supreme Court: Postconviction: Appeal and Error.** Any matter which can be determined from the record on direct appeal is considered by the Supreme Court when granting relief pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986), and is not available for further relief pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985).

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

Anthony S. Troia of Troia Law Offices, P.C., for appellant.

Robert M. Spire, Attorney General, and Mark D. Starr, for appellee.

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

WHITE, J.

This is an appeal from the Douglas County District Court's denial of the appellant's motion for postconviction relief. The appellant, Johnny E. Wilson, was convicted of theft by unlawful taking under Neb. Rev. Stat. § 28-511 (Reissue 1985) and was sentenced to 5 to 10 years in the Nebraska Penal and Correctional Complex. The facts relevant to this appeal are as follows.

During the proceedings in the district court which gave rise to this appeal, the appellant and a codefendant were represented jointly by one assistant public defender. On January 3, 1983, the day before the jury was to be impaneled, counsel moved to withdraw from her representation of Wilson on the basis of conflict of interest. Upon further inquiry by the district court judge, counsel stated that she had arranged to have the codefendant transferred to juvenile court in return for a plea of guilty to the charge pending against him. Counsel stated that

she felt that she could not adequately represent the appellant due to the fact that she intended to call the codefendant at trial to testify for the appellant and felt that she could not both ask the codefendant to testify and advise him against giving statements which would be incriminating in later proceedings. The trial judge assured counsel that the codefendant would be adequately advised of his rights against self-incrimination. The district court judge also stated that he saw no possible conflict of interest, as the codefendant's case had been transferred to juvenile court and the public defender's office could easily appoint separate counsel for the codefendant. Counsel's motion to withdraw was denied.

On June 3, 1985, the appellant filed a petition for postconviction relief in the district court, alleging that the trial court denied him his sixth amendment right to effective assistance of counsel by declining to permit his trial counsel to withdraw on the ground of conflict of interest. In his order denying Wilson's motion for postconviction relief, Judge Hickman stated that the proper method by which Wilson could have challenged the trial judge's holding on a motion to withdraw was by direct appeal, and not through the use of a motion for postconviction relief. Judge Hickman also held that the issue of the propriety of his holding with regard to counsel's motion to withdraw had already been addressed on direct appeal through appellate defense counsel's motion to withdraw and was found not to be prejudicial to the appellant. Wilson's motion for postconviction relief was denied. This appeal follows.

Appellant first assigns as error that the trial court denied him his sixth amendment right to effective assistance of counsel by its failure to permit his trial counsel to withdraw on the ground of conflict of interest. Wilson argues that although the public defender revealed that she felt a conflict of interest existed as a result of her joint representation of both defendants, the trial court failed to conduct an inquiry into trial counsel's claim. We do not agree with the appellant's characterization of the facts. The trial court conducted an adequate inquiry as to the claim of conflict of interest, as the following exchange illustrates:

MRS. FERER: . . . [B]ecause of my dealings with both

John and Ty I don't feel that I can represent John as fairly as I could since I have had to take the side of the co-defendant - - -

THE COURT: In what respect?

MRS. FERER: Well, in asking the Court to transfer Ty to juvenile court I presumed that John was the instigator of this scheme and approached the Court in that way. I am now, of course, taking the complete opposite stand because Ty has now come to me and told me that he was the instigator of this crime and that John didn't know that the truck was being stolen.

THE COURT: Well, if there is a conflict within your office that can easily be rectified by your office withdrawing from Ty Penn's case and asking the juvenile court to appoint independent counsel for him.

MRS. FERER: Well, Your Honor, I think further that - -

THE COURT: But since this court has no further jurisdiction over Ty Penn, the case having been transferred because of his age, I don't see that there's a conflict with you representing Mr. Wilson.

MRS. FERER: I lost my train of thought. I still feel that I have some present responsibility towards Ty. I'm intending to call him as a witness in John's trial; but of course, anything he says could be used against him in a later prosecution and I feel that somebody should be advising him of that.

THE COURT: Well, certainly if you don't, the Court will.

MRS. FERER: But Your Honor, I can't — it's to Mr. Wilson's advantage to have Ty to testify. I don't feel that I am in a position to start advising Ty not to testify.

The U.S. Supreme Court has explored the issue of conflict of interest in a line of cases which includes *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). Under *Cuyler*, multiple representation does not give rise to a denial of the defendant's sixth amendment right to effective assistance of counsel unless an actual conflict of interest exists and that conflict affects the performance of counsel. Although we do

not encourage joint representation, we agree with the district court that any alleged conflict of interest as a result of the assistant public defender's joint representation of the appellant and his codefendant did not affect the performance of counsel. The codefendant's case was transferred to juvenile court, and the codefendant was called at trial to give exculpatory testimony for Wilson. The assistant public defender's representation of Wilson was not rendered ineffective by her representation of the codefendant. See *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984). We find that the appellant is unable to show that he was prejudiced by the assistant public defender's joint representation of him and his codefendant. *State v. Williams, ante* p. 114, 396 N.W.2d 114 (1986); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We are unable to discover a conflict of interest from our examination of the record. *State v. Kerns*, 203 Neb. 278, 278 N.W.2d 348 (1979). We find this assignment of error to be without merit.

Appellant's second and final assignment of error involves the district court's dismissal of his motion for postconviction relief. Appellant argues that Neb. Rev. Stat. § 29-3001 (Reissue 1985) permits a defendant to file a motion for postconviction relief to litigate the issue of whether the defendant's sixth amendment right to effective assistance of counsel has been denied. We find this assignment of error also to be without merit.

The district court dismissed the appellant's motion for postconviction relief. It stated that a challenge to one of the rulings was more properly addressed to this court on direct appeal, as it in fact had been in the appellate defense counsel's motion to withdraw pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986). Although the decision on the motion is itself unpublished, the motion to withdraw was granted and the judgment of the district court was affirmed. *State v. Wilson*, 216 Neb. xix (case No. 83-158, Dec. 14, 1983). In *State v. Sanders*, 220 Neb. 308, 369 N.W.2d 641 (1985), this court wrote:

> In granting relief pursuant to rule 3B, this court examines the entire record, not only to resolve those matters which are specifically called to the court's attention by

> court-appointed counsel but also to determine whether any possible errors exist. Therefore, any matter which can be determined from the record on direct appeal is considered by the Supreme Court when granting relief pursuant to rule 3B and is not available for further relief pursuant to the Nebraska Post Conviction Act. See, *State v. Weiland*, 190 Neb. 111, 206 N.W.2d 336 (1973); *State v. Losieau*, 182 Neb. 367, 154 N.W.2d 762 (1967).

Id. at 309, 369 N.W.2d at 642; *State v. Galvan*, 222 Neb. 104, 382 N.W.2d 337 (1986).

As the issue of propriety of the district court's failure to permit trial counsel to withdraw from representation of Wilson due to conflict of interest had previously been addressed by this court, the district court properly dismissed the appellant's motion for postconviction relief and its attempt to relitigate an issue which had already been addressed on direct appeal. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LYLE D. BURLING, APPELLANT.

400 N.W.2d 872

Filed February 13, 1987. No. 86-549.

1. **Drunk Driving: Proof.** An alcohol-related violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984) may be proved by establishing that one was in actual physical control of a motor vehicle while under the influence of alcohol or that one was in actual physical control of a motor vehicle while having ten-hundredths of 1 percent by weight of alcohol in his or her body fluid.
2. **Drunk Driving: Words and Phrases.** As used in Neb. Rev. Stat. § 39-669.07 (Reissue 1984), the phrase "under the influence of alcoholic liquor" means after the ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner.
3. **Evidence: Words and Phrases.** "Competent evidence" is that which tends to establish the fact in issue; that which is admissible and relevant on the point in issue.
4. **Constitutional Law.** The Constitution of this state distributes the powers of government to three separate and coequal departments or branches, namely, the legislative, executive, and judicial branches, and prohibits any one branch from

exercising any power belonging to another branch.

5. **Constitutional Law: Evidence.** Determining whether evidence, if believed, is sufficient to sustain a conviction is a judicial function.
6. **Constitutional Law: Legislature: Evidence.** The Legislature may not declare the weight to be given to evidence or what evidence shall be conclusive proof of an issue of fact.
7. _____: _____: _____. Whether evidence is of probative value is a legal question, the judicial analysis and resolution of which the Legislature cannot impair.
8. **Blood, Breath, and Urine Tests.** A chemical test result of one's body fluid for alcohol content which is subject to a margin of error must be adjusted so as to give the defendant the benefit of that margin.
9. **Convictions: Appeal and Error.** A conviction will not be set aside in the absence of a showing that an error prejudiced the defendant.

Appeal from the District Court for Jefferson County: WILLIAM B. RIST, Judge. Affirmed.

Robert R. Gibson of Professional Legal Associates of Nebraska, P.C., for appellant.

Robert M. Spire, Attorney General, and Janie C. Castaneda, for appellee.

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

PER CURIAM.

Following a county court bench trial, defendant, Lyle D. Burling, was convicted of failing to stop at a clearly marked stop sign and of driving while under the influence of alcohol, first offense, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984). The county court judgment was affirmed on appeal to the district court. While defendant appeals both convictions to this court, his three assignments of error relate solely to the drunk driving conviction and combine to claim that the district court erred in failing to find error appearing on the record made in the county court, in that (1) the Intoxilyzer Model 4011AS test result should not have been considered, and (2) the evidence does not support the conviction. We affirm.

At approximately 1 a.m. on July 13, 1985, Trooper Steven Gill of the Nebraska State Patrol observed a pickup truck, pulling a trailer which was carrying an automobile, weave across the centerline of the road four to five times, change speed

from 45 to 60 mph, and fail to stop for a stop sign at the intersection of two highways. Gill then turned on his flashing lights and proceeded to stop the defendant driver, who explained he had not stopped for the sign because of difficulty in pulling the trailer.

Gill noticed defendant had the odor of alcohol on his breath, had slurred speech, and had trouble retrieving his license from his billfold. When instructed to go to the patrol car, defendant staggered and swayed, lost his footing "once or twice," and had difficulty walking on the shoulder of the road.

After he got inside the patrol car, defendant was cited for failing to stop at the stop sign and was asked to recite the alphabet. He made three attempts to recite the alphabet, but could not proceed past the letter *k*. According to Gill, defendant also failed a "horizontal gaze test."

More field sobriety tests were performed outside of the patrol car. When instructed to walk heel to toe, defendant staggered and had to step to the side to balance himself. When instructed to hold his arms out, close his eyes, and touch his finger to the tip of his nose, defendant would either touch the bridge of his nose or miss his nose completely. He also swayed while attempting to perform this test. When instructed to balance on one leg and raise the opposite foot off the ground, defendant lifted his foot, then dropped it immediately. Defendant was asked to stand erect with his head tilted back and his eyes closed. During this maneuver defendant swayed, staggered, and almost fell. Finally, defendant was asked to take a preliminary breath test, which he also failed. Gill concluded that defendant was driving while under the influence of alcohol.

Defendant was then taken to the Jefferson County sheriff's office, where a test on an Intoxilyzer Model 4011AS was administered by Fairbury Police Officer Terry Mathy. Mathy testified that he had difficulty getting a sample because defendant would not blow hard enough into the machine to produce a reading. After the fifth attempt, a reading showing that defendant had a blood alcohol level of .164 of 1 percent by weight of alcohol was obtained. Mathy also testified that defendant's speech was slurred, his clothes were disorderly, and

his eyes were bloodshot.

Section 39-669.07 provides in part:

> It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug or when that person has ten-hundredths of one per cent or more by weight of alcohol in his or her body fluid as shown by chemical analysis of his or her blood, breath, or urine. Any person who shall operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug or while having ten-hundredths of one per cent by weight of alcohol in his or her body fluid as shown by chemical analysis of his or her blood, breath, or urine shall be deemed guilty of a crime . . . .

Thus, an alcohol-related violation of § 39-669.07 may be proved by establishing that one was in actual physical control of a motor vehicle while under the influence of alcohol or that one was in actual physical control of a motor vehicle while having ten-hundredths of 1 percent by weight of alcohol in his or her body fluid. *State v. Tomes*, 218 Neb. 148, 352 N.W.2d 608 (1984); *State v. Hilker*, 210 Neb. 810, 317 N.W.2d 82 (1982); *State v. Weidner*, 192 Neb. 161, 219 N.W.2d 742 (1974). As used in § 39-669.07, the phrase "under the influence of alcoholic liquor" means after the ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner. *State v. Weidner, supra*. See, also, *Uldrich v. State*, 162 Neb. 746, 77 N.W.2d 305 (1956); *Shanahan v. State*, 162 Neb. 676, 77 N.W.2d 234 (1956).

Under the provisions of § 39-669.07 the measurement of the amount of alcohol in the body fluid, that is, in the blood, may be determined by a chemical analysis of the blood, breath, or urine. Thus, the result of any chemical analysis of the breath or urine must be converted into a percentage by weight of alcohol in the blood.

An associate professor of pharmacology who is also a research scientist testified on behalf of the defendant that the machine known as the Intoxilyzer Model 4011AS is an

abbreviated infrared spectrophotometer, or infrared camera, which reads the amount of infrared light waves absorbed by alcohol and certain other organic-compound molecules present in the test subject's breath. The machine then converts that reading into a measure of the alcohol in the subject's blood, which registers as the test result. The conversion formula built into the machine assumes that alcohol in any human's breath will be distributed and reflected in his or her blood in a ratio of 1 breath unit to 2,100 blood units. According to this witness, recent research has shown that the ratio in fact varies from one human to another and ranges from 1:1,100 to 1:3,400. For this reason forensic toxicologists have abandoned reliance upon the 1:2,100 ratio. Moreover, the ingestion of certain substances other than alcohol will adversely affect the Intoxilyzer test result. Thus, it is this pharmacologist's opinion that the Intoxilyzer does not reliably measure blood alcohol levels. The State adduced no evidence to contradict the foregoing testimony.

Neb. Rev. Stat. § 39-669.11 (Reissue 1984) provides that a chemical test of blood, breath, or urine made in conformity with methods approved by the Department of Health and by an individual possessing a valid permit issued by that department

> shall be competent evidence in any prosecution under a state statute or city or village ordinance involving operating a motor vehicle while under the influence of alcoholic liquor, or involving driving or being in actual physical control of a motor vehicle with an amount of alcohol in the blood in violation of a statute or a city or village ordinance.

"Competent evidence" is that which tends to establish the fact in issue; that which is admissible and relevant on the point in issue. See, *Weiner v. State ex rel. Real Estate Comm.*, 217 Neb. 372, 348 N.W.2d 879 (1984); *Shepherd v. City of Omaha*, 194 Neb. 813, 235 N.W.2d 873 (1975), *overruled on other grounds Caniglia v. City of Omaha*, 210 Neb. 404, 315 N.W.2d 241 (1982). Thus, by enacting § 39-669.11, the Legislature has made breath tests conducted in accordance with the regulations of the Department of Health admissible in evidence on the issue of the level of alcohol in one's blood.

The Constitution of this state, however, distributes the powers of government to three separate and coequal departments or branches, namely, the legislative, executive, and judicial branches. It further prohibits any one branch from exercising any power belonging to another branch. Neb. Const. art. II, § 1. It has been held that while the Legislature has the right to prescribe acceptable methods of testing for alcohol content in the body fluid, and perhaps even the right to prescribe that such evidence is admissible in a court of law, it is a judicial function to determine whether the evidence, if believed, is sufficient to sustain a conviction. *State v. Bjornsen*, 201 Neb. 709, 271 N.W.2d 839 (1978). Accord *State v. Boehmer*, 1 Haw. App. 44, 613 P.2d 916 (1980). Stated another way, the Legislature may not declare the weight to be given to evidence or what evidence shall be conclusive proof of an issue of fact, *People v. Buford*, 110 Ill. App. 3d 46, 441 N.E.2d 1235 (1982); that is to say, determining whether evidence is of probative value is a legal question, and the Legislature cannot impair judicial analysis and resolution of such questions. See *Kentucky Com'n, etc. v. Com., Dept. of Justice*, 586 S.W.2d 270 (Ky. App. 1979).

Even ignoring in this instance the effect of ingesting certain substances, the uncontroverted testimony of the pharmacologist compels the conclusion that if one's breath-to-blood distribution ratio were at the 1:3,400 level, the machine would understate his or her blood alcohol level, whereas if one's distribution ratio were at the 1:1,100 level, the machine would overstate his or her blood alcohol level. *State v. Bjornsen, supra*, ruled that a test result which was subject to a margin of error had to be adjusted so as to give the defendant the benefit of that margin. Thus, we are concerned only with the degree by which the machine may overstate defendant's blood alcohol level. One having a 1:1,100 breath-to-blood distribution ratio has an actual blood alcohol level which is but 52.38 percent of the reading produced by the machine. Therefore, in this case the Intoxilyzer result must be reduced to 52.38 percent of .164 of 1 percent, that is, to .086 of 1 percent. Consequently, the Intoxilyzer test result fails to establish that defendant had "ten-hundredths of 1 percent by weight of

alcohol in his blood" and therefore fails to establish a violation of § 39-669.07.

That conclusion does not, however, resolve the matter, for a conviction will not be set aside in the absence of a showing that an error prejudiced the defendant. *State v. Borchardt, ante* p. 47, 395 N.W.2d 551 (1986). Even discarding the Intoxilyzer test result, the preliminary breath test result, *State v. Klingelhoefer*, 222 Neb. 219, 382 N.W.2d 366 (1986), and the "horizontal gaze test" result, *State v. Borchardt, supra*, the remaining evidence that defendant had the odor of alcohol on his breath, slurred his speech, had bloodshot eyes, had trouble retrieving his license from his billfold, was disheveled, could not recite the alphabet, had difficulty in coordinating his movements, could not keep his balance, failed to stop at a stop sign, and crossed over the centerline of the road four or five times overwhelmingly supports the conclusion that he had ingested alcohol in an amount sufficient to impair to an appreciable degree his ability to operate a motor vehicle in a prudent and cautious manner, thus establishing a violation of § 39-669.07. Therefore, the error the county court committed in considering the Intoxilyzer test result was harmless beyond a reasonable doubt and provides no basis for reversing defendant's conviction.

The judgment of the district court being correct, it is affirmed.

AFFIRMED.

FATHER FLANAGAN'S BOYS' HOME, A NONPROFIT NEBRASKA CORPORATION, APPELLEE, V. DANNY GOERKE, APPELLANT.
401 N.W.2d 461

Filed February 20, 1987. No. 85-325.

1. **Records: Appeal and Error.** A brief may not expand the evidentiary record and must limit itself to arguments supported by the record.
2. **Fair Employment Practices: Discrimination: Proof.** In a discrimination suit brought under the provisions of Neb. Rev. Stat. § 48-1104 (Reissue 1984) of the Nebraska Fair Employment Practice Act, the following is the procedure to be followed in presentation of evidence relevant to a question about discrimination

against a disabled person: First, the complainant has the burden of proving a prima facie case of discrimination. Second, if the complainant succeeds in proving that prima facie case, the burden shifts to the respondent to articulate some legitimate, nondiscriminatory reason for the complainant's rejection or discharge from employment. Third, should the respondent carry the burden, the complainant must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the respondent were not its true reasons, but were a pretext for discrimination.

3. **Fair Employment Practices: Words and Phrases.** Under Neb. Rev. Stat. § 48-1101 (Reissue 1984), "disability" designates a protected class regarding employment in Nebraska. By virtue of Neb. Rev. Stat. § 48-1102(8) (Reissue 1984), "epilepsy" is included within the definition of a "disability," but only if such epilepsy is "unrelated to such person's ability to engage in a particular occupation."

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

Richard D. Sievers of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellant.

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

Steven E. Guenzel of Barlow, Johnson, DeMars & Flodman, and Cynthia Lehman, for amici curiae Epilepsy Foundation of America et al.

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

PER CURIAM.

When Father Flanagan's Boys' Home discovered that Danny Goerke was an epileptic, it dismissed him from employment as an assistant family teacher. Goerke filed a charge with the Nebraska Equal Opportunity Commission, alleging that the home discriminated against him, thereby violating the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 through 48-1126 (Reissue 1984). The commission determined that the home had unlawfully discriminated against Goerke and ordered that he be reinstated to his former employment and be paid back wages and benefits. On appeal by the home, the district court reversed the commission's decision. We affirm.

Our standard of review is controlled by the provisions of

Neb. Rev. Stat. § 84-918 (Reissue 1981), and we accordingly review the matter de novo on the record. *Harris v. Misty Lounge, Inc.*, 220 Neb. 678, 371 N.W.2d 688 (1985).

Before undertaking that review, however, we sustain the home's motion to strike those portions of the brief filed by the amici curiae, Epilepsy Foundation of America and Epilepsy Association of Nebraska, Inc., which constitute evidentiary material not received in evidence in this case. A brief may not expand the evidentiary record and must limit itself to arguments supported by the record brought to us. See, *Raymond v. Department of Motor Vehicles*, 219 Neb. 821, 366 N.W.2d 758 (1985); *Snyder v. Nelson*, 213 Neb. 605, 331 N.W.2d 252 (1983); Neb. Ct. R. of Prac. 9C(2) (rev. 1986).

In 1966, when he was 7 years old, Goerke suffered a grand mal epileptic seizure, lost consciousness, and experienced convulsions. Therapy involving prescribed medications was commenced and continues to this day. During his youth, Goerke suffered a number of petit mal seizures wherein he experienced a preliminary sense of an impending episode, which was followed approximately 1 1/2 minutes later by a loss of consciousness for approximately 15 seconds. However, Goerke has not experienced a seizure during the last 10 years. Goerke's physician, a neurologist, reported that the condition has been under control since 1973. Goerke rarely forgets his medication, but even on those rare occasions when he has overlooked his medication seizures have not occurred. On especially stressful days, Goerke increases his medication. Epilepsy does not interfere with Goerke's mental processes, concentration, or coordination.

The home provides care for and educates boys ranging from 10 to 19 years of age who are homeless, abandoned, neglected, delinquent, or otherwise disadvantaged, and utilizes school and on-campus homes, which are operated through specially trained, married family teaching couples. Family couples, with their own children, live on the home's campus and are responsible for providing a family environment for the 8 to 10 boys who have been assigned to them. They teach the boys, among other things, self-discipline and socially acceptable living skills, as well as encourage their moral and religious

development. An assistant teacher is assigned to assist each couple and to take over when the couple is away from the home. When and for how long an assistant is to take over is a matter negotiated and arranged between the assistant and the particular couple to whom the assistant has been assigned. The assistant does most of the driving required to take the boys to various appointments, activities, and places of employment. The boys themselves are not allowed to drive.

In 1983, Goerke applied for a job as an assistant family teacher at the home. In his written application for employment, Goerke stated that he had no physical handicaps which would impair his ability to perform the job. He so answered because he believed that his history of past seizures would not impair his ability to do the job. When asked about his physical health during one of the six or seven oral interviews the home conducted, Goerke said he was in good health except for a bad knee. The only job qualifications of which he was advised were the requirements that he have a valid driver's license and a high school diploma. Goerke was a high school graduate and possessed a Minnesota driver's license, which he has continually held since the age of 16. Goerke has been involved in two motor vehicle accidents in his lifetime. One accident was a minor collision attributable to icy roads, and the other was a single-car accident when he was a high school student. Neither incident involved any aspect of epilepsy as a factor in the accident.

Goerke had previously worked for 6 months at a juvenile correctional facility for 12- to 18-year-old boys, operated by the State of Minnesota. The facility was located in a relatively isolated area approximately 50 miles from the nearest town. Goerke's duties included assigning the juveniles work duties, monitoring their behavior, and taking care of medical emergencies as a trained emergency medical technician. His duties also required a considerable amount of driving, including transporting juveniles by vehicle into town for medical appointments and other purposes, and obtaining equipment and supplies for the facility. Goerke had no difficulty making such trips.

Goerke was hired by the home and began his job training with a couple to whom he was assigned at the home. According

to the schedule negotiated with this couple, Goerke was to work every other weekend, during which time the couple would be away from the home, and, in addition, was to work from 2:30 to 10:30 p.m. 5 days per week. During these periods, Goerke was to assist the operation of a motivational system, oversee the boys' activities, prepare meals as needed, develop relationships with the boys, and assist them. Additionally, he was to drive the boys as circumstances required and to accompany the couple and the household members on trips to Lake Okoboji. Goerke expected to live away from the home and drive to work.

The amount of work-related driving required of an assistant varies from one couple to another. Although there is no evidence as to what percentage of his time Goerke would spend driving, there is evidence that some assistants devote as much as half their employment time to duties in which driving is required.

Goerke was discharged from his employment at the home near the end of his training period and before he had driven any of the boys anywhere. The discharge came about after he asked the couple to whom he had been assigned where he might store his medication. At this point the fact that Goerke suffered from epilepsy was revealed. The home then informed him it had a policy prohibiting epileptics from serving as assistant family teachers. It should perhaps be noted at this point that the parties raise no issue as to whether Goerke was required by law to have a Nebraska driver's license. See Neb. Rev. Stat. §§ 60-403 and 60-410 (Reissue 1984). The home offered Goerke employment in its maintenance or custodial departments, but nothing was available with duties whereby he could work directly with the boys, as Goerke desired.

Although the home had no written policy on epilepsy as such, it determined in 1980 that, as a result of epileptic seizures sustained by some of its employees, staff members with histories of epileptic seizures should not be allowed to transport the boys. The only memoranda concerning this policy were the individual communications to the various epileptics informing them of such decision. The written job description for assistants did not mention epilepsy as a disqualifying condition. The home's policy was described as a "blanket exclusion for all

individuals who had a known history of seizures," but the home had not screened employees to determine who was suffering from epilepsy. At the hearing, the home did not present any evidence that epileptics in general, and Goerke in particular, were unable to perform the duties of an assistant family teacher.

Section 48-1104 of the Nebraska Fair Employment Practice Act provides in relevant part that it "shall be an unlawful employment practice for an employer: (1) To . . . discharge any individual . . . because of such individual's . . . disability . . . ."

Section 48-1102(8) defines disability as including epilepsy or seizure disorders "unrelated to such person's ability to engage in a particular occupation."

Additionally, § 48-1111(1) provides that it shall not be an unlawful employment practice for an employer to deny privileges of employment "when the nature and extent of a disability reasonably preclude the performance of the particular employment."

In a discrimination suit brought under the provisions of § 48-1104 of the Nebraska Fair Employment Practice Act, the following is the procedure to be followed in presentation of evidence relevant to a question about discrimination against a disabled person: First, the complainant has the burden of proving a prima facie case of discrimination. Second, if the complainant succeeds in proving that prima facie case, the burden shifts to the respondent to articulate some legitimate, nondiscriminatory reason for the employee's rejection or discharge from employment. Third, should the respondent carry the burden, the complainant must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the respondent were not its true reasons, but were a pretext for discrimination. See *Harris v. Misty Lounge, Inc.*, 220 Neb. 678, 371 N.W.2d 688 (1985). See, also, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984).

The first question to be decided, then, is whether Goerke has proved a prima facie case of discrimination against a person with a disability within the Nebraska Fair Employment Practice

Act. Goerke may prove his prima facie case by showing:

> (1) that he is a member of a protected class within the meaning of the Nebraska Fair Employment Practice Act, §§ 48-1101 et seq.; (2) that he is qualified for the position of employment sought; (3) that he applied for and was rejected [or discharged from] that position; and (4) that after he was rejected [or discharged] the job remained open.

Williams v. Goodyear Tire & Rubber Co., 219 Neb. 748, 751, 366 N.W.2d 132, 135 (1985). See, also, *McDonnell Douglas Corp. v. Green, supra* at 802, n.13 ("The facts necessarily will vary in [discrimination] cases, and . . . the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations").

Under § 48-1101, "disability" designates a protected class regarding employment in Nebraska. By virtue of § 48-1102(8), "epilepsy" is included within the definition of a "disability," but only if such epilepsy is "unrelated to such person's ability to engage in a particular occupation."

The record conclusively establishes that Goerke is an epileptic. In order to be within a protected class, however, Goerke must establish that his condition was unrelated to his ability to perform employment duties and did not adversely affect his carrying out the responsibilities of an assistant teacher.

Goerke's evidence is that his condition has been under control by medication for at least 10 years and that he had, at least for a short time, successfully performed for another employer some of the duties required by the home. The evidence also establishes, however, that the dosage Goerke requires depends upon the amount of stress he encounters and that he does, quite humanly, occasionally forget to take his medicine. The Nebraska Fair Employment Practice Act does not require the home to risk the safety of the boys for whom it is responsible on the assumption that Goerke has not forgotten to take his medication and that he has accurately forecast the amount of stress he will encounter and has properly adjusted his dosage.

It is self-evident that transporting boys produces varying

degrees of stress, depending upon the presence of a number of variables, such as weather, road, traffic, and mechanical conditions, and the behavior of one's passengers. The fact Goerke has not yet had a seizure while transporting others does not require the home to risk the safety of the boys in its charge on the basis of trial and error, and thereby invite and await disastrous results.

We note that the U.S. Department of Transportation regulation found at 49 C.F.R. § 391.41(b)(8) (1985) disqualifies epileptics from operating motor carriers in interstate commerce. While we recognize that the Department of Transportation regulation does not apply to the home, the regulation's existence nonetheless demonstrates that the department considers epileptics unsuited to be commercial motor vehicle operators. See *Costner v. United States*, 720 F.2d 539 (8th Cir. 1983). While there are undeniable differences between commercial interstate driving and the driving duties of an assistant family teacher for the home, the safety concerns are nonetheless similar.

Thus, we conclude that Goerke's epilepsy is not unrelated to his ability to engage in the home's occupation of assistant family teacher and that the nature of epilepsy is such as to reasonably preclude performance of that employment. That being so, Goerke has failed to prove that he is within a protected class and thus has failed to prove a prima facie case of discrimination.

The judgment of the district court being correct, it is affirmed.

AFFIRMED.

SHANAHAN, J., dissenting.

If facts and law are disregarded, today's decision may become acceptable.

Before receipt of his driver's license at age 16, Goerke held a farm permit issued by the State of Minnesota and operated farm machinery, tractors, trucks, cars, and pickups used in agricultural operations. Later, when employed at Thistledew, a Minnesota correctional facility with 53 boys and a capacity of 70, Goerke frequently drove a van or station wagon to transport boys, ages 12 to 18, from Thistledew to neighboring

towns, sometimes involving trips in excess of 100 miles. As noted by the majority, Goerke's duties at Thistledew "required a considerable amount of driving." In April 1983 Goerke came to Boys Town because he saw an opportunity to advance his career and to take additional courses at a local university. Three weeks after Goerke started his job, and without any intervening incident detrimental to the home, Boys Town discharged him from employment when the home learned about Goerke's epilepsy. As additional background, reflected in the majority's opinion, Goerke has not experienced an epileptic episode during the last 10 years, even when he may have overlooked taking medication, and epilepsy "does not interfere with Goerke's mental processes, concentration, or coordination."

The Legislature has clearly expressed the public policy which is the foundation of the Nebraska Fair Employment Practice Act:

> It is the policy of this state to foster the employment of all employable persons in the state on the basis of merit regardless of their race, color, religion, sex, disability, or national origin, and to safeguard their right to obtain and hold employment without discrimination because of their race, color, religion, sex, disability, or national origin. Denying equal opportunity for employment because of race, color, religion, sex, disability, or national origin is contrary to the principles of freedom and is a burden on the objectives of the public policy of this state. . . .

Neb. Rev. Stat. § 48-1101 (Reissue 1984).

Through the Nebraska Fair Employment Practice Act, the Legislature has sought to secure to the disabled full and equal access to employment, based on merit and bounded only by the actual disability which an employee or potential employee may be unable to overcome. Employment discrimination, attributable to a classification based solely on an individual's disability rather than ability, is "peculiarly repugnant in a society that prides itself on judging each individual by his or her merits." *Andersen v. Exxon Co.*, 89 N.J. 483, 491, 446 A.2d 486, 490 (1982). A disability, by itself, is not a permissible basis to assume that an individual is unable to function in a particular context. *Southeastern Community College v. Davis*, 442 U.S.

397, 99 S. Ct. 2361, 60 L. Ed. 2d 980 (1979).

However, Neb. Rev. Stat. §§ 48-1102(8) and 48-1111(1) (Reissue 1984) of the Nebraska Fair Employment Practice Act secure to the employer freedom to reject an applicant for employment or discharge an employee when such individual is unable to perform the duties imposed by the particular employment because that individual is generally unqualified for the employment or has a disability which actually impedes or prevents adequate job performance. See *Andersen v. Exxon Co., supra.*

Concerning the Nebraska Fair Employment Practice Act and unlawful discrimination based on disability, the question is whether the nature and extent of an individual's disability reasonably preclude adequate performance of the particular job. See, *Andersen v. Exxon Co., supra; Foods, Inc. v. Iowa Civil Rights Commission*, 318 N.W.2d 162 (Iowa 1982); *Silverstein v. Sisters of Charity*, 43 Colo. App. 446, 614 P.2d 891 (1979).

In view of Goerke's work and medical history, buttressed by the evidence from the neurologist who was Goerke's attending physician, Goerke, although an epileptic, was able to perform the exact job from which he was discharged. Goerke has proved he is a member of a protected class and has, therefore, established a prima facie case of employment discrimination condemned by the Nebraska Fair Employment Practice Act.

Whatever has prompted the majority to refer to regulations of the U.S. Department of Transportation—regulations which the majority readily acknowledges are inapplicable to Boys Town—remains without suitable explanation and cogent correlation. The federal regulations pertain to drivers of 18-wheelers, semis, tremendous trucks, and other motorized mammoths moving for protracted periods as common carriers in interstate commerce. The "undeniable differences between commercial interstate driving" and Goerke's driving duties at Boys Town annihilate any possible relevance regarding those federal regulations which, in relation to this case, are reduced to bureaucratic bunkum.

The majority's opinion apocalyptically announces: "The fact that Goerke has not yet had a seizure while transporting others

does not require the home to risk the safety of the boys in its charge on the basis of trial and error, and thereby invite and await disastrous results." To the majority, it is absolutely inevitable that Goerke, an epileptic, will cause "disastrous results" in employment such as that at Boys Town. The facts do not warrant such awesome augury. Only a conclusion contradictory to the prognostication of the majority is deducible from facts presented to this court.

One objective of the antidiscrimination provision of the Nebraska Fair Employment Practice Act is prohibition of employment discrimination resulting from unfounded stereotyping of persons disabled by some physical or mental handicap. That objective is, as yet, unrealized. Today, epileptics; tomorrow, diabetics; thereafter . . . ?

KRIVOSHA, C.J., and WHITE, J., join in this dissent.

DAN K. WAYLETT, APPELLEE, V. UNITED SERVICES AUTOMOBILE ASSOCIATION, APPELLANT.

401 N.W.2d 160

Filed February 20, 1987. No. 85-341.

1. **Insurance: Contracts: Intent.** An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made.
2. **Insurance: Contracts.** An insurance policy is to be construed as any other contract; if its terms are clear, they are to be applied according to their plain and ordinary meaning.
3. _____: _____. The parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.

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

James W. Knowles and Edward A. Mullery, for appellant.

Martin A. Cannon of Matthews & Cannon, P.C., for appellee.

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

KRIVOSHA, C.J.

This appeal involves the interpretation of an underinsured motorist coverage policy issued by the appellant, United Services Automobile Association (U.S.A.A.), to the appellee, Dan K. Waylett.

The record discloses that on August 5, 1981, an automobile, then being driven by Waylett and occupied by his wife, Maryann, and their two daughters, Denise and Michele, was struck head on when an automobile driven by one Valerie Fitzpatrick came across the centerline of the highway. As a result of the accident all four occupants were injured. It was admitted that the automobile, owned by Paul and Julie Foxhoven and being driven by Fitzpatrick, was covered by a policy of automobile insurance with a limit of $100,000 per accident. It was further admitted that the carrier paid in settlement of the claims of the parties the policy limits, divided as follows: Maryann Waylett, $50,000; Michele Waylett, $25,000; Dan Waylett, $25,000. It was further admitted that the driver of the automobile, Valerie Fitzpatrick, also had a policy of insurance with a limit of $50,000 per accident and that the entire policy was paid by the carrier as follows: Maryann Waylett, $25,000; Denise Waylett, $25,000. It was further admitted that the county of Sarpy, Nebraska, had a policy of liability insurance and, in apparent settlement of claims made by the Wayletts, paid to them a total of $175,000 as follows: Maryann Waylett, $120,000; Denise Waylett, $35,000; Michele Waylett, $10,000; Dan Waylett, $10,000. The Wayletts therefore received a combined payment of $325,000 from all persons or organizations which might be responsible for the injuries they suffered as a result of the accident on August 5, 1981.

Waylett then sought to recover additional damages from U.S.A.A. under an underinsured motorist endorsement issued by U.S.A.A. Following the overruling of a motion for

summary judgment made by U.S.A.A., the court sustained Waylett's motion for a bifurcated trial, and a jury was impaneled to determine the amount of the damages incurred by the Wayletts. The district court, then sitting without a jury, held a separate hearing to determine what part, if any, of the damages was covered by the underinsured motorist coverage. The court rendered its judgment as follows: Maryann Waylett, $25,000; Denise Waylett, $75,000; Michele Waylett, $75,000; Dan Waylett, $75,000. It is from that judgment which U.S.A.A. now appeals. In support of its appeal it assigns 10 errors. Because of the manner, however, in which we dispose of this case, we need only consider assignment of error No. 5, which reads: "The District Court erred in failing to offset the amounts paid by the insurers of Valerie Fitzpatrick, Paul Foxhoven, Julie Foxhoven, and Sarpy County against the limit of liability per accident of the underinsured motorist coverage." We agree with U.S.A.A. that the district court erred, and, for that reason, we reverse and dismiss.

The underinsured motorist coverage is contained in an endorsement made a part of a policy purchased by Waylett from U.S.A.A. The policy provides in part: "We will pay damages which a **covered person** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** because of bodily injury: 1. Sustained by a **covered person**; and 2. Caused by an accident."

The policy then further provides: "We will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements."

The schedule on the policy provides that the limits of liability on the policy are $100,000 for each person; $300,000 for each accident. The policy has a further provision, however, which affects the amount of coverage. The policy provides: "However, the limit of liability shall be *reduced* by *all sums* paid because of the bodily injury by or on behalf of *persons or organizations* who *may be* legally responsible." (Emphasis supplied.) U.S.A.A. contends that because the amounts paid by Fitzpatrick, the Foxhovens, and Sarpy County exceeded $300,000, to wit: $325,000, the limit of liability per each

accident was reduced to zero, and therefore there was no underinsured motorist coverage.

Waylett, on the other hand, maintains that U.S.A.A. is not entitled to consider the payments made by Sarpy County. In support of that position, Waylett cites to us the cases of *State Farm Mut. Auto. Ins. Co. v. Selders*, 187 Neb. 342, 190 N.W.2d 789 (1971), and *Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 156 N.W.2d 133 (1968). In particular, Waylett cites to us from *State Farm Mut. Auto. Ins. Co. v. Selders, supra* at 347, 190 N.W.2d at 792, as follows:

> "A provision, drawn by the insurer to comply with the statutory requirement of *uninsured* motorist coverage, must be construed in light of the purpose and policy of the statute. Such a provision, drawn in pursuance of a statutorily declared public policy, is enacted for the benefit of injured persons traveling on the public highways. Its purpose is to give the same protection to the person injured by an uninsured motorist as he would have had if he had been injured in an accident caused by an automobile covered by a standard liability policy. Such provisions are to be liberally construed to accomplish such purpose." Statutory requirements must be complied with by insurers and if the policy issued fails in this respect, the statute will be read into the policy.

(Emphasis supplied.)

That citation has no application in the instant case for two reasons. In the first place, at the time that the underinsured motorist coverage was issued by U.S.A.A. to Waylett, there was no underinsured motorist statute, and therefore the agreement was simply the result of negotiations between the parties.

Furthermore, the Underinsured Motorist Insurance Coverage Act, enacted by the Nebraska Legislature on January 1, 1987, Neb. Rev. Stat. §§ 60-571 to 60-582 (Cum. Supp. 1986), contains provisions significantly different from the provisions of the uninsured motorist coverage involved in *Selders* and *Stephens* (see Neb. Rev. Stat. §§ 60-509.01 to 60-509.04 (Reissue 1984)). In particular, there is no provision in the *un*insured motorist statutes similar to the underinsured

motorist statute, § 60-578, reducing the liability by reason of amounts paid or received. Rather than attempting to decide this on the basis of some statutorily declared public policy, we are, instead, required to determine this on the basis of the plain meaning of the contract entered into between the parties.

We observed in *Safeco Ins. Co. of America v. Husker Aviation, Inc.*, 211 Neb. 21, 25, 317 N.W.2d 745, 748 (1982): " 'An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made. . . .' "

In *Lumbard v. Western Fire Ins. Co.*, 221 Neb. 804, 807, 381 N.W.2d 117, 119 (1986), we further said: "The rule controlling the resolution of the issues presented by that ground is that an insurance policy is to be construed as any other contract; if its terms are clear, they are to be applied according to their plain and ordinary meaning." We further observed in *Lumbard, supra* at 807, 381 N.W.2d at 119:

> It is true that if an insurance policy is ambiguous, it will be construed in favor of the insured. However, an ambiguity exists only when the policy can be interpreted to have two or more reasonable meanings. *Denis v. Woodmen Acc. & Life Co.*, 214 Neb. 495, 334 N.W.2d 463 (1983). An ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.

And, in the case of *Pettid v. Edwards*, 195 Neb. 713, 716, 240 N.W.2d 344, 346-47 (1976), we said:

> The parties to an insurance contract may contract for any lawful coverage and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute. Mills v. Aetna Ins. Co., 168 Neb. 612, 96 N.W.2d 721. An insurance policy should be considered as any other contract and be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning. Preferred Risk Mut. Ins. Co. v. Continental Ins. Co., 172 Neb. 179, 109 N.W.2d 126.
>
> The plain language of the policy in this case limited the

> liability of the intervener to the limit stated in the declarations as applicable to each person, regardless of the number of automobiles to which the policy applied. It is difficult to see how the intervener could have stated more clearly the limit for medical payments coverage would be $1,000 per person per accident although the policy might apply to more than one automobile. In view of the language used the plaintiff could have no reasonable expectation that the policy did not mean exactly what it said.

(Emphasis omitted.) See, also, *Johnsen v. Harper*, 213 Neb. 145, 328 N.W.2d 192 (1982).

Our examination of the provisions of the endorsement leads us to the conclusion that the language is clear and unambiguous and requires no interpretation.

With these rules in mind we then examine the policy in question. It provides in clear and precise terms that the $300,000 (the limit of liability) is to be reduced by *all sums* paid because of the bodily injury by or on behalf of *persons or organizations which may* be legally responsible. We can perceive of no way in which the sentence could be made any clearer. The word "all" is one of the most inclusive terms in the English language and does not exclude anyone or anything. As we said in *Kellogg Company v. Herrington*, 216 Neb. 138, 147, 343 N.W.2d 326, 332 (1984): "Few words in the English language are as clear in meaning as is 'all' . . . . 'The word "all" is commonly understood and usually does not admit of an exception, addition or exclusion.' " Therefore, all of the moneys are to be used in reducing the limits of liability if they were paid because of the bodily injury by or on behalf of persons or organizations which may be legally responsible. All of the moneys paid, including that paid by Sarpy County, were paid because of injuries sustained in an accident on August 5.

And, finally, we must simply acknowledge that Sarpy County's payment was not made as a donation, but had to have been made because Sarpy County thought it may have been liable. The policy does not say that it must be paid by persons who are *found* to be legally responsible, but only who *may* be legally responsible. One is hard pressed to imagine that Sarpy

County ordered its carrier to pay $175,000 to the Wayletts if it did not believe it may be responsible.

Furthermore, we believe that if the policy was intended to be limited to payments made by the driver or owner of the automobile, it would have been easy enough to say that. In the earlier part of the endorsement the driver or owner is described. The policy provides: "We will pay damages which a **covered person** is legally entitled to recover from *the owner or operator of an* ***underinsured motor vehicle*** because of bodily injury." (Emphasis supplied.) Had this been the carrier's intent, it would have been relatively easy to have inserted in the later provision that the limits of liability shall be reduced by all sums paid because of bodily injury by or on behalf of "the owner or operator of an underinsured motor vehicle." The endorsement did not so read.

We believe that we are left with no choice except to conclude that we must consider all sums paid by all persons and organizations, including Sarpy County. When that is done, the liability under the policy is reduced to zero, and there is no sum due and owing from U.S.A.A. to the Wayletts. One may argue that this seems unfair. The simple answer is, however, that that is the contract which was entered into between Waylett and U.S.A.A., and the court is not free to redraft the contract.

We believe that the district court was in error in denying the motion for summary judgment made by the appellant, and for that reason we need not consider any of the other assignments of error raised by U.S.A.A. The judgment of the district court is reversed and remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

RICHARD ANDREWS, APPELLEE, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.

401 N.W.2d 467

Filed February 20, 1987. No. 85-351.

1. **Jurisdiction: Municipal Corporations: Contracts: Claims.** Concerning a contract claim against a city of the primary class, Neb. Rev. Stat. § 15-840 (Reissue 1983) requires that such claim be filed with the city clerk and disallowed before a claimant, pursuant to Neb. Rev. Stat. § 15-841 (Reissue 1983), may timely appeal from the city's disallowance and thereby become entitled to invoke a district court's power to adjudicate the merit of the disallowed claim.
2. **Jurisdiction: Claims: Appeal and Error.** If a district court lacks power to adjudicate whether a claim is meritorious, the Supreme Court also lacks power to determine the merit of the claim which was the subject matter of the proceedings in the district court.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded with direction.

James D. Faimon, Assistant Lincoln City Attorney, for appellant.

Robert R. Gibson, for appellee.

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

SHANAHAN, J.

From the judgment of the district court for Lancaster County, awarding Richard Andrews $11,856 and an attorney fee for Andrews' counsel, the City of Lincoln, a city of the primary class, see Neb. Rev. Stat. § 15-101 (Reissue 1983), has appealed. We reverse and remand with direction.

Andrews, a city employee, filed his petition in the district court, seeking judgment against the city for "loss of employment, loss of wages, and humiliation and embarrassment" because the city had failed to perform its contract of employment with Andrews. In his petition, Andrews did not allege that he had filed a claim with the city regarding any amount sought to be recovered by his suit. Among its defenses, the city asserted that Andrews had failed to comply with the filing requirement of Neb. Rev. Stat. § 15-840

(Reissue 1983) concerning liquidated or unliquidated contract claims against a city of the primary class.

After a trial on the merits, and notwithstanding absence of proof that Andrews had filed his claim with the city, the district court concluded that Andrews' "petition alleges a cause of action for an unliquidated claim in contract," and then awarded Andrews judgment for $11,856 and an attorney fee.

Concerning claims against a city of the primary class, § 15-840 provides:

> All liquidated and unliquidated claims and accounts payable against the city shall (1) Be presented in writing; (2) state the name of the claimant and the amount of the claim; and (3) fully and accurately identify the items or services for which payment is claimed or the time, place, nature, and circumstances giving rise to the claim. The finance director shall be responsible for the preauditing and approval of all claims and accounts payable, and no warrant in payment of any claim or account payable shall be drawn or paid without such approval. In order to maintain an action for a claim, other than a tort claim as defined in section 23-2402, it shall be necessary, as a condition precedent, that the claimant file such claim within one year of the accrual thereof, in the office of the city clerk, or other official whose duty it is to maintain the official records of a primary class city.

Neb. Rev. Stat. § 15-841 (Reissue 1983) states in part:

> Any taxpayer of the city, after the allowance in whole or in part of any liquidated or unliquidated claim, or the claimant, after the disallowance in whole or in part of any such claim, may appeal therefrom to the district court of the county in which the city is situated in accordance with the procedures set forth in sections 15-1201 to 15-1205.

Neb. Rev. Stat. §§ 15-1201 to 15-1205 (Reissue 1983) express the statutory provisions for an appeal to and hearing in the district court.

The city assigns 20 errors regarding the district court's judgment, including the district court's failure to find that Andrews had not complied with § 15-840—the requirement that all liquidated and unliquidated claims be filed in the office

of the city clerk. Andrews responds that his

> claim is an unliquidated claim in contract seeking consequential damages which require judicial action to determine, and his action is founded in the common law of contracts. The legislature has provided District Court jurisdiction for actions in contract, and a five-year statute of limitations, with no exceptions or reservations for actions against governmental subdivisions.

Brief for Appellee at 16.

There is no evidence, and Andrews does not contend, that any claim was filed by Andrews before he commenced the action in the district court.

A contract claim against a city of the metropolitan class was involved in *Bolan v. Boyle*, 222 Neb. 826, 387 N.W.2d 690 (1986), when the plaintiffs, without first filing their claim with the appropriate municipal officer, brought an original action in the district court to collect wages for overtime. In *Bolan* we stated:

> Generally, before a court may acquire jurisdiction over a claim against a city of the metropolitan class, the procedures set out in § 14-804 [filing a verified claim with the city comptroller] must be followed. . . . No evidence showing that plaintiffs followed the procedures set out in § 14-804 was presented to the district court. Jurisdiction did not attach in the district court, and, therefore, this court has no jurisdiction to consider the matter further. [Citations omitted.]

Id. at 827-28, 387 N.W.2d at 691-92.

In *Bolan* we concluded that "[t]he district court was correct in finding that it lacked jurisdiction, and its dismissal of [plaintiffs'] petition is affirmed." *Id.* at 828, 387 N.W.2d at 692.

Shortly after *Bolan v. Boyle, supra*, this court decided *Coffelt v. City of Omaha*, 223 Neb. 108, 388 N.W.2d 467 (1986), which involved a city employee's original action in the district court, a suit based on the city's breach of contract regarding failure to pay disability benefits accruing as the result of the plaintiff's employment with the city. Coffelt had failed to file his contract claim with the city of Omaha, a city of the metropolitan class. Referring to Neb. Rev. Stat. § 14-804

(Reissue 1983) and *Bolan, supra*, we reasoned:

> Litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent. [Citation omitted.]
>
> . . . .
>
> In Coffelt's case the district court never acquired jurisdiction regarding the second cause of action [breach of contract] contained in Coffelt's petition. Consequently, this court, as well, has no jurisdiction to review any issue raised in the second cause of action contained in Coffelt's petition.

223 Neb. at 110-11, 388 N.W.2d at 469-70.

Section 15-840 prescribes a procedural prerequisite concerning contract claims, liquidated or unliquidated, against a city of the primary class: "In order to maintain an action for a claim . . . it shall be necessary, as a condition precedent, that the claimant file such claim . . . in the office of the city clerk . . . ."

Andrews did not file his claim with the city and, therefore, has not complied with § 15-840. Concerning a contract claim against a city of the primary class, § 15-840 requires that such claim be filed with the city clerk and disallowed before a claimant, pursuant to § 15-841, may timely appeal from the city's disallowance and thereby become entitled to invoke a district court's power to adjudicate the merit of the disallowed claim. Without the prerequisite filing of Andrews' contract claim in compliance with § 15-840, and appeal after disallowance, the district court lacked power to decide whether Andrews' contract claim was meritorious. If the district court lacked such power, the Supreme Court also lacks the power to determine the merits of Andrews' claim.

However, because the district court lacked jurisdiction, that is, power to adjudicate the merit of Andrews' claim, the district court improperly entered judgment in favor of Andrews. "Jurisdiction is the inherent power or authority to decide a case . . . ." *State ex rel. Bauersachs v. Williams*, 215 Neb. 757, 759, 340 N.W.2d 431, 433 (1983). Therefore, we reverse the judgment of the district court and remand this matter with the direction to dismiss Andrews' petition.

REVERSED AND REMANDED WITH DIRECTION.

IN RE COMPLAINT OF FECHT.
JOHN A. FECHT, SUPERVISOR, WAREHOUSE DEPARTMENT, NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE, V. ASPEGREN GRAIN & FERTILIZER, INC., ET AL., APPELLEES, FRENCHMAN VALLEY FARMERS COOPERATIVE, INC., ASSIGNEE, APPELLANT.

401 N.W.2d 470

Filed February 20, 1987. No. 85-441.

1. **Public Service Commission: Jurisdiction.** The Nebraska Public Service Commission lacks jurisdiction to construe the provisions of Neb. Rev. Stat. § 88-503(3)(b) (Supp. 1983) or of any bond provided pursuant thereto.
2. **Supreme Court: Jurisdiction: Appeal and Error.** The Nebraska Supreme Court acquires no jurisdiction of a cause appealed from a tribunal which lacked subject matter jurisdiction.

Appeal from the Nebraska Public Service Commission. Appeal dismissed.

James D. Owens of Owens and Owens, for appellant.

John C. Hahn and Gene T. Oglesby, for appellees Aspegren Grain & Fertilizer et al.

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

CAPORALE, J.

As briefed and argued, this appeal by Frenchman Valley Farmers Cooperative, Inc., seeks to reverse the Nebraska Public Service Commission's decision not to file a district court suit on the bond that Continental Western Insurance Company provided on behalf of Aspegren Grain & Fertilizer, Inc., a public grain warehouse then licensed by the commission. We dismiss the appeal for lack of jurisdiction.

From August through December of 1983, four corn producers undertook to sell corn to the cooperative. Because it lacked storage space, a representative of the cooperative contacted an Aspegren Grain representative and determined the price Aspegren Grain would pay for the corn. Upon the producers' agreement to sell at that price, the cooperative took delivery of the corn and gave the producers a warehouse

receipt. The cooperative in turn delivered the corn to Aspegren Grain, which issued warehouse receipts in the names of the producers. The producers apparently surrendered the warehouse receipts issued by the cooperative and Aspegren Grain to the cooperative. In some manner which is not entirely clear from the record, it appears the receipts issued by Aspegren Grain were ultimately returned to it. One of the producers received payment for the corn from the cooperative in the fall of 1983, when he delivered the corn. The other three did not wish to receive payment until after January 1984, and, therefore, the cooperative did not pay them until then. Aspegren Grain, however, failed to reimburse the cooperative for the payments it had made to the producers.

The cooperative thereupon took purported assignments of the producers' separate claims against Aspegren Grain and filed a complaint with the commission, seeking to recover its losses from the bonding company. Thereafter, the commission, through John A. Fecht, the supervisor of its warehouse department, filed a complaint calling upon Aspegren Grain to show cause why its license should not be revoked. In deciding that the cooperative should "go hence with its claim to a proper tribunal," the commission concluded that the bond did not cover "deferred-payment" contracts such as those involved in the instant case. (It appears the commission overlooked that one of the producers had received payment upon delivery of the corn to the cooperative.)

While the bond is not in the record, it was provided under a statute which at the relevant time provided:

> Before any license is issued to any applicant, such applicant shall file with the commission a bond or certificate of deposit in such sum as the commission may require, and on a form and in a manner prescribed by the commission, which shall not be less than one thousand dollars for any warehouseman receiving grain from producers in wagon or truckload lots and not less than twenty-five thousand dollars for warehousemen receiving grain in carload lots. The bond and the certificate of deposit shall run to the State of Nebraska and be for the benefit of all persons storing grain in such warehouse and

> persons holding checks for the purchase of grain which were issued by the warehouseman not more than five business days prior to the cutoff date of operations for the warehouse, which shall be the date the commission officially closes the warehouse. The bond shall be conditioned upon such warehouseman carrying combustion, fire, lightning, and tornado insurance sufficient to cover loss upon all stored grain in such warehouse, and the delivery of all stored grain or payment of the value thereof upon the surrender of the warehouse receipt, and upon the faithful performance by the warehouseman of all the provisions of law relating to the storage of grain by such warehouseman, and regulations of the commission relative thereto. The commission may require such increases in the amount of such bond or certificate of deposit, from time to time, as it may deem necessary for the protection of the storage receipt holders. The surety on the bond must be a surety company holding a certificate of the Department of Insurance of the State of Nebraska authorizing it to execute the same.
>
> The bond or an attachment to the certificate of deposit shall particularly describe the location of the warehouse intended to be covered by the bond or certificate. The liability of the surety on the bond shall not accumulate for each successive license period the bond covers. The total liability of the surety shall be limited to the amount stated on the bond or as charged by an appropriate rider or endorsement to the bond.

Neb. Rev. Stat. § 88-503(3)(b) (Supp. 1983).

Thus, the first question to be resolved is whether the commission possessed jurisdiction to construe the foregoing statute and determine whether a bond provided pursuant to its provisions covered the cooperative's claims.

As observed in *In re Complaint of Fecht*, 216 Neb. 535, 344 N.W.2d 636 (1984), the commission's jurisdiction over public grain warehouses is limited to such as is granted by statute.

At the time the commission made its decision in this case, Neb. Rev. Stat. § 88-515(3) (Reissue 1981) provided:

> In the event that the commission determines that a

shortage of grain exists at a duly licensed warehouse, necessitating the closing of the warehouse, the commission may:

(a) Take title to all grain stored in the public grain warehouse at that time in trust, for distribution on a pro rata basis to all valid owners, depositors, or storers of grain who shall be holders of evidence of ownership of grain. Such distribution can be made in grain or in proceeds from the sale of grain; or

(b) Commence a suit in district court for the benefit of owners, depositors, or storers of grain.

The commission may deposit the proceeds from the sale of grain under subdivision (a) of this subsection in an interest-bearing trust account for the benefit of the valid owners, depositors, or storers of grain.

There is nothing in that statute, or elsewhere in Neb. Rev. Stat. ch. 88, art. 5 (Reissue 1981 & Cum. Supp. 1984), which purports to empower the commission to construe the provisions of § 88-503(3)(b) or any bond provided thereunder. (Whether such a statute, if enacted, would constitute an unconstitutional conferrence upon the commission of judicial power in violation of Neb. Const. art. II, § 1, is a question not involved in this action.)

Thus, the commission lacked subject matter jurisdiction over the merits of the cooperative's claims against the bonding company. That being so, this court also lacks jurisdiction to determine the merits of the claims, for this court acquires no jurisdiction of a cause appealed from a tribunal which lacked subject matter jurisdiction. *Andrews v. City of Lincoln, ante* p. 748, 401 N.W.2d 467 (1987); *Wood v. Tesch,* 222 Neb. 654, 386 N.W.2d 436 (1986); *Glup v. City of Omaha,* 222 Neb. 355, 383 N.W.2d 773 (1986); *Moell v. Mennonite Deaconess Home & Hosp.,* 221 Neb. 168, 375 N.W.2d 618 (1985).

Accordingly, we dismiss the cooperative's appeal for lack of jurisdiction.

APPEAL DISMISSED.

BETTY MARIE KUNZIE, APPELLANT, V. EDWARD GEORGE KUNZIE, APPELLEE.

401 N.W.2d 164

Filed February 20, 1987. No. 85-598.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

Gregory N. Lohr, for appellant.

Kurt A. Hohenstein of Rager & Hohenstein, for appellee.

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

PER CURIAM.

The petitioner wife, Betty Marie Kunzie, appeals from the decree dissolving her marriage to the respondent husband, Edward George Kunzie, on the bases that the trial court erred in its property division, in failing to award alimony, and in the amount of the attorney fee awarded to her. Having reviewed the record de novo as we are required to do, we conclude that the trial judge did not abuse his discretion in any regard.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

MARY J. NELSON, APPELLANT, V. EUNICE L. CHENEY AND NEWEL S. CHENEY, WIFE AND HUSBAND, APPELLEES.

401 N.W.2d 472

Filed February 20, 1987. No. 85-600.

1. **Fraud.** In order to maintain an action for false representation, the plaintiff must allege and prove by a preponderance of the evidence 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 reasonably did so rely; and (6) that he or she suffered damage as a result.

2. **Fraud: Vendor and Vendee.** In order to maintain an action for damages for fraudulent concealment or false representation by suppression or concealment in the vendor/purchaser setting, the plaintiff must allege and prove by a preponderance of the evidence the following elements: (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled as to the true condition of the property; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Reversed and remanded for further proceedings.

Clyde F. Starrett, for appellant.

Fred T. Hanson and John F. Hanson of Hanson & Hanson, for appellees.

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

HASTINGS, J.

On January 12, 1982, the plaintiff, purchaser of certain residential real estate in McCook, Nebraska, filed a petition against the defendants, vendors of that real estate, which prayed for damages due to alleged termite infestation at the time of the sale. Thereafter, the plaintiff, in response to various orders of the district court for Red Willow County, filed four amended petitions. On August 28, 1984, the defendants moved to strike the fourth amended petition from the files on the ground that it contained substantially the same allegations as the third amended petition, as to which a demurrer had been sustained and leave granted to amend. On October 9, 1984, the motion came on for hearing. The court found the facts in the fourth amended petition did not amount to misrepresentation or fraudulent concealment and there appeared to be no reasonable possibility that a cause of action against the defendants could be stated. The court sustained the defendants' motion to dismiss and dismissed the plaintiff's case. The plaintiff has appealed.

The plaintiff assigns as error the dismissal of her fourth

amended petition for failure to allege facts sufficient to constitute a cause of action. We reverse and remand.

The facts as alleged in the fourth amended petition are as follows: A purchase agreement for the sale of the defendants' home was entered into between the parties on February 22, 1978. Prior to signing the agreement, plaintiff made a demand on the defendants' agent that a termite inspection be done. In response to that demand, the agent said it had been done and he had the papers at his office. The plaintiff accompanied the agent to his office, where he showed the plaintiff a Lystads, Inc., 5-year termite-proofing guarantee bond. The plaintiff did not get a chance to examine it closely on that day. The agent said he would deliver the bond to the lender prior to the closing of the sale. The sale was closed on March 7, 1978, at which time the bond was delivered to the plaintiff.

The petition further stated that in July of 1979 the plaintiff discovered termite damage in the home. The plaintiff contacted Lystads and from that company learned there had been termite damage to the premises in October 1977 and that the defendants knew of this damage at the time of the sale to the plaintiff. The petition then alleged that the defendants

> intended to deceive Plaintiff as to the termite damage or in the alternative the representations as to the termites was [sic] so recklessly made when the [defendants] should have known the extent of the damage to the said property from termites and should have advised Plaintiff about termites, that [defendants] by their actions asserted that the property was free of such termite damage and that the Plaintiff, relying on such statements and actions of the [defendants] or their agents, suffered loss because of the termite damage.

Finally, the plaintiff alleged it was not possible to discover the termites by a usual and ordinary inspection of the property prior to purchase.

The plaintiff in this case was apparently proceeding under the theories of false representation and fraudulent concealment. In order to maintain an action for false representation, the plaintiff must allege and prove by a preponderance of the evidence 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 reasonably did so rely; and (6) that he or she suffered damage as a result. *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

The plaintiff contends the defendants represented the property was free of termite damage at the time of the sale. We disagree. The only allegation of any representations made by the defendants with regard to termites was that relating to the giving of the termite-proofing bond to the plaintiff in response to her request that a termite inspection be done. That bond, which is incorporated in the pleading, states Lystads agreed to treat the premises for the extermination and control of subterranean termites for a period of 5 years from October 6, 1977, for $495, payable upon completion of the treatment. Lystads also agreed to return to the premises if termite reinfestation occurred within the 5-year guarantee period.

The use of the words "extermination" and "reinfestation" clearly indicates that termites were found on the premises in October of 1977 and that Lystads agreed to exterminate them at that time. When this bond was given to the plaintiff, it constituted a representation by the defendants of just those things—that there were termites in October of 1977 and that Lystads agreed to exterminate them. There was no representation made as to the status of the termites at the time of the sale or as to the status of any damage done by the termites which had been found in 1977. Thus, the plaintiff failed to state facts sufficient to constitute a cause of action for false representation as to the condition of the premises at the time of the sale.

The plaintiff did not, however, base her petition solely upon the theory of false representation, but also pled facts based on the theory of fraudulent concealment. What constitutes a cause of action for fraudulent concealment in the vendor/purchaser setting in Nebraska is somewhat unclear. The elements of fraudulent concealment have been stated in basically two

different ways, one which includes "intent to deceive" as an element and one which does not. The first rule, initially found in *Linton v. Sheldon*, 98 Neb. 834, 839, 154 N.W. 724, 725-26 (1915), is as follows:

> "If, with the *intent to deceive*, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."

(Emphasis supplied.)

The other often-quoted articulation of the elements of fraudulent concealment was first found in *O'Shea v. Morris*, 112 Neb. 102, 104, 198 N.W. 866, 867 (1924):

> [A]s between vendor and purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or to mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud; but where such facts are known by the vendor and he knows them to be not within reach of the reasonably diligent attention, observation and judgment of the purchaser, and they are such as would readily mislead the purchaser as to the true condition of the property, the vendor is bound to disclose such facts . . . .

In the most recent case of fraudulent concealment in the vendor/purchaser setting, *Christopher v. Evans*, 219 Neb. 51, 361 N.W.2d 193 (1985), both of these rules were quoted without discussion that one required an "intent to deceive" while the other did not. In passing, however, we did state that one of the necessary elements, "intent to deceive," was not present in the facts of that case and therefore the action for fraudulent concealment failed. *Id.* at 56, 361 N.W.2d at 197.

Christopher v. Evans, supra, was, however, decided before *Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986), the case in which we determined that "intent to deceive" was not a necessary element of a cause of action for false representation. We did this in order to permit one to recover because of a statement made by a defendant who, although not making a misstatement of a material fact with a "bad motive," nevertheless made it so recklessly, without having proper knowledge from a reasonable inquiry, that "[t]he fact that the defendant deceives, itself, establishes scienter even though the defendant may have been unaware of the deception." *Id.* at 271, 388 N.W.2d at 846.

Although an action for fraudulent concealment is sometimes referred to as an action for false representation by suppression or concealment, we do not believe it wise or good public policy to adopt a theory of negligent concealment in the vendor/purchaser setting. This is notwithstanding the language found in *Dargue v. Chaput*, 166 Neb. 69, 85, 88 N.W.2d 148, 158 (1958): "Considering the entire situation, which we have set out in rather full detail, we can come to no other conclusion than that Chaput either knew, or should have known, of the faulty construction by Keenan in building the house purchased by the Dargues." However, this statement must be read in light of the facts and findings in that case, some of which are set out in some detail:

> The question then arises, was Chaput aware of these conditions? The evidence discloses that Chaput had, through experience, considerable knowledge concerning drainage and that he was fully acquainted with the land on which the house at 8525 Bellevue Boulevard was built since it was part of a tract he had owned since 1948 and which was only some 200 feet from where he lived at 8521 Bellevue Boulevard. After the construction of the house began at 8525 Bellevue Boulevard he was there at least as often as once a week. When there he would look over the construction and confer with Keenan about different features thereof and make suggestions in regard thereto. When the crack occurred in the west wall as the result of the caterpillar incident Keenan contacted Chaput about it

> and, as a result, the steel beam supports were put on the inside of the west wall. At that time Chaput must have observed the fill that was being made west of the house, the effect it was having and would have on the west wall, and what was being done to take care of the water that would naturally fall and flow thereon. We do not think Chaput is now in a position to say he did not know what was being done by Keenan in this respect.

Id. at 83-84, 88 N.W.2d at 157.

In other words, the *holding* of the court was not that from the circumstances then existing a reasonable person should have known that the facts existed but, rather, that from those circumstances it could only be said that the defendant did know the facts.

We believe this statement supports a holding that to establish a case of fraud by reason of concealment or suppression, the vendor must have known the existence of the material fact, which was deliberately withheld from the purchaser with the intent that the purchaser be misled. Additionally, of course, the existence of such fact must not have been equally within the knowledge or reach of the purchaser. *Linton v. Sheldon*, 98 Neb. 834, 154 N.W. 724 (1915).

We therefore hold that in order to maintain an action for damages for fraudulent concealment in the vendor/purchaser setting, the plaintiff must allege and prove by a preponderance of the evidence the following elements: (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled as to the true condition of the property; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result.

Under this rule the plaintiff pled sufficient facts to state a cause of action for fraudulent concealment of termite damage. The facts that plaintiff did not insist on a new termite inspection and received notice of the prior termite infestation raise a jury question as to whether it was reasonable for her to have been

misled as to the true condition of the property. Accordingly, the judgment of the district court sustaining the defendants' motion to dismiss is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ANNE MARIE FERGUSON, APPELLEE AND CROSS-APPELLANT, V. BRUCE LEROY FERGUSON, APPELLANT AND CROSS-APPELLEE.
401 N.W.2d 165

Filed February 20, 1987. No. 85-613.

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

Avis R. Andrews, for appellant.

William G. Line and David G. Hartmann of Kerrigan, Line & Martin, for appellee.

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

PER CURIAM.

Bruce LeRoy Ferguson has appealed from the order modifying his obligation to pay child support. He assigns as error the trial court's temporary reduction of the child support, the amount of the reduction, the reassignment of the costs of transporting the children for visitation, that the appellee was not required to investigate the possibility of obtaining medical insurance for the children through her present husband's employer, and that the decree was not modified retroactively to the date the application for modification was filed. The appellee has cross-appealed, contending the trial court erred in finding a material change of circumstances had occurred and in reducing the child support payments.

After reviewing the record de novo, we conclude the trial court did not abuse its discretion in modifying the child support obligation. The judgment is, therefore, affirmed.

AFFIRMED.

IN RE INTEREST OF A.W., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. T.M.W., APPELLANT.

401 N.W.2d 477

Filed February 20, 1987. No. 86-550.

1. **Appeal and Error.** Where an appellant to the Nebraska Supreme Court fails to assign any specific error, the decision appealed from will be affirmed unless the court elects to note plain error.
2. **Service of Process: Notice.** A reasonably diligent search for the purpose of justifying service by publication does not require the use of all possible or conceivable means of discovery, but is such an inquiry as a reasonably prudent person would make in view of the circumstances and must extend to those places where information is likely to be obtained and to those persons who, in the ordinary course of events, would be likely to receive news of or from the absent person.
3. _____: _____. Whether all reasonable means to qualify a search as a "reasonably diligent" one have been exhausted must be determined by the circumstances of each particular case.
4. **Due Process.** The opportunity to be heard is a fundamental aspect of due process.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Reversed and remanded with direction.

Steven Lefler of Lefler Law Firm, for appellant.

Donald L. Knowles, Douglas County Attorney, and Francis T. Belsky, for appellee.

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

CAPORALE, J.

T.M.W. appeals from the juvenile court's termination of her rights as the mother of her 6-year-old son and from the overruling of her motion to vacate the judgment of termination. We reverse with direction.

We note at the outset that appellant's brief fails to assign any specific error. In such a circumstance the decision appealed from will be affirmed unless this court elects to note plain error. *Reynolds v. Myers, ante* p. 509, 398 N.W.2d 722 (1987); *In re Interest of P.W., ante* p. 197, 397 N.W.2d 36 (1986); Neb. Rev. Stat. § 25-1919 (Reissue 1985); Neb. Ct. R. of Prac.

9D(1)d (rev. 1986). In this instance appellant's arguments suggest the presence of an issue having constitutional magnitude, which we analyze in order that we may determine whether plain error exists.

The State filed a petition on October 18, 1985, alleging that appellant had abandoned her son by leaving him with her mother on December 4, 1984, and praying that, among other things, the juvenile court terminate the appellant's parental rights. The juvenile court placed the child in temporary foster care on the day the petition was filed. Thereafter, on October 31, 1985, an employee of the juvenile court filed a motion for service by publication, which was combined with an affidavit reciting that he had contacted the "proper persons or officials at the following places":

> Omaha City Directory; Northwestern Bell Telephone Company; Omaha Public Power District; Metropolitan Utilities District; Drivers License Bureau; Department of Corrections-710 So. 17th St.; Jail, City of Omaha; United States Post Office; Archbishop Bergan Mercy Hospital; Bishop Clarkson Memorial Hospital; Douglas County Hospital; Immanuel Medical Center; Lutheran Medical Center; Midlands Community Hospital; Nebr. Methodist Hospital; Nebraska Psychiatric Institute; St. Joseph Hospital; University of Nebraska Medical Center; Veterans Hospital; Virginia Gross, 444-6674; Lori McKeon, Probation Officer, 444-7749.

The affiant further stated that notwithstanding his "diligent search," he was unable to learn appellant's whereabouts and had been unable to serve summons upon her.

On November 4, 1985, the juvenile court entered an order to give the appellant notice by publication. Thereafter, notice was published under the authority of Neb. Rev. Stat. § 43-268(2) (Reissue 1984), which states:

> Except as provided in section 43-264, notice, when required, shall be given in the manner provided for service of a summons in a civil action. Any published notice shall simply state that a proceeding concerning the juvenile is pending in the court and that an order making an adjudication and disposition will be entered therein. If the

> names of one or both parents or the guardian are unknown, he, she, or they may be notified as the parent or parents, or guardian of (naming or describing the juvenile) found (stating address or place where the juvenile was found). Such notice shall be published once each week for three weeks, the last publication of which shall be at least five days before the time of hearing.

The publication was completed on November 26, 1985, and a dispositional hearing was held on February 3, 1986, at which time appellant's rights in and to her son were terminated. On February 11, 1986, appellant filed her motion to vacate that judgment, alleging that she had not been given proper notice.

As noted earlier, § 43-268(2) requires that in a juvenile proceeding, with an exception not relevant to this action, notice shall be given as in "a civil action." Neb. Rev. Stat. § 25-517.02 (Reissue 1985) provides that service may be made by publication upon a "motion and showing by affidavit that service cannot be made with reasonable diligence by any other method provided by statute." Thus, appellant correctly maintains that service by publication under § 43-268(2) can only be made after a reasonably diligent search fails to locate the party to be served.

A reasonably diligent search for the purpose of justifying service by publication does not require the use of all possible or conceivable means of discovery, but is such an inquiry as a reasonably prudent person would make in view of the circumstances and must extend to those places where information is likely to be obtained and to those persons who, in the ordinary course of events, would be likely to receive news of or from the absent person. See, *Donea v. Massachusetts Mutual Life Insurance Co.*, 220 Minn. 204, 19 N.W.2d 377 (1945); *Ryken v. State*, 305 N.W.2d 393 (S.D. 1981); *Turnquist v. Kjelbak*, 77 N.W.2d 854 (N.D. 1956). Whether all reasonable means have been exhausted must be determined by the circumstances of each particular case. *Ryken v. State, supra.*

During the detention hearing on November 4, 1985, appellant's mother testified that she had last heard from appellant some 5 months earlier, at which time appellant was living in Oxnard, California. At that time appellant, according

to her mother, said she was going "underground for a while" because she had written a bad check and the police were looking for her. While appellant's mother indicated she would give the juvenile court any new address she should receive for appellant, she was not asked what address she last had, if any.

Virginia Gross, one of the persons referred to in the aforedescribed affidavit, is a caseworker employed by "Child Protective Services, State of Nebraska." She testified during the adjudication hearing held December 9, 1985, that she had talked with appellant's mother sometime during September and again on October 8, 1985. Appellant's mother said her daughter reported she was "on the lam" in California. Gross testified that the mother "was unable to give an address" for appellant.

Lori McKeon, the other individual mentioned in the affidavit, was a probation officer employed by the juvenile court. She prepared a report dated January 23, 1986, which was received in evidence during the dispositional hearing held February 3, 1986, stating that appellant's whereabouts were unknown. The report does not show the basis of that statement.

In testifying on May 9, 1986, in support of her motion to vacate the termination judgment, appellant testified that she lived at 223 East Lark, Oxnard, California, and that her mother always knew that address. The evidence in support of the motion also reveals that an Omaha employee of the Nebraska Department of Social Services, "on a referral from the ADC office," undertook, beginning February 14, 1985, to determine appellant's ability to pay child support. As a result of that effort, it was determined by July 8, 1985, that appellant lived at 223 East Lark, Oxnard, California, and that to the best of this person's knowledge she remained at that address from then on.

It is significant that the person charged with the responsibility to locate appellant, remarkably enough an employee of the very court required to pass upon the quality of the search, did not himself contact appellant's mother. A reasonably prudent person could reasonably expect appellant's mother to receive news of or from appellant. It is also significant that neither he nor anyone else asked appellant's mother what address she last had for appellant. The mother's testimony does not contradict appellant's claim that the mother

at all times had the Oxnard, California, address because the mother at no time said she never had a California address for appellant. The fact appellant said she was seeking to avoid the police does not mean she was not where she had told her mother she was. In any event, a search which makes no effort to determine where the subject of the search was last known to be and which makes no effort to check whether the subject is still there cannot be considered reasonably diligent. As a consequence of the failure to make proper inquiry, the search for appellant focused in Omaha, where she was known not to be, rather than in Oxnard, California, where she had been known to be.

The opportunity to be heard is a fundamental aspect of due process. *Greene v. Lindsey*, 456 U.S. 444, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982); *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); *Grannis v. Ordean*, 234 U.S. 385, 34 S. Ct. 779, 58 L. Ed. 1363 (1914); *Masid v. First State Bank*, 213 Neb. 431, 329 N.W.2d 560 (1983); *Tuch v. Tuch*, 210 Neb. 601, 316 N.W.2d 304 (1982). In this instance appellant was impermissibly denied such opportunity by a less than reasonably diligent search to determine her whereabouts.

Accordingly, the record demonstrates plain error which requires that the order overruling appellant's motion to vacate the termination judgment be reversed. The matter is remanded to the juvenile court with the direction that it vacate, set aside, and hold its termination order for naught and for such further proceedings as are appropriate under the law.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. KEN SLUYTER, APPELLANT.
401 N.W.2d 480

Filed February 20, 1987. No. 86-562.

1. **Motions for Continuance: Appeal and Error.** A motion for continuance is addressed to the court's sound discretion, and absent a showing of an abuse of that discretion the trial court's ruling will not be disturbed on appeal.

2. **Motions for Continuance.** There is no abuse of discretion by the court in denying a continuance unless it clearly appears that the defendant suffered prejudice as a result of that denial.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

David W. Jorgensen of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellee.

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

GRANT, J.

This is an appeal of defendant's conviction by a jury of one count of theft by deception, in violation of Neb. Rev. Stat. § 28-512 (Reissue 1985), and two counts of failure to appear, in violation of Neb. Rev. Stat. § 29-908 (Reissue 1985). The only error assigned by defendant is that the district court erred in overruling defendant's motion for a continuance so that he could obtain a different attorney. We affirm.

The record discloses that in an information filed on February 25, 1986, the defendant was charged with one count of theft by deception occurring on October 7, 1983, and two counts of failure to appear before the county court, on September 30, 1984, and on February 22, 1985. The charge of theft by deception involved the defendant's alleged obtaining of property belonging to Kenneth Hervert. The defendant received a pickup truck from Hervert in exchange for a pickup truck which the defendant represented he owned but, in fact, did not. The failure to appear charges arose out of the defendant's failure to appear in county court on two occasions in proceedings concerning the theft charge. Shortly after defendant's arrest in January or February 1986, the public defender of Buffalo County was appointed to represent defendant. The public defender represented defendant at a preliminary hearing and, later, at the arraignment in these proceedings on April 3, 1986. At that time the defendant was present with the public defender and entered pleas of not guilty

on all charges. Trial was set for the jury session commencing May 12, 1986.

On the day trial was to begin, the defendant appeared in court with a different attorney, David Jorgensen. Jorgensen stated he appeared for defendant only to seek a continuance of the trial, with the understanding that if the continuance was denied, Jorgensen would not represent defendant further and the public defender would represent defendant in the jury trial. A hearing on the oral request for a continuance was held immediately. At the hearing the defendant testified that he had been living in Oklahoma "for some part of this time between February and now [May 12, 1986]." He further testified that he returned to Nebraska twice during that time in connection with his case, once for the preliminary hearing and once for his current appearance for trial. Defendant testified that he did try to call the public defender on several occasions regarding his case.

Gary Hogg, the public defender assigned to represent the defendant, testified that on April 15, 1986, he sent the defendant a letter requesting information concerning witnesses to be used in the defense. This letter stated: "Per our previous conversations, it is necessary that you get me the information concerning witnesses and what they are going to say, in writing, as soon as possible, or I will not be able to adequately prepare for your defense, the jury trial session in May." The letter also contained a handwritten addition, as follows: "P.S.—I need the information on or before 21 April 1986, to begin adequate preparation for trial & that's pressing the time frame." Hogg testified that he received no written response to this letter, although he had further telephone conversations with defendant.

The district court overruled defendant's motion for a continuance. A jury was selected on May 12 and the case tried to that jury on May 13 and 14. The defendant was subsequently convicted on all three charges and was sentenced to the Nebraska Penal and Correctional Complex for a term of 6 months on the charge of theft and 1 year on each of the charges of failure to appear. The 1-year sentences were to be served concurrently, but consecutively to the 6-month sentence on the

theft charge.

The defendant alleges in his appeal that the district court erred in failing to sustain his motion for a continuance so that new counsel could be obtained. In Nebraska it has been held that a motion for continuance is addressed to the court's sound discretion, and absent a showing of an abuse of that discretion the trial court's ruling will not be disturbed on appeal. *State v. Polyascko, ante* p. 272, 397 N.W.2d 633 (1986); *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986). We further held in *Lynch* at 859-60, 394 N.W.2d at 660, "There is no abuse of discretion by the court in denying a continuance unless it clearly appears that the defendant suffered prejudice as a result of that denial."

The bill of exceptions filed herein contains only the proceedings of the hearing on defendant's motion for a continuance and the hearing on the motion for a new trial after defendant's conviction. There is no record before us as to the trial itself, and thus no showing whether the defendant was prejudiced or not as a result of the denial of the motion for continuance. The record shows that Hogg's alleged inadequacies in subpoenaing defense witnesses were largely due to defendant's failures to provide names, addresses, and possible testimony of such witnesses. It would appear that defendant's attitude as displayed in his two previous failures to appear in court carried over to his failure to cooperate with his attorney in his trial on those same two charges.

There was no abuse of discretion on the part of the trial court in refusing to grant the defendant's motion for continuance. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEE A. DAVIS, APPELLANT.

401 N.W.2d 165

Filed February 20, 1987. No. 86-706.

Mental Competency: Pleas: Appeal and Error. The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding.

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

Anthony S. Troia, for appellant.

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

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

GRANT, J.

Defendant, Lee A. Davis, appeals his conviction and sentence to 6 to 10 years in the Nebraska Penal and Correctional Complex on one count of burglary in violation of Neb. Rev. Stat. § 28-507 (Reissue 1985), following his plea of guilty to that charge. The defendant alleges the district court erred in accepting defendant's plea "when it was obvious that Mr. Davis was on medication, that he had been diagnosed as having both medical and emotional problems and was not competent enough to understand his actions." For the reasons stated below, the judgment of the district court is affirmed.

On March 17, 1986, an information was filed in the district court for Douglas County charging the defendant with one count of burglary, in that on October 2, 1985, the defendant willfully, maliciously, and forcibly entered a building occupied by Ak-Sar-Ben Metals with intent to steal property. The defendant initially entered a plea of not guilty. On June 13, 1986, the defendant, with counsel, withdrew his not guilty plea and entered a plea of guilty.

Before accepting the plea of guilty the court inquired, in detail, as to whether the defendant was fully aware of the nature of the proceedings and if defendant understood the questions the court directed to him. Defendant answered in the affirmative. The court ascertained that defendant was on medication for a "nerve problem" and specifically inquired if defendant had any difficulty with going forward with the hearing because of the medication. The defendant answered in the negative and stated he wished to proceed. The court then meticulously advised defendant of all of his constitutional rights, examined the defendant and determined that he

understood those rights, and told defendant of the possible range of penalties for burglary. After explaining the nature of the crime to defendant, the court then established the factual basis for the plea by statements from the defendant himself and from the county attorney. The arraignment complied in every respect with the standards recently set out in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), decided October 10, 1986.

The factual allegation set out in defendant's assignment of error, stating that it was obvious that defendant was not competent at the time of his plea, is not supported in any way in the record before us. At the conclusion of the arraignment the district court found

> beyond a reasonable doubt that the defendant understands the nature of the charge against him to which he has pled guilty, that he understands the possible sentence thereunder, that the plea is made freely, knowingly, intelligently and voluntarily, and that the plea is accurate and that there is a basis in fact for the defendant's offered plea of guilty.

The evidence in the record fully supports the trial court's finding.

The conclusion that must be drawn from such finding is that defendant was competent at the time of his plea. The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding. As we held in *State v. Teater*, 217 Neb. 723, 725, 351 N.W.2d 60, 62 (1984), "The district court's finding that Teater was mentally competent to stand trial will not be disturbed unless there is insufficient evidence to support that finding. The test of mental capacity to plead or stand trial is the same."

To reinforce the correctness of the court's finding, we note that at the sentencing hearing the trial court offered defendant an opportunity to withdraw his plea of guilty. At that time defendant again informed the court that he was guilty of the crime charged, that he did not want to withdraw his plea, and that his plea of guilty was in his best interests.

There is no merit in defendant's assignment of error. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES DURAN, APPELLANT.
401 N.W.2d 482

Filed February 20, 1987. No. 86-800.

1. **Criminal Law: Sentences.** A law which changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed is an ex post facto law and insofar as it affects the punishment of the party to his disadvantage is void.
2. **Criminal Law: Restitution: Sentences.** Restitution ordered by a court pursuant to Neb. Rev. Stat. § 29-2280 (Cum. Supp. 1986) is a criminal penalty imposed as punishment for the crime, not an administrative or civil penalty as is restitution under Neb. Rev. Stat. § 28-427 (Reissue 1985).
3. **Criminal Law: Sentences.** A court is without authority to impose a criminal penalty for a crime unless the law authorizing such penalty was effective on or before the date of the commission of the crime.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed as modified.

Charles F. Fitzke, for appellant.

Robert M. Spire, Attorney General, and Mark D. Starr, for appellee.

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

PER CURIAM.

Pursuant to a plea of guilty the defendant was convicted of assault in the first degree, a violation of Neb. Rev. Stat. § 28-308 (Reissue 1985) and a Class III felony. He was sentenced to a term of imprisonment of from 3 to 7 years and was further ordered to pay restitution for the medical expenses of the victim. On appeal to this court his assignments of error relate solely to that portion of the sentence concerned with restitution.

The crime occurred on July 7, 1986. The plea was entered on July 25, and sentencing was had on September 4, 1986. As of the date of the crime the only penalty authorized by statute for conviction of a Class III felony was a term of imprisonment for not less than 1 year nor more than 20 years, or a fine not to exceed $25,000, or both imprisonment and fine. Neb. Rev. Stat. § 28-105 (Reissue 1985).

However, Neb. Rev. Stat. § 29-2280 (Cum. Supp. 1986) became effective on July *17*, 1986, and provides as follows:

> A sentencing court may order the defendant to make restitution for the actual physical injury or property damage or loss sustained by the victim as a direct result of the offense for which the defendant has been convicted. Whenever the court believes that restitution may be a proper sentence or the victim of any offense or the prosecuting attorney requests, the court shall order that the presentence investigation report include documentation regarding the nature and amount of the actual damages sustained by the victim.

Neb. Rev. Stat. §§ 29-2281 et seq. (Cum. Supp. 1986) then proceed to detail the procedure whereby the amount of restitution shall be determined.

Although in his assignments of error defendant attacks the procedure employed by the district court, it is only necessary for us to address the question of the authority of that court in this instance to order restitution.

We have stated that a law which changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed is an ex post facto law and insofar as it affects the punishment of the party to his disadvantage is void. *Marion v. State*, 16 Neb. 349, 20 N.W.289 (1884). Cf., *State v. McCoy*, 87 Neb. 385, 127 N.W. 137 (1910); *State v. Peiffer*, 212 Neb. 864, 326 N.W.2d 844 (1982). Thus, if restitution under the authority of § 29-2280 is an additional criminal penalty imposed as punishment for the crime, its application in this case violates the prohibitions against ex post facto laws.

In *State v. Holmes*, 221 Neb. 629, 379 N.W.2d 765 (1986), we held that restitution ordered (return of drug buy money) pursuant to Neb. Rev. Stat. § 28-427 (Reissue 1985) was in the nature of a civil or administrative penalty, not a criminal penalty imposed as punishment for the crime. Because restitution imposed under § 28-427 was not part of the sentence, we determined it could be ordered subsequent to the time of sentencing.

In making this decision we contrasted restitution pursuant to § 28-427 with restitution under the federal Victim and Witness

Protection Act of 1982, 18 U.S.C. §§ 1501 et seq. (1982), which has been held to be a criminal penalty. *United States v. Keith*, 754 F.2d 1388 (9th Cir. 1985); *United States v. Florence*, 741 F.2d 1066 (8th Cir. 1984). We stated that restitution under the federal act is required to be imposed at the time of and as a part of the sentencing procedure (18 U.S.C. § 3579), whereas § 28-427 was silent as to when an order for restitution could be made. *Holmes, supra*. Based on this distinction we determined that restitution pursuant to § 28-427 was *not* a criminal penalty.

At this time, however, we are faced with restitution ordered pursuant to § 29-2280. Restitution under § 29-2280 is made by a sentencing court "[w]henever [it] believes that restitution may be a proper sentence . . . ." The use of the words "sentencing court" and "sentence" compels the conclusion that restitution pursuant to § 29-2280 is a criminal penalty imposed as punishment for the crime, not an administrative or civil penalty as is restitution under § 28-427.

Other courts considering the same issue have disallowed restitution orders where the offense was committed prior to the effective date of the law authorizing restitution to be imposed as a part of the sentence. *Cox v. State*, 394 So. 2d 103 (Ala. Crim. App. 1981), held that such an order was unconstitutional as being ex post facto. In *State v. Crawford*, 289 Or. 151, 610 P.2d 1232 (1980), the court held that a defendant is subject to no greater penalty than that which was in effect on the date of the commission of the crime, and a sentence to include restitution under those circumstances was erroneous because it was in excess of the court's authority.

Before § 29-2280 was enacted, sentencing courts did not have the authority to order the defendant to pay restitution, except as part of an order of probation. See Neb. Rev. Stat. § 29-2262(2)(j) (Reissue 1985). Thus, the enactment of § 29-2280 made "more burdensome" the punishment of the crime the defendant committed. Whether the sentence is called ex post facto or in excess of the trial court's authority, § 29-2280 cannot be given retroactive effect to crimes committed prior to its effective date.

The judgment of the district court is modified to delete the requirement as to restitution and, as so modified, is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. DOUGLAS F. DUCHEK, RESPONDENT.
401 N.W.2d 484

Filed February 20, 1987. No. 87-116.

Original action. Judgment of suspension.

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

PER CURIAM.

This is an original disciplinary proceeding brought by the State on behalf of the Nebraska State Bar Association against the respondent, Douglas F. Duchek. On September 17, 1986, respondent was charged in the U.S. District Court for the District of Nebraska with three counts of willful failure to file an income tax return in violation of I.R.C. § 7203 (1982). On September 18, 1986, the Nebraska State Bar Association filed a disciplinary complaint against the respondent in connection with the charges filed against him in the U.S. District Court. Duchek pled guilty to one count of willful failure to file an income tax return, and the remaining two counts pending against him were dropped. Respondent was sentenced to a term of 2 years' probation, a condition of which was that he must perform 350 hours of community service. Duchek admits that he has violated § 7203 and that these actions constitute a violation of his oath of office as an attorney and Canon I, DR 1-102(A)(1) and (6), of the Code of Professional Responsibility.

In view of these facts and all the circumstances disclosed by the available record, we find that the respondent's willful failure to file his income tax return as required by federal law constitutes misconduct involving moral turpitude and a violation of the standards of ethics applicable to attorneys.

DR 1-102 provides in pertinent part: "(A) A lawyer shall not: (1) Violate a Disciplinary Rule. . . . (3) Engage in illegal conduct involving moral turpitude. . . . (6) Engage in any other conduct that adversely reflects on his fitness to practice law." Prior disciplinary actions before this court involving an attorney's willful failure to file income tax returns have resulted in a suspension of the respondent for a period of 1 year. *State ex rel.*

Nebraska State Bar Assn. v. Fitzgerald, 165 Neb. 212, 85 N.W.2d 323 (1957); *State ex rel. Nebraska State Bar Assn. v. Tibbels*, 167 Neb. 247, 92 N.W.2d 546 (1958); *State ex rel. NSBA v. Hahn*, 218 Neb. 508, 356 N.W.2d 885 (1984). In these cases a knowing failure to file a tax return constituted misconduct involving moral turpitude in violation of the standards of ethical procedure governing attorneys. These cases are dispositive of the case at bar and instruct us that the appropriate action to be taken is to suspend the respondent for a period of 1 year.

It is the judgment of the court that the respondent be suspended from the practice of law for 1 year from March 1, 1987. The respondent may apply for reinstatement at the end of the period of suspension by making an affirmative showing that he has fully complied with the order of suspension and in the future will not engage in practices offensive to the legal profession.

JUDGMENT OF SUSPENSION.

SHIRLENE WATSON, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, APPELLANT, V. AVCO FINANCIAL SERVICES INTERNATIONAL, INC., A NEBRASKA CORPORATION, AND GAMBLES SKOGMO, INC., A MINNESOTA CORPORATION, APPELLEES.

401 N.W.2d 485

Filed February 27, 1987. No. 44184.

Statutes. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning.

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

Robert G. Hays, for appellant.

James L. Haszard of Zimmerman & Haszard, for appellee Avco Financial Services, Inc.

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

KRIVOSHA, C.J.

Shirlene Watson, on behalf of herself and all others similarly situated, has appealed from a judgment entered by the district court for Lancaster County, Nebraska, granting summary judgment in favor of the appellees, Avco Financial Services International, Inc., a Nebraska corporation, and Gambles Skogmo, Inc., a Minnesota corporation. In granting the summary judgment, the district court did not address the issue of whether appellant could properly bring a class action. In view of the fact that we affirm the decision of the district court granting summary judgment in favor of all of the defendants and against the appellant, we also need not address that issue.

The pleadings and affidavits of the parties reveal that Watson entered into an installment sales contract with Gambles on April 19, 1978, for the purchase of certain household furniture. The total unpaid balance was in the amount of $1,300, to be repaid in 35 equal installments of $46.25 each and a final payment of the balance. The contract was thereafter sold to Avco on June 16, 1978. Watson did not make the entire payment due for the month of June 1979, and, therefore, the payment was deferred for an additional month, thereby making it a contract for 37 months. In consideration of Avco's deferring the contract for an additional month, Avco charged and received from Watson the sum of $10.09. Watson thereafter defaulted in payment, owing Avco $1,118.74.

Watson then filed this action to have the contract declared void and to recover back the charges and penalties as provided by Neb. Rev. Stat. § 45-344 (Reissue 1978), that being the law then in effect.

Watson has listed nine assignments of error. In fact there are but three issues. They are as follows: (1) Did the appellees contract for and collect an excessive time-price differential in violation of Neb. Rev. Stat. § 45-338 (Reissue 1978)? (2) Did the appellees contract for unauthorized attorney fees? and (3) Did the appellees collect an unauthorized deferment fee?

Section 45-338, in effect at the time this contract was entered

into, provided in part as follows:

> Notwithstanding the provisions of any other law, the time price differential for any goods or services sold under an installment contract shall not exceed eighteen per cent per annum on that part of the unpaid principal balance not in excess of one thousand dollars, and not exceeding twelve per cent per annum on that part of the unpaid principal balance in excess of one thousand dollars; *Provided*, a minimum time price differential of ten dollars may be charged on any installment contract. When the installment contract is payable in substantially equal and consecutive monthly installments, the time price differential shall be computed on the basic time price of each contract, as determined under the provisions of section 45-336, from the date of the contract until the due date of the final installment, notwithstanding that the time price balance is required to be paid in installments.

Appellant maintains that, under the provisions of the Nebraska Installment Sales Act, Neb. Rev. Stat. §§ 45-334 et seq. (Reissue 1978), the time-price differential must be computed by, in effect, dividing the contract in question into two contracts, one for $1,000 and one for $300. Watson further maintains that as each payment of $46.25 is made, a portion of the payment must be applied to the $1,000 principal unpaid times 18 percent and a portion of the payment must be applied to the $300 principal unpaid times 12 percent. Watson argues that by failing to calculate the time-price differential in this manner, appellees contracted for and collected charges that were $18.79 in excess of those authorized by the statute, entitling her to void the contract and recover up to the first $1,000 of the time-price differential and $4,000 of the principal of the contract. See § 45-344.

We are simply unable to grasp the argument made by Watson, nor are we able to adopt the position advanced by her. It appears to us that the statutes in question are clear on the face of the act and require no interpretation as suggested by Watson. In the instant case there was but one contract for $1,300 and not two, as suggested by Watson. As in all contracts of debt, the principal is reduced by applying payments to the total amount

of the unpaid principal due and owing, and not by dividing the contract up and in some manner applying part of the principal payment to the first sums due and owing and part of the principal payment to some part in the middle. When Watson ceased making payments in this case she owed $1,118.74, and did not owe some part of $300 in excess of $1,000 and some part of the $1,000 not in excess of $1,000.

The language of § 45-338 is clear and unambiguous. It provides that the charge "shall not exceed 18 per cent per annum on that part of the unpaid principal balance not in excess of one thousand dollars, and not exceeding twelve per cent per annum on that part of the unpaid principal balance in excess of one thousand dollars." It seems clear to us that there is but one unpaid principal balance, and that to divide the contract into two contracts with two unpaid principal balances, as suggested by Watson, is neither proper nor warranted.

As we said in *S.I.D. No. 95 v. City of Omaha*, 221 Neb. 272, 276, 376 N.W.2d 767, 770 (1985): "Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning." And, furthermore, this court is not free to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute. See *State v. Schulz*, 221 Neb. 473, 378 N.W.2d 165 (1985).

Under the provisions of § 45-338 the seller is entitled to charge the buyer 18 percent interest on that portion of the unpaid balance which is less than $1,000 and 12 percent interest on that portion of the unpaid balance in excess of $1,000. Of necessity, the 18-percent rate of interest will be charged against the $1,000 balance for a greater portion of the time that the contract remains unpaid than will be charged at 12 percent against the unpaid portion in excess of $1,000, simply because the portion not in excess of $1,000 will remain unpaid for a longer time than will the portion in excess of $1,000, which is paid first. In our view that is precisely what the act in question contemplates. Watson's argument to the effect that an excessive charge was made is simply without merit and must be overruled.

Watson's second contention is that, contrary to Nebraska law, Gambles contracted for an attorney fee, thereby entitling

Watson to void the contract and recover back the principal and interest as provided by statute. Watson concedes that no attorney fee was in fact collected. Nevertheless, Watson correctly points out that collection is not required if, indeed, a contract to pay was made. The difficulty with Watson's argument is that the language of the contract is specifically to the contrary. The contract provides: "4. DEFAULT AND BREACH OF AGREEMENT: *To the extent permitted by law*: . . . (b) Buyer will be liable for payment of all costs, including reasonable attorneys' fees, incurred in repossessing and reselling the merchandise and collecting any sums due hereunder." (Emphasis supplied.)

Watson claims that by reason of this language Gambles and Avco have indirectly contracted for unauthorized attorney fees. Whether one may contract for attorney fees under the provisions of the Nebraska Installment Sales Act is an open question and need not here be decided because the contract clearly provides that the agreement to pay is applicable only "[t]o the extent permitted by law." To the extent, therefore, that Nebraska does not permit the collection of such a fee, the contract provided that no fee may be collected, and therefore neither Gambles nor Avco contracted to collect such a fee. Watson's attempt to argue that the language of the contract is ambiguous and permits Gambles or Avco to do indirectly what it may not do directly is simply an attempt to read into the contract words which are not there. That this court may not do. The second claim is therefore without merit.

That leaves us, then, with the last issue. As the facts upon which the parties agree indicate, Watson became delinquent in her payments at some time before the contract was to be paid in full. In consideration of the payment of $10.09 by Watson, an amount less than Avco could have charged initially for the month, Avco extended the life of the contract an additional month. The fee paid was based on the fact that the amount due Avco under the contract was not to be paid for an additional month. Watson now maintains that because the statutes make no provision for a deferment fee, the receipt by Avco of this $10.09 voids the contract. Again, we believe that the argument is without merit.

It is clear to us that the $10.09 was interest for an additional month, no matter what it was called. In all of our previous cases involving installment sales we have held that we shall look to the substance of the transaction, regardless of the form. See *General Motors Acceptance Corp. v. Mackrill*, 175 Neb. 631, 122 N.W.2d 742 (1963). As an example, in *Humber v. Gibreal Auto Sales, Inc.*, 207 Neb. 286, 298 N.W.2d 363 (1980), we held that we would consider a transaction as a sale and subject to the act even though called a lease. We see no reason why we should depart from that rule where, as here, by looking through the form to the substance, it is obvious that the payment is interest permitted under the act in question.

Avco extended the contract for an additional month so that the unpaid principal balance could be paid over 37 months rather than 36 months. There was nothing illegal about that. Under the provisions of the act then in effect, an installment sales contract could have initially been entered into for up to 145 months (see § 45-335(5)). It would therefore appear to us to be an absurdity to suggest that Gambles could have initially entered into a contract with Watson for 37 months and collected interest during that entire time, but that, having once entered into the contract for 36 months, appellees' only remedy upon default by Watson was to declare the contract totally due and owing and subject either to an action for replevin or an action on the balance due. No provision of the sales act is directed to our attention, nor are we able on our own to find any provision of the act, which precludes Avco from renegotiating the contract once a default occurs, so long as the contract does not extend for more than 145 months. We believe that no violation was committed by reason of Avco's extending the time of payment for an additional month and collecting an additional month's interest.

For those reasons, therefore, the judgment of the district court granting summary judgment in favor of the appellees and against the appellant is in all respects affirmed.

AFFIRMED.

CHADD CHRISTOPHER CHIRNSIDE, A MINOR, BY AND THROUGH ELAINE A. WAGGONER, HIS GUARDIAN AND CONSERVATOR, APPELLANT, V. LINCOLN TELEPHONE & TELEGRAPH COMPANY, A CORPORATION, APPELLEE.

401 N.W.2d 489

Filed February 27, 1987. No. 85-342.

1. **Evidence: Juries: Appeal and Error.** In viewing a matter on appeal we are guided by the rule that where evidence is in conflict or reasonable minds may differ, it is normally within the province of the jury to decide issues of fact.
2. **Damages: Proof.** Impairment of earning capacity is an item of general damage, and proof may be had under general allegations of injury and damage. Proof of an actual loss of wages or earnings is not essential to a recovery for loss of earning capacity.
3. **Trial: Rules of Evidence.** When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given in evidence.
4. _____: _____. Generally, the rule of completeness is concerned with the danger of admitting a statement out of context. When this danger is not present it is not an abuse of discretion to fail to require the production of the remainder or, if it cannot be produced, to fail to exclude all the evidence.

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

Warren C. Schrempp and Peter J. Hoagland of Schrempp, Hoagland, Gray & Gerdes, and Elaine A. Waggoner, for appellant.

William D. Sutter, Kile W. Johnson, and Robert W. Shively of Barlow, Johnson, DeMars & Flodman, for appellee.

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

WHITE, J.

This is an appeal from a judgment rendered by the district court on a jury verdict in favor of plaintiff-appellant in the amount of $175,000 for personal injuries suffered by appellant's ward in a pedestrian-motorist accident in Lincoln, Nebraska. Plaintiff appeals.

Several errors are assigned, and they may be stated in the

following general categories: (1) The verdict was inadequate; (2) The court failed to allow the jury to consider loss of earning capacity as an element of damages; (3) Certain evidence was erroneously admitted; (4) The court erred in failing to instruct the jury that defendant was negligent as a matter of law; and (5) The court erred in failing to give certain instructions requested by appellant and in giving certain other instructions relating to negligence and contributory negligence.

A detailed statement of the facts will be helpful in an understanding of the issues.

Appellant's ward, Chadd Christopher Chirnside, was 8 years of age on June 26, 1981, the date of the accident. Chadd was living with foster parents in Lincoln and attending summer school at Elliott School at 25th and N Streets in Lincoln. The foster parents' (Henry and Linda Rappl) residence is located at 2137 E Street. Chadd attended summer school during the morning hours to correct a perceived educational deficiency. At the time of the trial Chadd lived with his adoptive parents in Omaha.

To reach Elliott School from the Rappl residence it is necessary to cross Capitol Parkway, a divided arterial street. On the day of the accident the route taken included the intersection of Randolph Street near Lincoln High School. At the Randolph intersection the total distance from curb to curb of Capitol Parkway, including all passing and turning lanes and a median, is 85 feet. The time for crossing the intersection free of traffic on Capitol Parkway is 22 seconds. The average adult walks at a rate of 3 to 4 feet per second; thus, if an adult stepped off the curb exactly at the moment the walk sign for pedestrians crossing Capitol Parkway came on and traveled at 4 feet per second, he would have a safety margin of 3 feet and three-fourths of a second before motorists started crossing Randolph. The city of Lincoln is not a party to the action, and the safety of the intersection is not an issue.

Capitol Parkway runs in a generally southeast to northwest direction at Randolph Street. The defendant's driver and a passenger were returning from a duty assignment at approximately noon to the Lincoln Telephone & Telegraph Company building. The defendant's LT&T utility truck was

traveling in the extreme right-hand lane in a northwesterly direction, on a green light. As the truck proceeded through the intersection, the passenger, Wyman Dughman, informed the driver and his fellow LT&T employee, Gerald Harris, "There's a pedestrian in the crosswalk." Harris testified that he did not see Chadd before the accident, applied his brakes, and struck Chadd. Harris did not know the direction in which Chadd was traveling. Chadd was struck by the left front fender of the truck and was thrown and rolled a distance of 49 feet from the northernmost crosswalk stripe. Chadd has no recollection of the accident. Chadd was taken to Lincoln General Hospital; he was bleeding from his left ear, nose, and scalp. He remained in a coma or semicoma for 8 days. His left femur was fractured, and the fracture could not be reduced until 12 days after the accident. Testimony was presented to prove that as a result of the accident Chadd incurred brain damage, resulting in impaired cognitive and speaking abilities and coordination, loss of hearing on the left side, and facial sagging on the left side. The injuries manifested themselves in Chadd's garbled speech, inability to build things with boards, inability to remember his address and telephone number, twitching eyes, and lack of athletic coordination. Further surgery will be required to correct a limp caused by the necessary shortening of Chadd's left leg by three-fourths of an inch in the treatment of the fractured femur.

Extended testimony was received concerning Chadd's preaccident mental acuity and his postaccident defects in his abilities to read, spell, dress himself, communicate, and perform simple physical and recreational tasks.

The trial court submitted the allegations of negligence and contributory negligence to the jury. After the verdict, plaintiff brings this appeal.

With respect to the first assignment of error, that the verdict was inadequate, the jury found appellee negligent, and we affirm that finding. We are not convinced that the appellee was negligent as a matter of law, but in view of our decision to remand on the issue of damages no useful purpose can be had by an extended discussion of the first assignment.

We next consider whether the trial court erred in submitting

the alleged contributory negligence of Chadd, and the related question of whether the jury should have been directed on liability. In viewing the matter we are guided by the rule that where evidence is in conflict or reasonable minds may differ, it is normally within the province of the jury to decide issues of fact. *Koerner v. Perrella*, 213 Neb. 189, 328 N.W.2d 473 (1982); *Poppe v. Petersen*, 221 Neb. 877, 381 N.W.2d 534 (1986).

There is evidence from which a jury could conclude that Chadd was returning from Elliott School to the home of his foster parents (i.e., from the northeast to the southwest) and stepped into the first lane of northwestern-bound traffic of Capitol Parkway when a "Don't Walk" sign at Randolph prohibited such entry. There is further evidence that the LT&T truck entered and nearly crossed the intersection on a green light before observing Chadd. No complaint is made of instructions relating to the reduced duty of a child with respect to care for his own safety. It is sufficient to state that a jury issue was presented. The assignments are not meritorious.

We next consider the trial court's refusal to instruct the jury in assessing damages it could consider in Chadd's loss of capacity to earn in the future. At the instruction conference, the court stated:

> I'm not going to instruct on loss or impairment of future earning capacity. We have evidence from Dr. Wolcott that he would be hard pressed to get beyond high school. What that means, we don't know, in terms of dollars and cents. He'll, one would imagine, certainly, you know, have a permanent disability, and there was evidence of permanency. What that will translate into in terms of his earning capacity, I don't think there's enough evidence. Now, the evidence in that regard, I believe our Supreme Court is saying, can be rather minimal. And I've read Baylor v. Tyrrell.
>
> . . . .
>
> Now, we don't have to have evidence of any prior earnings or anything like that, but — it could be minimal, but it just seems to me that we have not reached the minimal threshold of impairment of earning capacity.

In *Baylor v. Tyrrell*, 177 Neb. 812, 822, 131 N.W.2d 393, 400

(1964), this court noted that in objecting to the instruction, appellant's counsel asserted that "no loss of past earnings was proved, and none was pleaded." We said, "On the other hand, impairment of earning capacity is an item of general damage and proof may be had under general allegations of injury and damage. [Citations omitted.] Proof of an actual loss of wages or earnings is not essential to a recovery for loss of earning capacity." *Id.* at 823, 131 N.W.2d at 400-01.

We quoted with approval language from a Minnesota case, *Wilson v. Sorge*, 256 Minn. 125, 132, 97 N.W.2d 477, 483 (1959), speaking of impairment of earning capacity as an item of general damage:

> It permits recovery for a loss or diminution of the power to earn in the future and is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry. It is within the province of the jury to weigh all these elements and, guided by experience and common sense, to arrive at the proper monetary value of plaintiff's loss without recourse to his past earnings.

See, also, *Washington v. American Community Stores Corp.*, 196 Neb. 624, 244 N.W.2d 286 (1976).

Proof was introduced as to Chadd's age, life expectancy, health, habits, talents, skills, and permanency of certain injuries. As argued persuasively by appellant's counsel, Chadd, who had admittedly limited educational skills before the accident, cannot conceivably have been other than adversely affected by a brain injury and related memory, speech, and loss of hearing problems and, of course, a shortened leg resulting in a pronounced mobility problem. Appellee LT&T does not point out the "minimal threshold of impairment of earning capacity" that Chadd did not meet so as to entitle it to the instruction given. On the contrary, the proof was adequate and the failure to instruct on future earning capacity was error requiring a reversal for retrial on the issue of damages.

As this court cannot state whether the jury found that Chadd was not contributorily negligent or whether it found him to be contributorily negligent but to a degree less than slight when compared to the defendant's gross negligence, the issue of

contributory negligence will necessarily again be submitted to the jury in its determination of damages. The jury must, however, be informed that the negligence of Chadd, if any, is less than slight, and the jury must be instructed to return a money verdict for appellant.

The appellant assigns as error the admission into evidence of a statement of the LT&T driver, Harris, given to Officer Starr at the accident scene. On the plaintiff's case in chief the following questions were asked by counsel:

> Q. Now, Officer, as I understand it, once again, you observed only one skid mark. Now, you had a conversation with the driver of the truck at the scene of the accident, is that correct?
>
> A. Yes, I did.
>
> Q. Now, did he make any observations to you at that time, Officer, about the way the truck handled when he attempted to bring it to a stop?
>
> A. Yes, he did.
>
> Q. And what did he say to you?
>
> A. He felt that the brakes were not working properly.

The statement was admitted as an admission of a party pursuant to Neb. Rev. Stat. § 27-801(4)(b) (Reissue 1985).

Officer Starr was later recalled to the stand by the defendant, and defense counsel was allowed to inquire into the rest of the same conversation. His testimony with regard to the conversation included the following:

> Q. . . . Officer Starr, you testified that you had a conversation with the driver of the pickup truck, Gerald Harris.
>
> A. Yes.
>
> Q. Was that a conversation about fifteen minutes after the accident occurred?
>
> A. It would have been real close to that. I can't say exactly it was fifteen minutes.
>
> Q. Did you have more than one conversation with Gerald Harris?
>
> A. No.
>
> Q. What did Mr. Harris say to you in that conversation?
>
> . . . .

> THE WITNESS: I had questioned Mr. Harris in regard to the accident. Essentially, Mr. Harris stated to me that he was northwestbound on Capitol Parkway in the curb lane, approximately 30 to 35 miles per hour. He stated that when he was four to five car lengths from the intersection of Randolph that he observed that he had a green light for northwestbound traffic. He stated that he continued into the intersection, at which time he heard the passenger in his vehicle yell something to the effect of look out, at which time he stated that directly in front of him he observed a juvenile and that the juvenile was running to the south. He states that he applied his brakes and then the collision occurred.

Appellant contends that Harris' statement about the boy's running to the south was inadmissible as substantive evidence because prior inconsistent statements were admissible only for purposes of impeachment. Appellee contends that the statement was admissible as substantive evidence. Neb. Rev. Stat. § 27-106(1) (Reissue 1985) states:

> When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given. When a detached act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence.

The driver, Harris, testified previously that he was driving through the intersection at 30 to 35 miles per hour and did not see Chadd until his attention was called to Chadd's presence by his passenger. We observe that had the statement been offered for impeachment purposes only it was clearly admissible; the requirement of previous examination of the declarant and declarant's denial no longer pertains in Nebraska law. See *State v. Johnson*, 220 Neb. 392, 370 N.W.2d 136 (1985).

In discussing the completeness doctrine in *State v. Manchester*, 213 Neb. 670, 679, 331 N.W.2d 776, 781 (1983), we stated:

> The defendant's argument is based on the "rule of completeness," which states that an opponent may require one introducing part of a writing or statement to introduce any part which ought in fairness to be considered with the part introduced. See, Fed. R. Civ. P. 32(a)(4), which applies the rule to use of depositions; McCormick on Evidence § 56 (2d ed. 1972); Fed. R. Evid. 106, Notes of Advisory Committee.

Generally, the rule of completeness is concerned with the danger of admitting a statement out of context. McCormick on Evidence § 56 (E. Cleary 3d ed. 1984). When this danger is not present it is not an abuse of discretion to fail to require the production of the remainder or, if it cannot be produced, to fail to exclude all the evidence.

The rule was stated by the Minnesota Supreme Court, " 'When part of a conversation is brought out on cross-examination the remainder of the conversation may be brought out . . . if it tends to qualify or explain the part disclosed . . . ; *otherwise not*.' " *Jeddeloh v. Hockenhull*, 219 Minn. 541, 551, 18 N.W.2d 582, 588 (1945). The conversation introduced by plaintiff dealt only with whether the truck had faulty brakes. The proffered conversation did not qualify or explain the previous testimony. Whether Chadd was running or not running cannot conceivably be said to embrace the subject of faulty brakes. The admission of the testimony was error.

Since this case must be retried in part, we must comment on another evidentiary ruling. The trial court excluded the deposition evidence of the driver, Harris, on the ground that as a condition of the admission of that evidence the offering party must demonstrate the witness' unavailability. The deposition was clearly admissible under § 27-801(4)(b) as a statement offered against a party in either his individual or a representative capacity. Neb. Ct. R. of Disc. 32 (rev. 1986) refers to witness testimony and not to admissions of a party.

The remaining assignments of error relate to matters which will be unlikely to occur on retrial in view of our evidentiary rulings and do not need to be discussed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

HENRY STEED AND STEED BROTHERS CONSTRUCTION CO., INC., APPELLANTS AND CROSS-APPELLEES, V. OAK RIDGE EQUESTRIAN CENTER, INC., ET AL., APPELLEES AND CROSS-APPELLANTS.

401 N.W.2d 495

Filed February 27, 1987. No. 85-372.

1. **Jury Instructions: Appeal and Error.** In determining the sufficiency of jury instructions on appeal, this court will read the instructions as a whole, and when they fairly submit the case and the jury could not have been misled, there is no prejudicial error.
2. _____: _____. It is not error for the trial court to refuse a requested instruction when it has, on its own motion, fairly and fully instructed the jury on a party's theory of the case.
3. _____: _____. Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence. Ordinarily, it is error to submit to the jury an issue which is not pleaded in the case.
4. **Conspiracy: Words and Phrases.** The principal element of a conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another.
5. **Conspiracy: Proof.** It is necessary to prove the existence of at least an implied agreement, to establish a conspiracy.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Brian R. Watkins and Richard Scott of Watkins & Scott, for appellants.

Martin A. Cannon of Matthews & Cannon, P.C., for appellees.

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

BOSLAUGH, J.

This was an action for damages for an alleged conspiracy by the defendants to ruin the business and profits of the plaintiffs, Henry Steed and Steed Brothers Construction Co., Inc.

Steed Brothers is in the business of wrecking buildings. To operate its business successfully it needs a landfill site where it can dispose of the debris and rubble from the buildings it demolishes.

The defendant Robert C. Luikart formerly operated the Oak Ridge Equestrian Center on a 53-acre irregular tract of land just

north of Omaha, Nebraska. The land was wooded and had several large ravines upon the property. On November 1, 1979, Steed Brothers entered into a lease agreement with Oak Ridge for the use of a portion of the Oak Ridge property as a landfill. In June of 1980 Oak Ridge's attorney advised Steed Brothers to cease dumping on the property. In May of 1981 Oak Ridge commenced an action against Steed Brothers to enjoin the latter from continuing to dump on the property. A temporary restraining order was issued by the court, and dumping on the property was halted.

The matter came on for hearing July 7, 1981. During the hearing the parties entered into a settlement agreement which was dictated into the record, the alleged breach of which is the basis of this case. The settlement agreement required Steed Brothers to remove an earthen "ramp" from the Oak Ridge property within 7 days, at which time the restraining order would be dissolved. Steed Brothers also agreed to seed an arena located on the property. The parties agreed to meet on the property later that day "to stake the property for the removal of the ramp and for the boundaries of the land to be purchased."

With regard to the land to be purchased by Steed Brothers, the agreement provided in part that

> the land will be described in a survey which will be completed within a reasonable time hereafter to allow for the execution of the purchase agreement on or before August 1, 1981.
>
> Under the terms of the purchase agreement the defendant will give the plaintiff a $10,000 down payment and will assume the land contract or mortgage of the plaintiff now existing against this property, and the defendant will make his payment through an escrow agent to ensure that the land contract or mortgage is paid in full.
>
> . . . .
>
> The parties further agree that the survey to be completed of the property will be completed within a reasonable time and the cost of such survey will be split equally between the parties.

A few days after the settlement agreement was reached, the parties met at the property and set the boundaries for the

survey. At that time the parties agreed to wait until fall to have the property surveyed, to avoid additional expenses caused by the dense foliage in the area. Steed Brothers removed the ramp on the property, and the restraining order was dissolved. Steed Brothers then resumed dumping at the site but did not seed the arena.

On August 5, 1981, Steed Brothers' then attorney, William Dittrick, wrote to Oak Ridge's then attorney, Stephen Gerdes, and requested the latter to obtain the proper consents for assumption of the mortgage on the property, requested that the required downpayment of $10,000 be placed in escrow to pay a substantial payment due on the property in 1982, and commented that he assumed the purchase agreement and other necessary agreements were being prepared. Subsequently, in telephone conversations between Oak Ridge's attorneys and Steed Brothers' attorney, which occurred between August 5 and 28, the latter was informed the necessary consents had been obtained and the parties would proceed. On August 28, 1981, Dittrick again wrote to one of Oak Ridge's attorneys, to confirm an earlier telephone conversation. The letter stated that it was Dittrick's understanding that all necessary consents had been obtained and requested the attorney for Oak Ridge, Martin Cannon, to prepare the purchase agreement as soon as possible so that the matter could be finalized and the litigation closed.

The next correspondence which appears in the record is dated October 22, 1981, wherein Steed Brothers was notified the entire tract of land owned by Oak Ridge, including the portion Steed Brothers had agreed to buy, had been sold to Anderson Excavating and Wrecking Co., a competitor of Steed Brothers. The letter was written by Martin Cannon, Oak Ridge's attorney, on behalf of the Anderson Co. In addition to informing Steed Brothers of the sale, the letter stated that Steed Brothers had violated the terms of its lease and the terms of the settlement agreement and, therefore, should find another landfill site. The Anderson Co. offered to allow Steed Brothers to use the site for a "reasonable period" upon proof of insurance and a conference with Cannon to set the terms of the usage. Steed Brothers continued to use the property until June

1982.

On September 15, 1982, Henry Steed and Steed Brothers filed this action, alleging that Oak Ridge and Robert Luikart had conspired with the Anderson Co. and Virgil Anderson, the president of the Anderson Co., to breach the settlement agreement, thereby preventing Steed Brothers from using the landfill, and damaging its business and profits. The plaintiffs alleged the breach of the settlement agreement was

> a direct result of a deliberate conspiracy between the defendants for the purpose of ruining the business and profits of the plaintiff herein and permanently damaged plaintiff's ability to compete by denying the plaintiff the use of the proposed land site that was the subject of the in court settlement.

The plaintiffs sought to recover damages for lost profits and the loss of future business and profits, and special damages of $150,000.

The defendants' answer, substantially, was a general denial.

At the close of all of the evidence the trial court dismissed the case as to Henry Steed and Virgil Anderson. The jury returned a verdict in favor of Oak Ridge, Robert Luikart, and the Anderson Co. This appeal followed.

The defendants assert a cross-appeal, contending that their motion for a directed verdict at the close of the evidence should have been granted. They contend that the plaintiffs failed to establish a prima facie case of conspiracy against Oak Ridge, Luikart, and the Anderson Co., because all of Steed Brothers' rights under the lease and settlement agreement, as well as all of Oak Ridge's defenses, were unchanged by the sale to the Anderson Co.

The testimony at trial was conflicting. Luikart testified that he had negotiated with the Anderson Co. in 1977 or 1978 for the sale of his property, but the negotiations had lapsed until late September or early October of 1981. Luikart admitted he had a "legal obligation" to sell Henry Steed the land by August 1, but when that date had passed and Steed Brothers had not fulfilled its end of the bargain, he felt the agreement was null and void. Luikart then testified that before the sale he called Steed Brothers and offered it the entire tract for the same terms as he

had offered the Anderson Co. After Steed Brothers refused the offer, Luikart sold the property to the Anderson Co. Luikart testified that he negotiated the sale to the Anderson Co. through its then vice president, Don Reynolds. He also testified that while he had agreed to defer the survey of the property, he had not agreed to defer the balance of the agreement, including the downpayment and mortgage payments Steed Brothers had agreed to pay.

Virgil Anderson testified, by way of deposition, that he believed negotiations for the sale of the property began in approximately January of 1981. He testified that Don Reynolds had negotiated the sale on behalf of the Anderson Co. and that he had been made aware of the settlement agreement and understood Steed Brothers had a right to purchase the property by a certain date. He further testified the parties waited until after that date to close the sale. It was his understanding that if Steed Brothers failed to purchase the property by that date, its lease became void.

Henry Steed testified that Luikart had offered him the right to purchase the entire tract on the same terms offered to the Anderson Co. Steed admitted that he had not made the required $10,000 downpayment nor made any mortgage payments as required by the agreement. He stated that he had not made the payments because he had not signed the purchase agreement, yet conceded that Luikart had made some demand for the payments and had not expressly agreed to postpone those payments until the survey was completed and the purchase agreement signed.

There was also testimony from Luikart and Anderson that Steed Brothers had violated the terms of its landfill permit by improperly dumping material for which it had no permit, after the sale to the Anderson Co. Anderson testified it was the improper use of the site which ultimately led to the termination of the use of the landfill by Steed Brothers.

The plaintiffs have made three assignments of error.

The first two assignments of error concern the trial court's refusal to give two instructions offered by the plaintiffs. Plaintiffs first contend the trial court erred in refusing to instruct the jury that the settlement agreement bound the

parties as a matter of law. Plaintiffs next contend the trial court erred in refusing to give the following instruction: "[A]ny Defendant who intentionally or improperly interfered with or conspired to interfere with the in court settlement agreement was liable to the Plaintiffs-Appellants for damages."

In determining the sufficiency of jury instructions on appeal, this court will read the instructions as a whole, and when they fairly submit the case and the jury could not have been misled, there is no prejudicial error. *Kresha v. Kresha*, 216 Neb. 377, 344 N.W.2d 906 (1984); *Duling v. Berryman*, 193 Neb. 409, 227 N.W.2d 584 (1975). It is not error for the trial court to refuse a requested instruction when it has, on its own motion, "fairly and fully instructed the jury on a party's theory of the case." *Kresha, supra* at 380, 344 N.W.2d at 909. See, also, *Baumann v. Hutchinson*, 124 Neb. 188, 245 N.W. 596 (1932).

Plaintiffs contend the trial court was required to instruct the jury that the settlement agreement was binding as a matter of law in view of Neb. Rev. Stat. § 7-107 (Reissue 1983), the defendants' admissions, the defendants' testimony at trial that no material disagreement existed as to the legal description or survey, and the plaintiffs' counsel's testimony that he was never informed prior to the sale to Anderson that any problem existed with regard to the settlement agreement. The plaintiffs argue the trial court misled the jury by instructing it as to the intent of the parties in making the settlement and as to the interpretation of the settlement agreement.

In instruction No. 2 the trial court instructed the jury that the plaintiffs alleged the parties had entered into an in-court settlement agreement to settle a prior lawsuit between them. The instruction stated that Oak Ridge had agreed to sell the property in dispute to the plaintiffs and that the plaintiffs alleged they had fully performed under the agreement, but that Oak Ridge and Luikart had not. The instruction then set out plaintiffs' allegations concerning the defendants' alleged conspiracy to damage the plaintiffs. In instruction No. 3 the court set out the defendants' answer to the petition, including the defendants' admission "that on or about August 28, 1981, no material disagreements then existed between the parties, and the plaintiff was merely waiting for preparation of such papers

to carry out the intent of the parties in the settlement agreement." The instruction further stated, "The defendants further admit that defendant Oak Ridge refused to prepare the purchase agreement, land contract and consents for the sale of the land to effectuate the settlement of the parties, even though the preparation of such documents was their sole responsibility."

In instruction No. 5 the court instructed the jury the plaintiff Steed Brothers had the burden to prove

> [t]hat in 1981, the defendants, or some of them, entered into a conspiracy with the purpose or object of denying the plaintiff the use of the proposed land site that was the subject of the settlement agreement evidenced by Exhibit 1 and thereby to deny the plaintiff its business profits from the use of said site.

Further, in instruction No. 12 the court stated, "The settlement agreement evidence [sic] by Exhibit 1 was reached during hearings in this court to determine whether that temporary restraining order should continue or be dissolved."

The existence or binding nature of the settlement agreement was not an issue at the trial. Instead, the testimony centered on whether the parties had performed as required by the agreement. The instructions, read as a whole, adequately instructed the jury as to the existence of the settlement agreement and its possible construction. Because the record shows the plaintiffs were not prejudiced by the omission of this instruction, plaintiffs' first assignment of error is overruled.

The plaintiffs next contend the trial court erred in failing to instruct the jury that any defendant who tortiously interfered with the plaintiffs' business was liable for any damages caused thereby. Plaintiffs appear to be arguing that the trial court should have given an instruction for an alternative ground of liability; conspiracy to interfere with the plaintiffs' business or tortious interference by any defendant. This contention is also without merit.

The petition alleged only that the breach of the settlement agreement was the result of a conspiracy by the defendants to deny the plaintiffs the use of the land in question. There was no allegation that any one defendant tortiously interfered with any

business right of the plaintiffs. In addition, the record discloses no evidence of tortious interference by any defendant, acting alone.

" 'Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence. Ordinarily, it is error to submit to the jury an issue which is not pleaded in the case.' " *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 690, 380 N.W.2d 268, 277 (1986) (quoting *Simon v. Christie*, 210 Neb. 600, 316 N.W.2d 303 (1982)). As this issue was not raised in the pleadings nor supported by the evidence, the trial court properly refused to give the requested instruction to the jury.

Plaintiffs' final assignment of error concerns the trial court's ruling that the deposition statements of Virgil Anderson were not admissible against Oak Ridge and Luikart. The trial court limited the applicability of Virgil Anderson's deposition testimony to the deponent and the Anderson Co. Plaintiffs contend this ruling was erroneous because a prima facie case of conspiracy had been proven at that point, and, therefore, the statements of Anderson were admissible against the other defendants as coconspirators. Plaintiffs contend the elements of a conspiracy were established by the testimony of William Dittrick, plaintiffs' first witness.

"The principal element of a conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another." *Hahn & Hupf Constr. v. Highland Heights Nsg. Home*, 222 Neb. 189, 194, 382 N.W.2d 607, 611 (1986). See, also, *Davidson v. Simmons*, 203 Neb. 804, 280 N.W.2d 645 (1979). It is necessary to prove the existence of at least an implied agreement, to establish a conspiracy. *Morton Bldgs. of Neb., Inc. v. Morton Bldgs., Inc.*, 531 F.2d 910 (8th Cir. 1976).

Although the trial court submitted the issue to the jury, the evidence as to a conspiracy was weak and circumstantial at best. The defendants conceded that the sale to the Anderson Co. was subject to whatever rights Steed Brothers had in the property, and contended that Steed Brothers lost its rights under the settlement agreement when it failed to perform.

At the close of all of the evidence, the court dismissed

Anderson from the case. The record supports this dismissal because there was no evidence that Anderson, as an individual, conspired to interfere with Steed Brothers' purchase of the landfill site. Anderson was not personally involved in the negotiations for the sale of the property, and there was no evidence that he had instructed or authorized Don Reynolds, as vice president, to conspire with the other defendants to harm the plaintiffs. Anderson was not proven to be a coconspirator, so his statements were not admissible against Luikart and Oak Ridge under the coconspirator rule.

Since the judgment was in favor of the defendants, it is unnecessary to consider the cross-appeal.

The judgment of the district court is affirmed.

AFFIRMED.

CAPORALE, J., not participating.

LLOYD A. RECTOR, APPELLEE, V. SHIRLEY ANN RECTOR, APPELLANT.

401 N.W.2d 167

Filed February 27, 1987. No. 85-474.

Divorce: Domicile: Intent: Jurisdiction. One who proves he or she met the durational residency requirement for jurisdiction in divorce proceedings set out in Neb. Rev. Stat. § 42-349 (Reissue 1984) shall be permitted the inference that such residency was with the intention to make Nebraska a permanent home, absent a showing that the residency was a sham and not bona fide.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

James R. Nisley, for appellant.

Frank E. Piccolo of Murphy, Pederson, Piccolo & Pederson, for appellee.

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

WHITE, J.

Shirley Ann Rector appeals from an order of the district court for Lincoln County dissolving her marriage to Lloyd A. Rector and dividing the property between the parties. She alleges for the first time that the court lacks subject matter jurisdiction, and further contests the district court's award of a truck and trailer to the husband. We affirm the order in all respects.

The appellee is an over-the-road truckdriver who spends the majority of his time operating a truck between the east and west coasts of the United States. Appellee was reared in North Platte, considers it his home, does his banking there, and testified at trial that he has resided there for several years prior to petitioning for divorce. In the district court's order the trial judge made specific findings that the appellee had resided in North Platte for at least 1 year and that it had jurisdiction over the matter.

Neb. Rev. Stat. § 42-349 (Reissue 1984) provides in part:

> No action for dissolution of marriage may be brought unless at least one of the parties has had actual residence in this state with a bona fide intention of making this state his permanent home for at least one year prior to the filing of the petition, or unless the marriage was solemnized in this state and either party has resided in this state from the time of marriage to filing the petition.

The parties were married in Nevada on July 10, 1976. The appellant argues that the appellee failed to prove that he resided with bona fide intent to make Nebraska his permanent home, and, therefore, the district court erred in finding it had jurisdiction of the matter.

In *Ashley v. Ashley*, 191 Neb. 824, 217 N.W.2d 926 (1974), the constitutionality of the durational residency requirement for jurisdiction over divorce proceedings was challenged. In that opinion this court recognized jurisdiction depends on domicile and that the durational residency requirement may well be the least restrictive method of determining domicile, as it is useful in demonstrating bona fide residence. The requirement was upheld as a reasonable method of serving the state's compelling interest in ascertaining the domicile of those who seek dissolution of their marriages in Nebraska's courts.

Mr. Rector's testimony supports the finding that he met the 1-year residency requirement. Since the requirement's constitutional validity is based upon its usefulness in proving that the petitioner had bona fide domicile, we hold that one who proves he or she met the durational residency requirement shall be permitted the inference that such residency was with the intention to make Nebraska a permanent home, absent a showing that the residency was a sham and not bona fide. This holding is consistent with the purpose of the durational residency requirement and recognizes that an intent to be a permanent resident often has few tangible attributes other than duration.

We must review this case de novo on the record and reach conclusions independent of those made by the trial judge. Neb. Rev. Stat. § 25-1925 (Reissue 1985); *Burhoop v. Burhoop*, 221 Neb. 657, 380 N.W.2d 254 (1986). It is our conclusion that the appellee resided in Nebraska for more than 1 year prior to filing his petition, that his residency here was bona fide and not a sham, and that the district court had jurisdiction to act upon the appellee's petition.

The appellant also contests the division of property made by the district court. Division of property is entrusted to the discretion of the trial court and will not be disturbed on appeal absent a showing of abuse of discretion. *Burhoop v. Burhoop, supra*. Our review of the record discloses no abuse of discretion, and therefore we affirm the order in all respects.

AFFIRMED.

CAROL GALE, APPELLANT, V. ALFRED J. GALE, APPELLEE.
401 N.W.2d 501

Filed February 27, 1987. No. 85-531.

1. **Alimony: Appeal and Error.** On appeal an alimony award will be reviewed de novo on the record and affirmed in the absence of an abuse of discretion by the trial judge.
2. _____: _____. The ultimate test in determining correctness in the amount of the alimony awarded is reasonableness as determined by the facts of each case.
3. _____: _____. The factors determining the reasonableness of an award of alimony include the duration of the marriage, history of the contributions to the marriage by each party, the ability of the supported party to engage in gainful employment, and the income and earning capacity of each party, as well as the general equities of each situation.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed as modified.

Frank E. Piccolo of Murphy, Pederson, Piccolo & Pederson, for appellant.

Richard A. Birch of Nielsen & Birch, for appellee.

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

HASTINGS, J.

Carol Gale, petitioner, appeals to this court from a decree entered in a dissolution of marriage proceeding by the district court for Lincoln County. A dissolution hearing was held on April 17, 1985, and the court entered a decree dissolving the marriage.

Carol has urged several assignments of error, but only one was discussed in her brief and during oral argument. It has long been the rule that errors assigned but not discussed will generally not be considered by this court on appeal. *Johnson v. Johnson,* 209 Neb. 317, 307 N.W.2d 783 (1981). As such, the only assignment of error we will address is whether the amount of alimony awarded to Carol by the court is inadequate and not supported by the evidence or law. Because we find that the award of alimony is inadequate, we modify the judgment of the district court.

Carol and Alfred J. Gale, the respondent, were married for

35 years at the time of the dissolution action. Carol is 51 years old and has worked at a variety of minimum-wage jobs most of her life, but has not worked outside the home for the past 5 years. She has recently been looking for a job, but has been unable to find one. She has some health problems, but does admit she is capable of holding down a job if she can just find one. She believes she will need approximately $1,229 per month living expenses after the dissolution of her marriage.

Alfred, on the other hand, is 55 years old and has worked at the Union Pacific Railroad for approximately 36 years. He testified he nets approximately $1,800 per month, but his pay stub introduced into evidence indicates he actually nets, after taxes, approximately $2,037 per month. Additionally, his 1984 income tax return discloses that his net after taxes is approximately $2,088 per month. This takes into consideration his railroad retirement tax of approximately $197 per month. Historically, he overpays his taxes, and for 1984 he will receive a refund of approximately $2,400. Alfred believes he will incur approximately $1,500 per month living expenses after the marriage is dissolved. Finally, he testified he intends to retire at 62 and guesses his retirement income would be $1,200 per month.

The court determined that Carol could probably get a job for 40 hours a week at minimum wage, which would provide her with a little less than $500 a month. It also determined that Alfred nets about $1,800 per month, but added $150 more per month to that amount to account for the yearly tax refund, resulting in a total of $1,950 per month. The court then awarded Carol $650 per month in alimony in order for there to be some "equalization" between the parties. Using the court's figures, Carol would have access to $1,150 per month, and Alfred would be left with $1,300 per month. The court then determined that when Alfred is 62 he will retire, and his income will go down to $1,200 per month. Figuring that it will then be impossible for Alfred to pay $650 per month, the court reduced the alimony to $350 per month until Carol reaches the age of 62, when alimony would cease, presumably because at that time she will be entitled to half of Alfred's retirement income.

It is the rule in Nebraska that the awarding of alimony in

marriage dissolution cases is a matter entrusted to the sound discretion of the trial judge. On appeal an alimony award will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. *Busekist v. Busekist, ante* p. 510, 398 N.W.2d 722 (1987); *Taylor v. Taylor,* 222 Neb. 721, 386 N.W.2d 851 (1986). The ultimate test in determining correctness in the amount of alimony awarded is reasonableness as determined by the facts of each case. *Busekist v. Busekist, supra; Taylor v. Taylor, supra.* An appropriate award of alimony must turn on reasonableness and the circumstances of each case in light of the factors set forth in Neb. Rev. Stat. § 42-365 (Reissue 1984). Those factors include duration of the marriage, history of the contributions to the marriage by each party, and the ability of the supported party to engage in gainful employment. In addition to the specific criteria listed in § 42-365, the income and earning capacity of each party, as well as the general equities of each situation, must be considered. *Taylor v. Taylor, supra.*

With the foregoing in mind, we believe that the trial court abused its discretion in setting the amount of alimony. The documentary evidence shows that Alfred was netting approximately $2,250 per month, instead of the $1,950 the court determined. True, there were some other deductions for union dues and credit union payments. Given that Alfred is making more per month than the court determined, we believe that Carol's award should be increased to $750 per month. Although the record substantiates Carol's claim that she may not be able to get a job for a while in North Platte, we do believe that it was reasonable for the court to find that she had the capacity to earn $500 per month at a minimum-wage job. With alimony of $750 per month, she would then have access to $1,250 per month, enough to meet her expected living expenses. Alfred would have monthly income left to meet his expected living expenses.

We also believe it was improper for the court to order adjustments in the alimony at the time respondent reaches age 62 and complete termination of the periodic payments when petitioner attains the age of 62. The basis for this action by the court was because respondent indicated he was planning to

retire, and, supposedly, when the petitioner reaches the age of 62 she is entitled to a vested portion of her husband's retirement pension.

However, both of these events were somewhat speculative. There was nothing definite about the retirement date, nor was there any solid evidence of the amount of any resulting pension. Additionally, although counsel stipulated that petitioner would be entitled to one-half the amount of her husband's pension when she retired, assuming the respondent had also retired, the figure of one-third was mentioned during arguments. More importantly, there was no evidence from the railway retirement board which in any way substantiated these rather vague claims.

We believe the better way to handle this situation is to leave the alimony of $750 per month in force until the further order of the court. In that way the respondent can come into court and prove an actual change of circumstances in the event that he does retire and suffers a reduction of income. In the same manner, he can follow the same procedure at such time as the petitioner's share of the pension becomes fixed and definite. Substantial adjustments undoubtedly should be made upon the happening of those events, but, in the manner outlined, we believe that burden to show these events is now properly placed on the respondent.

We therefore modify the decree to provide for the payment of alimony to the petitioner in the amount of $750 per month until the further order of the trial court, and, as so modified, the judgment of the district court is affirmed. Petitioner is awarded a fee of $750 for the services of her attorney in this court.

AFFIRMED AS MODIFIED.

HENRY R. LATEK, APPELLANT, V. K MART CORPORATION, A FOREIGN CORPORATION, ET AL., APPELLEES.

401 N.W.2d 503

Filed February 27, 1987. No. 85-532.

1. **False Imprisonment: Liability.** Merchants cannot claim protection from civil liability in accord with Neb. Rev. Stat. § 29-402.01 (Reissue 1985) where the detention of a suspected shoplifter was unreasonable because it continued after the detainers knew that their suspicions were groundless and that they had made a mistake.
2. **Expert Witnesses: Trial.** Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion, and where the opinion is based on the facts shown not to be true the opinion lacks probative value.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded for further proceedings.

Richard F. Welling and Kelle J. Westland of Breeling, Welling, Place & Steier, for appellant.

Albert M. Engles and Jack A. Dike of Hansen, Engles & Locher, P.C., for appellees.

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

WHITE, J.

This is an appeal by the plaintiff below from a jury verdict in favor of appellees, K Mart Corporation and others, on a cause of action for false imprisonment. The jury found for appellant on a separate cause of action for assault and battery and returned a verdict in the amount of $15,000. No appeal was taken by K Mart from that verdict, and the disposition of that cause will not be discussed here.

Two principal errors are assigned. First, the trial court erred in refusing to direct a verdict for appellant on the false imprisonment count, and second, the court erred in sustaining an objection to the testimony of Dr. Jerome Sherman, an economist, concerning appellant's diminished capacity to earn in the future.

A review of the facts is necessary. Henry R. Latek was, on

November 23, 1982, a self-employed builder and carpenter. After completing a remodeling project and collecting from the owner, Latek drove first to a banking outlet and then to a K Mart store at 50th and L Streets in Omaha, Douglas County, Nebraska, arriving at 6:45 p.m. He parked his van near the entrance and went immediately to an area of the store in which cassette tapes were offered for sale. As the tape case was secured, he requested assistance. After ascertaining that the desired tape was not available, he left the store.

The K Mart store has a vestibule consisting of a space, on opposite sides of which are inner and outside doors. As he was leaving through the outer doors he heard one of two men say, "Let's get him," whereupon Latek, fearing an assault and conscious of some $500 in his possession, started to run toward his van. Before reaching the van he was tackled, forced to the parking lot surface on his stomach, his arms forced behind his back, and handcuffed. At the same time his face was held to the surface by means of a baton or club held to the back of his neck.

Latek was lifted to his feet and was informed that the two men were security guards. They escorted Latek through the store, handcuffed, to a second-story office, where he was held for a period of 15 to 20 minutes until he was released, a suspected offender having been apprehended in the meantime. Latek claimed injuries to his neck, arm, and leg as a result of the incident. At the time of the incident Latek was dressed in denim jeans and a denim jacket, wore a full beard and mustache, and had nearly shoulder-length hair. He was about 5 feet 7 inches tall.

Charles Gurzick and Joseph Costello were, at the time of these events, observing customers of K Mart from a window overlooking the selling area. It was to this area that Latek was later removed. Gurzick observed a man approximately 5 feet 7 inches in height. The man had a full beard, mustache, and long hair, and was wearing blue jean trousers, a bright blue vest, and a long-sleeved red shirt. Gurzick observed this male tearing the plastic covering from packs of two batteries each and placing the batteries in his trouser pockets or down the front of the trousers. Gurzick dispatched Costello to the sales floor to observe the suspect. He shortly followed. Gurzick and Costello

did not obtain a clear front view of the suspect, but saw him from the rear, and had a fleeting view of the side and front when he passed from their view.

Gurzick and Costello then adjourned to the outside of K Mart and engaged in a conversation. Costello had forgotten what the suspect looked like, and Gurzick reminded him that the suspect resembled a neighbor of Gurzick's. It was at this point Latek walked out of the store and was pursued and apprehended. Before pursuing Latek, Gurzick informed Costello, "I don't think that's him, Joe." According to Gurzick, Costello replied, "That's him man, that's him." After a further protest by Gurzick, Costello said, "It is damn it."

At all times Latek was protesting his innocence and demanding to be searched. No search was made, and no attention was paid to Latek's protests.

As Latek was being escorted through the vestibule, Gurzick's attention was diverted to the checkout lanes immediately in front of the inner doors: "At this time . . . I glanced over at the check-out lanes; and at this point I noticed Mr. Roberts, who was the actual shoplifter. I noticed him going through the check-out lines." Without informing Costello, who held Latek near the door, Gurzick left to apprehend the actual shoplifter. When asked, "Is there a reason why at that time you did not let Mr. Latek go?" Gurzick responded, "At that point I figured it would have caused a lot more trouble and harm if we would have explained the situation in the midst of the floor . . . and stuff." Gurzick was further asked, "Now, by this time you knew Mr. Latek was not the individual that you initially were after?" to which he responded, "Yes."

The actual shoplifter was apprehended, asked to accompany Gurzick to the office, and did so. He was not handcuffed, though Latek, whom Gurzick now knew to be innocent, was led handcuffed through the store to the office, where he was held an additional 15 to 20 minutes, and finally released from the handcuffs and allowed to leave.

Neb. Rev. Stat. § 29-402.01 (Reissue 1985) states:

> A peace officer, a merchant, or a merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a

> person and that he can recover them by taking the person into custody may, for the purpose of attempting to effect such recovery, take the person into custody and detain him in a reasonable manner for a reasonable length of time. Such taking into custody and detention by a peace officer, merchant, or merchant's employee shall not render such peace officer, merchant, or merchant's employee criminally or civilly liable for slander, libel, false arrest, false imprisonment, or unlawful detention.

Assuming, as we must do for the purposes of this case, that the statements of Gurzick and Costello constituted probable cause for the detention of Latek, we are faced with the acknowledged fact that Gurzick knew that he had apprehended and detained an innocent person. Nevertheless, he did not inform Costello of that fact, and detained Latek for a substantial period of time, handcuffed.

The record establishes clearly that a detention arguably lawfully made was continued for an unreasonable time, i.e., after the detainers knew that their suspicions were groundless and the apprehension a mistake. Such further detention was clearly unreasonable, and the judge was in error in not so holding. See *Hardin v. Barker's of Monroe, Inc.*, 336 So. 2d 1031 (La. App. 1976).

Appellant argues that the trial court's refusal to receive the testimony of Dr. Sherman was erroneous. In *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979), we articulated the rule that expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion, and where the opinion is based on the facts shown not to be true the opinion lacks probative value. Dr. Sherman's opinion on Latek's decreased earning capacity was based on the assumption of a permanent 10-percent disability of the body as a whole. The only medical witness testified the disability was not permanent. The trial court was correct in excluding the testimony.

We reverse and remand for further proceedings in conformity with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ROY A. JOHNSON, APPELLANT, V. SHEILA K. JOHNSON, APPELLEE.
401 N.W.2d 506

Filed February 27, 1987. No. 85-947.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Emily R. Scherr of Law Offices of Robert C. Guinan, for appellant.

William G. Line of Kerrigan, Line & Martin, for appellee.

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

PER CURIAM.

In a prior opinion, *Johnson v. Johnson, ante* p. 159, 396 N.W.2d 284 (1986), we summarily affirmed the judgment of the district court because of the failure of the appellant to file a bill of exceptions in this court as required by then Neb. Ct. R. of Prac. 5C(5) (rev. 1986).

Appellant filed a motion for rehearing which is still pending, and consequently the issuance of the mandate has been stayed. In the meantime, we have amended the previously-referred-to rule by placing the responsibility for filing the bill of exceptions in this court on the clerk of the district court rather than on the appellant, provided the appellant has timely filed the bill in the district court.

Because the appellant had made a timely filing of the bill with the clerk of the district court, he is entitled to have us consider the bill of exceptions, in light of our amendment of the rule.

However, from our de novo review of the record, which we are obligated to do, we conclude that the judgment of the district court was correct on the merits, and it is hereby affirmed. Appellee is awarded as costs the sum of $750 for the services of her attorney in this court. The motion for rehearing is overruled.

AFFIRMED.

IN RE ESTATE OF MARY V. WALKER, DECEASED. GRACE M. WALKER, PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES O. WALKER, DECEASED, APPELLANT, V. LAWRENCE WALKER, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY V. WALKER, DECEASED, APPELLEE.

402 N.W.2d 251

Filed March 6, 1987. No. 85-481.

1. **Decedents' Estates: Wills: Intent.** The cardinal rule concerning a decedent's will is the requirement that the intention of the testator or testatrix shall be given effect, unless the maker of the will attempts to accomplish a purpose or to make a disposition contrary to some rule of law or public policy.
2. _____: _____: _____. To arrive at a testator's or testatrix's intention expressed in a will, a court must examine the decedent's will in its entirety, consider and liberally interpret every provision in a will, employ the generally accepted literal and grammatical meaning of words used in the will, and assume that the maker of the will understood words stated in the will.
3. **Wills.** When language in a will is clear and unambiguous, construction of a will is unnecessary and impermissible. As a corollary of this rule, when ambiguity exists in a testamentary provision, construction of a will is necessary.
4. **Wills: Words and Phrases.** Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings.
5. _____: _____. A patent ambiguity is one which exists on the face of an instrument.
6. _____: _____. *Construction* includes the process of determining the correct sense, real meaning, or proper explanation of an ambiguous term, phrase, or provision in a written instrument.
7. **Wills.** When patent ambiguity exists in a will, a court must resolve such ambiguity as a matter of law.
8. **Appeal and Error.** Regarding a question of law, the Supreme Court has an obligation to reach its conclusion independent from the conclusion reached by a court whose judgment is the subject of review.
9. **Wills: Judges.** Neb. Rev. Stat. § 24-519 (Reissue 1985) expressly denies to an associate county judge who is not an attorney at law the power to construe a will.

Appeal from the District Court for Harlan County: BERNARD SPRAGUE, Judge. Affirmed in part, and in part reversed and remanded with direction.

Patrick J. Nelson of Jacobsen, Orr & Nelson, P.C., for appellant.

Denzel R. Busick of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

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

SHANAHAN, J.

When Mary V. Walker, 91 years of age, died on May 15, 1984, her survivors included her brother, James O. Walker, and 13 nieces and nephews. Mary's uncontested will, executed in 1977, was admitted to probate in the county court for Harlan County. Among the directions and dispositions contained in Mary's will were:

> IV
>
> In the event that my sister-in-law Alta Walker shall survive me, I devise the sum of $200.00 without restriction or reservation.
>
> V
>
> If my brother, James O. Walmer [sic] shall survive me, I give and devise to my brother a life estate in and to the following described real estate [legal description omitted for the purpose of this opinion], he to have the income therefrom for and during the period of his natural lifetime .... Upon the death of James O. Walker as the life tenant, or upon my death if my brother James O. Walker shall not have survived me [at this point in her will, Mary specified a procedure for sale of her real estate to family members]. If none of the Walker family members above named desire to purchase the land it shall be sold by my Personal Representative in whatever manner he shall deem to be for the best interest of my estate. My Personal Representative, if a Walker family member herein named, shall not be disqualified from buying the land by reason of his fiduciary capacity. The proceeds realized from the sale of the land shall be distributed to the persons and in the manner directed in paragraph VI of this will.
>
> VI
>
> All of the rest, residue and remainder of my estate . . . shall be sold and converted to cash by my Personal Representative .... Whenever my residuary estate has been converted into cash as herein directed the same shall be distributed and I devise said residuary cash estate as

follows:

A. If my brother James O. Walker shall survive me, I give and bequeath one-third thereof to him without restriction or reservation. If my brother James O. Walker shall not have survived me, his share of said cash residuary estate shall lapse and be divided to the beneficiaries named in the following sub-paragraph.

B. I give and bequeath the two-thirds remaining of my cash residuary estate to the following nephews and nieces who are living at the time of my death, namely [here, Mary's will listed 13 nieces and nephews as individual devisees] . . . .

Mary's will then designated her nephew Lawrence Walker as personal representative.

At her death, Mary owned the real estate described in paragraph V of her will. Surviving Mary were James O. Walker, Alta Walker, and the 13 nieces and nephews named as devisees in paragraph VI of Mary's will. One of Mary's nephews, Lawrence Walker, was appointed personal representative and, on October 10, 1984, filed in the county court a "FORMAL PETITION FOR COMPLETE SETTLEMENT AFTER FORMAL TESTATE PROCEEDING," alleging:

5. The will of Mary V. Walker, page two, states that James O. Walker shall have a life estate in the real estate owned by Mary V. Walker and as described on page two. The real estate described on page two constitutes all of the real estate that Mary V. Walker owned at the date of her death. The will further states that the real estate is to be appraised at the time of James O. Walker's death by two disinterested appraisers and their values averaged to determine the sale price thereof. The personal representative shall then offer the same at the value so established to only the following Walker family members: [names of family members] and sell it for cash to the one accepting the same.

On page three of the will, Mary V. Walker's will further states that the proceeds realized from the sale of the land shall be distributed to the persons and in the manner directed in Paragraph VI of the will.

On page three, Paragraph VI of the will, the will states that whenever the residuary estate has been converted into cash, the same shall be distributed and devised one-third to James Walker, provided he is living at the date of Mary V. Walker's death, and the remaining two-thirds equally to the following nieces and nephews who are living at the time of Mary V. Walker's death, namely [names of 13 nieces and nephews], "the same to be divided equally between the named beneficiaries who were living as of the time of my death."

The personal representative interprets the directions of Mary V. Walker to direct and authorize that after the death of James O. Walker and after the real estate is converted to cash that the proceeds thereof would be divided equally among the nieces and nephews named above, namely [nieces and nephews] in equal shares, so that each of the persons named above would each receive a one-thirteenth share of the net sales proceeds of the real estate sold after James O. Walker's death. All thirteen of the persons so named in Mary V. Walker's will are alive at this time, but in the event one of them should die prior to James O. Walker, it would appear from a reading of the will that Mary V. Walker intended that each survive only beyond her death and there is no requirement that any of them survive James O. Walker, so that in the event one of them should predecease James O. Walker, his or her share shall not lapse but shall go to his or her heirs by the right of representation.

At the conclusion of his petition, the personal representative requested that the court

D. Enter an order construing the will of Mary V. Walker so that after the death of James O. Walker and the eventual conversion of the real estate to cash, that the net sales proceeds shall be divided, a one-thirteenth share each, to [nieces and nephews], and in the event one of them predeceases James O. Walker, his or her share shall not lapse but shall go to his or her heirs by right of representation.

The "CERTIFICATE OF SERVICE" incorporated into the

petition recites that the personal representative mailed a copy of his petition to each of the 13 nieces and nephews, including himself, but not to James O. Walker. A "notice" was properly published in the appropriate newspaper, namely, notice that the personal representative had filed a petition for complete settlement and that a hearing on such petition would be held on November 1. A copy of that notice, as published on October 11, was mailed to James O. Walker.

On October 31 the personal representative filed a "SCHEDULE OF DISTRIBUTION" reflecting James O. Walker's life estate in Mary's real estate and a one-third interest in Mary's residuary estate. The schedule of distribution also reflected the $200 devise to Alta Walker. Additionally, the personal representative's schedule of distribution recited that each of Mary's 13 nieces and nephews had a "1/13 of 2/3 of Residue" and a "1/13 remainder interest [in Mary's real estate] subject to sale of same upon James Walker's death, all as set forth in Mary Walker's Will."

A hearing on the personal representative's petition was held on November 1. The record does not indicate that any evidence was adduced in reference to the petition and does not identify persons attending that hearing. After considering the personal representative's petition, the associate county judge, who, both parties agree, was not an attorney at law, entered a "FORMAL ORDER FOR COMPLETE SETTLEMENT AFTER FORMAL TESTATE PROCEEDING," which stated:

> D. The Personal Representative be, and hereby is authorized and directed to deliver and distribute title and possession of the assets of the estate to the distributees in the amount and manner set forth in the Schedule of Distribution after payment of 1984 Federal and State Income taxes.
>
> E. The Authority of the Personal Representative shall not terminate, but shall continue until the death of James Walker, at which time, pursuant to the terms of the will, the Personal Representative shall offer the real estate of Mary V. Walker to the Walker family members named in the will of Mary V. Walker and in the manner thereof, and, in the event none of the family members shall purchase

said real estate as set forth in the Mary V. Walker will, the Personal Representative shall sell the same at public or private sale.

After the real estate is sold, the proceeds shall be distributed in equal shares to the following named persons: [names of Mary's 13 nieces and nephews], and if any predecease James Walker, his or her share shall not lapse but shall pass to his or her beneficiaries by the right of representation.

James O. Walker filed his appeal to the district court, contesting the distribution prescribed in the November 1 order entered by the associate county judge. Pending his appeal in the district court, James O. Walker, who was 79 years of age at the time of Mary's death, died, and, without any objection, Grace M. Walker, personal representative of the estate of James O. Walker, deceased, was substituted for prosecution of the appeal from the county court. The district court affirmed the associate county judge's November 1 order of distribution in the estate of Mary V. Walker, deceased.

Grace M. Walker, personal representative of the estate of James O. Walker, contends that the testamentary dispositions by Mary V. Walker's will and the nature of the associate county judge's order of distribution necessarily involved a construction of Mary's will. Such action is beyond the power of an associate county judge who is not an attorney at law, Grace Walker argues, in view of Neb. Rev. Stat. § 24-519 (Reissue 1985), which, in part, provides:

> The county judge . . . may assign to associate county judges who are not attorneys at law . . . the following matters:
>
> . . . .
>
> (8) Any proceedings relating to decedents' estates, noncontestable inheritance tax matters, guardianship or conservatorship, except the construction of wills and trusts, the determination of title to real estate, and authorization of the sale or mortgaging of real estate.

Lawrence Walker, personal representative of the estate of Mary V. Walker, counters: "If Appellant's contention is correct,

then it has the ultimate effect of virtually gutting the statutory provisions of the county court statutes which allow county judges to delegate certain functions to associate county judges." Brief for Appellee at 7-8. Additionally, Lawrence Walker suggests that vitality and validity of the associate county judge's order are preserved by Neb. Rev. Stat. § 24-520 (Reissue 1985):

> All assignments of matters to associate county judges shall be by written order signed by the presiding county judge and filed with the clerk. No order or judgment shall be void or subject to collateral attack solely because it was rendered pursuant to improper assignment to an associate county judge.

In view of the manifest intention of the Legislature expressed in the unequivocal language of § 24-519, a county judge cannot assign to an associate county judge who is not an attorney at law any matter which necessitates "the construction of wills and trusts." We also note that § 24-519 (Cum. Supp. 1986) now refers to "clerk magistrates," rather than "associate county judges who are not attorneys at law," but still denies a clerk magistrate the power to determine matters "relating to the construction of wills and trusts."

The cardinal rule concerning a decedent's will is the requirement that the intention of the testator or testatrix shall be given effect, unless the maker of the will attempts to accomplish a purpose or to make a disposition contrary to some rule of law or public policy. See, *Overbeck v. Estate of Bock*, 198 Neb. 121, 251 N.W.2d 872 (1977); *Lacy v. Murdock*, 147 Neb. 242, 22 N.W.2d 713 (1946); *In re Estate of Dimmitt*, 141 Neb. 413, 3 N.W.2d 752 (1942). To arrive at a testator's or testatrix's intention expressed in a will, a court must examine the decedent's will in its entirety, consider and liberally interpret every provision in a will, employ the generally accepted literal and grammatical meaning of words used in the will, and assume that the maker of the will understood words stated in the will. See, *In re Testamentary Trust of Criss*, 213 Neb. 379, 329 N.W.2d 842 (1983); *Jacobsen v. Farnham*, 155 Neb. 776, 53 N.W.2d 917 (1952); *In re Estate of Dimmitt, supra.*

When language in a will is clear and unambiguous,

construction of a will is unnecessary and impermissible. See, *Lowry v. Murren*, 195 Neb. 42, 236 N.W.2d 627 (1975); *Wall v. Wall*, 157 Neb. 360, 59 N.W.2d 398 (1953). See, also, G. Thompson, The Law of Wills § 210 (3d ed. 1947). As a corollary of the immediately preceding rule, when ambiguity exists in a testamentary provision, construction of a will is necessary. Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings. See, *Denis v. Woodmen Acc. & Life Co.*, 214 Neb. 495, 334 N.W.2d 463 (1983); *American Sec. Servs. v. Vodra*, 222 Neb. 480, 385 N.W.2d 73 (1986). A patent ambiguity is one which exists on the face of an instrument. *In re Estate of Corrigan*, 218 Neb. 723, 358 N.W.2d 501 (1984); *Jacobsen v. Farnham, supra*. *Construction* includes the process of determining the correct sense, real meaning, or proper explanation of an ambiguous term, phrase, or provision in a written instrument. See *Koy v. Schneider*, 110 Tex. 369, 221 S.W. 880 (1920). When patent ambiguity exists in a will, a court must resolve such ambiguity as a matter of law. See *In re Estate of Corrigan, supra*. Cf. *Denis v. Woodmen Acc. & Life Co., supra* (construction of an ambiguous clause in a policy of insurance). Regarding a question of law, the Supreme Court has an obligation to reach its conclusion independent from the conclusion reached by a court whose judgment is the subject of review. See *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).

Although the record does not disclose that the county judge authorized the associate county judge's action in the case before us, nevertheless, the fundamental question is whether the associate county judge's order of distribution constituted a construction of Mary V. Walker's will.

There is no question that, pursuant to paragraph V of Mary's will, James Walker received a life estate in Mary's real estate. However, in paragraph V of her will, Mary did not explicitly designate persons entitled to the remainder in her real estate when the life estate would become extinguished by the death of James O. Walker as the life tenant. Rather, as expressed in paragraph V of her will, Mary stated that her real estate which

had been subject to James' life estate must be sold and proceeds "distributed to the persons and in the manner directed in Paragraph VI of this will." In paragraph VI, Mary disposed of her residuary estate by directing that James, if he survived Mary as is the fact, shall receive one-third of the residuary estate. At that point, a number of questions arise. Did Mary, in paragraph V of her will and by reference to a plan of distribution specified in paragraph VI(A), intend to devise to the heirs or devisees of James O. Walker a one-third interest in the proceeds realized when Mary's real estate is sold? On James O. Walker's death and when the real estate is sold, are sale proceeds distributable as directed in paragraph VI(A), namely, "one-third thereof [to James O. Walker] without restriction or reservation," so that a one-third share of the sale proceeds must be distributed to the heirs or devisees of James O. Walker? Implicit in the associate county judge's order is an answer in the negative to each of the foregoing questions. As a result of such answer, James O. Walker and his heirs or devisees are denied a share in the proceeds which will be realized from the sale of Mary's real estate. Although the 13 nieces and nephews have survived Mary, what distribution shall be made of the sale proceeds if one of the 13 nieces or nephews is not living at the death of James O. Walker? Does the share of that niece or nephew lapse and become distributable among the remaining named nieces and nephews living at James' death? Is the share of a named niece or nephew who has predeceased James O. Walker contained in the estate of such deceased niece or nephew? By virtue of the associate county judge's order for distribution, each of the three preceding questions was answered, excluding James O. Walker's heirs or devisees from sharing proceeds which will be realized on the sale of Mary's real estate. The preceding questions, seeking interpretive answers, may not be exhaustive, but do illustrate a point. There is more than one reasonable interpretation or meaning for the provisions in paragraphs V and VI of Mary's will. Mary's testamentary provisions produced contradictory or incompatible results, depending on Mary's intention for distribution of the sale proceeds. Thus, there is patent ambiguity in some provisions found in Mary's will and,

consequently, a need for construction of the will to answer at least two questions: Did James O. Walker receive a life estate, one-third of Mary's residuary estate, and nothing more? Or, did James O. Walker receive a life estate, one-third of Mary's residuary estate, and a property right in the sale of proceeds which will be realized on liquidation of Mary's real estate?

As an analysis of the associate county judge's action, and to paraphrase an apocryphal aphorism, we conclude that if such action looks like a construction and acts as a construction, the action is a construction. Ostensibly, the associate county judge's order is based on the premise that the expressions in paragraphs V and VI of Mary's will demonstrate Mary's intention to exclude James and his heirs or devisees from receiving a distribution of proceeds from the sale of Mary's real estate. That order was entered in response to the personal representative's request for action, "construing the will of Mary V. Walker," consistent with the allegations in the personal representative's petition. In entering his order for distribution of Mary's estate, the associate county judge had to answer at least one of the questions we have suggested, if not answer all the questions previously posed. Answering any question we have posed requires construction of Mary's will. What answer the associate county judge selected as a construction of Mary's will is unimportant for the purpose of this appeal. What is important is the inescapable fact that distribution of Mary's estate depends on Mary's intention ascertained from a construction of her will. Section 24-519 clearly places such construction of a will beyond the power of an associate county judge who is not an attorney at law. While we are reviewing a question concerning the power of an associate county judge who is not an attorney at law, we add that in no wise are we deciding a question concerning the correctness of any construction placed, or to be placed, on any word, phrase, or provision in Mary V. Walker's will. Moreover, none of our suggested questions illustrating that some patent ambiguity exists in the language of the will of Mary V. Walker dictates or indicates a particular construction regarding any language in Mary V. Walker's will. Rather, we determine and hold only that the action taken by the associate county judge constituted a

"construction" of Mary's will, an action expressly excluded from the power otherwise authorized in and conferred by § 24-519.

Further, we do not state, and do not hold, that there is ambiguity regarding every devise prescribed in Mary's will. By virtue of the language which is clear and unambiguous in paragraphs IV, V, and VI, Alta Walker received a $200 devise and James O. Walker received a life estate in Mary's real estate plus one-third of Mary's residuary estate. No construction of Mary's will was necessary regarding those devises just mentioned. Under the circumstances, it became the duty of Lawrence Walker, as personal representative of the estate of Mary V. Walker, deceased, to make expeditious distributions in accordance with Mary's intent expressed in the plain provisions of paragraphs IV, V, and VI in Mary's will. Neb. Rev. Stat. § 30-2465 (Reissue 1985) provides:

> A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate and, except as otherwise specified or ordered in regard to a supervised personal representative, do so without adjudication, order, or direction of the court, but he may invoke the jurisdiction of the court, in proceedings authorized by this code, to resolve questions concerning the estate or its administration.

See *Kenfield v. Dudek*, 135 Neb. 574, 283 N.W. 209 (1939).

Next, as viewed by the personal representative in this case, any irregularity in the associate county judge's order is absolved or neutralized by § 24-520. We take a different view of that statute. The case before us involves a direct appeal from the county court's order and, therefore, is not a collateral attack on such order. In *Vasa v. Vasa*, 163 Neb. 642, 80 N.W.2d 696 (1957), after examining the validity of a district court's order entered at chambers, an action then unauthorized by the Nebraska Constitution, this court stated at 645, 80 N.W.2d at 698: "This situation does not go to a procedural irregularity but to the power of the court and the legality of the order. Any judgment or ruling so entered without authority or jurisdiction is void." Similar to the situation in *Vasa, supra*, the present case does not involve some procedural irregularity, but concerns the

very power of the associate county judge to enter the order questioned in the present case. As already noted, § 24-519 expressly denies an associate county judge the power to construe a will. Therefore, § 24-520 does not preserve the order entered by the associate county judge in the case under review.

With the exception of the devise to Alta Walker, the devise of a life estate to James O. Walker, and the devises pertaining to Mary V. Walker's residuary estate, the distribution ordered by the associate county judge involved a construction of Mary V. Walker's will—an action taken outside the power authorized and conferred in § 24-519. Therefore, we reverse the judgment of the district court insofar as such judgment relates to distribution of proceeds from the sale of real estate owned by Mary V. Walker and remand this matter with direction that the district court shall set aside the county court's order of distribution regarding such proceeds of sale and shall remand this matter to the county court for further proceedings consistent with this opinion.

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

BOSLAUGH, J., dissenting.

If the associate county judge construed the will of the deceased in entering the order of distribution, it was at most erroneous, not "void or subject to collateral attack." Neb. Rev. Stat. § 24-520 (Reissue 1985). If the order was otherwise correct, it was at most error without prejudice.

Upon appeal to the district court, all questions of *law* were determined anew. The order of the district court affirming the order of the county court cured any error there may have been in the order of distribution entered in the county court.

JON DUANE BLACK, APPELLEE AND CROSS-APPELLANT, V. SIOUX CITY FOUNDRY CO., AN IOWA CORPORATION, APPELLANT AND CROSS-APPELLEE.

401 N.W.2d 679

Filed March 6, 1987. No. 86-086.

1. **Judgments: Words and Phrases.** A judgment is the final consideration and determination of a court on matters submitted to it in an action or proceeding.
2. **Workers' Compensation.** There is no procedure under the Nebraska Workers' Compensation Act which authorizes the compensation court to clarify an award on rehearing when more than 10 days have elapsed from the date on which the findings were made in the rehearing.
3. _____. In the absence of specific statutory authority to correct an ambiguity by a procedure other than as described in Neb. Rev. Stat. § 48-180 (Reissue 1984), the compensation court does not have authority to enter an order revising one of its awards.
4. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded with direction to dismiss.

Wayne E. Boyd of Smith & Boyd, for appellant.

William Horneber of Horneber Law Offices, for appellee.

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

PER CURIAM.

The plaintiff, Jon Duane Black, filed a petition in the Nebraska Workers' Compensation Court. In his petition, Black alleged that he had sustained a compensable injury while in the employment of Sioux City Foundry Co. on August 17, 1983, and prayed for an award of compensation under the provisions of the Nebraska Workers' Compensation Act. After a one-judge hearing, a three-judge panel of the compensation court found in favor of Black and entered an "Award on Rehearing" on March 25, 1985. The award ordered Sioux City Foundry Co. to pay for and on behalf of Black certain medicals, which included a bill from Marian Health Center in the amount of $106,950.36 and the bill of the Veterans' Administration for $5,768. Neither party appealed from the

March 25 award of the compensation court.

Sioux City Foundry Co. contacted Marian Health Center about Black's bill and was informed that Central States Health & Life Co. of Omaha had paid $66,420 on Black's account at the Center. The payment by Central States was made under its disability insurance contract issued to Black. After credit for the payment by Central States, the balance of Black's account at Marian Health Center was approximately $40,000. Sioux City Foundry Co. and Marian Health Center negotiated a compromise of the balance due on Black's bill, and, on April 24, the Center accepted payment of $25,000 from Sioux City Foundry Co. in full satisfaction of Black's account. Sioux City Foundry Co. believed that Central States had a right of subrogation or was entitled to reimbursement due to the insurance company's payment to Marian Health Center. Also, by its check Sioux City Foundry Co. paid the Veterans' Administration $5,768, as directed in the award of the compensation court. However, Black and the Veterans' Administration had negotiated a settlement, so that Black was obligated to pay only $3,850 on his account. The Veterans' Administration endorsed the check for $5,768 from Sioux City Foundry Co. and delivered the check to Black.

By virtue of Neb. Rev. Stat. § 48-188 (Reissue 1984), Black had the March 25 award of the compensation court filed in the district court for Dakota County on June 3, 1985, and then filed a praecipe for execution against Sioux City Foundry Co. to satisfy $96,498 unpaid on the award. Sioux City Foundry, on June 19, issued its check to Black and Central States for $66,420, and also issued checks for the remaining hospital and medical bills, totaling $14,550. Thereafter, Sioux City Foundry Co. learned Central States did not have any subrogation interest or right to reimbursement concerning the insurance company's payment to Marian Health Center. Sioux City Foundry Co. then stopped payment on the $66,420 check to Black and Marian Health Center. Black filed a "partial satisfaction" on July 26, 1985, in the district court, indicating a balance of $81,950 to be satisfied by the execution against Sioux City Foundry Co. The sum of $81,950 included the $66,420 on Black's account at Marian Health Center, as represented by the

check which Sioux City Foundry Co. had stopped, and the $15,530 negotiated by the Center and Sioux City Foundry Co. as the reduction in Black's account.

Sioux City Foundry Co. filed an application in the Workers' Compensation Court on August 1, 1985, and alleged that it had paid all of the compensation due Black under the March 25 award and, further, requested that the compensation court determine the rights of the parties regarding the $66,420 payment to Marian Health Center. Sioux City Foundry asked the compensation court to decide whether Sioux City Foundry Co. must pay the $66,420 directly to Black as "compensation," whether Sioux City Foundry Co. was entitled to the benefit of its negotiated $15,530 reduction in Black's account with Marian Health Center, and whether Black was entitled to any part of the $5,768 payment from the Veterans' Administration, in view of the reduction of the amount accepted by the Veterans' Administration in settlement of Black's account. Black filed a "Resistance" to Sioux City Foundry's application and claimed that Sioux City Foundry Co. had not paid "compensation" of $81,950. Black also claimed he was entitled to the benefit of the reduced amount of Black's account negotiated with the Veterans' Administration. The application was heard by the same three-judge panel that had entered the award on March 25, 1985. The compensation court then entered an order on January 6, 1986, by two of the three-judge panel, one judge dissenting, finding that Sioux City Foundry Co. must pay $66,420 to Black, and also finding that Sioux City Foundry Co. was entitled to the benefit of the $15,530 reduction in the amount due on Black's account at Marian Health Center and that Black was entitled to his negotiated reduction or credit on his account with the Veterans' Administration. The compensation court found that "compensation," as used in Neb. Rev. Stat. § 48-130 (Reissue 1984), refers not only to weekly payments of indemnity but also refers to medical and hospital expenses. The compensation court denied Black an attorney fee for his lawyer.

Both parties have appealed. Sioux City Foundry Co. assigns as error the compensation court's finding that "compensation" refers not only to weekly payments of indemnity but also to

medical and hospital expenses. Sioux City Foundry Co. further claims that the compensation court erred in requiring payment of $66,420 to Black and permitting Black to retain the benefit of his compromise settlement with the Veterans' Administration. In its brief at 35, Sioux City Foundry Co. states:

> Clarification of the award was thus required, and such clarification should not be confused with a reopening of the case to seek modification or additional relief. The Compensation Court's order in response to the application for clarification, from which this appeal is taken, is therefore an appealable post-judgment order, separate from the Award on Rehearing itself.

Black's position is that the order entered by the compensation court on January 6, 1986, is not authorized by law. In the errors assigned by Black in his cross-appeal, Black states that the compensation court erred in the denial of an attorney fee and in the rate of interest to be applied to the amounts which the compensation court ordered to be paid.

Neb. Rev. Stat. § 48-185 (Reissue 1984) in part states:

> The proceedings to obtain a reversal, vacation, or modification of judgments, awards, or final orders made by the Nebraska Workmen's Compensation Court after a rehearing shall be by filing in the office of the clerk of the Nebraska Workmen's Compensation Court within one month after the rendition of such judgment or decree, or the making of such final order, a notice of intention to prosecute such appeal signed by the appellant or his attorney of record.

No appeal was taken from the award entered in the compensation court on March 25, 1985. Thus, the award on rehearing became a final judgment in the absence of an appeal to this court.

Sioux City Foundry's appeal is disposed of by our decision in *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986), which arose out of proceedings to dissolve a marriage. On March 11, 1983, a decree of dissolution was entered, and provided for a division of personal property. Neither party appealed from the decree. When the parties were not able to

resolve their separate claims to many items not specifically included in the decree, the wife filed a motion in which she set out the disputed portion of the decree concerning property distribution and requested that the court interpret its decree of March 11, 1983, even though the decree was, at the time of the wife's request, already final. After a hearing, the court, on April 26, 1985, ordered that various items of property were assigned specifically to either the wife or the husband. In reversing the order assigning specific items of property, we stated in *Neujahr v. Neujahr, supra* at 725-26, 728, 393 N.W.2d at 49-51:

> We regret that we must once again reverse and dismiss the proceedings. We do so because there simply is no procedure authorizing what was done in the current action.
>
> . . . "Litigation must be put to an end, and it is the function of a final judgment to do just that. A judgment is the final consideration and determination of a court on matters submitted to it in an action or proceeding." [Citing and quoting from *Crofts v. Crofts*, 21 Utah 2d 332, 445 P.2d 701 (1968).]
>
> . . . .
>
> . . . By whatever name, however, the procedure is one to modify a decree because the decree fails to address the issue [citation omitted].
>
> . . . .
>
> There are, obviously, instances when a decree is ambiguous and parties are left at their peril to know what they are authorized to do. When that situation arises, the parties must bring some form of action which raises the issue and thereby requires the court before whom the matter is then pending to resolve the issue as a matter of law in light of the evidence and the meaning of the decree as it appears.
>
> What the district court did in the instant case was simply to enter a modified supplemental decree, without authority, after the decree had already become final. For that reason the order of the district court entered on April 26, 1985, must be set aside and the cause remanded with

directions to dismiss.

As was the case in *Neujahr v. Neujahr, supra*, there is simply no procedure authorizing what was done in the current action. Neb. Rev. Stat. § 48-180 (Reissue 1984) provides: "The Nebraska Workmen's Compensation Court may, on its own motion, modify or change its findings, order, award or judgment at any time before appeal and within ten days from the date of such findings, order, award or judgment for the purpose of correcting any ambiguity or clerical error." We find no procedure under the Nebraska Workers' Compensation Act which authorizes the compensation court to clarify an award on rehearing when more than 10 days have elapsed from the date on which the findings were made in the rehearing. The application of Sioux City Foundry Co. was clearly filed more than 10 days after the findings for the award on rehearing entered on March 25, 1985. In the absence of specific statutory authority to correct an ambiguity by a procedure other than as described in § 48-180, the compensation court does not have authority to enter an order revising one of its awards. The fact that the parties, without objection, participated in the hearing which led up to the order on January 6, 1986, does not alter the result. As we held in *Riedy v. Riedy*, 222 Neb. 310, 312, 383 N.W.2d 742, 744 (1986): "It is axiomatic, however, that the parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent."

The order of January 6, 1986, entered by the compensation court was not within its jurisdiction and, thus, must be set aside. For this reason, we reverse the judgment of the compensation court and remand this matter to the compensation court with direction to dismiss the application of Sioux City Foundry Co.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

BOSLAUGH and SHANAHAN, JJ., concur in the result.

STATE OF NEBRASKA, APPELLEE, V. ROBERT L. HOFFMAN, APPELLANT.

401 N.W.2d 683

Filed March 6, 1987. No. 86-089.

1. **Constitutional Law: Criminal Law.** Once a defendant has been informed of the rights required by *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), there is no requirement that the same information be conveyed to a defendant on each subsequent court appearance.
2. **Pleas.** After the entry of a plea of nolo contendere but before sentencing, a court should allow the defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution would not be substantially prejudiced by its reliance upon the plea.
3. _____. The burden is upon the defendant to establish by clear and convincing evidence the grounds for withdrawing a plea.
4. **Pleas: Appeal and Error.** The right to withdraw a plea previously entered is not absolute, and in the absence of a clear abuse of discretion exercised by the trial court, the denial of withdrawal will not be disturbed on appeal.
5. **Right to Counsel.** The right of an indigent defendant to have counsel does not give him the right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed as modified.

Donald A. Fitch, for appellant.

Robert L. Hoffman, pro se.

Robert M. Spire, Attorney General, and Mark D. Starr, for appellee.

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

PER CURIAM.

Two charges had been filed against Robert L. Hoffman. The first charge was possession of burglar's tools in violation of Neb. Rev. Stat. § 28-508(1)(a) (Reissue 1985), which is a Class IV felony punishable by a maximum sentence of 5 years' imprisonment, a $10,000 fine, or both such fine and imprisonment, with no minimum penalty. Neb. Rev. Stat. § 28-105(1) (Reissue 1985). In a companion case, Hoffman was charged with criminal attempt (burglary) in violation of Neb.

Rev. Stat. § 28-201 (Reissue 1985), which, in this case, was a Class IV felony. The information charging Hoffman with possession of burglar's tools also contained an allegation for the habitual criminal penalty provided in Neb. Rev. Stat. § 29-2221(1) (Reissue 1985).

On September 3, 1985, Hoffman was arraigned in the district court and appeared with his court-appointed attorney. At arraignment, the two informations were read to Hoffman, including the provision regarding the habitual criminal penalty. The court then explained the penalty regarding possession of burglar's tools and attempted burglary and also explained the enhanced penalty concerning the habitual criminal provision. The district court informed the defendant concerning all rights required by *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). When the court asked if Hoffman understood the charges and the penalties, Hoffman answered, "Yeah." Hoffman entered his plea of "not guilty" to each information. The court then set Hoffman's cases for trial.

On November 13, 1985, Hoffman and his attorney again appeared in the district court, this time to change his plea as the result of a plea bargain reached with the State. By the plea bargain, the State dismissed the charge of attempted burglary and dismissed the habitual criminal provision in the information charging Hoffman with possession of burglar's tools. When the district court asked if the plea bargain was as represented by the county attorney to the court, Hoffman answered, "Yeah." The court elicited and found that there was a factual basis for Hoffman's plea of no contest. Also, Hoffman verified that he had been advised of his "constitutional rights" at the time of arraignment, when he entered a plea of not guilty. Hoffman was informed by the court that his plea of no contest was, in effect, a plea of guilty for the purpose of the charge against Hoffman and that only sentencing remained. Hoffman said he understood that fact. Hoffman informed the court that he had sufficient time to confer with his attorney regarding the plea bargain and was ready to enter a "no contest" plea as required by the plea bargain. The court then determined that Hoffman's plea was being entered voluntarily, intelligently, and understandingly and, therefore, accepted Hoffman's plea of no

contest to the charge of possession of burglar's tools. The court deferred sentencing until a presentence report was submitted.

On December 17, 1985, Hoffman appeared before the district court for sentencing, again represented by his court-appointed counsel. The district court asked Hoffman and his court-appointed counsel if they were prepared to proceed, and the following occurred:

> [Hoffman]: I'm going to object right now. I'm withdrawing my plea and I want this guy to dismiss as counsel.
>
> [Hoffman's counsel]: Your Honor, I have been advised this morning by Mr. Hoffman that he wanted to withdraw his plea. I have indicated I would bring that to the attention of the Court. I have been advised approximately 30 seconds ago to dismiss as his counsel. I have an obligation to the Court to continue to represent him and I will do so. I believe you have the right to inquire of him as to both of his desires here and I would ask that you do that for purposes of the record.

When the court asked why Hoffman no longer wanted his court-appointed attorney, Hoffman answered: "Because he and the sheriff and the deputy get away with all of that shit that's going on downstairs. I laid downstairs with these handcuffs and shackles on all dam night and all dam day, and I haven't done any dam thing. I ain't done nothing."

Then, when the court asked specifically about anything which Hoffman's attorney had failed to do, or about legal representation in the proceedings, Hoffman said: "It's been inadequate. That's what." The court then asked: "In what regard, sir?" Hoffman answered: "He ain't did a lot of the stuff, man." The court found there was no good and sufficient reason shown by Hoffman for discharge of Hoffman's court-appointed counsel. The court then inquired of Hoffman regarding the basis for his requested withdrawal of his plea; Hoffman answered: "Because I feel I've been coerced into the mother . . . by the sheriff, the sheriff's deputy and my attorney, and this county attorney, deputy county attorney too." When the court asked, "Is there anything further as far as your request to withdraw your plea is concerned?" Hoffman

answered, "Nope." The court then refused to allow Hoffman to withdraw the plea of no contest. After reviewing the presentence report with Hoffman and his attorney, the court sentenced Hoffman to imprisonment for a term of 16 to 48 months and did not give Hoffman credit for the time incarcerated before sentencing, which amounted to 190 days. Substitute counsel was appointed for the purpose of Hoffman's appeal to this court.

In his appeal, Hoffman claims that the district court failed to inform him of his constitutional rights and the effect of his plea of no contest, that the court erred in its finding that Hoffman's plea was made knowingly, intelligently, and voluntarily, that the court erred in refusing to dismiss the court-appointed attorney and permit withdrawal of Hoffman's plea of no contest, and that the court erred in failing to give him credit for the 190 days' jail time served in the Dakota County jail.

Upon our review of the record, we find that, as a result of Hoffman's appearances in the district court on September 3 and November 13, 1985, Hoffman was informed of all the rights to be explained by the admonition required in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). In *State v. Tharp, ante* p. 126, 129-30, 395 N.W.2d 762, 765 (1986), we stated: "[O]nce a defendant has been informed of his right to counsel, there is no requirement that the same information be conveyed to a defendant on each subsequent court appearance." The same rule applies to all the admonitions required to be given a defendant under *State v. Irish, supra*. The record clearly establishes that, when the appearances of Hoffman before the district court on September 3 and November 13 are considered together, all the rights required under *Irish* were stated to Hoffman. Also, the record establishes that Hoffman's plea of no contest was knowingly, understandingly, and voluntarily entered. Therefore, there is no merit to Hoffman's claims that he was not informed about his rights, required by *State v. Irish, supra*, and that the district court erred in finding that Hoffman's plea was made knowingly, intelligently, and voluntarily.

In *State v. Nearhood*, 223 Neb. 768, 393 N.W.2d 530 (1986), this court examined a defendant's alleged claim of mistreatment

in relation to a defendant's request to withdraw a plea of guilty before sentence was imposed. In *Nearhood*, we stated:

> Nearhood's claims of mistreatment center around the facts that without any due process hearing, he was kept in a segregated cell at the Hitchcock County jail for 14 days prior to entering his plea, during which time he was unable to roam the jail as were the other prisoners; he was not permitted to have visitors; he was not permitted to find a personal physician and be seen by him; his medication was administered by other inmates; and his outgoing mail was censored or perhaps not delivered as promised. The sheriff testified, however, that Nearhood was kept apart from the other prisoners for security reasons.
>
> Whether Nearhood was properly segregated from the other prisoners and whether his privileges were properly curtailed are not material to the inquiry before us. See *O'Rourke v. State*, 166 Neb. 866, 90 N.W.2d 820 (1958). The material question is whether Nearhood has established any "fair and just" reason which would require, absent substantial prejudice to the State, that he be permitted to withdraw his plea.

223 Neb. at 770, 393 N.W.2d at 532.

As further stated in *State v. Nearhood, supra*, "[A]fter the entry of a plea of nolo contendere but before sentencing, a court should allow the defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution would not be substantially prejudiced by its reliance upon the plea." 223 Neb. at 769-70, 393 N.W.2d at 532. See, also, *State v. Copple*, 218 Neb. 837, 359 N.W.2d 782 (1984). "The burden is upon the defendant to establish by clear and convincing evidence the grounds for withdrawing a plea." *State v. Nearhood, supra* at 771, 393 N.W.2d at 533. " 'The right to withdraw a plea previously entered is not absolute, and in the absence of a clear abuse of discretion exercised by the trial judge, [the denial of withdrawal] will not be disturbed on appeal.' " *State v. Dixon*, 223 Neb. 316, 321, 389 N.W.2d 307, 310 (1986). We find no abuse of discretion in the district court's refusal to allow Hoffman to withdraw his plea. There is no merit to Hoffman's claim that the district court erred in

refusing to allow withdrawal of Hoffman's plea of no contest.

" '[T]he right of an indigent defendant to have counsel does not give him the right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel. . . .' " *State v. Clark*, 216 Neb. 49, 57-58, 342 N.W.2d 366, 371 (1983) (quoting from *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982)). Based on the record presented to this court, we find no error in the district court's refusal to discharge Hoffman's attorney in the trial court.

However, as conceded by the State, there is merit to Hoffman's claim that the district court committed error in failing to credit Hoffman's sentence with the 190 days Hoffman was incarcerated pending trial and sentencing in Dakota County. If the 190-day jail time is added to the minimum sentence imposed in this case, it would be equivalent to a 22-month, 10-day minimum term. According to Neb. Rev. Stat. § 83-1,105 (Reissue 1981), the minimum term imposed can be no greater than one-third the maximum term provided by law. In this case, that would mean the minimum term imposed could not exceed 20 months (one-third of 5 years).

As we have stated in *State v. Knight*, 220 Neb. 666, 667-68, 371 N.W.2d 317, 319 (1985):

> [T]he court's discretion in withholding credit for jail time cannot be used to impose sentences in violation of Neb. Rev. Stat. § 83-1,105(1) (Reissue 1981) [which] requires that in imposing an indeterminate sentence "the minimum limit fixed by the court shall not be . . . more than one-third of the maximum term. . . ."

Therefore, the minimum term of Hoffman's sentence must be reduced by 70 days. Therefore, we modify the judgment of the district court to the effect that 70 days are deducted from the minimum term of imprisonment imposed on Hoffman.

AFFIRMED AS MODIFIED.

TAMARA J. GAUGHAN AND JEFFREY UBER, APPELLEES, V. TOMMY GILLIAM AND SAMIE GILLIAM, APPELLANTS.

401 N.W.2d 687

Filed March 6, 1987. No. 86-205.

1. **Child Custody: Habeas Corpus: Appeal and Error.** A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. Where the evidence is in irreconcilable conflict, we consider the findings of the trial court.
2. **Parental Rights: Adoption: Proof.** The burden is on a natural parent challenging the validity of a relinquishment to prove that it was not voluntarily given.
3. **Parental Rights: Adoption.** In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption signed by a natural parent knowingly, intelligently, and voluntarily is valid.
4. _____: _____. The mere fact that a mother of a child might be influenced by the real concern expressed by friends or family for the welfare of both the mother and the child does not necessarily mean that a relinquishment executed by such mother is the product of threats, coercion, fraud, or duress.
5. **Child Custody: Habeas Corpus.** A question present in every habeas corpus case for custody of a child is the welfare and best interests of the child.

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

Craig D. Wittstruck of Berry, Anderson, Creager & Wittstruck, for appellants.

Maureen A. Doerner, for appellee Gaughan.

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

HASTINGS, J.

This was an action for a writ of habeas corpus brought by Tamara Gaughan and Jeffrey Uber to regain custody of their minor child. The child had been placed for adoption with the respondents, Tommy and Samie Gilliam, pursuant to relinquishments and consents executed by the petitioners. The trial court found against Jeffrey Uber because his consent was voluntary and he did not execute a revocation within a reasonable time. He has not filed a brief in this appeal. However, the court did hold that Tamara Gaughan had not executed the consent voluntarily and did act within a reasonable

time to revoke it. Therefore, the court ordered the child delivered to the custody of the petitioner, Tamara Gaughan, but directed that the order be stayed pending appeal. Respondents have appealed the court's decision.

The assignments of error are that the trial court erred in finding (1) that the relinquishment and consent was executed involuntarily, (2) that the petitioner acted within a reasonable time to revoke her consent, and (3) that the child is being unlawfully detained by the respondents.

On May 4, 1985, Tamara Gaughan, an unmarried 16-year-old living with her parents in Wichita, Kansas, gave birth to the minor child involved in this case. When the child was approximately 5 weeks old, the child, Tamara, and Jeffrey Uber, the child's father, moved to Bellevue, Nebraska, to live with Edward and Pauline Uber, the child's paternal grandparents. They lived there until approximately July 31, 1985, at which time Tamara and Jeffrey moved to their own home. The child was left with Edward and Pauline. This arrangement was a trial adoption to see if Edward and Pauline were willing to adopt the child and for Tamara and Jeffrey to see what it would be like without their child.

Shortly before August 13, 1985, Edward and Pauline decided not to adopt and informed Tamara and Jeffrey of this. Pauline Uber then contacted a friend who knew of a couple, Tommy and Samie Gilliam, who were interested in adopting. Pauline arranged a meeting at her home on or about August 13, 1985, so that Samie could meet the child.

Tamara testified that after this meeting she was very upset, so much so that she ran outside into a storm. She called her mother and told her she did not want to go through with the adoption. She also told Jeffrey that she did not want to go through with the adoption. When Pauline's friend, Girta Rogge, came upstairs to talk to Tamara, she told Tamara that a girl her age needed to go school and to proms. Tamara also testified that whenever Edward and Pauline would talk to her about adoption they kept saying that the baby needed good clothes and that he needed toys and school. They never said that he was lacking in love or attention, or asked Tamara how she felt or what she needed. Tamara, however, never told Pauline or Girta

that she did not want to go through with the adoption.

On August 22, 1985, Tamara was at Edward and Pauline's home. She was getting ready to pick Jeffrey up from work when she was told by Pauline Uber that after they picked Jeffrey up they would go to a lawyer's office regarding the adoption. Tamara testified that nothing was said to her about this meeting until right before they went to it and that she would not have gone to the lawyer's office if it had not been for Pauline. Pauline testified that Tamara knew there was going to be an appointment but did not know the exact date.

The lawyer involved, Douglas Veith, testified that he telephoned Tamara on August 21, 1985, to get the information he needed to prepare the relinquishment and consent forms. When he told her who he was, she said that she wanted to talk to her mother. Douglas Veith said he encouraged her to talk to her mother and that he was not pressuring her at all. He said the conversation was left that he would prepare the documents and that when they made their decision to adopt, they would come into his office.

Tamara denied ever receiving such a telephone call. Veith testified that he made a similar telephone call to Jeffrey, which Jeffrey acknowledged receiving.

Douglas Veith testified that when Tamara, Jeffrey, and Pauline arrived at his office on August 22, 1985, he showed them into his personal office, introduced himself, and explained that he was the attorney for Tommy and Samie Gilliam and that he did not get into people changing their minds concerning parental rights. He then advised them that execution of the consent forms would terminate all parental rights, that they would have no right to come back and reclaim the child, that they could no longer come back and find out about the child, and that the decision was serious and to be made solely by the child's natural parents.

Tamara, on the other hand, testified that she was never advised there were alternatives to adoption such as foster care, that the relinquishment forms were never explained to her, and that she did not understand she would never see her child again. Jeffrey also testified that Veith did not go into detail explaining anything about the relinquishment and adoption process.

Veith then testified that after he told them about the process he gave the documents to Tamara and Jeffrey and advised them to read them and to talk about the process while he left the room for a few minutes. When he returned to his office with a witness, Van Schroeder, Jeffrey had already signed the forms. Schroeder refused to witness the signature, so Veith had the forms reaccomplished. Then, both Jeffrey and Tamara signed the forms in the presence of Veith and Schroeder.

Contrary to Veith's testimony, Tamara and Jeffrey testified that Schroeder did not see Jeffrey sign the relinquishment and consent forms. It was uncontroverted that Schroeder did see Tamara sign her forms and that Tamara only partially signed her name and then stopped signing. When Pauline Uber put her hand on Tamara's shoulder and told her it was best for the child, Tamara finished her signature. Tamara testified that she felt pressured into making a decision.

That evening Pauline took the baby to Girta Rogge's home and the Gilliams received the baby.

"A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. Where the evidence is in irreconcilable conflict, we consider the findings of the trial court." *Auman v. Toomey*, 220 Neb. 70, 73, 368 N.W.2d 459, 461 (1985).

"The burden is on a natural parent challenging the validity of a relinquishment to prove that it was not voluntarily given." *Id.*

"In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption signed by a natural parent knowingly, intelligently, and voluntarily is valid." *Id.*

In this case, Tamara Gaughan signed the relinquishment and consent form on August 22, 1985. Sometime shortly after that, she and Jeffrey had a fight, after which it was decided that she should get away from him for a while. She went back home to Wichita for approximately 2 weeks and then apparently returned to Bellevue.

At the end of September, Tamara's mother came up from Wichita to Bellevue to see how her daughter was doing. While she was visiting Tamara, Mrs. Gaughan went to visit an attorney, Mr. Hovey, because she was concerned about whether

Tamara should be in school. She also talked to him about whether a minor can validly relinquish the rights to her own child, to which he responded affirmatively.

The following week, on October 9, 1985, Tamara for the first time went in to see Hovey. He told her his hourly rate and half-hourly rate, which she knew she could not afford. She saved her money and then went back to Hovey sometime in November. At that time he said he needed a retainer, the names and present address of the prospective adoptive parents, and the relinquishment papers.

Tamara contacted the attorney who handled the adoption for a copy of the relinquishment documents and was refused. Tamara then went back to Hovey, and he suggested that she contact Legal Aid, which she did. Tamara signed a revocation of relinquishment and consent to adoption form on December 13, 1985. A copy of this document was sent to the attorney handling the adoption. In an attempt to learn the Gilliams' names, Tamara contacted their church pastor, but he would not tell her their names. Finally, on December 30, 1985, she did learn their names. This action for a writ of habeas corpus was filed on January 2, 1986.

The very nature of the act of a mother in relinquishing her child for adoption is emotionally traumatic. However, the mere fact that a mother in a situation such as this might be influenced by the real concern expressed by friends or family for the welfare of both the mother and the child does not mean that such act of relinquishment is the product of threats, coercion, fraud, or duress. We do not think that the record in this case supports such a finding. From our review of the record de novo, we determine that the relinquishment and consent was voluntarily executed by the petitioner, and she has failed to meet her burden of proof to establish the contrary. That she may have changed her mind at some time after she had relinquished the child is insufficient to invalidate the earlier consent. *Auman v. Toomey, supra*. Having determined that the relinquishment was voluntary, it is not necessary for us to consider the question of the timeliness of its attempted revocation.

The remaining question present in every habeas corpus case is the welfare and best interests of the child. *Auman v. Toomey,*

supra. The record is crystal clear that the best interests of the child would be served by allowing the child to remain with the respondents. The testimony of the respondents and of Gene Welch, a psychotherapist who visited the home of the respondents and observed the interactions between them and the child, leaves no basis to conclude that the respondents are unfit to have custody of the child. To the contrary, to uproot this child after approximately a year and a half in his present environment could be seen as nothing but detrimental to his future development. The statement by the trial judge as he announced his oral findings would support such a conclusion.

The judgment of the district court is reversed and remanded with directions to enter judgment consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

KRIVOSHA, C.J., dissenting.

For reasons more fully set out in my dissent in *Lum v. Mattley*, 208 Neb. 789, 305 N.W.2d 878 (1981), and my dissent in *Auman v. Toomey*, 220 Neb. 70, 368 N.W.2d 459 (1985), I must likewise dissent in this case.

The hazard which I feared for in *Lum v. Mattley, supra*, did in fact occur in some part in the instant case. The first couple to whom the child was given declined to adopt the child. Had there not been a second couple already in the wings, our decision would stand for the proposition that while the natural mother has lost her rights to the child, the child has acquired no adoptive parents and now becomes a ward of the state. In the case of a licensed agency we would not permit such a situation to arise. See *Kellie v. Lutheran Family & Social Service*, 208 Neb. 767, 305 N.W.2d 874 (1981). One may argue that the distinction between the licensed agency and the private placement is the language of the statute. Nevertheless, in *Kellie v. Lutheran Family & Social Service, supra* at 772, 305 N.W.2d at 877, we said, "Basic principles of offer and acceptance, as well as the statute, dictate that result." I believe that basic principles of offer and acceptance, of mutuality, and of the law regarding contracts, generally, should apply in the case of private placement as well as that of licensed agencies.

In the instant case a near disaster was avoided only because another couple was available. For a host of reasons, that may

not always be the case; yet the rule of law will prevail. I would have supported the action of the district court and affirmed its judgment.

IN RE INTEREST OF R.J., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. R.J., APPELLANT.
401 N.W.2d 691

Filed March 6, 1987. No. 86-548.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed.

David T. Schroeder, for appellant.

Vincent Valentino, York County Attorney, and Charles W. Campbell, for appellee.

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

HASTINGS, J.

The county court for York County, sitting as a juvenile court, adjudged the appellant, a male juvenile of the age of 15 years, to be a juvenile within the meaning of Neb. Rev. Stat. § 43-247(1) (Cum. Supp. 1986), i.e., a juvenile under the age of 16 years who has committed a misdemeanor or infraction under the laws of this state in that he had violated Neb. Rev. Stat. § 28-709 (Reissue 1985) by contributing to the delinquency of a child. This determination was affirmed by the district court for York County.

On appeal to this court, error is assigned because of the failure of the courts below to find § 28-709 unconstitutionally vague and overbroad and in their failing to find that the evidence was insufficient to find a violation of § 28-709.

Section 28-709 provides in pertinent part as follows:

> (1) Any person who, by any act, encourages, causes, or contributes to the delinquency or need for special

> supervision of a child under eighteen years of age, so that such child becomes, or will tend to become, a delinquent child, or a child in need of special supervision, commits contributing to the delinquency of a child.
>
> . . . .
>
> (b) A child in need of special supervision shall mean any child under the age of eighteen years . . . who deports himself so as to injure or endanger seriously the morals or health of himself or others.
>
> (3) Contributing to the delinquency of a child is a Class I misdemeanor.

The child in this case was a 14-year-old female. The act which it was alleged contributed to her delinquency occurred on September 20, 1985. According to her testimony, she, the juvenile, and a 19-year-old male friend of the juvenile were together at that friend's apartment. She stated that the two males undressed her, removed their own clothes, and then each, alternately, commencing with the juvenile, engaged in two acts of sexual intercourse with her.

This testimony was substantiated by that of the 19-year-old friend, except that he described only one act of intercourse by each, the juvenile and himself. However, he did testify to circumstances suggesting that in his apartment on an earlier occasion the juvenile had engaged in some type of sexual activity with the child and that later in the evening the juvenile told him, "You ought to try her sometime." Although not referring to this specific occasion, the child testified that she had engaged in sexual intercourse with the juvenile on 8 or 10 previous occasions.

The minor child also testified that she had willingly engaged in sexual activity with the juvenile, that as a result of these activities coming to light she had been "grounded" by her family and was now going to counseling, and that she had not been sexually active with anyone before these occasions.

Norman Cobb, a police officer of the city of York, testified that the two witnesses had given him the same information approximately 1 week after the September 20 incidents when he took the minor child and the 19-year-old friend into custody at the latter's apartment.

Appellant's challenge to the constitutionality of § 28-709 is nearly identical to that made and rejected in *State v. Cialkowski*, 193 Neb. 372, 227 N.W.2d 406 (1975), and *State v. Simants*, 182 Neb. 491, 155 N.W.2d 788 (1968). The legislation is constitutional, and the first assignment of error is without merit.

In his brief appellant correctly states that in order to sustain the judgments of the lower courts it is necessary that he be shown to have by his actions encouraged, caused, or contributed to the minor's deporting herself so as to injure or endanger seriously her principles or habits with respect to right or wrong conduct.

In addition to the testimony of the child that she had been "grounded" and was in counseling, her stepfather told how he and his wife previously had found evidence of the child's untruthfulness, and also recently, particularly with respect to her whereabouts on the night of the sexual episodes previously referred to and to two other occasions when she apparently stayed overnight with the juvenile's friend. He also testified that the child had indicated to him that she was lonely and that the juvenile knew this, and the juvenile's sexual relations with her "has not helped one bit."

Common sense, as well as the sense of decency, propriety, and the morality which most people entertain, to say nothing of the health threat which promiscuous sexual activity promotes, when joined with the obvious consequences which have befallen this child of immature years, amply demonstrates that the actions of the juvenile have contributed to a situation in which the child affected has suffered serious injuries to her principles and habits regarding right or wrong conduct. Cf. *State v. Cialkowski, supra.*

The judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF JAMES M. REDPATH, DECEASED. MARY ALICE PETERSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF ALICE REDPATH, DECEASED, APPELLANT AND CROSS-APPELLEE, V. BESSIE ANN REDPATH, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES M. REDPATH, DECEASED, APPELLEE AND CROSS-APPELLANT.

402 N.W.2d 648

Filed March 13, 1987. No. 85-321.

1. **Trusts: Evidence: Proof.** One who claims the existence of a constructive trust has the burden of proof to establish the existence of a constructive trust by evidence which is clear, satisfactory, and convincing in character.
2. **Trusts: Property: Conversion: Proof.** As a general rule, provided the property can be traced or identified, any third person who has obtained trust property or its product by a transfer made in violation of the trust may be subject to a constructive trust. It is necessary, however, that the property can be traced or identified.
3. **Trusts: Joint Accounts: Conversion.** If the trustee makes a withdrawal from the mixed account for an admittedly personal purpose, for example, to pay his living expenses or his individual debts, or for an unknown purpose, such withdrawal will be charged to the personal part of the account as long as there remains any cash or credit in such personal portion of the account. It will be only after the personal credit or cash is exhausted that withdrawals for personal or unknown purposes will be charged to the trust side of the account.
4. **Trusts: Conversion: Presumptions.** When a trustee wrongfully commingles trust money with his own and makes payments from the common fund, it will be presumed that he paid out his own money, and not the trust money.
5. **Judgments: Ratification: Debtors and Creditors.** In order that a confession of judgment may be binding on the plaintiff, it is essential that he, either expressly or impliedly, assent thereto; if it is made without his request, knowledge, or consent, and entered at the instance of the debtor alone, it will have no validity unless the creditor ratifies or accepts it.
6. **Joint Accounts: Intent.** A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Affirmed as modified.

Brad Roth of Black, Sennett & Roth, for appellant.

Steven O. Stumpff, for appellee.

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

KRIVOSHA, C.J.

In January of 1982 Alice Redpath, by and through her guardian, her daughter, Mary Alice Peterson, filed a claim against the estate of her son, James M. Redpath, seeking to recover the sum of $54,581.77, which Alice Redpath maintained her son had unlawfully converted while handling moneys belonging to her. After the action was commenced, Alice Redpath died and the cause of action was revived in the name of Mary Alice Peterson, as the personal representative of the estate of Alice Redpath. Following a trial, the district court for Custer County, Nebraska, entered a decree finding in part for the estate of Alice Redpath and in part for the estate of James M. Redpath and his widow, Bessie Ann Redpath. The district court determined that the estate of James M. Redpath had confessed judgment in open court at the beginning of the trial for $348, that apparently being the amount of the premiums paid on a life insurance policy issued on the life of James M. Redpath. The court further determined that the evidence presented was sufficient to establish that James M. Redpath had in fact converted $45,119.15 from his mother and that a claim against his estate for that amount should be allowed. And, although the district court found that the estate of James M. Redpath had confessed judgment in the amount of $348, the district court further found that the appellant had failed to produce sufficient evidence to establish that the proceeds converted from Alice Redpath were used for the payment of any insurance premiums and that, therefore, the appellant had failed to establish that the insurance proceeds constituted a res upon which a constructive trust could be imposed.

It is this judgment and decree from which the personal representative of the estate of Alice Redpath has now appealed to this court. The appellee, Bessie Ann Redpath, both individually and as personal representative of the estate of James M. Redpath, has cross-appealed. We believe that the trial court was generally correct except with regard to its findings concerning the confession of judgment, and for that reason we affirm as modified.

A number of questions are presented to the court by both the

appeal and the cross-appeal. Included is the question as to whether, if a person wrongfully obtains money of another and uses it in the payment of premiums for insurance on his life, a trust may be created in favor of the person from whom the property was wrongfully, illegally, or fraudulently appropriated, over such portion of the total insurance proceeds payable as the amount of the premiums which have been paid from the money wrongfully, illegally, or fraudulently appropriated bears to the total premium paid. While that question was earlier raised in *Mullikin v. Pedersen*, 161 Neb. 22, 71 N.W.2d 485 (1955), like our decision in *Mullikin v. Pedersen*, it is not necessary for us to decide the issue in the instant case. We do not reach that question because the facts in this case fail to disclose that James M. Redpath, during his lifetime, used any of the converted funds for the payment of the premiums on the insurance policy in question.

In beginning our analysis of this matter, we note that one who claims the existence of a constructive trust has the burden of proof to establish the existence of a constructive trust by evidence which is clear, satisfactory, and convincing in character. See, *Ford v. Jordan*, 220 Neb. 492, 370 N.W.2d 714 (1985); *Fleury v. Chrisman*, 200 Neb. 584, 264 N.W.2d 839 (1978); *Marco v. Marco*, 196 Neb. 313, 242 N.W.2d 867 (1976). Furthermore, as observed by the appellant, "As a general rule, provided the property *can be traced or identified*, any third person who has obtained trust property or its product, by a transfer made in violation of the trust" may be subject to a constructive trust. (Emphasis supplied.) 90 C.J.S. *Trusts* § 441 at 850 (1955). It is necessary, however, that the property can be traced or identified.

The record in this case discloses that six premiums were paid on a Bankers Life insurance policy issued on the life of James M. Redpath and payable to his widow, Bessie Ann Redpath. The first of these premiums was paid in December of 1980, and the five remaining premiums were paid at some date thereafter. The record discloses that the premiums were paid out of a First National Bank of O'Neill, Nebraska, account or a Nebraska State Bank & Trust Co. of Broken Bow, Nebraska, account. Both accounts were jointly owned by James M. and Bessie Ann

Redpath. While the record, at best, is confusing, it would appear that the amount of the premiums paid was $348 and that during all of this time there were proceeds clearly belonging to either James M. Redpath or Bessie Ann Redpath in an amount substantially in excess of $348 in either or both of those accounts. Furthermore, the evidence would seem to disclose that, although prior to December of 1980, when the first premium was paid out of the O'Neill account, funds belonging to Alice Redpath were deposited in one or both of the Nebraska accounts, more than $15,000 was transferred from the account in O'Neill, Nebraska, to an account in Tennessee in the joint names of James M. Redpath, Alice Redpath, and Bessie Ann Redpath. Based on the evidence before us, it would appear that by the time that the first premium was paid in Nebraska, most of the moneys belonging to Alice Redpath which had been deposited in either of these Nebraska accounts had been transferred back to an account in Tennessee and that no part of the funds converted from the Tennessee account was ever used to pay the premiums on the policy of insurance issued by Bankers Life on James M. Redpath's life.

In G. Bogert & G. Bogert, The Law of Trusts and Trustees § 926 at 407-08 (2d ed. 1982), the noted authors observe:

> If [the trustee] makes a withdrawal from the mixed account for an admittedly personal purpose, for example, to pay his living expenses or his individual debts, or for an unknown purpose, such withdrawal will be charged to the personal part of the account as long as there remains any cash or credit in such personal portion of the account. It will be only after the personal credit or cash is exhausted that withdrawals for personal or unknown purposes will be charged to the trust side of the account.

And, in *State v. Bank of Commerce*, 54 Neb. 725, 728, 75 N.W. 28, 29 (1898), we said: "[W]hen a trustee wrongfully commingles trust money with his own and makes payments from the common fund, it will be presumed that he paid out his own money, and not the trust money . . . ."

In the instant case, not only did the evidence before us establish that James and Bessie Redpath had more than enough money in the Nebraska accounts to pay the entire premiums,

but that an amount in excess of the amount of money belonging to Alice Redpath and previously deposited in these Nebraska accounts was transferred to Tennessee before the premiums on the policy in question were paid. The evidence failed to establish clearly, satisfactorily, and convincingly that any portion of Alice Redpath's money was used to pay the premiums in question. The district court therefore correctly determined that the appellant has failed to meet her burden of proof to establish by evidence which is clear, satisfactory, and convincing in character that a constructive trust upon the proceeds of the life insurance policy should be impressed by reason of the alleged claim that moneys belonging to Alice Redpath were used to pay the premiums on the life insurance policy.

We believe that part of the confusion in this case arises by reason of the district court's having concluded that judgment should be entered against the estate of James M. Redpath for the amount of the premiums ($348) by reason of a confession of judgment. An examination of the record discloses that, while an effort was made by the appellee to confess judgment in the amount of $348, the offer was not accepted and therefore may not be considered by the trial court or this court in the determination of this case.

Neb. Rev. Stat. § 25-906 (Reissue 1985) provides as follows:

> After an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action. Whereupon, if the plaintiff, being present, refuses to accept such confession of judgment in full of his demands against the defendant in the action, or, having had such notice that the offer would be made, of its amount and of the time of making it, as the court shall deem reasonable, fail to attend, and on the trial do [sic] not recover more than was so offered to be confessed, such plaintiff shall pay all the costs of the defendant incurred after the offer. *The offer shall not be deemed to be an admission of the cause of action or amount to which the plaintiff is entitled, nor be given in evidence upon the trial.*

(Emphasis supplied.)

Appellant argues that while she did not accept the offer of confession in so many words, neither did she reject it, and therefore it should be considered to have been accepted. As noted in 49 C.J.S. *Judgments* § 148 at 275 (1947):

> In order that a confession of judgment may be binding on the plaintiff, it is essential that he, either expressly or impliedly, assent thereto; if it is made without his request, knowledge, or consent, and entered at the instance of the debtor alone, it will have no validity unless the creditor ratifies or accepts it. . . .
>
> . . . The creditor's consent to, or acceptance of, the judgment, if not express, may be implied from the circumstances of his dealing with it, as from the fact that he attempts to enforce it. In the absence of anything appearing to the contrary, the creditor's consent may be presumed from the record or from the fact that the judgment confessed operates to his benefit, but the creditor's mere silence or failure to object on being informed of the judgment does not amount to an acceptance of it, although it is admissible as evidence tending to prove his acceptance.

An examination of the record in this case clearly establishes that appellant did not accept or consent to the confession of judgment in the amount of $348 and, quite to the contrary, elected to litigate the question of whether Alice Redpath was entitled to receive all of the proceeds of the insurance policy. As we have already indicated, the evidence before us establishes that premiums were not paid from moneys belonging to Alice Redpath. The offer to confess judgment could only have been made in an effort to resolve the entire lawsuit for $348. The offer did not permit the appellant to both accept a judgment in the amount of $348 and litigate the further question of whether all of the proceeds of the policy were due and owing. In that regard, the district court was in error in entering judgment in favor of the estate of Alice Redpath and against the estate of James M. Redpath. To that extent the judgment of the district court must be modified in favor of the appellee, Bessie Ann Redpath, both individually and as personal representative of the estate of James M. Redpath, and against the estate of Alice

Redpath.

The remaining issue raised by appellee's cross-appeal appears to question the district court's entering a judgment against the estate of James M. Redpath in the amount of $45,119.15, the amount which the district court found had been converted by James M. Redpath from his mother. Appellee does not deny that funds were taken out of the Tennessee joint account and used solely for the benefit of James M. Redpath or his family. Her principal argument in this regard seems to be based upon the notion that when moneys are placed into a joint banking account, they become the property of the joint tenants and may be withdrawn by either party without liability to the other. In support of that position appellee cites to us several cases, including *White v. Ogier*, 175 Neb. 883, 125 N.W.2d 68 (1963), *Rose v. Hooper*, 175 Neb. 645, 122 N.W.2d 753 (1963), and *Crowell v. Milligan*, 157 Neb. 127, 59 N.W.2d 346 (1953). The difficulty with appellee's position is that she ignores the provisions of the Nebraska Probate Code enacted in this jurisdiction in 1974.

Neb. Rev. Stat. § 30-2703(a) (Reissue 1985) provides as follows: "A joint account belongs, *during the lifetime* of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." (Emphasis supplied.) All of the funds which were converted, as found by the district court, were so converted prior to the death of either Alice Redpath or James M. Redpath and therefore clearly fall within the provisions of § 30-2703. The comment to § 30-2703 further provides: "This section reflects the assumption that a person who deposits funds in a multiple-party account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, he usually intends no present change of beneficial ownership." The comment then goes on to provide that this presumption, however, may be rebutted by evidence which is clear and convincing. Not only is the evidence in this case not clear and convincing that Alice Redpath intended to make a gift to her son, but it is actually clear and convincing that she never intended to do so. The evidence in this case clearly establishes that Alice Redpath was

not aware that moneys belonging to her and transferred to joint certificates of deposit would not remain her sole property or that the money had been used by her son for anything else except her care. The most that appellee argues is that the actual intent of Alice Redpath is not known. Appellee argues: "We stress the fact that Alice Redpath's actual intent in placing the accounts in joint ownership is not known." Brief for Cross-Appellant at 8. Accepting that as all of the evidence, we would be compelled to find that the party having the burden of overcoming the presumption created by § 30-2703, in this case appellee, failed and that the decision of the district court was correct.

Appellee further cites to us our decision in *Ford v. Jordan*, 220 Neb. 492, 370 N.W.2d 714 (1985). The *Ford* case has no application because it involved the disposition of joint tenancy property following the death of one of the joint tenants and is controlled by Neb. Rev. Stat. § 30-2704 (Reissue 1985) and not § 30-2703.

Section 30-2704(a) reverses the presumption following death, providing in part as follows: "Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created." See, also, *In re Estate of Lienemann*, 222 Neb. 169, 382 N.W.2d 595 (1986). In the instant case, James M. Redpath preceded his mother in death and had converted the funds in question prior to his death.

We believe that the judgment of the district court finding that the estate of James M. Redpath, deceased, is indebted to the estate of Alice Redpath in the amount of $45,119.15 was correct and should be affirmed. The judgment of the district court is therefore affirmed except as herein modified.

AFFIRMED AS MODIFIED.

NANDAGASEN G. NAIDOO, ALSO KNOWN AS CASEY NAIDOO, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE.

402 N.W.2d 653

Filed March 13, 1987. No. 85-515.

1. **Summary Judgment.** On a motion for summary judgment, the moving party is entitled to judgment as a matter of law where there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom.
2. _____. In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving that party the benefit of all favorable inferences which may reasonably be drawn from the evidence.
3. _____. The party moving for summary judgment bears the burden of showing that no genuine issue of material fact exists and must produce enough evidence to demonstrate his entitlement to judgment if the evidence remains uncontroverted. If he is successful in doing so, the burden of producing contrary evidence shifts to the nonmoving party.
4. **Employer and Employee: Liability: Negligence.** An action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (1982), may be based on the theory of respondeat superior or on a theory of direct negligence.
5. **Employer and Employee: Damages.** Only damages for physical injury may be recovered under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (1982).

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

Joseph P. Inserra and John P. Inserra of Inserra Law Offices, for appellant.

Gayla L. Fletcher, for appellee.

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

BOSLAUGH, J.

The plaintiff, Nandagasen G. Naidoo, also known as Casey Naidoo, commenced this action under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 et seq. (1982), to recover general damages for emotional distress and special damages for medical expenses and lost wages alleged to have been caused by the negligence of the defendant, Union Pacific Railroad Company.

The plaintiff alleged his damages were the result of verbal and physical abuse inflicted by a Mr. Bachman, an employee of the defendant, at a June 24, 1981, meeting. The plaintiff claims he was acting in the course and scope of his own employment with the defendant at the time of the meeting.

The defendant's negligence was predicated on two grounds in the petition: In failing to comply with the statutory and nondelegable duties to (1) provide plaintiff with a safe place to work in that it knew or should have known the defendant's employee would or had a propensity to commit the acts alleged; and to (2) provide safe customs and practices to do the work in that defendant failed through its customs and practices to screen the type of individual, namely defendant's employee, who committed the acts alleged.

The defendant's answer generally denied the allegations of the petition and alleged that the FELA was not applicable to the plaintiff's claims.

The defendant filed a motion for summary judgment which was heard on the pleadings, affidavits, and the deposition of the plaintiff. The trial court sustained the motion and dismissed the action. The plaintiff has appealed.

The record shows that in May of 1981, the plaintiff was a specialist in the defendant's billing and contracts department. His direct supervisor, Pam Mellegaard, and her supervisor, Bob Eperson, attempted to fire the plaintiff because of a "personality conflict" between the plaintiff and Mellegaard. The plaintiff, through his union, the Brotherhood of Railway and Airline Clerks (BRAC), attempted to exercise his seniority to find a new job. As a member of BRAC, the plaintiff was subject to the terms and conditions of employment imposed by the collective bargaining agreement between BRAC and the defendant.

A union official, George MacIntosh, informed the plaintiff that he could not be fired. MacIntosh then arranged a meeting between the plaintiff; himself; and two management representatives, John Casteel, an assistant to John Deasey, the controller of the railroad, and Chuck Saylor, an assistant to Casteel. At this meeting the plaintiff was told that he was not fired and was asked to provide a list of deficiencies in the

department and also a writeup on Mellegaard's outside business affiliations. The list of deficiencies was to be given to Deasey. The plaintiff did submit a list of deficiencies to Saylor and a writeup on Mellegaard to MacIntosh.

On June 24, 1981, Bachman, the local chairman of the union and also an employee of the defendant, summoned the plaintiff from his office at work to a meeting with Saylor, MacIntosh, and himself. According to the plaintiff, the following transpired at the meeting:

> A. I went in the office, and there was Mr. Saylor sitting across from me, and Mr. MacIntosh was sitting on the other side of the table. And Mr. Bachman threw this list at me and said, "What is this?" And he used a couple of foul languages.
>
> Q. What did he say?
>
> A. He said, "You think I'm a fucking idiot?" And he threw this — and I said, "What do you mean?" He said — he made a statement, he said, "This is not enough. This is not enough, the list." And he picked on my background and my religion and he threatened — he first — he caught me by my collar up here and pushed me against the wall and said he'd burn my house down, and he told me that he was doing [sic] to kick me out of the country. And I said, "Well, I'm a citizen," and he said, "Well, not anymore." He said, "Then you're fired. Get out of here." And Mr. Casteel's staff was all outside, they all heard it, so —

According to the plaintiff, Bachman was intoxicated at the time of the incident.

Saylor later apologized to the plaintiff for Bachman's actions and assured the plaintiff that Bachman could not fire him. Bachman was employed in a different department, and there is no evidence that the plaintiff ever worked for or with Bachman.

As a result of the confrontation with Bachman, the plaintiff claims he began to drink, take drugs, gamble, and have marital problems, which eventually led to his divorce. The plaintiff also claims that he suffered nightmares, fear, anger, paranoia, and sleeping problems, lost his management aspirations, and even began to plot to kill the people at work whom he believed had caused his problems. The plaintiff claims that he was truly

fearful of Bachman's threats because he believed Bachman to be a dangerous man.

The plaintiff claims that the order granting the motion for summary judgment was in error because the trial court impliedly and erroneously determined that (1) Naidoo's claim was a minor dispute under the Railway Labor Act (RLA), 45 U.S.C. §§ 151 et seq. (1982), and, therefore, was within the exclusive jurisdiction of the National Railroad Adjustment Board, (2) Bachman was not, in fact, acting within the scope of his employment with Union Pacific at the time he allegedly assaulted Naidoo, and (3) as a matter of law, a purely mental injury is not cognizable under the FELA.

We note at the outset that on a motion for summary judgment, the moving party is entitled to judgment as a matter of law where there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom. *Deutsche Credit Corp. v. Hi-Bo Farms, Inc., ante* p. 463, 398 N.W.2d 693 (1987). In considering such a motion, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving that party the benefit of all favorable inferences which may reasonably be drawn from the evidence. *Deutsche Credit Corp., supra.* The moving party bears the burden of showing that no genuine issue of material fact exists and must produce enough evidence to demonstrate his entitlement to judgment if the evidence remains uncontroverted. *Deutsche Credit Corp., supra.* If he is successful in doing so, the burden of producing contrary evidence shifts to the nonmoving party. *Deutsche Credit Corp., supra.*

The plaintiff contends there was a genuine issue of material fact as to whether Bachman was acting within the scope of his employment with the defendant at the June 24, 1981, meeting.

The FELA makes the carrier liable for "the negligence of any of the officers, agents, or employees of such carrier . . . ." 45 U.S.C. § 51. Although the express language of the statute limits the carrier's liability to that for the negligence of its employees, etc., the FELA has been interpreted to reach at least some intentional torts. *Lancaster v. Norfolk and Western Ry. Co.*, 773 F.2d 807 (7th Cir. 1985).

Two theories of liability are recognized in FELA cases involving intentional assaults by fellow employees. *Brooks v. Washington Terminal Co.*, 593 F.2d 1285 (D.C. Cir. 1979). The first, the respondeat superior theory, provides that an assault committed by an employee in the course of his duties and in furtherance of the employer's business can serve as a basis for FELA liability. *Jamison v. Encarnacion*, 281 U.S. 635, 50 S. Ct. 440, 74 L. Ed. 1082 (1930); *Lancaster v. Norfolk and Western Ry. Co., supra; Brooks v. Washington Terminal Co., supra; Sowards v. Chesapeake & O. Ry. Co.*, 580 F.2d 713 (4th Cir. 1978); *Green v. River Terminal Ry. Co.*, 585 F. Supp. 1019 (N.D. Ohio 1984), *aff'd* 763 F.2d 805 (6th Cir. 1985). The second, the direct negligence theory, holds the railroad employer liable for failing to prevent reasonably foreseeable danger to an employee from intentional or criminal misconduct. *Harrison v. Missouri Pacific R. Co.*, 372 U.S. 248, 83 S. Ct. 690, 9 L. Ed. 2d 711 (1963); *Lancaster v. Norfolk and Western Ry. Co., supra; Brooks v. Washington Terminal Co., supra; Sowards v. Chesapeake & O. Ry. Co., supra; Green v. River Terminal Ry. Co., supra.*

The traditional concept of proximate cause is abrogated in FELA cases by the fact that the plaintiff's proof is sufficient to state a claim if it shows that the carrier's negligence, however slight, played some part in causing the injury. *Green v. River Terminal Ry. Co., supra.*

In the present case, the record shows Bachman was acting solely in his capacity as a union representative at the June 24, 1981, meeting.

The RLA imposes an affirmative duty on both the carrier and the employee

> to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier . . . .

45 U.S.C. § 152.

The evidence is clear that the plaintiff initiated contact with the local BRAC office in May of 1981, after he claims his

immediate supervisors allegedly attempted to fire him. This initial contact led to the two meetings between union officials and management representatives. Those meetings reflect reasonable efforts by the parties to settle the dispute in compliance with the RLA.

In his deposition the plaintiff admitted that Bachman and his assistant, MacIntosh, were both union representatives and did not work in the same department as the plaintiff. Bachman's only purpose in attending the June 24, 1981, meeting was in his capacity as a union official.

Under the direct negligence theory of FELA liability, the plaintiff need not prove that the coemployee's misconduct was done in furtherance of the employer's business. See, *Harrison v. Missouri Pacific R. Co., supra; Lancaster v. Norfolk and Western Ry. Co., supra.*

The plaintiff argues that since there is some evidence that at least one official of the defendant was aware of Bachman's propensity for making and carrying through on threats, it is reasonable to infer that the defendant could have foreseen harm to other employees by its continued employment of Bachman or by its failure to supervise his activities. See *Harrison v. Missouri Pacific R. Co., supra.* The difficulty with this argument is that the selection of union officials is a matter controlled entirely by members of the union. The affidavit of D.D. Matter, assistant director of labor relations for the defendant, establishes that the selection of union representatives for the BRAC is made exclusively by members of the union, and the defendant is forbidden by federal law to interfere in or control the selection of union representatives by the union members. Thus, anything done by the local chairman of the union in his capacity as chairman was a union matter which was in no way subject to the control of the defendant. The record establishes that there was no genuine issue of material fact as to liability upon a direct negligence theory.

The plaintiff in this case admits that he sustained no physical injuries as a result of the incident on June 24, 1981, and claims only damages resulting from emotional distress. The clear weight of authority is that only damages for *physical* injury may be recovered under the FELA.

In *Lancaster v. Norfolk and Western Ry. Co.*, 773 F.2d 807, 813 (7th Cir. 1985), the court recognized that "the FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact—an act such as telling a man he's fired . . . ."

Previously, in *Bullard v. Central Vermont Ry.*, 565 F.2d 193 (1st Cir. 1977), the court recognized that recovery for mental distress in an FELA action is allowed only to the extent that it is directly associated with physical injuries resulting from the defendant's negligence. Several recent federal district court decisions adhere to this view. In *Moody v. Maine Cent. R. Co.*, 620 F. Supp. 1472 (D. Me. 1985), the court granted the defendant's motion for summary judgment against the plaintiff's FELA claim for emotional distress, which was alleged to be the result of harassment and psychological abuse by the employer. Relying on *Bullard, supra*, the court concluded that "there can be no recovery for emotional disturbance under the FELA without some *precipitating* physical injury." (Emphasis in original.) *Moody, supra* at 1473.

In *Finn v. Consolidated Rail Corp.*, 622 F. Supp. 41 (D. Mass. 1985), *aff'd* 782 F.2d 13 (1st Cir. 1986), the court granted the defendant's motion for summary judgment where the employee's estate brought an FELA action. The estate claimed that the employee became depressed and ultimately committed suicide as the result of a recordkeeping error which resulted in the employee's not being hired by a third party which had taken over part of the original employer's route. Relying on *Bullard, supra*, the court sustained the motion because there was no showing of a precipitating physical injury.

In *McSorley v. Consolidated Rail Corp.*, 581 F. Supp. 642 (S.D.N.Y. 1984), the court held that allegations of false arrest and malicious prosecution did not state claims under the FELA. This holding was based in part on the court's recognition of the fact that the FELA was judicially expanded to encompass intentional conduct that caused physical injury "in order to effectuate the Act's central purpose of removing legal obstacles to the compensation of employees who are physically injured or killed at work." *McSorley, supra* at 645. See, also, *Brady v. Penn Central Transp. Co.*, 406 F. Supp. 1239

(S.D.N.Y. 1975).

Also, in the very recent case of *Pikop v. Burlington Northern R. Co.*, 390 N.W.2d 743, 753 (Minn. 1986), the court decided that a state tort action for intentional infliction of emotional distress was not preempted by the FELA because "recovery for intentional acts under the FELA is limited to intentional torts that cause *physical* injury."

The overwhelming majority of courts have recognized that the purpose of the FELA is to provide a means of compensation to railroad employees who are physically injured as a result of their employment. See, e.g., *Brady v. Penn Central Transp. Co., supra*. The trial court did not err in holding that the plaintiff had failed to state a claim under the FELA.

It is unnecessary to consider the contentions of the parties in regard to the jurisdiction of the National Railroad Adjustment Board.

The judgment of the district court is affirmed.

AFFIRMED.

FIRST NATIONAL BANK, STROMSBURG, NEBRASKA, A CORPORATION, APPELLEE, V. BENEDICT CONSOLIDATED INDUSTRIES, INC., AND RONALD L. BAKER, APPELLANTS, ROBERT W. BAKER AND WILLIAM E. REETZ, APPELLEES.

402 N.W.2d 259

Filed March 13, 1987. No. 85-713.

1. **Guaranty: Time.** A guarantor is not discharged by an extension of time for payment or performance of the principal obligation if he consents thereto, as where the contract of guaranty expressly or impliedly provides for the extension.
2. **Pleadings: Proof.** The burden of both pleading and proving affirmative defenses is upon the defendants, and when they fail to do so they cannot recover upon mere argument alone.
3. **Guaranty.** With an unconditional guaranty of payment, the holder is not required to first seek collection or satisfaction against the maker, but is authorized to go directly against the guarantors.
4. **Banks and Banking: Debtors and Creditors.** A bank may set off the funds of a depositor to pay a debt due the bank from the depositor, and, absent an

agreement to the contrary or specific instructions from the debtor, a creditor may apply the proceeds to such debts and in such order as the creditor determines.

Appeal from the District Court for Polk County: WILLIAM H. NORTON, Judge. Affirmed.

Richard F. Welling and Alan M. Thelen of Breeling, Welling, Place & Steier, for appellants.

Ward F. Hoppe of Mattson, Ricketts, Davies, Stewart & Calkins, for appellee First National Bank.

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

KRIVOSHA, C.J.

The First National Bank, Stromsburg, Nebraska (First National), filed suit against Benedict Consolidated Industries, Inc. (BCI), and Robert W. Baker, Ronald L. Baker, and William E. Reetz, as guarantors of a certain note executed and delivered by BCI to First National in the principal sum of $70,894.03. The note provided on its face that it was initially due on February 13, 1982. The note further provided on its face, "Sureties, endorsers and guarantors consent that time of payment of this note or any part thereof may be extended from *time to time without notice*." (Emphasis supplied.) The reverse side of the note signed by the guarantors reads as follows:

> For value received the endorsers of this note hereby guarantee the validity thereof, the genuineness of the signatures thereto and *the payment thereof* at maturity or at any time thereafter, waiving demand, notice on non-payment, protest *and all defenses by reason of extending the time of payment* or delay in bringing suit.

(Emphasis supplied.)

Following a trial to the court, a jury having been waived, judgment was entered in favor of First National and against all of the defendants in the sum of $93,839.15 plus accruing interest. It is from this judgment that BCI and Ronald Baker appeal to this court. Jointly, they allege that the district court erred in rendering judgment for one or more of the following reasons. (1) The guarantors, including Ronald Baker, were

discharged from liability because the time of payment on the note was improperly extended. (2) The original debt was extinguished by agreement of the parties. (3) First National failed to take sufficient steps to collect the debt from BCI before pursuing the guarantors. (4) The district court failed to properly set off certain sums on deposit with First National against the principal debt involved in this action. We have reviewed the record and have concluded that the judgment of the trial court is in all respects correct and should be affirmed.

The appellants' first assignment of error is based upon their argument that the time of payment of the note was extended to April 21, 1982, more than 31 days beyond the original maturity date of the note. Indeed, there is language on the reverse side of the note which reads, "Extend to 4-21-82 Robert W. Baker." Appellants then cite to us the provisions of Neb. U.C.C. § 3-606(1) (Reissue 1980), which reads in part as follows: "The holder discharges any party to the instrument to the extent that without such party's consent the holder (a) without express reservation of rights . . . agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person . . . ." Appellants then argue that since there was an extension of the time of payment, it must be shown that the extension was within the authority granted by statute or the endorser is discharged. Subject to certain exceptions, Neb. U.C.C. § 3-118(f) (Reissue 1980) limits the time payment may be extended. Section 3-118(f) provides in part: "Unless otherwise specified consent to extension authorizes a single extension for not longer than the original period." Appellants then maintain that in view of the fact that this extension was from February 13, 1982, until April 21, 1982, and was longer than the original period, i.e., 31 days, the extension was unauthorized and, therefore, the individual guarantors are discharged. The difficulty with their argument is that, while they correctly cite the law, they ignore the facts. Both §§ 3-606(1) and 3-118(f) provide, in effect, that the statutes as written apply unless there is an agreement by the parties to the contrary. In the instant case the document, on its face, reflects an agreement to the contrary. To begin with, the face of the note provided that the note could be extended "from time to time

without notice." It seems clear that this constitutes express consent to extend time of payment for more than 31 days. But more important than all of that is the language of the guaranty itself, found on the reverse side of the note. By signing the note as guarantor, Ronald Baker specifically agreed to waive "all defenses by reason of extending the time of payment." It is difficult to imagine what more encompassing statement could be made by a guarantor in indicating consent that time of payment may be extended without restriction than to waive "all defenses by reason of extending the time of payment."

Appellants argue that we have held to the contrary, citing to us *Citizens State Bank v. Beermann Bros. Dehy*, 188 Neb. 597, 198 N.W.2d 458 (1972). *Citizens State Bank*, however, has no application to the instant case. In *Citizens State Bank* we held that language providing that "time of payment may be extended without notice thereof," *id.* at 599, 198 N.W.2d at 459, provided for but a single extension no longer than the original period of the note pursuant to § 3-118(f). The language of the note in the instant case is not at all like the language found in the *Citizens State Bank* case. To begin with, on the face of the note it is provided not only that time of payment may be extended without notice thereof but, also, that such extension may be "extended from time to time without notice." This language obviously implies more than a single extension and is obviously intended to meet the very problem raised by our decision in *Citizens State Bank, supra*.

Additionally, as we have already noted, the language of the guaranty itself provides that Ronald Baker waives "all defenses by reason of extending the time of payment." We read that language to mean that even if Ronald Baker had a defense under § 3-118(f), he agreed to waive that defense and therefore cannot now defend on the grounds that he was discharged by reason of an unauthorized extension of time of payment. Having waived such a defense, if indeed one existed, Ronald Baker remained liable on the guaranty. A guarantor is not discharged by an extension of time for payment or performance of the principal obligation if he consents thereto, as where the contract of guaranty expressly or impliedly provides for the extension. See *First Nat. Bank v. Bolzer*, 221 Neb. 415, 377

N.W.2d 533 (1985).

Were we to hold that Ronald Baker was discharged, we, in effect, would be deleting from the guaranty the very language of the guaranty itself. In the instant case the evidence is satisfactory that in executing the guaranty the guarantors consented to more than one extension of the time of payment and waived any defense they had in that regard. For that reason the first assignment of error must be overruled.

The second assignment of error is based upon the argument that the note itself was discharged. In support of the argument Ronald Baker and BCI point out that in the upper left-hand corner there appears the number "10808." A line is then drawn through that number and above it the following appears: "50-10830 replaces." BCI and Ronald Baker then argue that this language signals an intent by the parties to generate a new loan with "possibly new terms." Brief for Appellants at 10. Further, BCI and Ronald Baker argue: "Thus, something happened between March 9, 1982, and April 6, 1982, that had the effect of generating a new loan number and of giving the $70,894.03 debt a 'current' status." Brief for Appellants at 11. The difficulty with this argument is that the parties who have the burden of establishing this defense (BCI and Ronald Baker) have failed to produce any evidence to support their contention. In support of appellants' position they cite to us the case of *First West Side Bank v. Herzog*, 204 Neb. 356, 282 N.W.2d 38 (1979). In that case we said at 360-61, 282 N.W.2d at 41: " 'The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt.' " Appellants then argue to us: "The evidence in the present case indicates that some such subsequent agreement occurred between the Bank and Robert Baker, acting for BCI." Brief for Appellants at 12. If there was some subsequent agreement, it was incumbent upon BCI and Ronald Baker to produce that evidence. The record in this case is silent as to any such subsequent agreement, and the mere fact that some bookkeeping notation appears on the note is insufficient to establish that "there is a specific agreement between the parties that the new note shall extinguish the

original debt."

Aside from the fact that the defendants did not allege in their amended answer that the note was canceled by some subsequent agreement, they did not prove that the note was canceled by some subsequent agreement. The burden of both pleading and proving affirmative defenses is upon the defendants, and when they fail to do so they cannot recover upon mere argument alone. See *Center Bank v. Mid-Continent Meats, Inc.*, 194 Neb. 665, 234 N.W.2d 902 (1975). There is simply no basis upon which the appellants' second assignment of error could be sustained. It is therefore overruled.

The third assignment of error is likewise without merit. The argument advanced by BCI and Ronald Baker apparently is that the language found on the reverse side of the note is intended to guarantee collection and not payment and that, therefore, under the provisions of Neb. U.C.C. § 3-416 (Reissue 1980), before the holder may seek collection against the guarantors, it must first reduce its claim to judgment and seek execution which is returned unsatisfied or take such other action as provided for by § 3-416(2). The argument simply is without substance. The guaranty provides: "For value received the endorsers of this note hereby guarantee . . . the payment thereof at maturity or at any time thereafter . . . ." BCI and Ronald Baker argue that because they have guaranteed payment, not only at maturity, but "at any time thereafter," they did not guarantee payment at maturity and therefore could only be guarantors of collection and not of payment. Unfortunately, appellants are unable to cite any authority to us in support of their position. The reason for this inability, however, may be obvious. There simply is no basis for their position. The facts that the holder of a note may elect to sue promptly at maturity or at any time thereafter and the guarantors agree to pay at maturity or thereafter do not change the guaranty from one of payment to one of collection. The language could not be clearer. Each of the guarantors "guarantee[d] . . . the payment" of the note. With an unconditional guaranty of payment, the holder was not required to first seek collection or satisfaction against the maker, but was authorized to go directly against the guarantors. See *International Harvester Co. v. Schultz*, 102 Neb. 753, 169

N.W. 428 (1918). That is what an unconditional guaranty of payment means.

The last assignment of error likewise is of little benefit to BCI or Ronald Baker. The evidence discloses that First National offset moneys on deposit in an account in the name of BCI against various debts owed by BCI, including the note involved in this case. BCI and Ronald Baker argue that, first of all, "[t]he Appellee exercised a set-off against funds which belonged to a third person, and not the Appellant BCI." Brief for Appellants at 16. We are simply at a loss to understand how, even if true, this could be of any benefit to either BCI or Ronald Baker. While there may be some third persons who have claims against First National, that issue is simply not involved in this action. If moneys in BCI's account actually were moneys belonging to a third person, that person may have a right to make such a claim. Certainly BCI and Baker are not in a position to argue a third person's case. Furthermore, should we agree with BCI and Ronald Baker, the net result would be to increase their own indebtedness. The first prong of their argument must be disregarded.

The second prong is to the effect that First National applied some of the proceeds to loans of BCI other than the one on which Ronald Baker was a guarantor and, therefore, Ronald Baker should receive greater credit. The law in Nebraska is clear and to the contrary. We have long held that a bank may set off the funds of a depositor to pay a debt due the bank from the depositor, see, *Stauffer Seeds, Inc. v. Nebraska Sec. Bank*, 222 Neb. 594, 386 N.W.2d 2 (1986), and *State, ex rel. Davis, v. Farmers & Merchants Bank*, 114 Neb. 378, 207 N.W. 666 (1926), and, absent an agreement to the contrary or specific instructions from the debtor, a creditor may apply the proceeds to such debts and in such order as the creditor determines. See, *Diesel Service, Inc. v. Accessory Sales, Inc.*, 205 Neb. 381, 288 N.W.2d 258 (1980); *Fox v. Carman*, 139 Neb. 34, 296 N.W. 343 (1941). The district court committed no error in this regard.

For the reasons set out above, we find that the decision of the district court was in all respects correct, and the judgment must be affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. CLAYTON H. SHROUT, RESPONDENT.
402 N.W.2d 263

Filed March 13, 1987. No. 86-109.

Original action. Judgment of disbarment.

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

PER CURIAM.

This is an original disciplinary proceeding submitted to this court upon the respondent's voluntary surrender of his license to practice law. Respondent, Clayton H. Shrout, voluntarily surrenders his license and consents to the entry of a disciplinary order against him.

Upon a careful review of the record before us, and based on the respondent's voluntary surrender of his license, his waiver of disciplinary proceedings, and consent to the entry of an order of disbarment against him, we order that the respondent, Clayton H. Shrout, be, and hereby is, disbarred effective March 16, 1987.

JUDGMENT OF DISBARMENT.

LARRY J. NORRIS, APPELLEE AND CROSS-APPELLANT, V. IOWA BEEF PROCESSORS, INC., APPELLANT AND CROSS-APPELLEE, STATE OF NEBRASKA, SECOND INJURY FUND, APPELLEE AND CROSS-APPELLEE.
402 N.W.2d 658

Filed March 13, 1987. No. 86-159.

1. **Workers' Compensation: Second Injury Fund.** Under the statutory scheme of Neb. Rev. Stat. § 48-128 (Reissue 1984), the amount payable from the Second Injury Fund is, ordinarily, the difference between the weekly benefits payable for permanent disability from a second injury which is compensable and the weekly benefits payable for the combined permanent disabilities from a previous injury and such second injury.
2. **Workers' Compensation: Second Injury Fund: Proof.** To recover from the

Second Injury Fund, Neb. Rev. Stat. § 48-128 (Reissue 1984), a claimant must prove by a preponderance of evidence (1) a prior permanent partial disability, (2) a second or subsequent injury which is compensable, causing permanent disability, and (3) the combination of permanent disabilities existing after such second or subsequent injury is substantially greater in degree or percentage than permanent disability from the second or subsequent injury, considered by itself and not in conjunction with the prior permanent disability.

3. _____: _____: _____. One claiming against the Second Injury Fund, Neb. Rev. Stat. § 48-128 (Reissue 1984), has the burden to prove that the combination of permanent disabilities is substantially greater in degree or percentage than the permanent disability from the second or subsequent compensable injury considered by itself.
4. **Workers' Compensation: Second Injury Fund.** Whether a combination of permanent disabilities, within the purview of Neb. Rev. Stat. § 48-128 (Reissue 1984), is substantially greater than permanent disability from a second or subsequent compensable injury is a question of fact.
5. **Workers' Compensation: Appeal and Error.** Findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case.
6. _____: _____. In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
7. _____: _____. Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly wrong. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, Neb. Rev. Stat. § 48-185 (Reissue 1984) precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court.
8. **Workers' Compensation: Witnesses.** As the "trier of fact," the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony. Entering into a resolution by the Workers' Compensation Court regarding any conflict of evidence are factors such as the respective interests of the parties in the lawsuit; demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by the witnesses; the extent to which the testimony of the various witnesses was corroborated; and the reasonableness or unreasonableness of statements of such witnesses.
9. **Workers' Compensation: Second Injury Fund: Words and Phrases.** With the exception of increased disability resulting from additional injury to the same specific member of the body, as classified by Neb. Rev. Stat. § 48-121(3) (Reissue 1984), *disability*, for the purpose of Neb. Rev. Stat. § 48-128 (Reissue 1984) means the decrease or loss of earning power (capacity) or diminished employability.
10. **Workers' Compensation: Second Injury Fund: Proof.** In addition to establishing an employee's decrease or loss of earning power or diminished

employability, a claimant seeking payment from the Second Injury Fund must also establish that, after the second or subsequent compensable injury, an employee's combined permanent disabilities are *substantially greater* than the permanent disability from the last compensable injury considered by itself.

11. **Workers' Compensation: Second Injury Fund: Words and Phrases.** Under Neb. Rev. Stat. § 48-128 (Reissue 1984), a combination of permanent disabilities is "substantially greater" than permanent disability from the second or subsequent injury when the resulting permanent disability from all causes combined is substantially greater than the disability resulting solely from the second or subsequent compensable injury.
12. **Workers' Compensation: Second Injury Fund.** For the combination of permanent disabilities necessary to sustain a claim against the Second Injury Fund, the prior permanent partial disability or disabilities must interact with the effects of the second or subsequent compensable injury and enhance the permanent disability that otherwise results from the later compensable injury alone.
13. **Workers' Compensation: Appeal and Error.** In an appeal after rehearing in the Nebraska Workers' Compensation Court, the Supreme Court will consider only those issues or questions properly presented and disposed in the Nebraska Workers' Compensation Court.
14. **Appeal and Error.** In the absence of plain error, where an issue is raised for the first time in the Supreme Court, such issue will be disregarded inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Wayne E. Boyd of Smith & Boyd, for appellant.

Dennis J. Mahr, for appellee Norris.

Robert M. Spire, Attorney General, and John R. Thompson, for appellee Second Injury Fund.

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

SHANAHAN, J.

Iowa Beef Processors, Inc., now IBP, inc., appeals the award obtained by Larry J. Norris in the Nebraska Workers' Compensation Court. Also, the Nebraska Workers' Compensation Court dismissed the action against the State of Nebraska, Second Injury Fund, impleaded by IBP. Norris cross-appeals on issues regarding the degree of Norris' permanent disability determined by the Nebraska Workers'

Compensation Court, and compensation from the Second Injury Fund. We affirm.

In his petition Norris alleged that as a result of his employment at IBP, he had sustained bodily injuries, and sought compensation for injuries to his legs, shoulders, right arm, and back. IBP filed a "claim against the Second Injury Fund," and the State of Nebraska, Second Injury Fund, was impleaded in the action.

Born on March 23, 1949, Larry Norris, at age 4, sustained accidental injury to his right eye and, since age 7, has had a prosthesis in his right eye socket. Norris has corrected vision in his left eye but has some trouble with peripheral vision in that eye. On account of Norris' loss of sight in the right eye, some prospective employers declined to hire Norris at the risk of possible total blindness resulting from employment. In his written application to IBP for employment in 1976, Norris stated: "I'm blind in my right eye." Similar statements about the absence of sight in Norris' right eye appear in other records of IBP, establishing IBP's knowledge of the disability when IBP hired Norris.

From 1978 through the fall of 1983, IBP employed Norris as a "beef lugger," a job which required Norris to unload trucks and carry quarters of beef which had an average weight of 185 pounds. The lightest pieces of beef weighed 135 pounds, and the quarters had a normal maximum weight of 235 pounds. Norris carried an average of 480 pieces of beef per day, thus daily bearing an average weight of more than 88,000 pounds of beef. While a truck was being unloaded, "fronts" of beef dropped a distance of 2 feet from the delivery truck onto Norris' shoulders. Occasionally, workers slipped and fell on the plant floor, which was slick with animal fat and blood.

In 1980, Norris slipped and fell at IBP, underwent six separate surgical procedures on his knees (three procedures on each knee), and eventually required a patellectomy (removal of kneecap) of his right knee in 1984. Norris also suffered a carpal tunnel syndrome (nerve entrapment at the wrist or elbow) in his right arm, restricting mobility and repetitive work involving Norris' right arm.

As a consequence of his employment at IBP, Norris sustained

various bodily injuries resulting in his inability to be on his feet for any prolonged duration; shoulder problems experienced when Norris pushed or reached with his arms; inability to lift more than 40 pounds; limitations in pushing and pulling leg controls on machinery or equipment; and general difficulty in squatting and crawling or climbing stairs. Loss of sight in the right eye never interfered with Norris' job at IBP.

Since 1981 Dr. John J. Dougherty, an orthopedist, has treated Norris' various injuries. Dr. Dougherty expressed his opinion that Norris has sustained permanent partial disability in five areas on account of injuries sustained at IBP, namely, disability of 1 percent of the right arm, 20 percent of the right knee, 5 to 10 percent of the left knee, and 1 to 2 percent in each shoulder. Referring to the American Medical Association, Guides to the Evaluation of Permanent Impairment (2d ed. 1984), and as an additional evaluation based on the five separate areas of Norris' disability, Dr. Dougherty extrapolated percentages of permanent disability to Norris' body as a whole. According to Dr. Dougherty, Norris sustained the following permanent partial disability to the body as a whole: 1 percent as the result of the arm injury; 8 percent from injury to the right knee; 4 percent on account of injury to the left knee; and 1 percent attributable to each shoulder injury. Dr. Dougherty further extrapolated Norris' disabilities and expressed an opinion that, as an overall disability or combined value of permanent disabilities or impairment, Norris had sustained 36 percent disability of the body as a whole, that is, 24 percent for the loss of sight in the right eye and 12 percent attributable to the other disabilities to Norris' body as a whole.

Additional evidence from Dr. Dougherty unfolded as follows:

> Q. . . . Let's just take a situation where physically he doesn't have any problems with his knees, shoulders, back or right arm. He just has the lost right eye. Add to that the problems you have indicated with those — the knees, shoulders, back and right arm. Would the combined disability of all of those be greater than it would before he had the problems — the other physical problems? Would it increase his disability by virtue of the back, knee, so on?

A. I don't think so. I mean, I'm not sure I quite understand. Are you saying that would he be worse because he has got the eye or not worse?

Q. Yes.

A. I don't think so.

Q. You don't think the eye contributes anything to it?

A. No.

Dr. Dougherty further testified that Norris had no "significant disability" of his back.

Norris hired Karen L. Stricklett, a rehabilitation professional certified in rehabilitation counseling, to assess Norris' employability in view of his several injuries. Stricklett testified that, assuming Norris had no disabilities and based upon his education (high school) and work history, Norris would be able to perform approximately 47 percent of the jobs available in the national economy. In Stricklett's opinion, when all disabilities of Norris are considered cumulatively, Norris would have approximately a 68-percent loss of access to the labor market, meaning that Norris was able to perform only 15 percent of the jobs in the national economy. If Norris' disability consisted only of the loss of vision, Norris would experience a 28-percent decrease in employment options. When asked whether the loss of Norris' right eye, combined with his other injuries, would be an obstacle in obtaining employment, Stricklett answered: "I feel that it would affect it to some extent." Concerning the effect of Norris' disabilities upon his earning capacity, Stricklett expressed: "[I]t certainly appears that Mr. Norris' job options as well as his earnings potential have been affected by his numerous injuries at Iowa Beef Processors." However, Stricklett never offered a comparative evaluation of Norris' employability, that is, employability in view of all Norris' permanent disabilities compared with Norris' employability which would have resulted from the injuries at IBP, considered alone and apart from the loss of sight in Norris' right eye.

Norris received a vocational rehabilitation evaluation by the State of Iowa. Although blindness in the right eye was listed as one of Norris' disabilities, the Iowa report stated: "Disability wise, the the [sic] back, knees will probably not be plus's [sic] in

the Industrial area." The Iowa report made no mention that Norris' lack of sight in the right eye would be a hindrance to employment, but stated that "the problem which interfered with the area evaluation projects was carpal tunnel syndrome. . . . We were unable to identify problems specifically resulting from the blindness."

On rehearing, the three-judge panel found that Norris had sustained a 20-percent permanent partial disability to his right leg, a 10-percent permanent partial disability to his left leg, a 1-percent permanent partial disability to his right arm, and, as a consequence of the shoulder injuries, a 5-percent permanent partial disability to Norris' body as a whole. The Workers' Compensation Court found that Norris had failed to prove any disability to his back and denied recovery referable to the back problem alleged by Norris. The Nebraska Workers' Compensation Court ordered payment of weekly benefits, as well as payment of medical and hospital expenses, and determined that Norris was entitled to vocational rehabilitation.

In denying the claim against the Second Injury Fund, two members of the panel (one judge dissenting) stated:

> While it is true that the plaintiff has vision in one eye only, and that this has been true during the whole of his employment by the first named defendant and was reflected on the plaintiff's application for employment with the first named defendant, the Court does not believe that the degree or percentage of disability suffered by the plaintiff today is substantially greater than that which would have resulted from the knee, shoulder and arm injuries considered alone and of themselves.

In his dissent, one judge expressed:

> Translating each of the injuries into whole body impairments, all of which are charged to Iowa Beef Processors, Inc., other than the loss of the eye, the defendant Iowa Beef Processors, Inc., would pay 42.8 per cent of the total disability compensation and the Second Injury Fund would pay 57.2 per cent.

Apparently, the dissenting judge in the compensation court, while agreeing with the other judges in a finding of 5 percent

disability to Norris' body as a whole on account of the shoulder injuries, used the sum of Dr. Dougherty's extrapolated percentages of disability to Norris' body as a whole (arm—1 percent, legs—12 percent, and eye—24 percent) in determining disability to Norris' body as a whole, arriving at 42 percent disability of the body as a whole. Based on the ratio between Norris' loss of sight (24 percent) and the cumulative disability to the body as a whole (42 percent), the dissenting judge apportioned payment of Norris' weekly benefits, that is, 42.8 percent to IBP and 57.2 percent to the Second Injury Fund. Because the majority of the compensation court had concluded that Norris' combined disabilities (nonindustrial and industrial accidents) were not substantially greater than the disability from Norris' injuries at IBP considered by themselves, the compensation court's majority never reached the question of apportionment between IBP and the Second Injury Fund as did the dissenting judge.

IBP asserts that Norris has sustained sufficient permanent disability to warrant payment of weekly benefits from the Second Injury Fund. IBP contends, therefore, liability for Norris' weekly benefits should have been apportioned between IBP and the Second Injury Fund. To support its argument, IBP relies on Dr. Dougherty's extrapolated percentages for the overall disability or combined value of Norris' disabilities of the body as a whole—36 percent to the body as a whole, that is, 12 percent attributable to injuries of Norris' arm, legs, and shoulders, and 24 percent pertaining to Norris' loss of sight. IBP suggests that, on the basis of Dr. Dougherty's evaluations of anatomical loss and because Norris' loss of sight accounts for disability of 24 percent out of the 36 percent expressed by Dr. Dougherty, the Second Injury Fund is liable for 24/36, or 2/3, of Norris' weekly benefits. Thus, IBP would be liable for only one-third of such benefits. Payment from the Second Injury Fund is governed by Neb. Rev. Stat. § 48-128 (Reissue 1984), which provides in part:

> If an employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, which is or is likely to be a hindrance or obstacle to his obtaining employment or obtaining reemployment if the

> employee should become unemployed and which was known to the employer prior to the occurrence of a subsequent compensable injury, receives a subsequent compensable injury resulting in additional permanent partial or in permanent total disability so that the degree or percentage of disability caused by the combined disabilities is *substantially greater* than that which would have resulted from the last injury, considered alone and of itself; and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability, and for the additional disability the employee shall be compensated out of a special trust fund created for that purpose, which sum so set aside shall be known as the Second Injury Fund.

(Emphasis supplied.)

For liability of the Second Injury Fund, statutory predecessors of the present § 48-128 required that the combined injuries must result in "total disability," see § 48-128 (Reissue 1968), whereas, by amendment, see § 48-128 (Reissue 1974), the present statute relates to claims based on additional permanent partial disability or permanent total disability.

Under the statutory scheme of § 48-128, the amount payable from the Second Injury Fund is, ordinarily, the difference between the weekly benefits payable for permanent disability from a second injury which is compensable and the weekly benefits payable for the combined permanent disabilities from a previous injury and such second injury. See 2 A. Larson, The Law of Workmen's Compensation § 59.34(a) (1986).

To recover from the Second Injury Fund, § 48-128, a claimant must prove by a preponderance of evidence (1) a prior permanent partial disability, (2) a second or subsequent injury which is compensable, causing permanent disability, and (3) the combination of permanent disabilities existing after such second or subsequent injury is substantially greater in degree or percentage than permanent disability from the second or subsequent injury, considered by itself and not in conjunction

with the prior permanent disability.

One claiming against the Second Injury Fund has the burden to prove that the combination of permanent disabilities is substantially greater in degree or percentage than the permanent disability from the second or subsequent compensable injury considered by itself. *Flansburg v. Giza*, 284 Minn. 199, 169 N.W.2d 744 (1969). See, also, *Benson v. Barnes & Barnes Trucking*, 217 Neb. 865, 354 N.W.2d 127 (1984) (on employer's claim for apportionment of benefits and payment by the Second Injury Fund, burden of proof is on employer).

Whether a combination of permanent disabilities, within the purview of § 48-128, is substantially greater than permanent disability from a second or subsequent compensable injury is a question of fact. See *Matter of Garcia v Brassiere Rest.*, 66 A.D.2d 930, 411 N.Y.S.2d 448 (1978).

Findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. Neb. Rev. Stat. § 48-185 (Reissue 1984); *Zaleski v. Farmland Foods*, 219 Neb. 157, 361 N.W.2d 523 (1985). In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Vredeveld v. Gelco Express*, 222 Neb. 363, 383 N.W.2d 780 (1986); *Knudsen v. Metropolitan Utilities Dist.*, 220 Neb. 902, 374 N.W.2d 56 (1985). Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly wrong. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. *Vredeveld v. Gelco Express, supra; Gibson v. City of Lincoln*, 221 Neb. 304, 376 N.W.2d 785 (1985). As the "trier of fact," the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony. Entering into a resolution by the Workers' Compensation Court regarding any

conflict of evidence are factors such as the respective interests of the parties in the lawsuit; demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by the witnesses; the extent to which the testimony of the various witnesses was corroborated; and the reasonableness or unreasonableness of statements of such witnesses. *Thompson v. Monfort of Colorado*, 221 Neb. 83, 375 N.W.2d 601 (1985).

Weekly benefits for total disability are determined in accordance with Neb. Rev. Stat. § 48-121(1) (Reissue 1984) of the Nebraska Workers' Compensation Act. For partial disability, weekly benefits are determined by § 48-121(2), except in cases of a specific "schedule injury" classified in § 48-121(3).

An analysis of the bases for payment of weekly benefits is contained in *Jeffers v. Pappas Trucking, Inc.*, 198 Neb. 379, 253 N.W.2d 30 (1977):

> Section 48-121 . . . provides for compensation for three categories of job-related disabilities. Subdivision (1) sets the amount of compensation for total disability; subdivision (2) sets the amount of compensation for disability partial in character, except in cases covered by subdivision (3); and subdivision (3) sets out "schedule" injuries to specified parts of the body with compensation established therefore. Disability under subdivisions (1) and (2) refers to loss of employability and earning capacity, and not to functional or medical loss alone. [Citations omitted.] Thus losses in bodily function, so far as subdivisions (1) and (2) are concerned, are important only insofar as they relate to earning capacity and employability. [Citation omitted.]
>
> For claims falling under subdivision (3), however, it is immaterial whether an industrial disability is present or not. [Citation omitted.] . . . There is, however, an exception to this rule. Where "an employee has suffered a schedule injury to some particular member or members, and some unusual or extraordinary condition as to other members or any other part of the body has developed," he may be compensated under subdivision (1) or (2) of

section 48-121. [Citations omitted.]

> . . . [I]f an employee suffers a schedule injury which falls under subdivision (3), of section 48-121 . . . he is entitled only to the compensation provided for in that subdivision, unless some unusual or extraordinary condition as to other members or other parts of the body has developed. The presence or absence of industrial disability is immaterial in cases falling under subdivision (3). If the injury falls under either subdivision (1) or (2), however, a determination must be made as to the employee's loss of employability or earning capacity, and loss of bodily function is not at issue.

Id. at 384-85, 253 N.W.2d at 33-34.

> "Earning power," as used in Neb. Rev. Stat. § 48-121(2) . . . is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted.

Akins v. Happy Hour, Inc., 209 Neb. 236, 239, 306 N.W.2d 914, 916 (1981).

Franzen v. Blakley, 155 Neb. 621, 52 N.W.2d 833 (1952), involved an employee's claim against the Second Injury Fund. Franzen's first accident, nonindustrial in origin, caused permanent partial disability to Franzen's right wrist. A subsequent and compensable injury caused permanent partial disability of Franzen's left hand. After the second accident, Franzen was "not able to do the work of her former employment, or any other kind of work that required the effective use of her hands." *Id.* at 624, 52 N.W.2d at 836. A physician testified that Franzen was unemployable as the result of the condition of her hands. In *Franzen*, this court stated at 628, 52 N.W.2d at 838:

> [P]laintiff's disability to her right hand is not, as such, a compensable injury under section 48-121 . . . . It is a fact condition which becomes material in applying the provisions of section 48-128 . . . . [T]he Legislature in section 48-128 . . . was not undertaking to provide

compensation for a previous disability other than one caused by disease, as such, but rather was undertaking to provide compensation for permanent total disability resulting from a combination of the previous fact condition with a compensable injury.

Subsequently, in *Camp v. Blount Bros. Corp.*, 195 Neb. 459, 238 N.W.2d 634 (1976), this court considered a claim by a carpenter (Camp) against the Second Injury Fund, based on a compensable prior disability of 25 percent permanent partial disability to Camp's right foot and a subsequent compensable injury causing permanent partial disability to Camp's left foot, as well as 5 percent permanent partial disability "to the body as a whole." This court noted in *Camp* at 463, 238 N.W.2d at 637: "The medical testimony is that the disability to the plaintiff's feet prevents him from doing rough carpenter work, and the only work he could do would be sitting down at a bench, not moving around or lifting anything." The State contended that the Second Injury Fund was not liable because Camp's injuries were "schedule injuries" compensated under § 48-121(3). Citing *Franzen v. Blakley, supra*, this court acknowledged that "the purpose of section 48-128 . . . is not to provide compensation for the previous disability but to provide compensation for permanent total disability resulting from a combination of the previous fact condition with a compensable injury." 195 Neb. at 464, 238 N.W.2d at 638. In *Camp*, the court concluded: "Section 48-128 . . . makes no distinction between a compensable first injury or a noncompensable injury. It is the previous fact condition combined with a second compensable injury causing permanent total disability in fact that establishes the right of the employee to compensation from the Second Injury Fund." 195 Neb. at 465, 238 N.W.2d at 638.

In *Akins v. Happy Hour, Inc., supra*, the employee's left arm had been amputated in an automobile accident, in 1952, which was not work-related. Akins severely cut the thumb of his right hand in 1978 during an industrial accident and sustained a "45 to 55 percent disability of the thumb, which translates to a 10 to 12 percent disability of the body as a whole. The total physical disability suffered from the combined injuries is a 62 percent permanent disability of the body as a whole." 209 Neb. at 237,

306 N.W.2d at 915. After noting Akins' unsuccessful attempt to obtain similar employment after his employer's cessation of business, we stated in *Akins*: "[P]laintiff's employability with his combined disabilities is substantially less than it would have been if he had only the injury to his thumb." 209 Neb. at 240, 306 N.W.2d at 917. Consequently, in *Akins* this court determined that the employer was liable for 12 percent disability of the body as a whole and the Second Injury Fund was liable for the remaining permanent partial disability of the body as a whole.

From the foregoing cases, a rule has evolved concerning a claim against the Second Injury Fund, § 48-128: With the exception of increased disability resulting from additional injury to the same specific member of the body, as classified by § 48-121(3), *disability* for the purpose of § 48-128 means the decrease or loss of earning power (capacity) or diminished employability. Frequently, "disability" is expressed in terms of a percentage of disability to the body as a whole, that is, anatomical loss of function. As a practical matter, in the absence of other evidence, such percentage of disability of "the body as a whole" may be accepted as the index for determination of weekly benefits under § 48-121(2). See *Jeffers v. Pappas Trucking, Inc.*, 198 Neb. 379, 253 N.W.2d 30 (1977).

However, in addition to establishing an employee's decrease or loss of earning power or diminished employability, a claimant seeking payment from the Second Injury Fund must also establish that, after the second or subsequent compensable injury, an employee's combined permanent disabilities are *substantially greater* than the permanent disability from the last compensable injury considered by itself.

Under § 48-128, a combination of permanent disabilities is "substantially greater" than permanent disability from the second or subsequent injury when the resulting permanent disability from all causes combined is substantially greater than the disability resulting solely from the second or subsequent compensable injury. See *Rex E. Lantham Co. v. Indus. Com'n of Utah*, 717 P.2d 255 (Utah 1986).

For the combination of permanent disabilities necessary to sustain a claim against the Second Injury Fund, the prior

permanent partial disability or disabilities must interact with the effects of the second or subsequent compensable injury and enhance the permanent disability that otherwise results from the later compensable injury alone. See *Bordo Citrus Products v. Varnadore*, 395 So. 2d 260 (Fla. App. 1981). See, also, *Davis v. Conger Life Insurance Company*, 201 So. 2d 727 (Fla. 1967), where the Florida Supreme Court, construing a former statute substantially similar to Nebraska's § 48-128, held that the combined disabilities must have the "total effect of creating a greater degree of disability to the body as a whole and a claimant's wage-earning capacity than would have resulted from the last injury considered by itself and not in conjunction with a previous injury." 201 So. 2d at 729.

As expressed in 2 A. Larson, The Law of Workmen's Compensation § 59.32(g) at 10-447 (1986):

> Although the prior impairment need not combine with the compensable injury in any special way, it must add something to the disability before the Special Fund [Second Injury Fund] can become liable. In other words, it is not enough to show that the claimant had some kind of handicap, if that handicap contributed nothing to the final disability.

Norris has unquestionably experienced problems in locomotion, lifting, reaching, and standing for protracted periods. We recognize, and do not minimize or disregard, those limitations consequent to Norris' injuries involving his knees, arm, and shoulders. The question is not whether those injuries are serious. The gravity of those individual injuries is obvious and beyond question. Rather, the issue is whether Norris' disability from loss of sight, when combined with the permanent disability from injuries to his knees, arm, and shoulders, resulted in permanent disability *substantially greater* in degree or percentage than would have resulted from Norris' injuries at IBP, considered by themselves and apart from Norris' loss of sight.

Dr. Dougherty rendered his opinion about Norris' permanent disabilities and expressed his evaluation in terms of percentages of disability sustained in specific areas of Norris' body, as well as an overall disability or combined value for

disability resulting from all injuries. On the basis of Dr. Dougherty's extrapolations, the loss of sight in Norris' eye accounted for 24 percent out of the 36 percent resulting from the overall disability or combined value of all permanent disabilities sustained by Norris. One might reasonably conclude that 36 percent (combination value of all disabilities) is substantially greater than 12 percent (disability from injuries at IBP) and that 24 percent (loss of sight) is a substantial contribution to Norris' overall disability or combined value of disabilities. As a simple arithmetical expression, when the various and individual percentages assigned to loss of function ("body as a whole") are added together, the sum of permanent partial disabilities for Norris' body as a whole is 42 percent—24 percent attributable to Norris' loss of sight, 18 percent to the injuries at IBP. From a purely mathematical analysis, one might conclude that 42 percent (combined disabilities) is substantially greater than 18 percent (disability from injuries at IBP).

In Dr. Dougherty's testimony there is an internal inconsistency or self-contradiction regarding Norris' industrial disability in relation to the loss of sight in Norris' right eye. Dr. Dougherty's evaluation of Norris' disability, after injuries at IBP, went further than an evaluation expressed in terms of overall disability, combined value of disabilities, and the anatomical loss in Norris' bodily function. Given Norris' work history, Dr. Dougherty expressed his opinion that Norris' loss of sight contributed nothing to Norris' present disability. If that testimony from Dr. Dougherty is accepted, Norris' disability, after the injuries at IBP, was unaffected by the prior disability on account of loss of sight in Norris' right eye. Cf. *Franzen v. Blakley*, 155 Neb. 621, 52 N.W.2d 833 (1952) (medical testimony that the employee was "unemployable" as the result of the combined disabilities). Cf., also, *Camp v. Blount Bros. Corp.*, 195 Neb. 459, 238 N.W.2d 634 (1976) (medical testimony that combined disabilities prevented employee's work as a carpenter). From Dr. Dougherty's testimony, the majority of the Workers' Compensation Court may have concluded that the loss of sight had no effect on any industrial disability sustained by Norris or that the contributory effect of the loss of eyesight, as a factor of Norris' employability or

earning power, was insubstantial, when the disability on account of injuries at IBP is considered apart from Norris' combined disabilities, nonindustrial and industrial.

Resolution of such contradictory opinions from Dr. Dougherty was a question for the compensation court as the "trier of fact."

> A conflict or contradiction regarding an expert's opinion need not result from opinions expressed by different experts. A conflict or contradiction of opinions may arise in the course of testimony given by the same expert witness. A good faith conflict due to self-contradiction of an expert's opinions presents a question to be resolved by the trier of fact.

Zaleski v. Farmland Foods, 219 Neb. 157, 161, 361 N.W.2d 523, 526 (1985).

The rehabilitation counselor, Stricklett, testified that Norris' "job options as well as his earnings potential have been affected by his numerous injuries at Iowa Beef Processors," and also testified that the combination of injuries and resultant disability "would affect [employability] to *some* extent." (Emphasis supplied.) The compensation court may have concluded that the rehabilitation counselor's nebulous and equivocal statements about Norris' particular employability fail to supply a sound basis for comparison of Norris' disabilities; that is, a failure to establish that Norris' loss of earning power or employability, as the result of combined disabilities, is "substantially greater" than would have resulted from injuries sustained at IBP when such injuries at IBP are considered by themselves and apart from Norris' loss of sight. The Iowa rehabilitation evaluators indicated their inability to "identify problems specifically resulting" from the loss of sight in Norris' right eye as a hindrance to future employment.

Under the standard of review imposed on this court, we are unable to conclude that the findings of the Nebraska Workers' Compensation Court are clearly incorrect.

In his cross-appeal Norris maintains the Nebraska Workers' Compensation Court is incorrect in its determination of his loss of earning capacity, and contends his injuries entitle him to recover from the Second Injury Fund. Also, Norris asserts that

the Nebraska Workers' Compensation Court has a conflict of interest in this case, because § 48-128 charges that court with "the conservation of the assets of the Second Injury Fund," while the Nebraska Workers' Compensation Court is also the tribunal adjudicating questions involving disabilities which may bear upon recovery from the Second Injury Fund.

Our disposition of IBP's appeal also disposes of Norris' cross-appeal regarding payment from the Second Injury Fund.

Next, concerning Norris' contention that the findings of the Nebraska Workers' Compensation Court are incorrect in its determination of the weekly disability benefits payable to Norris, we are unable to state that the findings of the compensation court are clearly incorrect. The award of compensation is supported by the record. Denial of compensation regarding an alleged injury to Norris' back is a permissible finding in view of Dr. Dougherty's testimony that Norris had no significant disability to his back. We cannot conclude that the Nebraska Workers' Compensation Court was clearly incorrect in its findings determinative of weekly benefits payable to Norris.

Norris' assertion that the Nebraska Workers' Compensation Court has a conflict of interest regarding the Second Injury Fund is an interesting question—whether the Nebraska Workers' Compensation Court, as custodian of the Second Injury Fund and charged with conservation and preservation of that fund, is the proper tribunal for adjudication of claims against the Second Injury Fund. However, that question was never raised in the Nebraska Workers' Compensation Court. In an appeal after rehearing in the Nebraska Workers' Compensation Court, the Supreme Court will consider only those issues or questions properly presented and disposed in the Nebraska Workers' Compensation Court. See, *State v. Fletcher*, 221 Neb. 562, 378 N.W.2d 859 (1985); *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985). "In the absence of plain error, where an issue is raised for the first time in the Supreme Court, such issue will be disregarded inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition." *Holden v. Urban, ante* p. 472, 474, 398 N.W.2d

699, 701 (1987). Consequently, we do not address any question concerning a conflict of interest asserted by Norris.

Finally, because IBP's appeal raised a question concerning apportionment between the Second Injury Fund and IBP regarding the payment of weekly benefits, and did not involve the amount of compensation payable to Norris, an attorney fee cannot be awarded to Norris under Neb. Rev. Stat. § 48-125 (Reissue 1984). On his cross-appeal, Norris has failed to obtain an increase in the amount of compensation awarded. Therefore, Norris is not entitled to an attorney fee on his cross-appeal. See § 48-125.

Inasmuch as we are unable to conclude that any finding by the Nebraska Workers' Compensation Court is clearly incorrect, the judgment and award entered by the Nebraska Workers' Compensation Court are affirmed.

AFFIRMED.

IN RE INTEREST OF STANLEY KINNEBREW, ALLEGED TO BE A MENTALLY ILL DANGEROUS PERSON. STATE OF NEBRASKA, APPELLEE, V. STANLEY KINNEBREW, APPELLANT.

402 N.W.2d 264

Filed March 13, 1987. No. 86-328.

1. **Mental Health: Appeal and Error.** A district court reviews the determination of a mental health board de novo on the record.
2. _____: _____. The standard of review of this court, in mental health proceedings, requires that a final order made by the district court be affirmed unless this court can say, as a matter of law, that the order is not supported by clear and convincing evidence.
3. **Mental Health: Evidence: Appeal and Error.** The transcript of the proceeding before a mental health board may not be treated as evidence before the board, the district court, or this court unless the facts in the transcript are offered as evidence, are not objected to, and are reviewed by the trier of fact.
4. **Mental Health: Proof: Expert Witnesses.** In proving the dangerousness of a mentally ill person as manifested by "evidence of inability to provide for his basic human needs," within the meaning of Neb. Rev. Stat. § 83-1009(2) (Cum. Supp. 1986), expert testimony may be used to prove such a condition.

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

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays, for appellant.

Michael G. Heavican, Lancaster County Attorney, and Mary L. Thramer, for appellee.

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

GRANT, J.

Appellant, Stanley Kinnebrew, was found by the Lancaster County Mental Health Board (hereafter board) to be a mentally ill and dangerous person, as defined by Neb. Rev. Stat. § 83-1009 (Cum. Supp. 1986). Appellant was committed to the Department of Public Institutions for inpatient treatment. Kinnebrew appealed to the Lancaster County District Court, which affirmed the order of commitment by the board. Kinnebrew timely appealed to this court. We affirm.

Before a person may be committed for treatment by a mental health board, it is necessary that that person be found to be mentally ill and that the person presents a substantial risk of harm to others or to himself. § 83-1009; *In re Interest of Ely*, 220 Neb. 731, 371 N.W.2d 724 (1985). In the present case, appellant was found to be a mentally ill person and a person who presented a substantial risk of serious harm to himself because of his inability to provide for his basic human needs, including food, clothing, shelter, or essential medical care. § 83-1009(2). In this court, appellant does not argue that the finding of mental illness is incorrect, but only that the court erred in finding appellant was dangerous to himself.

In mental commitment proceedings the district court reviews the determination of the mental health board de novo on the record. The standard of review by this court requires that a final order made by the district court must be affirmed unless this court can say, as a matter of law, that the order is not supported by clear and convincing evidence. See *In re Interest of Ely, supra*.

In the hearing before the board, the only evidence adduced

was that of a staff psychiatrist at the Lincoln Regional Center, Dr. Somasundaram Rajendran. This witness testified that in his expert opinion appellant was suffering from a mental illness and that

> [i]n my initial impression he is suffering from schizo-effective disorder. It is a form of psychosis where the person loses contact with his surroundings and does not share reality with other people, becomes delusional, may have hallucinations, also have mood changes, depression, and not able to function to their potential.

Dr. Rajendran also testified that in his expert opinion appellant "would not be able to meet his basic needs if left alone . . . [l]ike eating, taking care of his body needs, taking medication, able to communicate with other people."

The evidence of the psychiatrist was the only evidence before the board and was marked, in the district court, as exhibit 1. The record before us also contains a "transcript," which contains the pleadings before the board, consisting of the petition before the board, the warrant of arrest with a return of service, the summons to a hearing, the "emergency admittance pursuant to certificate of a peace officer of person alleged to be mentally ill or alcoholic and dangerous," seven pages of a supplementary police report, a praecipe, and the "order of commitment for observation." This transcript was marked as exhibit 2 before the district court. Both exhibits were received, without objection, in the de novo hearing before the district court.

Basic to the difficulties presented by this case is the problem that at some time in the briefs each of the parties treats the hearsay evidence contained in the transcript as fact, while the basic thrust of Kinnebrew's appeal is that there were no facts before the board to justify a finding of appellant's dangerousness to himself because of his inability to take care of his basic needs.

Appellant states in his brief, in his "Statement of Facts":

> Mr. Kinnebrew was admitted to the Lincoln Regional Center on an Emergency Peace Officer's Certificate (E2) which stated that he was brought into the Lincoln Police Department on November 10, 1985 by friends who

> claimed that Mr. Kinnebrew was withdrawn, had quit eating and would not leave his room.. Mr. Kinnebrew was examined by staff psychiatrist Dr. Somasundaram Rajendran.

Amended Brief for Appellant at 5.

The emergency peace officer's certificate referred to in the foregoing statement as "E2," together with the supplementary police report, sets out the following events, some of which are set out in appellee's brief in the "Statement of Facts" therein. On November 10, 1985, appellant, a student at the University of Nebraska, was brought into the Lincoln Police Department by friends who stated that appellant was withdrawn, had not spoken for approximately 3 weeks, had not been eating, and had not been sleeping in his dormitory room. When asked what precipitated bringing the appellant into the police department, one of appellant's friends reported that appellant "refused to acknowledge their existence" earlier that evening, but appellant finally "advised them that something had happened that he didn't want to talk about." Appellant's friends reported that they got the impression he had been assaulted by someone in an unknown manner and that he was so ashamed of it that he did not want to talk to anyone. When brought in appellant was observed to be without a coat, although the evening was chilly, and was wearing dirty pants, a sweatshirt, and shoes with no socks. He appeared to be clean, as if he were bathing on a regular basis, but appeared disoriented and tired.

It is obvious that if exhibit 2, the "transcript," would be considered as evidence before the board and the district court, there is more than enough evidence to support the finding that appellant was dangerous to himself. We hold, however, that the transcript from the board cannot be considered as evidence before the board or the district court unless the facts in the transcript are offered as evidence, are not objected to, and are received by the trier of fact. Neb. Rev. Stat. § 83-1059 (Reissue 1981) provides: "The rules of evidence applicable in civil proceedings shall be followed at all hearings held under this act [the Nebraska Mental Health Commitment Act]. In no event shall evidence be considered which is inadmissible in criminal proceedings."

Exhibit 2, consisting of the transcript of the proceedings before the board, cannot be considered as evidence before the board, before the district court on review, or before this court. The numerous factual allegations in that transcript, many of which are set out as facts in the "Statement of Facts" in the parties' briefs, may not be considered as evidence.

Recognizing that, and applying "the rules of evidence applicable in civil proceedings," we examine the only testimony before the board and before the district court on review. Dr. Rajendran was the only witness, and he testified as an expert. He testified that in forming his opinions as to appellant's condition, he relied on "[i]nformation in the emergency peace officer's certificate, information that's provided by other staff members in the hospital, information we obtained from the family, his friends, from school." In making his diagnosis, the doctor testified that he also relied on "[m]y own personal observation and the history, and the information from other staff."

The rules of evidence applicable to expert witnesses include Neb. Evid. R. 703, 704, and 705 (Neb. Rev. Stat. §§ 27-703, 27-704, and 27-705 (Reissue 1985)). Those rules provide:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

§ 27-703.

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

§ 27-704.

> The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on

cross-examination.
§ 27-705.

Applying those rules, as required by § 83-1059, to the proceedings in this case, the result is clear that the board had before it an expert's opinion that appellant was mentally ill and could not meet his basic human needs. That opinion was based on the history obtained by the doctor and on the doctor's personal observations, which included the doctor's personal knowledge about appellant's eating and about the fact that appellant's prescribed medication had to be administered by injection because the appellant would not take it.

The doctor was cross-examined by appellant's counsel, and appellant established that he was not physically ill. The board was not requested to have the doctor set out all of the underlying facts on which he based his opinions, nor did the board require the underlying facts to be disclosed. The board could have so ordered, if it desired, under the provisions of rule 705. No evidence was adduced by appellant.

The unrefuted expert testimony before the board, the district court, and this court establishes that appellant was dangerous to himself in that he could not provide for his own basic needs. That opinion was accepted by the board, which observed the only witness in the presence of appellant. It was accepted by the reviewing court. Such evidence, which was not controverted, constitutes clear and convincing evidence sufficient to support the board's order.

Appellant seems to contend that there was no evidence in the record concerning appellant's inability to provide for his basic needs. Appellant confuses the provisions of § 83-1009(1) and (2). Section 83-1009(1) provides that a mentally ill person shall be considered "dangerous" if that person presents "[a] substantial risk of serious harm" to others as "manifested by evidence of recent violent acts or threats . . . ." Section 83-1009(2) provides that before the commitment of a mentally ill person on grounds that that person presents a danger to himself, the evidence must establish that such a person presents "[a] substantial risk of serious harm to himself . . . within the near future as manifested by evidence of recent attempts at, or threats of, suicide or serious bodily harm or evidence of

inability to provide for his . . . basic human needs . . . ." Section 83-1009(1) is concerned with the manifestation of dangerousness to others as shown by acts. Those acts can be specifically identified and, by statute, must be recent. The same reasoning is to be applied to the portion of § 83-1009(2) with regard to dangerousness of the mentally ill person to himself by the specifically identifiable act of suicide or the threat of suicide. Those specific acts must be shown to be recent.

A different situation is presented with regard to the dangerousness of a mentally ill person to himself as manifested by "inability to provide for his . . . basic human needs." Inability is defined as "the quality or state of being unable : lack of ability : lack of sufficient power, strength, resources, or capacity." Webster's Third New International Dictionary, Unabridged 1139 (1981). Inability is not always shown by an identifiable act, but by evidence showing the lack of a quality or capacity to care for oneself. In proving the dangerousness of a mentally ill person as manifested by "evidence of inability to provide for his . . . basic human needs" within the meaning of § 83-1009(2), expert testimony may prove such a condition. If expert testimony is so used, that testimony would ordinarily concern the capacity of the person at the time of his examination by a physician during the mental health commitment proceeding, and need not concern acts before the beginning of the proceeding.

Such evidence, of course, whether it be solely expert testimony or not, must be clear and convincing to the trier of fact before the trier of fact can determine the mentally ill person is dangerous to himself. In the instant case, there was admissible expert testimony adduced that appellant could not provide for his basic needs. That testimony was properly received by the board pursuant to the laws of evidence of this State and was sufficient to constitute clear and convincing evidence to support the board's finding. There was, in addition, other convincing evidence before the board beyond the doctor's expert opinion, because the doctor personally knew that appellant was not eating properly and that appellant's prescribed medication had to be injected because appellant would not take it. The order of the district court, affirming the

board, is supported by clear and convincing evidence and is affirmed.

We note in passing the manner in which these mental health proceedings were handled. First of all, the form petition constituting the basis for this commitment states the petition is filed "pursuant to the provisions of L.B. 806 (Laws 1976)," hardly a readily helpful reference in 1985 or later. That legislative bill has been codified as Neb. Rev. Stat. §§ 83-1001 et seq. since 1976.

We also note that there were at least seven persons, in addition to appellant's friends who initially brought him to the police station seeking help, who knew of appellant's condition before he got into the mental health process. None of these witnesses were called. We have a situation comparable to that in *In re Interest of Ely*, 220 Neb. 731, 371 N.W.2d 724 (1985). In the *Ely* case, the evidence of the only psychiatrist who testified regarding Ely's ability to provide for his basic needs was determined to be insufficient to justify commitment. In this case, the sole evidence of the psychiatrist was determined to be sufficient. The triers of fact in these difficult and important cases are entitled to a broader base for their decisions, particularly when many witnesses are cognizant of basic facts.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROGER A. POINTER, APPELLANT.

402 N.W.2d 268

Filed March 13, 1987. No. 86-458.

1. **Trial: Evidence: Pretrial Procedure: Appeal and Error.** In a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal.

2. **Witnesses: Trial.** It is within the sound discretion of the trial court to allow testimony from a witness who is in violation of a sequestration order.

Appeal from the District Court for Saline County: ORVILLE L. CODY, Judge. Affirmed.

James H. Buhrmann of Buhrmann & Johnson, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

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

GRANT, J.

Defendant, Roger A. Pointer, was convicted after jury trial of burglary in violation of Neb. Rev. Stat. § 28-507 (Reissue 1985). The evidence at trial showed that defendant, with others, broke into a bar and stole substantial quantities of beer, lesser quantities of intoxicating liquor, and other items. Defendant was sentenced to 5 years' probation, with conditions including up to 90 days of nighttime local incarceration.

Defendant appeals, assigning two errors: (1) "That the trial court failed to suppress the statements of the accused"; and (2) "The trial court abused its discretion in failing to order a mistrial after being informed that a police officer had talked to a witness about the testimony in the case at bar while both were sequestered." We affirm.

With regard to the first assignment of error, the record shows that no objection was made at trial to the testimony of Officer Clark concerning defendant's oral statements made to the officer. There had been a hearing, before trial, on defendant's motions to suppress physical evidence and to suppress his statements. The motions were overruled at that hearing. At trial, defendant's counsel examined the State's witness who testified as to defendant's statements as to foundation, but did not further cross-examine the witness nor object to the witness' testimony. The evidence at trial concerning the statements was received without objection.

Neb. Evid. R. 103, Neb. Rev. Stat. § 27-103 (Reissue 1985), provides in part:

> (1) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:
>
> (a) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context.

The error alleged has not been preserved for our review. In *United States v. Udey*, 748 F.2d 1231, 1240 (8th Cir. 1984), the court stated: "[N]o objection was made to Agent Blasingame's testimony regarding those statements. Accordingly, the issue was not properly preserved for appeal because no objection was made at trial to the admission of the testimony. FED.R.EVID. 103 . . . ." See, also, *United States v. Vitale*, 728 F.2d 1090 (8th Cir. 1984); *United States v. Wagoner*, 713 F.2d 1371 (8th Cir. 1983).

Neb. Evid. R. 103 is identical with Fed. R. Evid. 103. Without an objection by defendant at trial, the trial court has no obligation to interject itself into the proceedings to make rulings not requested. Such actions might well trample on defendant's trial tactics not known to the court. The record before us does not include the instructions given in the case, so we do not know if the question of the voluntariness of defendant's statements was submitted to the jury (see *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985)). Defendant may have wanted the statements before the jury and may have been setting the stage for a jury argument on that issue. The trial court could not know, and is not required to guess, as to defendant's motivation in not objecting. The trial court in this case refrained from voluntarily interjecting objections to the State's testimony, and acted properly in this instance. Under rule 103(1), there is nothing for this court to review.

This court has consistently held that a defendant may not predicate error on the admission of evidence to which timely objection was not made. *State v. Laymon*, 217 Neb. 464, 348 N.W.2d 902 (1984); *State v. Holland*, 213 Neb. 170, 328 N.W.2d 205 (1982). That general rule has been applied specifically in cases where a motion in limine has been denied in a separate hearing but no objection to the same evidence was made at the

trial of the case. Uniformly, we have held that the alleged error was not presented for our review because of the lack of objection to the evidence at the trial. *State v. Tomrdle*, 214 Neb. 580, 335 N.W.2d 279 (1983); *State v. Harper*, 215 Neb. 686, 340 N.W.2d 391 (1983).

We note our holding in *State v. Van Ackeren*, 200 Neb. 812, 265 N.W.2d 675 (1978). In that case, we held that in a criminal case where a defendant has filed a timely pretrial motion to suppress physical evidence and the motion is denied after hearing, an objection at trial is not essential to preserve the question for review on appeal. That case involved a motion to suppress physical evidence under the fourth amendment to the U.S. Constitution or article I, § 7, of the Nebraska Constitution, while in the case at bar the defendant seeks the protection of the fifth amendment to the U.S. Constitution or article I, § 12, of the Nebraska Constitution.

We note that in the *Van Ackeren* case the defendant renewed "all motions previously made" and that the judge who denied the pretrial motion was the same judge who conducted the trial. In the case at bar, the record does not show any such general motion. We further note that in the *Van Ackeren* case at 819, 265 N.W.2d at 678, we stated that it would be "prudent and skillful to interpose an objection when the evidence is offered . . . ."

In view of the fact that on occasion a defendant may want his statement to go to the jury when a portion of the statement may be exculpatory (see *State v. Cook*, 182 Neb. 684, 157 N.W.2d 151 (1968)); or when the statement puts much of the blame on others, as in this case; or for reasons unknown to the trial court; we hold that in a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal. Such a procedural rule obviates the necessity of the trial court's guessing whether defendant wants his statement before the jury and removes the possibility of defendant's second-guessing the admissibility of the evidence after an unfavorable result.

We note that a ruling in a pretrial hearing that a defendant's statement is admissible is not a final order that may be appealed from by a defendant. Neb. Rev. Stat. § 29-824 (Reissue 1985)

has been construed to make a lower court's ruling that such statements are not admissible appealable, as to the State, in an interim appeal. No such right is afforded a defendant under that statute, and an order denying a motion to suppress a defendant's statement is not an appealable order.

We have examined the record in also applying Neb. Evid. R. 103(4), which provides: "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge." Our examination does not disclose any plain error. See *United States v. Vitale*, 728 F.2d 1090 (8th Cir. 1984).

With regard to defendant's second assignment of error, the record shows that a State's witness returned to the stand to correct a statement she had made in her earlier direct testimony. The witness had testified that she had never given any information to the police in other cases. After she left the stand and went into the hall outside the courtroom, one of the police officers remarked to her that she had given evidence to the police before, in another case. The witness then remembered that 7 years before she had given evidence to the police in "a child molesting case." The witness was recalled to the stand and corrected her testimony in that regard.

The police officer who furnished the correct information to the witness had completed his testimony in the trial, although he was called back by defendant to testify concerning this issue. The witness in question had completed her testimony. The terms of the witness sequestration order are not in the record, and we cannot say there was a violation of whatever order was issued.

In any event, there was clearly no prejudice to defendant. The incident gave defendant a chance to attack the credibility of one of the State's witnesses—a chance he might not otherwise have had. Where there is no prejudice shown to defendant, it is within the sound discretion of the trial court to allow testimony from a witness who is in violation of a sequestration order. *State v. Swillie*, 218 Neb. 551, 357 N.W.2d 212 (1984). The trial court did not abuse its discretion in this case.

The judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF J.W., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. R.J.W., APPELLANT.

402 N.W.2d 671

Filed March 13, 1987. No. 86-515.

1. **Parental Rights: Appeal and Error.** An order terminating parental rights is reviewed by this court de novo on the record on appeal.
2. **Juvenile Courts: Appeal and Error.** Where there is a dispute in the evidence, this court will give great weight to the juvenile court's findings because it heard and observed the parties and witnesses.
3. **Parental Rights.** A termination order must be supported by clear and convincing evidence and should only be issued as a last resort when no reasonable alternative can be said to exist.
4. _____. The primary consideration in termination proceedings is to reach a determination that serves the best interests of the child.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

Mary K. Thielen of Taylor, Fabian, Thielen & Thielen, for appellant.

W. Russell Bowie of Ashford, Bowie & Higgins, P.C., guardian ad litem.

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

BOSLAUGH, J.

R.J.W. has appealed from the order of the separate juvenile court of Douglas County, Nebraska, which terminated her parental rights to her son J.W.

J.W. was born out of wedlock to the appellant on July 9, 1984. By November of 1984, the 16-year-old appellant had determined that she was unable to properly provide for the 4-month-old J.W.'s needs. As a result, she contacted the Department of Social Services in order to voluntarily place her child in foster care. J.W. has remained in foster care since that time.

On November 28, 1984, a petition was filed alleging that J.W. and his brother, R.H.W., born September 16, 1982, were children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982), being under 18 years of age and homeless

or destitute or without proper support through no fault of their natural mother. According to the appellant, she herself was in foster care in 1982 when she had her first child, R.H.W.

At a December 11, 1984, detention hearing, the appellant did not contest the continued placement of J.W. with the Department of Social Services or of R.H.W. with his natural maternal grandmother, D.W., with whom he had lived since birth.

At the adjudication hearing held on January 31, 1985, the appellant stipulated to the allegations in the petition. The court found the facts in the petition sufficient to bring the children within the meaning of § 43-247(3)(a) and ordered that they be placed in the custody of the Department of Social Services. R.H.W. was ordered to continue to reside with his grandmother. The appellant was granted reasonable rights of visitation.

At a March 6, 1985, disposition hearing, there was evidence that the appellant had visited J.W. on only three occasions since his placement in foster care in November of 1984. There was also evidence that she had attempted suicide 1 month after J.W.'s placement. After reviewing the recommendations of the court service officer, guardian ad litem, and Child Protective Services (CPS) worker, the juvenile court entered an order requiring:

> 3. That [R.J.W.], mother, shall maintain regular visitation with [J.W.] as arranged by the Nebraska Department of Social Services.
>
> 4. That [R.J.W.] shall submit to a psychological and psychiatric evaluation and shall comply with all recommendations as a result of these evaluations; that the Court Service Officer shall make the arrangements.
>
> 5. That [R.J.W.] shall participate in parenting classes as arranged by the Court Service Officer.
>
> 6. That [R.J.W.] shall obtain and maintain adequate housing for herself and her children.
>
> 7. That [R.J.W.] shall cooperate with the workers involved and notify them within 72 hours of any change in residence.

Substantially similar orders were entered by the court following

review hearings on July 9, 1985, November 13, 1985, and March 12, 1986.

On March 17, 1986, a petition to terminate the appellant's parental rights to J.W. was filed. It alleged that J.W. was a child within the meaning of Neb. Rev. Stat. § 43-292(6) (Reissue 1984), because reasonable efforts, under the direction of the court, had failed to correct the conditions leading to the determination that J.W. was a child within the meaning of § 43-247(3)(a). Specifically, it alleged that the appellant had failed to comply with the court-ordered plan of rehabilitation by (1) visiting J.W. only 13 times in 15 months, (2) twice failing to keep scheduled appointments for psychiatric evaluations, (3) attending only one parenting class, (4) failing to obtain independent and stable housing, and (5) failing to maintain contact with her probation officers and to keep them informed of her situation and whereabouts. Following the presentation of evidence at a May 8, 1986, hearing, the court entered an order terminating the appellant's rights to J.W.

On appeal, the appellant maintains: (1) The evidence was not sufficient to support termination of her rights; (2) The court erred in finding it was in J.W.'s best interests to terminate R.J.W.'s parental rights; and (3) The order terminating her parental rights is contrary to law.

An order terminating parental rights is reviewed by this court de novo on the record on appeal. *In re Interest of J.S., S.C., and L.S., ante* p. 234, 397 N.W.2d 621 (1986). Where there is a dispute in the evidence, however, the reviewing court must give great weight to the juvenile court's findings because the trial court heard and observed the parties and witnesses. *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 368 N.W.2d 474 (1985). The termination order must be supported by clear and convincing evidence and should only be issued as a last resort when no reasonable alternative can be said to exist. *In re Interest of J.S., S.C., and L.S., supra.* Nevertheless, a primary consideration in termination proceedings is to reach a determination that serves the best interests of the child. *In re Interest of J.S., S.C., and L.S., supra.*

The appellant initially maintains that there was not clear and convincing evidence before the trial court to show that

reasonable efforts, under direction of the court, had failed to correct the conditions which led to the determination that J.W. was a child as described in § 43-247(3)(a).

By as early as the March 6, 1985, disposition hearing, the court service worker, CPS worker, guardian ad litem, and court all expressed concern over the appellant's failure to regularly visit J.W. The evidence indicates that although weekly visits were authorized, between his placement in November of 1984 and the March 6 hearing, the appellant visited J.W. on only three occasions. The appellant testified that visitation with J.W. was important to her but that transportation problems had made it difficult. At the court's request for his assessment of the situation, the deputy county attorney warned the appellant that if her performance did not improve, termination proceedings would be considered. The court then entered its order requiring the appellant, inter alia, to maintain regular visitation with J.W. as arranged by the Department of Social Services.

At the next hearing on July 9, 1985, the evidence showed that the appellant had visited J.W. again only two or three times in 4 months. The appellant, through her attorney, acknowledged the need to better comply with the order and was warned by the court to follow the order or face termination of her parental rights.

At the next review hearing, held on November 13, 1985, the appellant did not appear, and the evidence again showed that she had visited J.W. only twice since the previous hearing. No one at this hearing knew of her whereabouts. The court warned that if the appellant did not take action, her rights to J.W. would be terminated.

At the March 12, 1986, review hearing, the evidence was that the appellant had visited J.W. on only 6 of 14 opportunities since the November hearing. According to the court service officer and CPS worker, out of the 15 months J.W. had been in foster care, the appellant had visited him on only 13 occasions. The appellant, through her attorney, disputed that fact, claiming that she had visited J.W. on a more frequent basis.

The motion to terminate was filed on March 17, 1986, and the hearing on the motion was held on May 8, 1986. The CPS worker testified that the appellant had actually visited J.W. an

estimated 15 times in the 16 months he had worked on the case. He also stated that he had informed the appellant that transportation could be provided if that was ever a problem in visitation and that in fact, when she did visit, she usually came by means of transportation that he had arranged. The CPS worker also indicated that he had discussed with the appellant the importance of visiting her son, particularly following the November 1985 hearing.

There is evidence that the appellant made greater efforts to visit her son following the November hearing. On one such occasion, she missed a visitation when she showed up without previously arranging a visit. In late November she canceled a visit because she had just given birth to a third child. Following a December 10, 1985, visit, the appellant did not visit J.W. or contact the CPS worker for 3 weeks. She explained that she had been hospitalized for 2 weeks as the result of having been stabbed on December 13, 1985. After this 3-week hiatus from visitation, the CPS worker advised the appellant that he would not schedule any further visits until she had consulted with her attorney regarding the importance of her visits.

The appellant, eventually, did consult with her lawyer and the CPS worker confirmed that subsequent to that date, her pattern of visitation improved. From January 31 through March 4, 1986, she missed only one visit that was within her control to make.

Nevertheless, the CPS worker questioned why this improvement had occurred. On cross-examination by the guardian ad litem, the CPS worker estimated that only five of her many missed visitations over the 64 weeks that J.W. was in foster care could be attributed to circumstances beyond her control. He also acknowledged that in July of 1985, the appellant had exhibited a similar pattern of intense visitation for a very brief period of time, which was ultimately followed by several months with no visits at all.

The court-ordered rehabilitation plan also required the appellant to submit to both psychological and psychiatric evaluations. These evaluations were recommended by the team workers following her suicide attempt on December 15, 1984. A psychological evaluation was conducted on March 28, 1985, by

Peter Knolla, a psychologist. The appellant was found to be functioning in the retarded, borderline deficient level of intelligence; to be functionally illiterate; and to have a normal adolescent personality, with mental retardation and passive, acting-out, childlike defense impulses.

At the termination hearing, the court service officer testified that the appellant had missed scheduled psychiatric evaluations in April and August of 1985. The appellant explained that she had missed the first appointment due to illness and the second because she thought it was for "crazy folks." She testified that she promised to keep the appointment for a third evaluation when scheduled, but the arrangements were never made because the court service worker believed she would not attend.

The appellant's performance regarding the parenting classes required by the court's order was poor. She attended one class in June of 1985, dropped in on another class in February of 1986, and finally, after the filing of the petition to terminate, enrolled in classes on April 9, 1986. She had attended two parenting classes subsequent to April 9 and two others had been canceled by the instructor. The instructor did not know whether she could assist the appellant in improving her parenting skills in the future because the instructor was unsure whether the appellant would follow through with the course.

The rehabilitation plan also required the appellant to obtain and maintain adequate housing for herself and her children. The court service worker testified that appellant had not complied because she failed to obtain an independent or stable place of residence. Further testimony showed the appellant had lived in five or six different residences since the case began and at the time of the termination hearing was residing in a house with her mother's boyfriend. The appellant indicated that she sometimes lives with her mother at another Omaha residence.

The final requirement of the rehabilitation plan was that the appellant cooperate with the workers and notify them of any change of residence within 72 hours. The court service worker testified she was not informed on a regular basis of the appellant's moves and on occasion did not know how to reach her. The appellant admitted she only contacted the court service worker "every now and then," but indicated that she had

informed the CPS worker of her most recent move. The evidence indicates that frequently both the court service and CPS workers had to track her down.

The juvenile court was not required to implement a plan of rehabilitation. *In re Interest of M.B., R.P., and J.P.*, 222 Neb. 757, 386 N.W.2d 877 (1986). But failure to comply with such a plan, where the court has ordered a parent to make reasonable efforts to rehabilitate, presents an independent reason justifying termination of parental rights. *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 368 N.W.2d 474 (1985).

The evidence in the present case is both clear and convincing in showing the appellant's noncompliance with the plan. Her visits were sporadic at best, and there were long periods of time where she did not visit J.W. at all. She missed two opportunities for a psychiatric evaluation, and her only excuses for missing the later one were that it was for crazy people and she thought it unimportant. The appellant's explanation for her poor showing on the parenting classes was that they made her uncomfortable.

Improvements in the appellant's visitation just prior to the filing of the petition and her attendance at parenting classes following the filing are unimpressive. As this court noted in *In re Interest of D.*, 218 Neb. 23, 28, 352 N.W.2d 566, 570 (1984):

> As all too frequently occurs in cases such as the one before us, the enthusiasm or receptivity of a parent toward a rehabilitation program seems to intensify as the time for a dispositional hearing approaches. A practical program of parental rehabilitation should not be viewed as our system's indulgent toleration of an otherwise intolerable situation. A parent afforded a program of rehabilitation must realize that the courts will examine a pattern of parental conduct in determining an appropriate disposition for the best interests of the child. In cases such as this the past is an indication of the future.

The appellant's brief period of improved compliance just prior to and after the filing of the motion to terminate is similar to the pattern she exhibited in July of 1985, which was ultimately followed by over 3 months of not seeing the child. The evidence here was sufficient to terminate R.J.W.'s parental rights.

Further, we must agree that it was in J.W.'s best interests to

terminate R.J.W.'s parental rights. This court has frequently held that where a parent fails to rehabilitate herself within a reasonable time, the best interests of the child require that a final disposition be made without delay. See *In re Interest of A.L.N.*, 223 Neb. 675, 392 N.W.2d 780 (1986). Temporary custody situations are attendant with many problems and a child cannot, and should not, be left suspended in foster care, nor be made to await uncertain parental maturity. *In re Interest of D., supra.*

In the present case J.W. was 22 months old at the time of the termination hearing and had been in foster care since the age of 4 months. The appellant was 17 years of age at the time of the hearing. The record shows she has two other children, is unemployed, lives on social security benefits, has a ninth-grade education, and has a borderline deficient level of intelligence.

The above are not the reasons why the appellant's parental rights were terminated. Instead, it was her failure over a period of 16 months to cooperate with and take advantage of the court's and support workers' efforts and services, as well as her failure to visit J.W. The evidence shows that the infrequency of her visits resulted in J.W.'s being uncomfortable when visits did occur. When the frequency of the appellant's visits increased, J.W. became more comfortable, but that may have been due in part to the fact that R.J.W. was accompanied by other children.

> Parental inability to reach heights of economic success is no basis to sever the precious relationship which normally exists between parent and child. However, the same system of laws pertaining to juveniles cannot reward parental bankruptcy evidenced by indifference or inexcusable lethargy adversely affecting the life and living conditions demanded by a child's personal dignity.

In re Interest of D., supra at 29, 352 N.W.2d at 570. J.W. has spent over three-quarters of his life in foster care. After his first 4 months, his mother has been a part of that life for only approximately 15 to 16 hours. The claim that termination of the appellant's parental rights was not in J.W.'s best interests is without merit.

Finally, the appellant contends the termination was contrary to law because the record failed to establish by clear and

convincing evidence that termination was the only reasonable alternative remaining.

In the recent case of *In re Interest of M.B., R.P., and J.P.*, 222 Neb. 757, 386 N.W.2d 877 (1986), we held that the primary consideration in termination proceedings is the best interests of the child. While termination should be considered a last resort, § 43-292 requires that the best interests of the child and evidence of fault or neglect be considered together in reaching such a determination. *In re Interest of M.B., R.P., and J.P., supra.*

The record establishes that termination of the appellant's parental rights to J.W. was not contrary to law. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN V. PAINTER, APPELLANT.
402 N.W.2d 677

Filed March 13, 1987. No. 86-600.

1. **Verdicts: Appeal and Error.** A guilty verdict will not be reversed by this court on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law.
2. _____: _____. After a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of the evidence if the evidence sustains some rational theory of guilt.
3. **Appeal and Error.** In disposing of an appeal the Supreme Court considers only those errors which are properly assigned and presented to this court.
4. **Courts: Appeal and Error.** Where a cause has been appealed to the Supreme Court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to this court.
5. _____: _____. Looking at the role of the district court in appeals from county court, it is clear that the district court is considered to be an intermediate court of appeals and not a trial court.
6. _____: _____. Just as the Supreme Court may, on a motion for rehearing, timely modify its opinion, an intermediate appellate court may also timely modify its opinion.

7. **Criminal Law: Statutes: Sentences.** Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.

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

Richard J. Epstein, for appellant.

Robert M. Spire, Attorney General, and Janie C. Castaneda, for appellee.

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

KRIVOSHA, C.J.

The appellant, John V. Painter, was charged in the county court for Sarpy County, Nebraska, with driving while intoxicated in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984) and with refusing to submit to a chemical test in violation of Neb. Rev. Stat. § 39-669.08 (Reissue 1984). Following trial to a jury, Painter was convicted of both charges. Thereafter, the conviction for driving while intoxicated was enhanced to a third offense by reason of two previous convictions for driving while intoxicated. A presentence investigation report was ordered and received. On the charge of driving while intoxicated, Painter was sentenced to pay a fine of $500 and serve 6 months in jail, and he had his driver's license revoked for life. On the charge of refusing to submit to a chemical test, Painter was sentenced to pay a fine of $200 and serve 7 days in jail, and he had his license suspended for a period of 6 months. The county court further ordered that the jail sentences were to be served consecutively and the license suspensions were to run concurrently.

Painter appealed to the district court for Sarpy County, Nebraska. On appeal to the district court the convictions were affirmed. On July 11, 1986, the district court filed an opinion and order, which read in part as follows:

> The County Court decision should be affirmed in all respects, *identical sentences imposed* in this Court, and costs in both courts taxed to the defendant-appellant.

> IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED the convictions and sentences imposed by the County Court are affirmed.
>
> IT IS FURTHER ORDERED the defendant be, and hereby is, sentenced and committed to the County Jail for six (6) months on Count I and for seven (7) days on Count II, said sentences to be served *concurrently* . . . .

(Emphasis supplied.)

Thereafter, on July 14, 1986, the district court, apparently recognizing that its order of July 11 was internally inconsistent in that the judgment of the county court had ordered the jail sentences to be served consecutively and not concurrently, filed a document entitled "NUNC PRO TUNC ORDER." The order reads in part:

> This matter comes on for hearing on the Court's own motion to correct the Opinion and Order signed and entered July 11, 1986. The Court, being fully advised in the premises, finds the sentences to confinement imposed by the County Court were to be served consecutively rather than concurrently, and the Court finds since there was no abuse of discretion on the part of the County Court in imposing the sentences, that that portion of the Opinion and Order affirming the convictions and sentences requiring the sentences to be served concurrently was erroneous.

The order then provides that the sentences are to be served consecutively rather than concurrently.

It is from these orders that Painter now appeals to this court, alleging as error that the evidence was insufficient to convict Painter of the driving while intoxicated charge and that he received ineffective assistance of counsel in the county court. He also claims that the district court should have modified the sentence regarding the suspension of Painter's license from a lifetime suspension to a suspension for 15 years and should not have entered an order nunc pro tunc once the sentence had been announced by the district court. We believe that the judgment and sentences ultimately imposed by the district court should be affirmed as modified herein.

A brief recitation of the facts is necessary to address at least

two of the assignments of error. The record discloses that on March 8, 1985, officers went to the scene of a personal injury accident. Painter had collided with a parked automobile while driving along a straight road seven to eight blocks from his home. The front end of his Volkswagen and the rear of the other vehicle were both severely damaged.

The first officer to arrive at the scene detected the odor of alcohol on and about Painter. Painter told the officer that he had consumed seven beers that evening. When the officer asked Painter to perform field sobriety tests, Painter began complaining about his legs. The officer testified that Painter was belligerent and that his speech was slow and slurred.

At the trial the officer, after testifying to appropriate foundation, including the fact that he had seen persons who were intoxicated, testified that in his opinion Painter was intoxicated to the point that it impaired his driving ability.

A second officer who had been at the scene also testified. His testimony was to the effect that following the accident Painter was taken to the hospital for treatment of injuries. The second officer said that, after first going to the police station to obtain appropriate forms for Painter's consent to submit to appropriate body fluid tests, he also went to the hospital. When he arrived, the officer testified, he detected the smell of alcohol on Painter. He testified that Painter was red in the face and that his eyes were bloodshot and watery. The officer testified that he read Painter the implied consent form and placed him under arrest. At that point Painter became violent and refused treatment from the nurses. Painter refused to submit to a blood test, citing religious reasons. He was unable to provide a urine sample. The officer testified that he later observed Painter crying. After testifying to appropriate foundation, the second officer also testified that in his opinion Painter was sufficiently under the influence of alcohol to impair his driving ability.

A third witness for the State was one of the paramedics who was called to the scene of the accident. He testified that Painter was belligerent, that he smelled of alcohol, that his eyes were bloodshot and his pupils sluggish, that his skin was sweaty, that his pulse was a little rapid, and that his blood pressure was normal and respiration a little fast, even though, under normal

conditions following an accident, his blood pressure should have been elevated. He testified that, based upon his knowledge and experience, the signs which he observed in Painter at the scene of the accident were consistent with the effects of alcohol.

Painter then called a research scientist and medical educator affiliated with Creighton University. He testified that the signs displayed by Painter were more indicative of trauma to the head rather than due to alcohol.

Turning to the contentions that the evidence was either insufficient or that Painter received ineffective assistance of counsel, we believe that the record in this case simply does not support Painter's claims. What we had in this case was a traditional conflict in the evidence. If the triers of fact believed the police officers and the paramedic, they could have reasonably concluded that Painter was operating his motor vehicle under the influence of alcohol and refused to take the required test. On the other hand, if they believed Painter's expert witness, they could find that his behavior was due to the trauma. After hearing all of the evidence, they obviously chose to believe the officers and the paramedic and to give little weight to the testimony of Painter's expert. That does not amount to error nor entitle this court to set aside the verdict. As we have frequently said: "A guilty verdict will not be reversed by this court on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law." *State v. Taylor*, 221 Neb. 114, 119, 375 N.W.2d 610, 614 (1985). See, also, *State v. Warnke*, 221 Neb. 625, 380 N.W.2d 241 (1986). In a similar case, *State v. Borchardt, ante* p. 47, 59, 395 N.W.2d 551, 559-60 (1986), we said:

> It . . . is a well-established axiom that in resolving a challenge to the sufficiency of the evidence, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such is for the trier of fact and must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. [Citations omitted.] Stated more simply, it is not for this court to accept one version of a case over another; that is for the jury. [Citation omitted.]

> Moreover, it is well established that after a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of the evidence if the evidence sustains some rational theory of guilt. [Citation omitted.]

See, also, *State v. Baker, ante* p. 130, 395 N.W.2d 766 (1986); *State v. Halligan,* 222 Neb. 866, 387 N.W.2d 698 (1986); *State v. Blattner,* 222 Neb. 396, 383 N.W.2d 803 (1986). This record certainly would not support a claim that the evidence was insufficient as a matter of law.

While Painter suggests that the only evidence establishing his guilt was testimony that there was a smell of alcohol on his person, a reading of the record discloses that there was much more. To begin with, there was an unexplained accident with a parked car. Additionally, there was the testimony that there was the smell of alcohol on his person, that Painter conceded that he had consumed seven beers that evening, that his eyes were sluggish and bloodshot, that his speech was slow and slurred, and that he behaved in a belligerent manner. All of these are signs consistent with an individual who is operating under the influence of alcohol. The assignment must simply be overruled.

The claim that Painter received ineffective assistance of counsel must also be overruled. While the evidence does not disclose that Painter's counsel was ineffective and, quite to the contrary, discloses that he was as effective as one could be under the circumstances, we do not reach that question. We do not do so simply because the issue was not raised in the district court, even though counsel for Painter in the district court was not the same as counsel for Painter in the county court. That is to say, Painter did not raise the issue of ineffective assistance of counsel at the first opportunity. Painter simply did not present to the district court any contention regarding this alleged ineffective assistance of counsel, and raises the issue for the first time on appeal to this court. As we noted in *Haeffner v. State,* 220 Neb. 560, 564, 371 N.W.2d 658, 661 (1985):

> In disposing of an appeal the Supreme Court considers only those errors which are properly assigned and presented to this court. [Citation omitted.] Where a cause has been appealed to the Supreme Court from a district

> court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to this court. In the absence of plain error, where an issue is raised for the first time in the Supreme Court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition.[Citation omitted.]

Painter had an opportunity to raise that issue on appeal to the district court with new counsel and chose not to do so. We may, therefore, simply disregard that assignment.

That brings us, then, to the question of whether the district court is precluded from correcting its order and directing that the jail sentences be served consecutively rather than concurrently.

In support of his position that once the district court announces a sentence it cannot thereafter be modified, Painter cites to us the case of *State v. Cousins*, 208 Neb. 245, 302 N.W.2d 731 (1981), wherein we held that the district court may not change a sentence from concurrent to consecutive on its own motion by use of a nunc pro tunc order. While the holding of *Cousins* is correct, and a sentence validly imposed by a sentencing court takes effect from the time it is pronounced so that any subsequent sentence fixing a different term is a nullity, it has no application to the instant case. In *Cousins,* the district court was the *sentencing* court, while in this case the district court was an *appellate* court reviewing a sentence earlier imposed by the county court. That difference is significant.

Neb. Rev. Stat. § 29-613 (Reissue 1985) provides: "The district court shall hear and determine any cause brought by appeal from a county court . . . upon the record and may affirm, modify, or vacate the judgment or may remand the case to the county court for a new trial." It is clear that the district court is not sitting as the original court but, rather, as the appellate court.

As we recently noted in *State v. Daniels, ante* p. 264, 266, 397 N.W.2d 631, 633 (1986):

> Looking at the role of the district court in appeals from county court, it is clear that the district court is considered

> to be an intermediate court of appeals and not a trial court. *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984); *State v. Ledingham*, 217 Neb. 135, 347 N.W.2d 865 (1984).

See, also, *State v. Thompson, post* p. 922, 402 N.W.2d 271 (1987).

The significance of this is that, just as the Supreme Court may, on a motion for rehearing, timely modify its opinion, an intermediate appellate court may also timely modify its opinion. We believe the district court was in error in designating its order as a "nunc pro tunc order," in that the purpose of a nunc pro tunc order is to make the record reflect what in fact occurred and was erroneously recorded, and not to cause an order or judgment that was never made or rendered to be placed upon the record of the court. See *State v. Al-Hafeez,* 208 Neb. 681, 305 N.W.2d 379 (1981). In the instant case, the error was not committed by the scrivener, but was caused by a misstatement made by the judge. What the court entitles the order, however, is not controlling. One need only read the judgment and order entered by the district court on July 11 to recognize that what in fact the district court, sitting as an intermediate appellate court, intended to do was to impose the identical sentence which had been imposed by the county court and which admittedly provided that the jail sentences were to be served consecutively. In fact, had the district court ended its decision several paragraphs earlier, where it provided that "[t]he County Court decision should be affirmed in all respects, identical sentences imposed in this Court, and costs in both courts taxed to the defendant-appellant," no issue would be raised. It is only by reason of the fact that the court sought to expand its decision and included the word "concurrently" when referring to the jail sentences that any problem was created. There was simply no error in the district court's modifying its earlier order and eliminating the internal inconsistency which existed.

That leaves us, then, with the final question of whether the district court should have reduced the sentence. At the time that Painter was initially sentenced, the provisions of § 39-669.07 provided that upon conviction one's privileges to operate a

motor vehicle should be suspended for life. While the case was still on appeal to the district court, the Legislature amended the statute to provide that the suspension should be for a period of 15 years and not for life. In *State v. Randolph,* 186 Neb. 297, 301-02, 183 N.W.2d 225, 228 (1971), we said:

> While there is still some divergence of opinion among the states, we believe the better rule to be and we therefore hold that where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.

We then held in *State v. Randolph, supra,* that the sentences should be reduced to reflect the amended statute.

We likewise believe that where, as here, the matter is still pending before a court and, to that extent, has not become final and binding, the court should reduce the sentence to reflect the amendatory act. See *State v. Thompson, supra.* For that reason we believe that that portion of the sentence which suspended Painter's license for life on the conviction for driving while under the influence of alcohol should be vacated, and in lieu thereof Painter's privilege to operate a motor vehicle should be suspended for a period of 15 years.

In all other respects the judgment and orders of the district court affirming the convictions and order of the county court should be affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. BRUCE W. ROGGENKAMP, APPELLANT.

402 N.W.2d 682

Filed March 13, 1987. No. 86-648.

1. **Arrests: Police Officers and Sheriffs: Probable Cause.** The lawfulness of an arrest without a warrant must be based on probable cause, which exists where the facts and circumstances within an officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed.
2. _____: _____: _____. If the facts available to the officer at the time of the arrest would warrant a person of reasonable caution in the belief the action was appropriate, then probable cause exists.
3. **Rules of Evidence: Trial: Appeal and Error.** Error may not be predicated on a ruling which admits evidence unless a substantial right of a party is affected and a timely objection appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context. Neb. Evid. R. 103(1)(a) (Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1985)).
4. **Trial: Evidence: Appeal and Error.** If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error.
5. **Trial: Evidence: Pretrial Procedure: Appeal and Error.** In a criminal trial, after a pretrial hearing and order overruling a defendant's motion to suppress evidence, the defendant must object at trial to admission of the evidence which was the subject of the motion to suppress in order to preserve a question concerning admissibility of that evidence for review on appeal.
6. **Trial: Evidence: Stipulations: Appeal and Error.** A party who has stipulated to the admission of evidence cannot on appeal complain about evidence admitted pursuant to and in accordance with such stipulation.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

John D. Rouse and Jerry Soucie, for appellant.

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

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

SHANAHAN, J.

In a bench trial in the county court for Lancaster County Bruce W. Roggenkamp was convicted of drunk driving, that is, operating a motor vehicle while under the influence of alcoholic

liquor or while Roggenkamp had ten-hundredths of 1 percent by weight of alcohol in his body fluid, a violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984). Roggenkamp appealed to the district court for Lancaster County, which affirmed the judgment of the county court. We affirm.

At 1:45 a.m. on March 24, 1985, Deputy Gordon Harrod of the Lancaster County Sheriff's Department was northbound in his cruiser on Southwest 84th Street near Lincoln. Deputy Harrod observed a southbound vehicle approaching at a speed of 30 miles per hour on Southwest 84th Street, a two-lane public highway with a blacktop surface and a 55-m.p.h. speed limit. A yellow centerline divided the driving lanes of the highway, and white lines marked the edges of the surface.

After the oncoming car had passed the cruiser, Deputy Harrod observed the southbound vehicle in the cruiser's rearview mirror. Deputy Harrod saw the other vehicle move to the shoulder on the west side of the road, then "cross into the center" of the highway, and again move back toward the west edge of the road. Harrod turned his cruiser around, followed the southbound vehicle, a Chevrolet Vega, for some distance, and saw that automobile straddle the centerline on the road. Harrod also observed the other car "drop off — completely off the roadway with about half [the] vehicle on the right shoulder — the right side of [the] vehicle on the southbound lane on the shoulder and pull back out of the shoulder and cross the center lane with about half of [the] vehicle also southbound." Approximately 200 yards north of the private driveway from the highway to the Roggenkamp residence, Deputy Harrod activated the cruiser's revolving red lights. When the Vega turned into the driveway, Harrod followed as the driveway led to the Roggenkamp house.

The Vega stopped about 20 feet from the house. After Deputy Harrod stopped his cruiser behind the Vega and was getting out of the cruiser, the male driver of the Vega got out of his car. When Harrod walked up to the driver, later identified as Bruce Roggenkamp, Harrod told Roggenkamp about the deputy's observations of Roggenkamp's erratic driving. At that point Harrod detected the "odor of alcohol" from Roggenkamp. Through illumination from the deputy's

flashlight, Harrod saw Roggenkamp's bloodshot eyes. Roggenkamp is 6 feet tall and weighs 220 pounds. Deputy Harrod requested inspection of the driver's license of Roggenkamp and his vehicle registration. Roggenkamp responded: "I'm not interested. Good night." When Roggenkamp started to leave and walk toward his house, Deputy Harrod told Roggenkamp he would be arrested if he tried to leave. Roggenkamp's reply was "Now, good night. I'll see you some other time." Throughout this time Bruce Roggenkamp's wife, Cynthia, who is 5 feet 7 inches tall and weighs 230 pounds, was standing nearby, at the front of the Roggenkamp car.

As Bruce Roggenkamp was walking toward his house, Harrod stepped between Roggenkamp and the house, informing Roggenkamp that he was being placed under arrest. In Deputy Harrod's description of ensuing events, Cynthia Roggenkamp "came at me at a fairly high rate of speed," grabbed the officer, and "pulled, pushed, knocked me down to my knees when I was trying to keep Mr. Roggenkamp from leaving." Harrod "advised [Cynthia Roggenkamp] that she would have to leave me alone or I would place her under arrest." In the course of his contact with Cynthia Roggenkamp, Harrod detected the "odor of alcohol" on her breath but did not observe anything about her eyes. Bruce Roggenkamp, who had walked up some stairs to the front door of his house, returned to the bottom of the steps and joined the struggle between Cynthia Roggenkamp and Deputy Harrod. According to Harrod,

> At that time [Cynthia Roggenkamp] got back up. She was struggling with me. And shortly after she rejoined I believe [Bruce Roggenkamp] disengaged and went back upstairs. While he attempted to disengage, I was able to get away from her and shortly after that is when I tried to handcuff him initially.

Harrod arrested Bruce Roggenkamp and, during a momentary lull in the action, "got on my radio — my portable radio and advised [the sheriff's dispatcher] that I needed assistance. . . . [T]hey [Roggenkamps] weren't gonna quit. . . . I was fighting with a couple of real large people."

Roggenkamps ran up the stairs and into their house. Harrod pursued and placed his foot in the doorway, when Roggenkamps slammed the door, trapping Harrod's foot. "They smashed my foot," Harrod testified, causing "a great deal of pain." In an attempt to extricate his foot, Harrod thrust his PR 24, an aluminum nightstick, into the opening of the door. While Harrod was using his nightstick to pry open the door, he could hear "grunting" on the other side of the door as Roggenkamps pushed against that door. Harrod "could tell that they were right there so I just tried to keep my stick in the door." At this time someone, just inside the door, was "stomping" on Harrod's foot. Also, someone inside pulled on Harrod's nightstick,

> trying to scramble to get the — the stick. So while I was trying to pull on the stick and the door was — the pressure on the door was released, I was able to pull my foot back out. And then as I was pulling on the stick they reversed their efforts and pushed the stick, which resulted in the door being closed.

Through a window in the door, Deputy Harrod saw Bruce Roggenkamp depart from the door area and walk down a hallway in the house. Believing that Bruce Roggenkamp might "drink some alcohol that would adversely affect . . . an intoxilyzer" or that Roggenkamp might "get something like a shotgun and blow me off the porch," Deputy Harrod threw his weight against the door, breaking the doorjamb and gaining entry.

Later, an Intoxilyzer test was administered to Bruce Roggenkamp and produced a "digital reading" of ".163% w/v." Pursuant to Neb. Rev. Stat. § 29-824 (Reissue 1985), Bruce Roggenkamp filed a motion to suppress the results of the Intoxilyzer test. That motion was denied by the county court on July 18, 1985. Roggenkamp's case was tried to the county court on October 3 in a "Trial by Stipulation." For the purpose of that trial, the deputy county attorney and Roggenkamp's lawyer stipulated in open court:

> Your Honor, this matter was set for stipulated trial at this time. The parties are in agreement that Exhibits 1 through 5 may be received by the Court. We further stipulate that

> Deputy Harrod, the officer involved in the case, gave Mr. Roggenkamp an intoxilyzer test on March 24th, 1985 and that he followed the procedures that are listed in Rule — Title 177 of the Department of Health Rules and Regulations; that he followed the checklist technique using the Intoxilyzer 4011AS, Serial Number 102316. He followed the checklist technique in the sequence, which is on the sheet. He checked the maintenance performed by Pam Zilly, the maintenance officer, and verified that the maintenance, repair and calibration had been performed for that particular intoxilyzer and that everything was okay with the machine; that he performed the test; a good sample was given; there were no problems with the machine; and the result of the intoxilyzer test was .163 percent weight per volume blood alcohol content. This all occurred in Lancaster County, Nebraska; and also that he is a permit holder, having a Class B permit as required by the Rules.

Upon specific inquiry from the court, Roggenkamp's lawyer acknowledged that the stipulation covered venue, Roggenkamp's driving a motor vehicle on a "public street," and the "chemical test." Regarding the stipulation, exhibits 1 and 2 are transcriptions of testimony given at the hearing on Roggenkamp's motion to suppress, containing the description of events at the Roggenkamp residence, as previously stated in this opinion. Exhibit 5 is a written report containing the result of the test administered to Roggenkamp by an "Intoxilyzer Model 4011AS," and reflected the Intoxilyzer's digital reading of ".163% w/v" concerning the sample of Roggenkamp's breath given for such testing. Pursuant to the stipulation by counsel, the court stated: "Exhibits 1 through 5, inclusive are offered and received. Thank you." Thereafter, the court found Roggenkamp guilty of drunk driving and imposed sentence on Roggenkamp. On appeal, the district court for Lancaster County affirmed the county court's judgment.

Roggenkamp lists nine assignments of error, but those may be distilled into two. First, Roggenkamp claims there was no probable cause for Harrod's arrest of Roggenkamp. Second, Roggenkamp contends the Intoxilyzer test result was

inadmissible because such test resulted from an illegal search or seizure in violation of Roggenkamp's constitutional guarantees against such action.

Neb. Rev. Stat. § 29-404.02 (Reissue 1985) provides in part:

> A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed:
>
> . . . .
>
> (2) A misdemeanor, and the officer has reasonable cause to believe that such person . . . (d) has committed a misdemeanor in the presence of the officer.

The lawfulness of an arrest without a warrant must be based on probable cause, which exists where "facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed." *State v. Harrison*, 218 Neb. 532, 535, 357 N.W.2d 201, 204 (1984). See, also, *Ker v. California*, 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963). "If the facts available to the officer at the time of the arrest would warrant a man of reasonable caution in the belief the action was appropriate, then probable cause exists." *State v. Hack and Callans*, 212 Neb. 406, 408, 322 N.W.2d 806, 808 (1982). Thus, the key to a lawful arrest without a warrant is reasonable or probable cause that a person has committed a crime.

There is no doubt that Deputy Harrod had probable cause to arrest Roggenkamp for drunk driving. Deputy Harrod saw the erratic operation of Roggenkamp's automobile on a public highway. Harrod, within moments of observing Roggenkamp's display of driving, detected the odor of an alcoholic beverage, as such odor emanated from Roggenkamp, and saw Roggenkamp's bloodshot eyes. Because Deputy Harrod's attention was rather dramatically diverted from continuous observation of Bruce Roggenkamp, apparently the deputy did not notice the manner of Bruce Roggenkamp's walking. However, the Roggenkamp tag team effort is a circumstance which may be considered. Events outside the Roggenkamp house supplied an adequate basis for probable cause under the circumstances. Because Bruce Roggenkamp was arrested on

probable cause outside his home, an arrest warrant was unnecessary. See, *State v. Harrison, supra; United States v. Santana*, 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976). Beyond our inquiry whether there was probable cause to arrest Bruce Roggenkamp for drunk driving, we neither evaluate nor comment further on the events which occurred at the Roggenkamp residence. Roggenkamp's first assignment of error has no merit.

That brings us to Roggenkamp's second assignment of error, a question concerning admission of evidence in the form of the Intoxilyzer test result. As reflected in the briefs filed in this case, the attorneys have done considerable research regarding constitutional considerations involved in searches and seizures. However, there is another fundamental consideration. Where is Roggenkamp's objection to admission of the Intoxilyzer test result as evidence at his trial? Not only was there no objection to admitting the test result as evidence, there was a stipulation for admission of that test result.

Considering first the absence of an objection, McCormick on Evidence § 52 at 126 (E. Cleary 3d ed. 1984) expresses a reason for necessity of an objection at trial:

> If the administration of the exclusionary rules of evidence is to be fair and workable the judge must be informed promptly of contentions that evidence should be rejected, and the reasons therefor. The initiative is placed on the party, not on the judge. The general approach, accordingly, is that a failure to object to an offer of evidence at the time the offer is made, assigning the grounds, is a waiver on appeal of any ground of complaint against its admission.

As dictated by the Nebraska Evidence Rules, error may not be predicated on a ruling which admits evidence unless a substantial right of a party is affected and a timely objection appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context. Neb. Evid. R. 103(1)(a) (Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1985)). "If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error." *State v. Archbold*, 217 Neb. 345, 352, 350 N.W.2d 500, 505 (1984).

Today, in *State v. Pointer, ante* p. 892, 402 N.W.2d 268 (1987), we reviewed a situation involving a defendant's failure to object to evidence admitted at trial after a court had overruled the defendant's motion to suppress the same evidence. In *Pointer,* we stated at 895, 402 N.W.2d at 271: "[I]n a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal." The principle enunciated in *Pointer, supra,* is equally applicable to the Intoxilyzer test result in Roggenkamp's case.

If a waiver includes a voluntary relinquishment of a known right, a classic illustration of waiver is found in the present case. While Roggenkamp protests use of the Intoxilyzer test result as evidence against him, his situation is similar to that of an individual who invites another to throw a rock at him and, when struck, complains that the rock was thrown too hard. There is a legal maxim expressed in Latin—Volenti non fit injuria. Few care about Latin anymore, but the principle expressed in that language is noteworthy: One who consents cannot receive an injury. Therefore, we hold that a party who has stipulated to the admission of evidence cannot on appeal complain about evidence admitted pursuant to and in accordance with such stipulation. See *American Oil Co. v. City of Omaha,* 182 Neb. 532, 155 N.W.2d 805 (1968) (eminent domain proceedings; condemner's stipulation that condemnee had suffered a decrease in business during years pertinent to the condemnation proceedings; condemner cannot complain about stipulated evidence).

We conclude that there is no error in the judgment of the district court. Consequently, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. THOMAS B. THOMPSON, ALSO KNOWN AS EARL ALAN THOMPSON, APPELLANT.

402 N.W.2d 271

Filed March 13, 1987. No. 86-677.

1. **Prior Convictions: Right to Counsel: Proof.** The State's burden in proving valid prior convictions for enhancement purposes is only to show that defendant had or knowingly and voluntarily waived counsel at the time of such convictions.
2. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case to the district court, the latter acts as an intermediate court of appeal, and, as such, its review is limited to an examination of the county court record for error or an abuse of discretion.
3. **Courts: Sentences: Appeal and Error.** The State has the right to appeal a district court modification of a sentence imposed by a county court.
4. **Criminal Law: Statutes: Sentences.** In the absence of a specific contrary legislative mandate, where a criminal statute, after the commission of a prohibited act but before final judgment, is amended by mitigating the punishment, the punishment is that provided by the amendatory act.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Alan G. Stoler, for appellant.

Herbert M. Fitle, Omaha City Attorney, and Gary P. Bucchino, Omaha City Prosecutor, Richard M. Jones, and David F. Smalheiser, for appellee.

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

CAPORALE, J.

Following a county court bench trial, defendant, Thomas B. Thompson, also known as Earl Alan Thompson, was adjudged guilty of giving false information in violation of an ordinance of the city of Omaha and of driving while under the influence of alcohol, third offense, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984). On appeal the district court affirmed each conviction, but reduced the drunk driving sentence. While defendant has appealed both convictions to this court, his assignments of error relate solely to the drunk driving conviction and are that the district court (1) erred in failing to find error appearing on the record, in that the county court erred in admitting in evidence at the enhancement phase

of the trial a record concerning a prior drunk driving conviction, and (2) abused its discretion by imposing an excessive sentence. We affirm.

When the defendant was arrested for drunk driving on December 5, 1985, he told the police officers that his name was "Thomas B. Thompson," born August 17, 1951, and produced a driver's license under that name. On December 20, 1985, defendant was arraigned for drunk driving, first offense, as "Thomas B. Thompson." He entered a plea of no contest, and the matter was referred to the probation office for a presentence report.

That office discovered that "Thomas B. Thompson" was an alias used by Earl Alan Thompson, who had twice before been placed on probation for driving while drunk. A fingerprint analysis of "Thomas B. Thompson" and Earl Alan Thompson confirmed that these separate identities belonged to one and the same person. Moreover, defendant conceded in open court that Earl is his real given name.

The county court then allowed the State to amend its complaint to show that Earl Alan Thompson and the person originally charged were the same and, as such, to allege two prior drunk driving convictions. That changed the charge from driving while intoxicated, first offense, to driving while intoxicated, third offense. The trial court permitted defendant to withdraw the plea he had entered as Thomas B. Thompson so that he could be arraigned on the amended complaint as Earl Alan Thompson. Defendant then pled no contest to the new charge.

At the enhancement phase of the proceeding, the State introduced certified copies of two prior driving while intoxicated convictions. The first was dated September 12, 1983, and showed that defendant was represented by counsel. The second was dated February 8, 1985, and showed it was for driving while intoxicated, second offense, and that defendant was advised of his right to counsel and waived that right. Both of the certified copies of convictions were received into evidence. The county court then, on January 29, 1986, found defendant guilty of driving while intoxicated, third offense, and imposed a sentence which revoked defendant's driver's license

for life and required him to spend 180 days in jail and pay a $500 fine.

In connection with the first assignment of error, defendant argues the county court erred in receiving in evidence the record of the conviction for second offense drunk driving, for the reason that although the record recited that he had been advised of his right to counsel and had waived that right, such waiver could not be valid because the record does not show that counsel was present, that defendant was advised that the charges and penalties of the conviction were enhanced to second offense, that he had a right to an enhancement hearing to determine the validity of an earlier offense, and that said earlier offense could be used for enhancement purposes.

The claim that the questioned record is somehow deficient because it does not show counsel was present is frivolous; counsel obviously need not be present if the right to counsel has been validly waived. The certified record in question consists of a checklist signed by the trial judge, which reflects that defendant was advised of his right to counsel and waived that right. The checklist imports verity and supports the conclusion that defendant knowingly and voluntarily waived counsel and, thus, satisfies the State's burden in proving the conviction in question as a valid one for enhancement purposes under the provisions of § 39-669.07(3). See, *State v. Foster, ante* p. 267, 398 N.W.2d 101 (1986); *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984). There is therefore no merit to defendant's first assignment of error.

The district court, on July 22, 1986, reduced the jail time imposed by the county court to 120 days and the period of license revocation to 15 years. The jail time imposed by the district court is within the limits set by Neb. Rev. Stat. §§ 28-106 and 39-669.07(3) (Cum. Supp. 1986), as was the greater jail time imposed by the county court. Yet the defendant has the effrontery to argue that the sentence as reduced by the district court is excessive. Such a claim from one who has not only demonstrated he has not learned from his past experiences but who lied about his identity in order that he might escape the consequences of his past acts can only be described as preposterous!

The State correctly argues that in an appeal of a criminal case to the district court, the latter acts as an intermediate court of appeal, and, as such, its review is limited to an examination of the county court record for error or an abuse of discretion. *State v. Painter, ante* p. 905, 402 N.W.2d 677 (1987); *State v. Daniels, ante* p. 264, 397 N.W.2d 631 (1986); *State v. Lynch,* 223 Neb. 849, 394 N.W.2d 651 (1986); Neb. Rev. Stat. § 24-541.06 (Reissue 1985). There was no sentencing error or abuse of discretion shown by the county court record; the district court therefore erred in reducing the jail time imposed by the county court. Since the district court was acting as a reviewing rather than as a sentencing court, the State had the right to cross-appeal from that erroneous ruling. However, it elected not to do so, and we therefore do not disturb the district court's reduction of the jail time imposed by the county court. (Neb. Ct. R. of Prac. 9D(2)c (rev. 1986).)

As to the remaining aspect of the reduced sentence, Neb. Rev. Stat. § 39-669.38 (Cum. Supp. 1986) provides that one who, prior to April 19, 1986, had his or her driver's license revoked for life may "submit an application to the court for a reduction . . . [which court] in its discretion may reduce such revocation to a period of fifteen years." We recognize that in *State v. Jameson, ante* p. 38, 395 N.W.2d 744 (1986), a case involving a direct appeal of a county court judgment to the district court and thence to this court, we concluded that defendant's request for reduction of the period of his license revocation should be first referred to the county court as the sentencing court. Upon further reflection, however, we conclude that *State v. Roggenbach,* 223 Neb. 866, 394 N.W.2d 664 (1986), wherein this court, under the same circumstances as presented in *Jameson,* reduced the period of revocation, correctly applies the doctrine announced in *State v. Randolph,* 186 Neb. 297, 183 N.W.2d 225 (1971), *cert. denied* 403 U.S. 909, 91 S. Ct. 2217, 29 L. Ed. 2d 686; that is, in the absence of a specific contrary legislative mandate, where a criminal statute, after the commission of a prohibited act but before final judgment, is amended by mitigating the punishment, the punishment is that provided by the amendatory act. See *State v. Peiffer,* 212 Neb. 864, 326 N.W.2d 844 (1982). Thus, the district

court correctly reduced the period of defendant's license revocation. *State v. Painter, supra.*

The record not sustaining defendant's assignments of error, the judgments of the district court are affirmed.

AFFIRMED.

WHITE, J., concurring.

This case stands only for the proposition that a checklist signed by a judge, which recites that a defendant was advised of his right to counsel and waived the same, is evidence of the fact.

The opinion does not decide either the type of evidence that may be introduced to establish that counsel was afforded or that there was a knowing waiver of counsel, nor does it decide whether evidence extraneous to the record may be introduced by a defendant to contradict that record. Those questions remain to be decided by this court.

SHANAHAN, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. STUART J. KOCH, APPELLANT.
402 N.W.2d 275

Filed March 13, 1987. No. 86-718.

Motions for New Trial. New evidence offered in support of a motion for new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a new verdict.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Kent E. Florom, Lincoln County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Lisa D. Martin-Price, for appellee.

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

WHITE, J.

Appellant, Stuart J. Koch, was found guilty by a jury in Lincoln County of two counts of violation of Neb. Rev. Stat. § 28-517 (Reissue 1985), possession of stolen property. The value of the stolen property involved in each count was over $1,000, constituting Class III felonies (Neb. Rev. Stat. § 28-518(1) (Reissue 1985)).

Appellant was sentenced to a term of probation of 5 years, ordered to pay restitution and costs, and ordered to serve a term of 90 days in jail as a condition of probation. In his appeal Koch assigns as the sole error, "The District Court of Lincoln County . . . abused its discretion by overruling Appellant's Motion for New Trial based upon newly discovered evidence." We affirm.

Neb. Rev. Stat. § 25-1142 (Reissue 1985) provides in part:

> A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court. The former verdict, report or decision shall be vacated and a new trial granted on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of such party: . . . (7) newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial . . . .

However, "[n]ew evidence offered in support of a motion for new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a new verdict." *State v. Lieberman*, 222 Neb. 95, 103, 382 N.W.2d 330, 336 (1986). Such new evidence must not be merely cumulative. *State v. Hortman*, 207 Neb. 393, 299 N.W.2d 187 (1980).

At issue in the trial was the intent with which appellant possessed a quantity of hives and other related beekeeping equipment, together with the bee colonies. After an inspection by the State Apiarist of two unregistered apiaries, the Apiarist determined that the hives and associated material belonged to two separate beekeepers who had reported thefts of that material. The State Apiarist is an appointee of the Director of Agriculture and exercises the duties specified in Neb. Rev. Stat.

§§ 81-2,165 et seq. (Reissue 1981). The Apiarist testified that each beekeeper generally has a distinctive brand on his equipment, distinctive hive design, and frequently distinctive color combinations. It is sufficient to say that the evidence was overwhelming that the hives and associated equipment were stolen from the two beekeepers, that appellant had attempted to disguise the origin of the hives by painting and chiseling brand marks, and that the value of the property possessed exceeded $1,000 on each count.

It was the position of the appellant at trial that the material was purchased by him as agent of the First Unitarian Church of Hershey, Nebraska. First Unitarian Church has no other locatable members save appellant, and he appears to have access to the church funds for his own use. The seller was one Juan Martinez, whose whereabouts were not known. At trial two bills of sale covering the equipment were introduced. The newly discovered evidence is yet another bill of sale that apparently was sent from North Platte to Houston, and from Houston to the pastor of Holy Spirit Catholic Church, who furnished it to appellant.

In addition to being cumulative, the newly discovered evidence falls far short of being persuasive. The trial court was correct in refusing to grant a new trial.

AFFIRMED.

HEADNOTES

Contained in this Volume

Actions
Adoption
Adverse Possession
Affidavits
Aggravating and Mitigating Circumstances
Aiding and Abetting
Alimony
Antenuptial Agreements
Appeal and Error
Arrests
Attorney and Client
Attorneys at Law

Banks and Banking
Blood, Breath, and Urine Tests
Boundaries
Breach of Contract
Brokers

Case Disapproved
Case Overruled
Child Custody
Child Support
Circumstantial Evidence
Claims
Collateral Attack
Confessions
Conflict of Interest
Conspiracy
Constitutional Law
Contracts
Controlled Substances
Conversion
Convictions
Corporations
Corroboration
Courts
Criminal Law

Damages
Death Penalty
Debtors and Creditors
Decedents' Estates
Default Judgments
Demurrer
Directed Verdict
Discrimination
Divorce
Domicile
Double Jeopardy
Drunk Driving
Due Process

Effectiveness of Counsel
Employer and Employee
Employment Contracts
Employment Security Law
Escape
Estoppel
Evidence
Expert Witnesses

Fair Employment Practices
False Imprisonment
False Reporting
Final Orders
Foreclosure
Fraud

Good Cause
Guaranty

Habeas Corpus
Hearsay
Highways
Homicide
Hypnosis

Identification Procedures
Immunity
Impeachment

Implied Consent
Independent Contractor
Indictments and Informations
Innkeepers
Insurance
Intent
Interest

Joint Accounts
Judges
Judgments
Juries
Jurisdiction
Juror Qualifications
Jury Instructions
Jury Trials
Juvenile Courts

Labor and Labor Relations
Laches
Legislature
Lesser-Included Offenses
Liability
Liens

Mandamus
Marriage
Medical Malpractice
Mental Competency
Mental Health
Minors
Miranda Rights
Modification of Decree
Motions for Continuance
Motions for Mistrial
Motions for New Trial
Motions to Suppress
Motions to Vacate
Motor Vehicles
Municipal Corporations

Negligence
New Trial
Notice

Options to Buy or Sell
Other Acts

Parental Rights
Perjury
Photographs
Plea Bargains
Plea in Abatement
Pleadings
Pleas
Police Officers and Sheriffs
Postconviction
Prejudgment Interest
Prejudicial Statements
Presumptions
Pretrial Procedure
Prior Convictions
Prior Statements
Probable Cause
Probation and Parole
Proof
Property
Property Division
Prosecuting Attorneys
Public Officers and Employees
Public Service Commission

Ratification
Real Estate
Records
Redemption
Rescission
Restitution
Right to Counsel
Rules of Evidence
Rules of the Supreme Court

Sales
Schools and School Districts
Search and Seizure
Second Injury Fund
Securities Regulation
Security Interests
Self-Defense
Self-Incrimination
Sentences
Service of Process
Sexual Assault
Speedy Trial
Standing
Statutes
Stipulations
Summary Judgment
Supreme Court

Tax Sale
Taxation
Termination of Employment
Theft
Time
Trial
Trusts

Uniform Commercial Code

Valuation
Value of Goods

Vendor and Vendee
Venue
Verdicts

Wages
Waiver
Wills
Witnesses
Words and Phrases
Workers' Compensation

INDEX

Actions

1. The Securities Act of Nebraska, Neb. Rev. Stat. §§ 8-1101 et seq. (Reissue 1983), is not the exclusive remedy under Nebraska law in cases involving the sale of securities.
   Knoell v. Huff 90
2. A cause of action pleaded by amendment ordinarily relates back to the original pleading, provided that claimant seeks recovery on the same general set of facts.
   Forker Solar, Inc. v. Knoblauch 143
3. The theory of recovery is not itself a cause of action. If the general facts upon which the right to recover is based are the same, the amendment relates back to the original pleading.
   Forker Solar, Inc. v. Knoblauch 143
4. Notwithstanding that the statute provides that a school district is a body corporate, possesses the usual powers of a corporation for public purposes, and may sue and be sued, it is the law of this state that a school district may not maintain an action involving a change in the boundaries of a school district.
   School Dist. No. 46 v. City of Bellevue 543
5. A guarantee who holds an unconditional guaranty has no obligation to proceed against the security prior to seeking recovery under the guaranty contract.
   Lease Northwest v. Davis 617

Adoption

1. The burden is on a natural parent challenging the validity of a relinquishment to prove that it was not voluntarily given.
   Gaughan v. Gilliam 836
2. In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption signed by a natural parent knowingly, intelligently, and voluntarily is valid.
   Gaughan v. Gilliam 836
3. The mere fact that a mother of a child might be influenced by the real concern expressed by friends or family for the welfare of both the mother and the child does not necessarily mean that a relinquishment executed by such mother is the product of threats, coercion, fraud, or duress.
   Gaughan v. Gilliam 836

Adverse Possession

1. Proof of the adverse nature of the possession of the land is not sufficient to quiet title in the adverse possessor; the land itself

must also be described with enough particularity to enable the court to exact the extent of the land adversely possessed and to enter a judgment upon the description.
Matzke v. Hackbart 535

2. In determining whether a claimant of title by adverse possession met the required burden of proof, we review the record de novo and reach conclusions independent of the trial judge.
Matzke v. Hackbart 535

3. A claim of title by adverse possession must be proved by a preponderance of the evidence.
Matzke v. Hackbart 535

4. Where an exact metes and bounds description is impossible to ascertain from the record, the failure to adequately describe the proposed boundary is fatal to a claim of adverse possession.
Matzke v. Hackbart 535

5. A claimant of title by adverse possession must describe the land adversely possessed in an exact and definite manner.
Matzke v. Hackbart 535

Affidavits

1. Verification of a pleading constitutes no part of a pleading and, ordinarily, is not necessary to vest jurisdiction in a court.
In re Interest of L.D. et al. 249

2. As any other formal matter, an absence of, or defect in, verification is waived by failure to make a proper and timely objection.
In re Interest of L.D. et al. 249

Aggravating and Mitigating Circumstances

1. A defendant may offer any evidence on the issue of mitigation, even though the mitigating factor is not specifically listed in Neb. Rev. Stat. § 29-2523(2) (Reissue 1985).
State v. Palmer 282
State v. Joubert 411

2. The statutory aggravating circumstances set out in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) are not unconstitutionally vague.
State v. Palmer 282

3. Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), that a murder be "especially heinous, atrocious, cruel" or "manifest exceptional depravity by ordinary standards of morality and intelligence," describes in the disjunctive at least two distinct components of the aggravating circumstance which may operate in conjunction with or independent of one another.
State v. Palmer 282
State v. Joubert 411

4. The presence of any of the components of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) will sustain a finding that aggravating circumstance (1)(d) exists.
State v. Palmer 282
State v. Joubert 411
5. The words "especially heinous, atrocious, cruel," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), mean a conscienceless or pitiless crime which is unnecessarily torturous to the victim.
State v. Palmer 282
State v. Joubert 411
6. The phrase "exceptional depravity," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), refers and 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 282
State v. Joubert 411
7. For the purpose of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), "exceptional depravity" exists when the act is totally and senselessly bereft of any regard for human life as shown by the presence of the following circumstances, either separately or collectively: (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.
State v. Palmer 282
8. Any serious assaultive or terrorizing criminal activity committed by the accused prior to the time of the offense may properly be considered when deciding the applicability of Neb. Rev. Stat. § 29-2523(1)(a) (Reissue 1985).
State v. Joubert 411
9. 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. Joubert 411
10. For the purpose of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), "exceptional depravity" exists when the act is totally and senselessly bereft of any regard for human life as shown by the presence of the following circumstances, either separately or collectively: (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. Consequently, where one or more of those five factors are present, there may be a finding of "exceptional depravity."
State v. Joubert 411

Aiding and Abetting

1. A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender.
   State v. Schreck 650
2. Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient.
   State v. Schreck 650

Alimony

1. It is the rule in Nebraska that the division of property and the awarding of alimony in marriage dissolution cases are matters entrusted to the sound discretion of the trial judge. On appeal these matters will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.
   Busekist v. Busekist 510
   Gale v. Gale 803
2. The ultimate test in determining correctness in the amount of the alimony awarded is reasonableness as determined by the facts of each case.
   Gale v. Gale 803
3. The factors determining the reasonableness of an award of alimony include the duration of the marriage, history of the contributions to the marriage by each party, the ability of the supported party to engage in gainful employment, and the income and earning capacity of each party, as well as the general equities of each situation.
   Gale v. Gale 803

Antenuptial Agreements

An unambiguous antenuptial agreement which neither expressly nor by reasonable implication indicates an intention of the parties that it be valid upon divorce shall not be valid and binding upon the dissolution of marriage.
Busekist v. Busekist 510

Appeal and Error

1. This court will not overturn the trial court's factual findings when determining the correctness of the trial court's rulings on the suppression of evidence unless those findings are clearly wrong.
   State v. Bowersmith 6
   State v. Copple 672
2. Defendant in a postconviction case bears the burden of establishing a basis for relief, and a conviction will not be set

aside in the absence of a showing that an error created actual prejudice rather than merely the possibility of prejudice.
State v. Cole 10
State v. Fries 482
3. A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal.
State v. Cole 10
State v. Falkner 490
State v. Dillon 503
4. Issues which were known to defendant and counsel at the time of trial and were capable of being raised in a direct appeal, but were not raised in defendant's direct appeal, are not proper grounds for postconviction relief.
State v. Cole 10
State v. Falkner 490
State v. Dillon 503
5. It is within the discretion of the district court to determine whether counsel shall be appointed in a postconviction proceeding to represent defendant on appeal to this court, and in the absence of a showing of abuse of discretion, the failure to appoint counsel is not error.
State v. Cole 10
6. In a prosecution for a felony, error cannot be predicated upon the failure of the trial court to define a lesser offense included in the crime charged unless requested to do so.
State v. Pribil 28
7. Either the State or the defendant may request a lesser-included offense instruction where it is supported by the pleadings and the evidence. However, absent such a request, it is not error for the trial court to fail to give such instruction even though warranted.
State v. Pribil 28
8. Ordinarily, the overruling of a motion in limine does not eliminate the need to object to the introduction of evidence in order to preserve error.
State v. Borchardt 47
9. One wishing to preserve error on the basis of remarks contained in an opening statement generally must object to the questioned remarks when made, notwithstanding the overruling of a motion in limine.
State v. Borchardt 47
10. A litigant may rely on a trial judge's announcement of what he or she will permit an opponent to do.
State v. Borchardt 47
11. Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike improper material is sustained and the jury is admonished to disregard such material.
State v. Borchardt 47

12. The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion.
State v. Borchardt 47

13. A conviction will not be set aside in the absence of a showing that an error created prejudice.
State v. Borchardt 47

14. In resolving a challenge to the sufficiency of the evidence, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such is for the trier of fact and must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Borchardt 47
State v. Baker 130
State v. Kern 177
State v. Moniz 198
State v. Palmer 282
State v. Clancy 492

15. It is not for this court to accept one version of a case over another; that is for the jury.
State v. Borchardt 47

16. After a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of the evidence if the evidence sustains some rational theory of guilt.
State v. Borchardt 47
State v. Kern 177
State v. Moniz 198
State v. Painter 905

17. The findings of a court in a law action in which a jury has been waived have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
Chlopek v. Schmall 78
Marathon Realty Corp. v. Gavin 458

18. Regarding questions of law, this court has an obligation to reach its conclusion independent from the conclusion reached by a trial court.
Knoell v. Huff 90
In re Estate of Walker 812

19. In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.
State v. Williams 114
State v. Dillon 503

20. Any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence.
State v. Baker 130
21. Questions relating to the modification of child support are initially entrusted to the sound discretion of the trial court, and, although on appeal we are required to review the record de novo, in the absence of an abuse of discretion, the decision of the trial court will be affirmed.
Wagner v. Wagner 155
22. Child custody determinations are matters initially entrusted to the sound discretion of the trial court. On appeal the judgment of the trial court will be affirmed in the absence of a clear abuse of discretion.
Ainsworth v. Ainsworth 160
Peterson v. Peterson 557
23. A motion for change of venue filed pursuant to Neb. Rev. Stat. § 29-1301.01 (Reissue 1985) is addressed to the sound discretion of the trial court, whose ruling will not be disturbed absent a clear abuse of that discretion.
State v. Kern 177
24. A trial court abuses its discretion in denying a motion for change of venue where the defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial.
State v. Kern 177
25. The factors used to determine whether a change of venue should have been granted due to pretrial publicity include 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 selection of the jury; the number of challenges exercised during the voir dire; the severity of the offense charged; and the size of the area from which the venire is drawn.
State v. Kern 177
26. While any one of several errors may not, in and of itself, warrant a reversal, if all of the errors in the aggregate establish a defendant did not receive a fair trial, a new trial must be granted.
State v. Kern 177
27. Where the appellant's brief assigns no error or fails to make references to the record, the judgment of the lower court will be affirmed, absent any plain error the Nebraska Supreme Court may note.
In re Interest of P.W. 197
In re Interest of J.S., S.C., and L.S. 234

Reynolds v. Myers 509
Leseberg v. Meints 533
State v. Copple 672
In re Interest of A.W. 764
State v. Painter 905

28. The 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. Moniz 198

29. Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, the Supreme Court will affirm.
Kahl v. Frederick 212

30. There may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.
State v. Lee 216

31. The only errors which require reversal of a cause are those prejudicial to the rights of the accused or which constitute the denial of a substantial legal right.
State v. Lee 216

32. The withdrawal of a plea is a matter addressed to the discretion of the trial court, and the trial court's ruling will not be disturbed on appeal absent an abuse of that discretion.
State v. Suffredini 220
State v. Hoffman 830

33. Absent an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.
State v. Suffredini 220
State v. Kane 245
State v. Kenny 638
State v. Gonzales 659

34. An order terminating parental rights is reviewed de novo on the record in this court.
In re Interest of D.J. et al. 226
In re Interest of J.S., S.C., and L.S. 234
In re Interest of J.W. 897

35. Whether a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter.
In re Interest of L.D. et al. 249

36. Where lack of subject matter jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that

issue, it is the duty of the reviewing court to raise and determine the issue of jurisdiction sua sponte.
In re Interest of L.D. et al. 249
37. An adjudication under Neb. Rev. Stat. § 43-247 (Reissue 1984) of the Nebraska Juvenile Code is an appealable order.
In re Interest of L.D. et al. 249
38. If a lower court does not have subject matter jurisdiction and, therefore, has no power to entertain the proceedings or decide a question, an appellate court lacks jurisdiction to review or evaluate an evidentiary determination for an act outside the jurisdiction of the court whose judgment or order is appealed.
In re Interest of L.D. et al. 249
39. Although an extrajurisdictional act of a lower court cannot vest the appellate court with jurisdiction to review or evaluate an evidentiary determination involved in such act, an appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power to enter the judgment or final order sought to be reviewed.
In re Interest of L.D. et al. 249
40. Absent an abuse of discretion, the decision of a trial judge on a motion for continuance will be upheld on appeal.
State v. Polyascko 272
State v. Sluyter 768
41. Relief granted pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986) constitutes the disposition of a direct appeal on its merits.
State v. Bean 278
42. In disposing of a case under Neb. Ct. R. of Prac. 3B (rev. 1986), the Nebraska Supreme Court examines the entire record, not only to resolve those matters which are specifically called to its attention by counsel but also to determine whether any possible errors exist.
State v. Bean 278
43. Any matter which can be determined from the record on direct appeal is considered by the Nebraska Supreme Court when ruling on a motion filed pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986). Any such matter is not subject to relitigation in an action brought pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985).
State v. Bean 278
State v. Wilson 721
44. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Palmer 282
45. Retrial after reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute double jeopardy.
State v. Palmer 282

46. The proportionality review made under the requirements of Neb. Rev. Stat. §§ 29-2521.01, 29-2521.02, and 29-2521.03 (Reissue 1985) is limited to a comparison of the facts and circumstances of the death penalty-imposed case under review with those of all applicable cases in which the death penalty was imposed.
State v. Palmer 282
State v. Joubert 411

47. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
State v. Burchett 444

48. Determinations as to the qualifications of a person to be a witness or the admissibility of evidence are matters left to the sound discretion of the trial court, whose rulings will not be upset absent an abuse of discretion.
State v. Burchett 444

49. The Supreme Court disposes of an appeal on the basis of the theory presented by the pleadings on which the case was tried.
Holden v. Urban 472

50. In the absence of plain error, where an issue is raised for the first time in the Supreme Court, such issue will be disregarded inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition.
Holden v. Urban 472
Leseberg v. Meints 533
Norris v. Iowa Beef Processors 867
State v. Painter 905

51. On appeal of a county court's judgment rendered in a bench trial of a law action, the district court reviews the case for error appearing on the record made in the county court.
Holden v. Urban 472

52. A county court's factual findings in a bench trial of a law action have the effect of a verdict and will not be set aside unless such findings are clearly erroneous.
Holden v. Urban 472

53. This court will not interfere on appeal with a final order made by the district court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof.
State v. Steele 476
In re Interest of Kinnebrew 885

54. The admission or exclusion of evidence is a matter within the sound discretion of the trial court, whose ruling on an evidential question will be upheld unless such ruling constitutes an abuse of discretion.
State v. Clancy 492

55. Determination whether to grant a mistrial is a matter within the sound discretion of a trial court, whose ruling regarding a mistrial will be upheld unless such ruling constitutes an abuse of discretion.
State v. Clancy 492

56. It is the rule in Nebraska that the division of property and the awarding of alimony in marriage dissolution cases are matters entrusted to the sound discretion of the trial judge. On appeal these matters will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.
Busekist v. Busekist 510
Gale v. Gale 803

57. A property owner's exclusive remedy for relief from overvaluation of property for tax purposes is by protest to the county board of equalization. An appeal may then be taken to the district court from the order of the county board of equalization fixing the assessed value of the property.
Olson v. County of Dakota 516

58. Whether a defendant's guilty plea, which results in a conviction later used as the basis for application of an enhanced penalty, has been made understandingly, intelligently, and voluntarily is not an issue in the Supreme Court's review concerning the validity of an enhanced punishment imposed on a defendant.
State v. Davis 518

59. A decree of foreclosure is a final order for purposes of appeal to this court.
Leseberg v. Meints 533

60. In determining whether a claimant of title by adverse possession met the required burden of proof, we review the record de novo and reach conclusions independent of the trial judge.
Matzke v. Hackbart 535

61. If the statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the legislature to accomplish that end.
School Dist. No. 46 v. City of Bellevue 543

62. In determining the intent of the Legislature, the Supreme Court considers the history of the legislation and the reasonableness of an interpretation, weighed against an unreasonable or absurd construction evidently not intended by the Legislature.
County of Lancaster v. Maser 566

63. In an appeal regarding disqualification of benefits under Neb. Rev. Stat. § 48-628(b) (Reissue 1984), the Supreme Court retries

factual questions de novo on the record and reaches conclusions independent of those reached by the district court.
O'Keefe v. Tabitha, Inc. 574

64. In appeals under Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1986), we review the causes de novo on the record, retry the issues of fact, and come to independent conclusions regarding the findings challenged.
Ponderosa Villa v. Hughes 627

65. A trial court's finding that a prima facie case has been established concerning existence of a conspiracy will be upheld unless such finding is clearly erroneous.
State v. Copple 672

66. Whether a witness is qualified as an expert is a preliminary question for a trial court. Neb. Evid. R. 104(1) (Neb. Rev. Stat. § 27-104(1) (Reissue 1985)). Determination of a witness' qualification as an expert is a matter within the sound discretion of a trial court, whose ruling will be upheld unless such ruling constitutes an abuse of discretion.
State v. Copple 672

67. In order that assignments of error as to the admission or rejection of evidence may be considered, the Supreme Court requires that appropriate reference be made to the specific evidence against which objection is urged. A party who claims error in a proceeding is required to point out the factual and legal basis that shows the error.
State v. Copple 672

68. Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury. All other instructions must be read together, and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.
State v. Copple 672
Steed v. Oak Ridge Equestrian Ctr. 792

69. The findings of fact made by the compensation court have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
Bender v. Norfolk Iron & Metal Co. 706
Ward v. City of Mitchell 711
Norris v. Iowa Beef Processors 867

70. We must consider the evidence in the light most favorable to the successful party, when testing the sufficiency of the evidence

supporting the Workers' Compensation Court's findings of fact.
Ward v. City of Mitchell 711
Norris v. Iowa Beef Processors 867

71. When the record presents nothing more than conflicting medical testimony, the Supreme Court will not substitute its judgment for that of the Workers' Compensation Court.
Ward v. City of Mitchell 711

72. A conviction must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Tweedy 715

73. Whether to grant probation instead of a jail sentence is a matter left to the trial court's discretion. Absent an abuse of discretion, a sentence imposed within the statutory limits will be upheld on appeal.
State v. Tweedy 715

74. A conviction will not be set aside in the absence of a showing that an error prejudiced the defendant.
State v. Burling 725

75. A brief may not expand the evidentiary record and must limit itself to arguments supported by the record.
Father Flanagan's Boys' Home v. Goerke 731

76. If a district court lacks power to adjudicate whether a claim is meritorious, the Supreme Court also lacks power to determine the merit of the claim which was the subject matter of the proceedings in the district court.
Andrews v. City of Lincoln 748
In re Complaint of Fecht 752

77. The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding.
State v. Davis 771

78. In viewing a matter on appeal we are guided by the rule that where evidence is in conflict or reasonable minds may differ, it is normally within the province of the jury to decide issues of fact.
Chirnside v. Lincoln Tel. & Tel. Co. 784

79. It is not error for the trial court to refuse a requested instruction when it has, on its own motion, fairly and fully instructed the jury on a party's theory of the case.
Steed v. Oak Ridge Equestrian Ctr. 792

80. Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence. Ordinarily, it is error to submit to the jury an issue which is not pleaded in the case.
Steed v. Oak Ridge Equestrian Ctr. 792

81. The ultimate test in determining correctness in the amount of the

alimony awarded is reasonableness as determined by the facts of each case.
Gale v. Gale 803

82. The factors determining the reasonableness of an award of alimony include the duration of the marriage, history of the contributions to the marriage by each party, the ability of the supported party to engage in gainful employment, and the income and earning capacity of each party, as well as the general equities of each situation.
Gale v. Gale 803

83. A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. Where the evidence is in irreconcilable conflict, we consider the findings of the trial court.
Gaughan v. Gilliam 836

84. Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly wrong. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, Neb. Rev. Stat. § 48-185 (Reissue 1984) precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court.
Norris v. Iowa Beef Processors 867

85. In an appeal after rehearing in the Nebraska Workers' Compensation Court, the Supreme Court will consider only those issues or questions properly presented and disposed in the Nebraska Workers' Compensation Court.
Norris v. Iowa Beef Processors 867

86. A district court reviews the determination of a mental health board de novo on the record.
In re Interest of Kinnebrew 885

87. The transcript of the proceeding before a mental health board may not be treated as evidence before the board, the district court, or this court unless the facts in the transcript are offered as evidence, are not objected to, and are reviewed by the trier of fact.
In re Interest of Kinnebrew 885

88. In a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal.
State v. Pointer 892
State v. Roggenkamp 914

89. Where there is a dispute in the evidence, this court will give great weight to the juvenile court's findings because it heard and observed the parties and witnesses.
In re Interest of J.W. 897

90. A guilty verdict will not be reversed by this court on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law.
State v. Painter 905
91. Looking at the role of the district court in appeals from county court, it is clear that the district court is considered to be an intermediate court of appeals and not a trial court.
State v. Painter 905
92. Just as the Supreme Court may, on a motion for rehearing, timely modify its opinion, an intermediate appellate court may also timely modify its opinion.
State v. Painter 905
93. Error may not be predicated on a ruling which admits evidence unless a substantial right of a party is affected and a timely objection appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context. Neb. Evid. R. 103(1)(a) (Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1985)).
State v. Roggenkamp 914
94. If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error.
State v. Roggenkamp 914
95. A party who has stipulated to the admission of evidence cannot on appeal complain about evidence admitted pursuant to and in accordance with such stipulation.
State v. Roggenkamp 914
96. In an appeal of a criminal case to the district court, the latter acts as an intermediate court of appeal, and, as such, its review is limited to an examination of the county court record for error or an abuse of discretion.
State v. Thompson 922
97. The State has the right to appeal a district court modification of a sentence imposed by a county court.
State v. Thompson 922

Arrests

1. Generally, as a practical matter, no criminal investigation is complete until sufficient facts have been obtained to justify the arrest and conviction of the defendant.
State v. Nissen 60
2. The obligation of an officer making an arrest under a warrant is twofold: to apprehend the person named in the warrant and to avoid interfering with one not involved.
State v. Nissen 60
3. Law enforcement officers have a legitimate right to question persons about the identity of the subject of an arrest warrant before they arrest the suspect; and although persons so questioned may have the right to refuse to answer such inquiry, if they choose

to answer they may not give false information without subjecting themselves to criminal liability.
State v. Nissen 60

4. The test of probable cause for a warrantless arrest is whether, at the time of the arrest, the officer had knowledge of facts and circumstances based on reasonably trustworthy information which was sufficient to warrant a prudent man in believing the defendant had committed or was committing an offense.
State v. Evans 64
State v. Bishop 522
State v. Roggenkamp 914

5. A suspect may not defeat a warrantless arrest which has been set in motion in a public place upon probable cause by the expedient of escaping to a private place.
State v. Bishop 522

Attorney and Client

1. A lawyer should represent a client zealously within the bounds of the law.
State v. Borchardt 47

2. It is the duty of defense counsel to represent their clients in a manner consistent with the prevailing professional standard within their community. Implicit in that duty is a duty to conscientiously protect the interests of the client—a duty which is an integral part of every attorney-client relationship.
State v. Fries 482

3. Multiple representation does not give rise to a denial of the defendant's sixth amendment right to effective assistance of counsel unless an actual conflict of interest exists and that conflict affects the performance of counsel.
State v. Wilson 721

Attorneys at Law

In appearing in his or her professional capacity before a tribunal, a lawyer shall not state or allude to any matter that he or she has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
State v. Borchardt 47

Banks and Banking

1. The Securities Act of Nebraska, Neb. Rev. Stat. §§ 8-1101 et seq. (Reissue 1983), is not the exclusive remedy under Nebraska law in cases involving the sale of securities.
Knoell v. Huff 90

2. A bank may set off the funds of a depositor to pay a debt due the bank from the depositor, and, absent an agreement to the contrary or specific instructions from the debtor, a creditor may apply the

proceeds to such debts and in such order as the creditor determines.
First Nat. Bank v. Benedict Consol. Indus. 860

Blood, Breath, and Urine Tests

1. There is no requirement in this jurisdiction that *Miranda* warnings be given prior to a request to submit to a chemical test of blood, breath, or urine.
State v. Bishop 522
2. Under the implied consent law, a driver is not entitled to consult with an attorney, nor is a delay in the test required should a driver request to consult with an attorney.
State v. Bishop 522
3. A chemical test result of one's body fluid for alcohol content which is subject to a margin of error must be adjusted so as to give the defendant the benefit of that margin.
State v. Burling 725

Boundaries

1. In an action to establish a boundary line in accordance with Neb. Rev. Stat. § 34-301 (Reissue 1984), one need not present a survey that qualifies as an official record of survey under Neb. Rev. Stat. § 81-8,122.01 (Cum. Supp. 1986).
Matzke v. Hackbart 535
2. Proof of the adverse nature of the possession of the land is not sufficient to quiet title in the adverse possessor; the land itself must also be described with enough particularity to enable the court to exact the extent of the land adversely possessed and to enter a judgment upon the description.
Matzke v. Hackbart 535
3. Where an exact metes and bounds description is impossible to ascertain from the record, the failure to adequately describe the proposed boundary is fatal to a claim of adverse possession.
Matzke v. Hackbart 535
4. A claimant of title by adverse possession must describe the land adversely possessed in an exact and definite manner.
Matzke v. Hackbart 535
5. Notwithstanding that the statute provides that a school district is a body corporate, possesses the usual powers of a corporation for public purposes, and may sue and be sued, it is the law of this state that a school district may not maintain an action involving a change in the boundaries of a school district.
School Dist. No. 46 v. City of Bellevue 543
6. The fixing of boundaries of school districts is exclusively a legislative function, and it may be properly delegated to a subordinate agency, providing the Legislature prescribes the manner and the standards under which the power of the

designated board may be exercised. The Legislature may delegate this authority provided it states the purpose for doing so and sets up reasonable standards to guide the agency which is to administer it.
School Dist. No. 46 v. City of Bellevue 543

Breach of Contract

1. The general measure of damages for a breach of contract to convey land is the difference between the market value of the land at the time of the breach and the price set out in the contract.
Turner v. Alberts 632
2. The exception to the general rule is that where it appears that special damages have also arisen from the breach, the damages recoverable are such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time the contract was made.
Turner v. Alberts 632

Brokers

1. In order for a broker employed to secure a purchaser of realty to recover a commission, his or her efforts must be the efficient procuring cause of the sale.
Marathon Realty Corp. v. Gavin 458
2. The efforts of a broker employed to secure a purchaser of realty have been the efficient procuring cause of the sale when the broker has secured a prospective purchaser who is ready, willing, and able to buy the property on terms and conditions upon which the broker is authorized to secure a purchaser, or on terms acceptable to the seller.
Marathon Realty Corp. v. Gavin 458
3. Efforts which produce a series of unbroken, continuous events culminating in the sale of realty are the efficient procuring cause of the sale, notwithstanding the fact that such efforts may not be the sole cause of the sale.
Marathon Realty Corp. v. Gavin 458
4. A broker is not entitled to a commission for producing a prospective buyer willing to execute only an option to purchase realty.
Marathon Realty Corp. v. Gavin 458
5. Neb. Rev. Stat. § 36-107 (Reissue 1984) requires that every contract between the owner and any broker or agent employed to sell land is void unless the contract is in writing and subscribed by both the owner and the broker or agent; the contract must also describe the land to be sold and set forth the compensation to be allowed by the owner in case of sale by the broker or agent.
Marathon Realty Corp. v. Gavin 458
6. One who is a joint owner of realty but represents himself or herself to be the sole owner thereof may not avoid full payment of an

agreed commission on the ground that another also has an interest in the property.
Marathon Realty Corp. v. Gavin 458

7. A broker's right to compensation cannot be impaired by either the subsequent inability or unwillingness of a purported owner to consummate the sale on the terms prescribed or by said owner's inability to convey good title to real estate because of the failure to obtain a joinder in the conveyance by a third party who has an interest in the land.
Marathon Realty Corp. v. Gavin 458

Case Disapproved

The trial court may instruct on a lesser-included offense over the objection of the defendant if the information or complaint charging the crime is such as to give the defendant notice that he or she could at the same time face the lesser-included offense charge. To the extent that *McConnell v. State*, 77 Neb. 773, 110 N.W. 666 (1906), contains language to the contrary, such language is expressly disapproved.
State v. Pribil 28

Case Overruled

1. To the extent that any prior cases would limit the total compensation for damage to personal property to the fair market value of the property immediately before the injury, they are expressly overruled.
Chlopek v. Schmall 78

2. *Bish v. Fletcher*, 219 Neb. 863, 366 N.W.2d 778 (1985), is overruled.
County of Lancaster v. Maser 566

Child Custody

1. Child custody determinations are matters initially entrusted to the sound discretion of the trial court. On appeal the judgment of the trial court will be affirmed in the absence of a clear abuse of discretion.
Ainsworth v. Ainsworth 160
Peterson v. Peterson 557

2. The paramount consideration in determining who should have the care and custody of minor children following dissolution of a marriage is the best interests of the children.
Ainsworth v. Ainsworth 160

3. Where the custody of a minor child is involved, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. The courts may not properly deprive a parent of the custody of a 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.
Peterson v. Peterson 557
4. As authorized by Neb. Rev. Stat. § 42-364 (Reissue 1984), a district court may maintain legal custody while awarding physical custody to a parent or other party. Section 42-364 authorizes the court to place the custody of a minor child in the court, to determine custody on the basis of the best interests of the child, and to make subsequent changes when required. When the best interests of a child, in regard to custody, are not clear, the court may, and should, place custody in the court.
Peterson v. Peterson 557
5. Joint custody is not favored by the courts of this state and will be reserved for only the rarest of cases.
Wilson v. Wilson 589
6. A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. Where the evidence is in irreconcilable conflict, we consider the findings of the trial court.
Gaughan v. Gilliam 836
7. A question present in every habeas corpus case for custody of a child is the welfare and best interests of the child.
Gaughan v. Gilliam 836

Child Support

1. A proceeding to modify a child support order is not a retrial of the original case nor a review of the original decree.
Wagner v. Wagner 155
2. The paramount issue in child support cases, whether originally or in proceedings for modification, remains the best interests of the children.
Wagner v. Wagner 155
3. Increased age of children alone will not furnish a satisfactory basis for a modification of child support unless accompanied by competent evidence of the actual increase in the cost of maintaining the children.
Wagner v. Wagner 155
4. Although as a general rule a decree awarding child support will not be modified because of a change of circumstances which was in the contemplation of the parties at the time the original or preceding order was made, we limit that rule to include only those anticipated changes which were specifically noted on the record made at the time of entry of the previous order. To the extent that the language of *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985), has been misinterpreted, that interpretation is expressly disapproved.
Wagner v. Wagner 155

5. Questions relating to the modification of child support are initially entrusted to the sound discretion of the trial court, and, although on appeal we are required to review the record de novo, in the absence of an abuse of discretion, the decision of the trial court will be affirmed.
Wagner v. Wagner 155

6. A significant increase in the appellant's income, along with the increased ages of the children and the inability of the appellee to afford to pay the children's bills on the current support payment, meets the requirement of a material change in circumstances and supports the trial court's decision to modify child support payments.
Wilson v. Wilson 589

Circumstantial Evidence

1. A conviction may be based on circumstantial evidence where the evidence, taken as a whole, establishes guilt beyond a reasonable doubt.
State v. Baker 130

2. A person charged with a crime may be convicted solely upon the basis of circumstantial evidence.
State v. Baker 130
State v. Palmer 282

3. Circumstantial evidence may establish the operation or actual physical control of a motor vehicle, under the provisions of Neb. Rev. Stat. § 39-669.07 (Reissue 1984).
State v. Baker 130

4. Circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish defendant's guilt beyond a reasonable doubt.
State v. Kane 245
State v. Hunt 594

5. One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt.
State v. Clancy 492

6. Circumstantial evidence may establish existence of a conspiracy or the criminal intent necessary for a conspiracy.
State v. Copple 672

Claims

1. Concerning a contract claim against a city of the primary class, Neb. Rev. Stat. § 15-840 (Reissue 1983) requires that such claim be filed with the city clerk and disallowed before a claimant, pursuant to Neb. Rev. Stat. § 15-841 (Reissue 1983), may timely

appeal from the city's disallowance and thereby become entitled to invoke a district court's power to adjudicate the merit of the disallowed claim.
Andrews v. City of Lincoln 748

2. If a district court lacks power to adjudicate whether a claim is meritorious, the Supreme Court also lacks power to determine the merit of the claim which was the subject matter of the proceedings in the district court.
Andrews v. City of Lincoln 748

Collateral Attack

A collateral attack on valuation of property for tax purposes is permissible only if the assessment is partially or entirely void.
Olson v. County of Dakota 516

Confessions

1. Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."
State v. Bowersmith 6

2. To be admissible as evidence in his trial, an accused's statements must have been voluntarily made and must not have been the product of any inducement, no matter how slight.
State v. Bowersmith 6

Conflict of Interest

1. There is a presumption of prejudice involving a defendant's constitutional right to effective assistance of counsel when a defendant demonstrates (1) counsel actively represented conflicting interests and (2) an actual conflict of interest adversely affected performance by the defendant's lawyer. Such conflicts of interest must be shown to have resulted in counsel's conduct detrimental to the defense.
State v. Williams 114

2. Multiple representation does not give rise to a denial of the defendant's sixth amendment right to effective assistance of counsel unless an actual conflict of interest exists and that conflict affects the performance of counsel.
State v. Wilson 721

Conspiracy

1. The principal element of a conspiracy is an agreement or understanding between two or more persons to inflict a wrong

against or injury upon another. The very nature of a conspiracy requires an element of intent.
State v. Copple 672
Steed v. Oak Ridge Equestrian Ctr. 792
2. Circumstantial evidence may establish existence of a conspiracy or the criminal intent necessary for a conspiracy.
State v. Copple 672
3. When a conspiracy has been proved, a conspirator's acts and declarations, in furtherance of the conspiracy, are the acts and declarations of all conspirators and are admissible evidence against the coconspirators.
State v. Copple 672
4. An overt act, as something done pursuant to a conspiracy, tends to show a preexisting conspiracy and manifests an intent or design toward accomplishment of a crime. An overt act, by itself, need not have the capacity to accomplish the conspiratorial objective and does not have to be a criminal act.
State v. Copple 672
5. Silence, which is designed to conceal, may indicate an intention to conspire and, if intended to facilitate the conspiracy, may be an overt act pursuant to the conspiracy.
State v. Copple 672
6. For admission of a coconspirator's act as evidence against a defendant-coconspirator being tried for a crime other than the conspiracy itself, the trial court must first determine whether the State has proved a prima facie case that (1) a conspiracy existed, (2) the defendant and the witness were members of the conspiracy, and (3) the witness' act was done during and in furtherance of the conspiracy.
State v. Copple 672
7. Whether the State has established a prima facie case of conspiracy, thereby constituting anything within execution or furtherance of the common purpose as the act of every coconspirator, is a preliminary question for the trial court concerning admissibility of evidence. Neb. Evid. R. 104(1) (Neb. Rev. Stat. § 27-104(1) (Reissue 1985)).
State v. Copple 672
8. A trial court's finding that a prima facie case has been established concerning existence of a conspiracy will be upheld unless such finding is clearly erroneous.
State v. Copple 672
9. It is necessary to prove the existence of at least an implied agreement, to establish a conspiracy.
Steed v. Oak Ridge Equestrian Ctr. 792

Constitutional Law

1. Determinations as to whether a person has been seized, in the constitutional sense, are questions of fact.
State v. Bowersmith 6
2. The *Miranda* warnings are procedural safeguards intended to secure the privilege against compelled self-incrimination.
State v. Evans 64
3. As a result of Neb. Const. art. I, § 11, and U.S. Const. amend. VI, the right to counsel is the right to effective assistance of counsel. For effective assistance of counsel a defendant is constitutionally entitled to a lawyer's representation free from conflicting interests.
State v. Williams 114
4. There is a presumption of prejudice involving a defendant's constitutional right to effective assistance of counsel when a defendant demonstrates (1) counsel actively represented conflicting interests and (2) an actual conflict of interest adversely affected performance by the defendant's lawyer. Such conflicts of interest must be shown to have resulted in counsel's conduct detrimental to the defense.
State v. Williams 114
5. Notwithstanding constitutional mandates regarding a jury trial, such as the sixth amendment to the U.S. Constitution and article I, §§ 6 and 11, of the Nebraska Constitution, there is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of imprisonment of 6 months or less.
State v. Kennedy 164
6. There may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.
State v. Lee 216
7. The only errors which require reversal of a cause are those prejudicial to the rights of the accused or which constitute the denial of a substantial legal right.
State v. Lee 216
8. The statutory aggravating circumstances set out in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) are not unconstitutionally vague.
State v. Palmer 282
9. A convicted defendant is not entitled to all of the same rights accorded one merely accused of a crime but not yet convicted.
State v. Palmer 282
10. There is no constitutional requirement that the death penalty be imposed by a jury.
State v. Palmer 282

11. Neb. Rev. Stat. § 29-2006(3) (Reissue 1985) held constitutional.
State v. Burchett 444
12. Prospective jurors who are unable to fairly determine guilt because of their opposition to capital punishment are not a cognizable group.
State v. Burchett 444
13. Lack of jury members of the same race as the defendant, standing alone, does not support a claim of improper racial composition of the jury.
State v. Falkner 490
14. All that the Constitution forbids is systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels. The burden is on the defendant to allege and prove such systematic exclusion.
State v. Falkner 490
15. Evidence obtained in the implied consent context is not testimonial or communicative and does not fall within the privilege against self-incrimination.
State v. Bishop 522
16. The U.S. Constitution, through the due process clause of the 14th amendment, requires the states to provide a trial by jury whenever the 6th amendment would so require if the case were in federal court.
State v. Bishop 522
State v. Lafler 613
17. A voluntary waiver of the constitutional right to a jury trial must be express and intelligent.
State v. Bishop 522
18. If the statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the legislature to accomplish that end.
School Dist. No. 46 v. City of Bellevue 543
19. If the legislature has made a reasonable classification, one that is not a mere cloak or cover for an arbitrary exemption of certain persons or a certain class of persons, but a natural and proper selection of those who, upon a reasonable view of the mischiefs to be met, should be subject to the regulations prescribed, and the law is made to operate generally and uniformly upon all of the class so constituted, the constitutional provision in question is not violated.
School Dist. No. 46 v. City of Bellevue 543
20. An offense for which the maximum penalty is imprisonment for more than 6 months is a serious offense for which the accused is

constitutionally entitled to a jury trial.
State v. Lafler 613

21. A waiver of the constitutional right to a jury trial cannot be presumed from a silent record.
State v. Lafler 613

22. Fourth amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.
State v. Kenny 638

23. A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his fourth amendment rights infringed.
State v. Kenny 638

24. A statute which is clear and precise, and therefore not vague, may nonetheless fail to pass constitutional muster by virtue of being overbroad in the sense that it prohibits the exercise of constitutionally protected conduct.
State v. Copple 672

25. Irrespective of standing to challenge a statute for vagueness, an individual may have standing to assert that a statute is overbroad when such statute reaches a substantial amount of constitutionally protected conduct.
State v. Copple 672

26. In determining whether standing exists for a facial challenge to a statute as overbroad, a court must first determine whether the statute reaches a substantial amount of constitutionally protected conduct. If the statutory proscription does not reach a substantial amount of constitutionally protected conduct, there is no standing to challenge a statute on the basis that the statute is overbroad, and such challenge must fail.
State v. Copple 672

27. In order to have standing 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 a law as applied to the conduct of others.
State v. Copple 672

28. An essential purpose of a penal statute is to provide notice to the ordinary person concerning conduct which is proscribed as criminal. When a penal statute supplies an ordinary person with notice concerning conduct forbidden as criminal, such statute meets the constitutional standard of due process.
State v. Copple 672

29. Multiple representation does not give rise to a denial of the defendant's sixth amendment right to effective assistance of counsel unless an actual conflict of interest exists and that conflict affects the performance of counsel.
State v. Wilson 721

30. The Constitution of this state distributes the powers of government to three separate and coequal departments or branches, namely, the legislative, executive, and judicial branches, and prohibits any one branch from exercising any power belonging to another branch.
State v. Burling 725

31. Determining whether evidence, if believed, is sufficient to sustain a conviction is a judicial function.
State v. Burling 725

32. The Legislature may not declare the weight to be given to evidence or what evidence shall be conclusive proof of an issue of fact.
State v. Burling 725

33. Whether evidence is of probative value is a legal question, the judicial analysis and resolution of which the Legislature cannot impair.
State v. Burling 725

34. Once a defendant has been informed of the rights required by *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), there is no requirement that the same information be conveyed to a defendant on each subsequent court appearance.
State v. Hoffman 830

Contracts

1. A person who contracts with a corporation is estopped from later denying its corporate existence.
Forker Solar, Inc. v. Knoblauch 143

2. Once an option to purchase is exercised, it becomes a contract for the purchase and sale of the realty.
Marathon Realty Corp. v. Gavin 458

3. Neb. Rev. Stat. § 36-107 (Reissue 1984) requires that every contract between the owner and any broker or agent employed to sell land is void unless the contract is in writing and subscribed by both the owner and the broker or agent; the contract must also describe the land to be sold and set forth the compensation to be allowed by the owner in case of sale by the broker or agent.
Marathon Realty Corp. v. Gavin 458

4. Matters which seek to avoid a valid contract are affirmative defenses.
Lease Northwest v. Davis 617

5. Where the parties have contracted for the payment of a particular lawful rate of interest, such contract controls and the rate thus fixed is recoverable in accordance with the terms of the contract.
Lease Northwest v. Davis 617

6. An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made.
Waylett v. United Servs. Auto. Assn. 741

7. An insurance policy is to be construed as any other contract; if its terms are clear, they are to be applied according to their plain and ordinary meaning.
Waylett v. United Servs. Auto. Assn. 741
8. The parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.
Waylett v. United Servs. Auto. Assn. 741
9. Concerning a contract claim against a city of the primary class, Neb. Rev. Stat. § 15-840 (Reissue 1983) requires that such claim be filed with the city clerk and disallowed before a claimant, pursuant to Neb. Rev. Stat. § 15-841 (Reissue 1983), may timely appeal from the city's disallowance and thereby become entitled to invoke a district court's power to adjudicate the merit of the disallowed claim.
Andrews v. City of Lincoln 748

Controlled Substances

When an employee of the city, whose duties in part are to help apprehend persons using marijuana, himself engages in such activity, such action does constitute an act unbecoming an incumbent of the particular position, does affect the efficient conduct of the business of the city, and is not in the best interest of the city government.
Ostwald v. City of Omaha 530

Conversion

1. As a general rule, provided the property can be traced or identified, any third person who has obtained trust property or its product by a transfer made in violation of the trust may be subject to a constructive trust. It is necessary, however, that the property can be traced or identified.
In re Estate of Redpath 845
2. If the trustee makes a withdrawal from the mixed account for an admittedly personal purpose, for example, to pay his living expenses or his individual debts, or for an unknown purpose, such withdrawal will be charged to the personal part of the account as long as there remains any cash or credit in such personal portion of the account. It will be only after the personal credit or cash is exhausted that withdrawals for personal or unknown purposes will be charged to the trust side of the account.
In re Estate of Redpath 845
3. When a trustee wrongfully commingles trust money with his own and makes payments from the common fund, it will be presumed that he paid out his own money, and not the trust money.
In re Estate of Redpath 845

Convictions

1. Defendant in a postconviction case bears the burden of establishing a basis for relief, and a conviction will not be set aside in the absence of a showing that an error created actual prejudice rather than merely the possibility of prejudice.
State v. Cole 10
State v. Borchardt 47
State v. Burling 725

2. Generally, for prosecutorial misconduct to warrant vacation of a conviction, there must be evidence of prejudice to the defendant's right to a fair and impartial trial.
State v. Evans 64

3. A conviction may be based on circumstantial evidence where the evidence, taken as a whole, establishes guilt beyond a reasonable doubt.
State v. Baker 130

4. A person charged with a crime may be convicted solely upon the basis of circumstantial evidence.
State v. Baker 130
State v. Palmer 282

5. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and a finding made by the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Kern 177
State v. Moniz 198
State v. Palmer 282

6. A finding of guilt may not, as a matter of law, be set aside on appeal for insufficiency of the evidence if that evidence sustains some rational theory of guilt.
State v. Moniz 198

7. Only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, will a trial court be justified in directing a verdict of not guilty.
State v. Kane 245
State v. Hunt 594

8. Circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish defendant's guilt beyond a reasonable doubt.
State v. Kane 245
State v. Hunt 594

9. Each case must be considered on its own facts, and convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.
State v. Palmer 282

10. The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.
State v. Palmer 282

11. A convicted defendant is not entitled to all of the same rights accorded one merely accused of a crime but not yet convicted.
State v. Palmer 282

12. A criminal conviction may be based upon the uncorroborated statements of an accomplice.
State v. Burchett 444

13. In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury—all of which is within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
State v. Clancy 492
State v. Tweedy 715

Corporations

1. A person who contracts with a corporation is estopped from later denying its corporate existence.
Forker Solar, Inc. v. Knoblauch 143

2. A general denial does not put corporate character in issue.
Forker Solar, Inc. v. Knoblauch 143

Corroboration

A victim need not be independently corroborated on the particular acts constituting a sexual assault, but must be corroborated on the material circumstances and facts tending to support the victim's testimony.
State v. Polyascko 272

Courts

1. Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, the Supreme Court will affirm.
   Kahl v. Frederick 212
2. Motions to revoke probation must be filed in the sentencing court. Where a probationer was tried, convicted, and sentenced in the county court, it is the county court, not the district court which served in its appellate capacity, that has jurisdiction to hear a motion to revoke probation.
   State v. Daniels 264
3. On appeal of a county court's judgment rendered in a bench trial of a law action, the district court reviews the case for error appearing on the record made in the county court.
   Holden v. Urban 472
4. As authorized by Neb. Rev. Stat. § 42-364 (Reissue 1984), a district court may maintain legal custody while awarding physical custody to a parent or other party. Section 42-364 authorizes the court to place the custody of a minor child in the court, to determine custody on the basis of the best interests of the child, and to make subsequent changes when required. When the best interests of a child, in regard to custody, are not clear, the court may, and should, place custody in the court.
   Peterson v. Peterson 557
5. Where a cause has been appealed to the Supreme Court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to this court.
   State v. Painter 905
6. Looking at the role of the district court in appeals from county court, it is clear that the district court is considered to be an intermediate court of appeals and not a trial court.
   State v. Painter 905
7. Just as the Supreme Court may, on a motion for rehearing, timely modify its opinion, an intermediate appellate court may also timely modify its opinion.
   State v. Painter 905
8. In an appeal of a criminal case to the district court, the latter acts as an intermediate court of appeal, and, as such, its review is limited to an examination of the county court record for error or an abuse of discretion.
   State v. Thompson 922
9. The State has the right to appeal a district court modification of a sentence imposed by a county court.
   State v. Thompson 922

Criminal Law

1. Intent may be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his or her conduct.
State v. Robb 14

2. To secure a change of venue the defendant must show that pretrial publicity has made it impossible to secure a fair and impartial jury.
State v. Heathman 19

3. Nebraska's escape statute, Neb. Rev. Stat. § 28-912 (Reissue 1985), defines one offense and sets out factors which, if present, change the range of the penalty.
State v. Heathman 19

4. Just as a wrong date in an information will not preclude a defendant from being sentenced as a habitual criminal if the record discloses the defendant could not have been misled or confused, so, too, a wrong date in a complaint will not preclude a defendant from being sentenced as one who has previously been convicted of driving while under the influence of alcohol if the record discloses that the defendant could not have been misled or confused.
State v. Jameson 38

5. The responsibility of a public prosecutor differs from that of the usual advocate; his or her duty is to seek justice, not merely to convict. This special duty exists because (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial, the prosecutor is not only an advocate but he or she also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence known to him or her that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused.
State v. Borchardt 47

6. Generally, as a practical matter, no criminal investigation is complete until sufficient facts have been obtained to justify the arrest and conviction of the defendant.
State v. Nissen 60

7. The obligation of an officer making an arrest under a warrant is twofold: to apprehend the person named in the warrant and to avoid interfering with one not involved.
State v. Nissen 60

8. The language of Neb. Rev. Stat. § 28-907(1)(a) (Reissue 1985), "to impede the investigation of an actual criminal matter," includes the impeding of the gathering of information as to the identity of a defendant named in an arrest warrant.
State v. Nissen 60

9. Law enforcement officers have a legitimate right to question persons about the identity of the subject of an arrest warrant before they arrest the suspect; and although persons so questioned may have the right to refuse to answer such inquiry, if they choose to answer they may not give false information without subjecting themselves to criminal liability.
State v. Nissen 60

10. To sustain a claim of ineffective assistance of counsel and obtain reversal of a criminal judgment, a defendant must show (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense.
State v. Williams 114

11. Notwithstanding constitutional mandates regarding a jury trial, such as the sixth amendment to the U.S. Constitution and article I, §§ 6 and 11, of the Nebraska Constitution, there is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of imprisonment of 6 months or less.
State v. Kennedy 164

12. The 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. Moniz 198

13. Motions to revoke probation must be filed in the sentencing court. Where a probationer was tried, convicted, and sentenced in the county court, it is the county court, not the district court which served in its appellate capacity, that has jurisdiction to hear a motion to revoke probation.
State v. Daniels 264

14. In a general sense an ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed.
State v. Palmer 282

15. Not all retroactive legislation is in violation of the prohibition against ex post facto laws.
State v. Palmer 282

16. A legislature may not enact any law which imposes a punishment for an act which was not punishable at the time it was committed or imposes additional punishment to that then prescribed.
State v. Palmer 282

17. Statutes which simply enlarge the class of person who may be competent to testify in criminal cases are not ex post facto in their application to prosecutions for crimes committed prior to their passage, for they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefor than was prescribed at the time of its commission, nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.
State v. Palmer 282
18. No one has a vested right in a procedure; procedural matters can be changed at any time before trial and are binding on the defendant.
State v. Palmer 282
19. A "crime" is an act or omission for which one is subject to punishment by public authority.
State v. Palmer 282
20. "Violence" is the exertion of physical force so as to injure or abuse.
State v. Palmer 282
21. "Crime of violence" is an act which injures or abuses through the use of physical force and which subjects the actor to punishment by public authority.
State v. Palmer 282
22. A convicted defendant is not entitled to all of the same rights accorded one merely accused of a crime but not yet convicted.
State v. Palmer 282
23. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
State v. Burchett 444
State v. Tweedy 715
24. In a prosecution for a crime of violence, the defendant's spouse may be called to testify against the defendant as to any matter, including confidential communications. Neb. Rev. Stat. § 27-505(3)(a) (Reissue 1985).
State v. Burchett 444
25. An accomplice's testimony is admissible notwithstanding the fact that the testimony is procured by means of a plea bargain.
State v. Burchett 444
26. The promise of leniency or otherwise favorable prosecutorial treatment goes only to the credibility of the accomplice's testimony, not to its admissibility.
State v. Burchett 444
27. Generally, it is only where the prosecution has bargained for false

or specific testimony, or a specific result, that an accomplice's testimony is so tainted as to require its preclusion.
State v. Burchett 444
28. Prosecutions for felonies, including murder, may be had on informations filed by the county attorney.
State v. Burchett 444
29. Penal statutes are to be strictly construed, and it is not for us to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there.
State v. Steele 476
30. The U.S. Constitution, through the due process clause of the 14th amendment, requires the states to provide a trial by jury whenever the 6th amendment would so require if the case were in federal court.
State v. Bishop 522
State v. Lafler 613
31. Indigency, as used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), means the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family.
State v. Lafler 613
32. In determining whether a criminal defendant is indigent as the term is used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), a court is to consider the seriousness of the offense; the defendant's income; the availability to the defendant of other resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits; normal living expenses; outstanding debts; and the number and age of dependents.
State v. Lafler 613
33. An offense for which the maximum penalty is imprisonment for more than 6 months is a serious offense for which the accused is constitutionally entitled to a jury trial.
State v. Lafler 613
34. An essential purpose of a penal statute is to provide notice to the ordinary person concerning conduct which is proscribed as criminal. When a penal statute supplies an ordinary person with notice concerning conduct forbidden as criminal, such statute meets the constitutional standard of due process.
State v. Copple 672
35. At a hearing to determine whether the State had violated its agreement for immunity and restricted evidence or information, the State must present a prima facie case that it has fulfilled its agreement with the defendant, that is, demonstrate that the State's evidence, to be adduced at the defendant's trial, was obtained from a source or sources independent of the defendant and not by

direct or indirect use of information obtained from the defendant as the result of defendant's agreement for immunity and restricted evidence or information.
State v. Copple 672

36. If a prosecutor has a duty to disclose a statement in response to a general discovery request, it must derive from the obviously exculpatory character of the evidence.
State v. Tweedy 715

37. In order for an omitted statement to be considered material, it must create a reasonable doubt as to the defendant's guilt that did not otherwise exist. That the evidence "might" influence the outcome is insufficient.
State v. Tweedy 715

38. Where omitted evidence would have been cumulative and repetitive, the defendant suffered no prejudice because of the omission.
State v. Tweedy 715

39. When the sufficiency of the evidence as to criminal intent is questioned, the law is settled that independent evidence of specific intent is not required. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
State v. Tweedy 715

40. A law which changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed is an ex post facto law and insofar as it affects the punishment of the party to his disadvantage is void.
State v. Duran 774

41. Restitution ordered by a court pursuant to Neb. Rev. Stat. § 29-2280 (Cum. Supp. 1986) is a criminal penalty imposed as punishment for the crime, not an administrative or civil penalty as is restitution under Neb. Rev. Stat. § 28-427 (Reissue 1985).
State v. Duran 774

42. A court is without authority to impose a criminal penalty for a crime unless the law authorizing such penalty was effective on or before the date of the commission of the crime.
State v. Duran 774

43. Once a defendant has been informed of the rights required by *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), there is no requirement that the same information be conveyed to a defendant on each subsequent court appearance.
State v. Hoffman 830

44. Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the

amendatory act unless the Legislature has specifically provided otherwise.
State v. Painter 905
State v. Thompson 922

45. In an appeal of a criminal case to the district court, the latter acts as an intermediate court of appeal, and, as such, its review is limited to an examination of the county court record for error or an abuse of discretion.
State v. Thompson 922

Damages

1. Where the damage to personal property can, at a reasonable cost, be repaired and the property restored to substantially its condition immediately before the damage occurred, and the cost of repair does not exceed the difference in market value of the property before and after the injury, then the measure of damages is the reasonable cost of repair plus the reasonable value of the loss of use of the property for the reasonable amount of time required to complete the repair.
Chlopek v. Schmall 78

2. Where the damage to personal property is such that it cannot be repaired and the property thereby restored to substantially its condition immediately before the damage occurred, or when the reasonable cost of repair exceeds the difference in market value of the property immediately before and immediately after the injury, the measure of damages is the lost market value plus the reasonable value of the loss of use of the property for the reasonable amount of time required to obtain a suitable replacement.
Chlopek v. Schmall 78

3. The reasonable value of the loss of use of personal property is generally the fair rental value of property of a like or similar nature or the amount actually paid for rental, whichever is less.
Chlopek v. Schmall 78

4. Where property used for commercial or business purposes cannot be rented, then loss of profits may establish the reasonable value of the loss of use.
Chlopek v. Schmall 78

5. To the extent that any prior cases would limit the total compensation for damage to personal property to the fair market value of the property immediately before the injury, they are expressly overruled.
Chlopek v. Schmall 78

6. In an action for fraud a party may recover such damages as will compensate him for the loss or injury actually caused by the fraud and will place him in the same position as he would have been in had the fraud not occurred.
Forker Solar, Inc. v. Knoblauch 143

7. The plaintiff must present sufficient evidence to allow the trier of fact to estimate the actual damages with a reasonable degree of certainty and exactness.
Kahl v. Frederick 212
8. The general measure of damages for a breach of contract to convey land is the difference between the market value of the land at the time of the breach and the price set out in the contract.
Turner v. Alberts 632
9. The exception to the general rule is that where it appears that special damages have also arisen from the breach, the damages recoverable are such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time the contract was made.
Turner v. Alberts 632
10. Where the plaintiff claims damages for lost wages, and the trial court instructs the jury that the plaintiff can recover damages for wages lost due to the inability of the plaintiff to work, it is not error to refuse to instruct that the plaintiff has a duty to mitigate damages.
Beatty v. Davis 663
11. Impairment of earning capacity is an item of general damage, and proof may be had under general allegations of injury and damage. Proof of an actual loss of wages or earnings is not essential to a recovery for loss of earning capacity.
Chirnside v. Lincoln Tel. & Tel. Co. 784
12. Only damages for physical injury may be recovered under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (1982).
Naidoo v. Union Pacific Railroad 853

Death Penalty

1. The proportionality of a death sentence is for court determination and is not a subject for expert testimony.
State v. Palmer 282
2. A defendant may offer any evidence on the issue of mitigation, even though the mitigating factor is not specifically listed in Neb. Rev. Stat. § 29-2523(2) (Reissue 1985).
State v. Palmer 282
3. The statutory aggravating circumstances set out in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) are not unconstitutionally vague.
State v. Palmer 282
4. There is no constitutional requirement that the death penalty be imposed by a jury.
State v. Palmer 282
5. Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), that a murder be "especially heinous, atrocious, cruel" or "manifest exceptional depravity by ordinary standards of morality and intelligence," describes in the disjunctive at least two distinct components of the

aggravating circumstance which may operate in conjunction with or independent of one another.
State v. Palmer 282

6. The presence of any of the components of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) will sustain a finding that aggravating circumstance (1)(d) exists.
State v. Palmer 282

7. The words "especially heinous, atrocious, cruel," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), mean a conscienceless or pitiless crime which is unnecessarily torturous to the victim.
State v. Palmer 282

8. The phrase "exceptional depravity," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), refers and 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 282

9. For the purpose of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), "exceptional depravity" exists when the act is totally and senselessly bereft of any regard for human life as shown by the presence of the following circumstances, either separately or collectively: (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.
State v. Palmer 282

10. The proportionality review made under the requirements of Neb. Rev. Stat. §§ 29-2521.01, 29-2521.02, and 29-2521.03 (Reissue 1985) is limited to a comparison of the facts and circumstances of the death penalty-imposed case under review with those of all applicable cases in which the death penalty was imposed.
State v. Palmer 282

11. Neb. Rev. Stat. § 29-2006(3) (Reissue 1985) held constitutional.
State v. Burchett 444

12. Prospective jurors who are unable to fairly determine guilt because of their opposition to capital punishment are not a cognizable group.
State v. Burchett 444

13. In a prosecution for first degree murder, the State may use peremptory challenges to remove jurors who are opposed to the death penalty.
State v. Burchett 444

Debtors and Creditors

1. In order that a confession of judgment may be binding on the plaintiff, it is essential that he, either expressly or impliedly, assent

thereto; if it is made without his request, knowledge, or consent, and entered at the instance of the debtor alone, it will have no validity unless the creditor ratifies or accepts it.
In re Estate of Redpath 845

2. A bank may set off the funds of a depositor to pay a debt due the bank from the depositor, and, absent an agreement to the contrary or specific instructions from the debtor, a creditor may apply the proceeds to such debts and in such order as the creditor determines.
First Nat. Bank v. Benedict Consol. Indus. 860

Decedents' Estates

1. The cardinal rule concerning a decedent's will is the requirement that the intention of the testator or testatrix shall be given effect, unless the maker of the will attempts to accomplish a purpose or to make a disposition contrary to some rule of law or public policy.
In re Estate of Walker 812

2. To arrive at a testator's or testatrix's intention expressed in a will, a court must examine the decedent's will in its entirety, consider and liberally interpret every provision in a will, employ the generally accepted literal and grammatical meaning of words used in the will, and assume that the maker of the will understood words stated in the will.
In re Estate of Walker 812

Default Judgments

1. Factors to be considered in determining whether a trial court abused its discretion in rendering a default judgment include the promptness of the motion to vacate, the negligence or want of diligence of the party moving to vacate, and the avoidance of unnecessary delays and frivolous proceedings.
Forker Solar, Inc. v. Knoblauch 143

2. One who seeks to set aside a default judgment against him must show that neither he nor his attorney was negligent in failing to appear and defend.
Forker Solar, Inc. v. Knoblauch 143

3. A judgment will not be set aside on the application of a party who has, by his own laches, failed to avail himself of an opportunity to defend.
Forker Solar, Inc. v. Knoblauch 143

Demurrer

For the purpose of ruling on a demurrer, the court accepts well-pleaded facts in the petition, as distinguished from the conclusions alleged, as true.
Knoell v. Huff 90

Directed Verdict

1. A directed verdict is proper only where reasonable minds cannot differ and can only draw but one conclusion from the evidence, that is, when the controversy is properly resolved as a matter of law.
   Vice v. Darm Corp. 1

2. In considering a motion for a directed 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 the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom.
   Vice v. Darm Corp. 1

3. A motion to dismiss a criminal complaint at the close of the State's evidence can only be granted if there was a total failure of competent proof to support the existence of a material element of the alleged crime or if the testimony adduced was of so weak or doubtful a character that a conviction based thereon could not be sustained.
   State v. Pribil 28
   State v. Kane 245
   State v. Clancy 492
   State v. Hunt 594

Discrimination

In a discrimination suit brought under the provisions of Neb. Rev. Stat. § 48-1104 (Reissue 1984) of the Nebraska Fair Employment Practice Act, the following is the procedure to be followed in presentation of evidence relevant to a question about discrimination against a disabled person: First, the complainant has the burden of proving a prima facie case of discrimination. Second, if the complainant succeeds in proving that prima facie case, the burden shifts to the respondent to articulate some legitimate, nondiscriminatory reason for the complainant's rejection or discharge from employment. Third, should the respondent carry the burden, the complainant must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the respondent were not its true reasons, but were a pretext for discrimination.
Father Flanagan's Boys' Home v. Goerke 731

Divorce

1. An unambiguous antenuptial agreement which neither expressly nor by reasonable implication indicates an intention of the parties that it be valid upon divorce shall not be valid and binding upon the dissolution of marriage.
   Busekist v. Busekist 510

2. One who proves he or she met the durational residency requirement for jurisdiction in divorce proceedings set out in Neb. Rev. Stat. § 42-349 (Reissue 1984) shall be permitted the inference that such residency was with the intention to make Nebraska a permanent home, absent a showing that the residency was a sham and not bona fide.
Rector v. Rector 800

Domicile

One who proves he or she met the durational residency requirement for jurisdiction in divorce proceedings set out in Neb. Rev. Stat. § 42-349 (Reissue 1984) shall be permitted the inference that such residency was with the intention to make Nebraska a permanent home, absent a showing that the residency was a sham and not bona fide.
Rector v. Rector 800

Double Jeopardy

Retrial after reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute double jeopardy.
State v. Palmer 282

Drunk Driving

1. Just as a wrong date in an information will not preclude a defendant from being sentenced as a habitual criminal if the record discloses the defendant could not have been misled or confused, so, too, a wrong date in a complaint will not preclude a defendant from being sentenced as one who has previously been convicted of driving while under the influence of alcohol if the record discloses that the defendant could not have been misled or confused.
State v. Jameson 38
2. Circumstantial evidence may establish the operation or actual physical control of a motor vehicle, under the provisions of Neb. Rev. Stat. § 39-669.07 (Reissue 1984).
State v. Baker 130
3. An alcohol-related violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984) may be proved by establishing that one was in actual physical control of a motor vehicle while under the influence of alcohol or that one was in actual physical control of a motor vehicle while having ten-hundredths of 1 percent by weight of alcohol in his or her body fluid.
State v. Burling 725
4. As used in Neb. Rev. Stat. § 39-669.07 (Reissue 1984), the phrase "under the influence of alcoholic liquor" means after the ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner.
State v. Burling 725

Due Process

1. Notwithstanding constitutional mandates regarding a jury trial, such as the sixth amendment to the U.S. Constitution and article I, §§ 6 and 11, of the Nebraska Constitution, there is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of imprisonment of 6 months or less.
   State v. Kennedy 164
2. The U.S. Constitution, through the due process clause of the 14th amendment, requires the states to provide a trial by jury whenever the 6th amendment would so require if the case were in federal court.
   State v. Bishop 522
   State v. Lafler 613
3. An essential purpose of a penal statute is to provide notice to the ordinary person concerning conduct which is proscribed as criminal. When a penal statute supplies an ordinary person with notice concerning conduct forbidden as criminal, such statute meets the constitutional standard of due process.
   State v. Copple 672
4. The opportunity to be heard is a fundamental aspect of due process.
   In re Interest of A.W. 764

Effectiveness of Counsel

1. The test of effective assistance of counsel involves a two-part determination: first, counsel must perform at least as well as an attorney in that area with ordinary skill in criminal law, and second, the attorney must conscientiously protect the client's interests. The defendant must also demonstrate how the absence of counsel's error would have changed the result in the case.
   State v. Evans 64
   State v. Williams 114
2. The decision as to whether to call a witness is a matter of trial strategy within counsel's judgment.
   State v. Evans 64
3. As a result of Neb. Const. art. I, § 11, and U.S. Const. amend. VI, the right to counsel is the right to effective assistance of counsel. For effective assistance of counsel a defendant is constitutionally entitled to a lawyer's representation free from conflicting interests.
   State v. Williams 114
4. In cases of alleged ineffective assistance of counsel, prejudice has been characterized as a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
   State v. Williams 114

5. There is a presumption of prejudice involving a defendant's constitutional right to effective assistance of counsel when a defendant demonstrates (1) counsel actively represented conflicting interests and (2) an actual conflict of interest adversely affected performance by the defendant's lawyer. Such conflicts of interest must be shown to have resulted in counsel's conduct detrimental to the defense.
State v. Williams 114
6. To establish ineffectiveness of counsel as a ground for postconviction relief, the defendant must prove that his counsel failed to perform at least as well as an attorney in the area with ordinary training and skill in the criminal law.
State v. Fries 482
7. It is the duty of defense counsel to represent their clients in a manner consistent with the prevailing professional standard within their community. Implicit in that duty is a duty to conscientiously protect the interests of the client—a duty which is an integral part of every attorney-client relationship.
State v. Fries 482
8. To obtain postconviction relief on the ground of ineffectiveness of counsel, the defendant must show that counsel's action or inaction prejudiced the defense of the case and that there is a reasonable probability that, but for counsel's errors, the result of the case would have been different.
State v. Fries 482
9. The decision to call, or not to call, a particular witness is a matter of trial strategy. Even if that choice proves ineffective, it will not, without more, sustain a finding of ineffectiveness of counsel.
State v. Fries 482
10. When a defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.
State v. Lytle 486
11. In claiming ineffective assistance of counsel because counsel failed to obtain a plea concession, the defendant must allege facts which, if true, would establish that such a plea negotiation was reasonably possible.
State v. Lytle 486
12. Multiple representation does not give rise to a denial of the defendant's sixth amendment right to effective assistance of counsel unless an actual conflict of interest exists and that conflict

affects the performance of counsel.
State v. Wilson 721

Employer and Employee

1. An action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (1982), may be based on the theory of respondeat superior or on a theory of direct negligence.
Naidoo v. Union Pacific Railroad 853

2. Only damages for physical injury may be recovered under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (1982).
Naidoo v. Union Pacific Railroad 853

Employment Contracts

The wage rate is to be computed according to the contract of hire in force at the time of the accident.
Hayes v. A.M. Cohron, Inc. 579

Employment Security Law

1. For the purpose of determining unemployment tax liability, the common-law definition of an independent contractor is superseded by the definition found in Neb. Rev. Stat. § 48-604(5) (Reissue 1984).
Commissioner of Labor v. Lyric Co. 190

2. In an appeal regarding disqualification of benefits under Neb. Rev. Stat. § 48-628(b) (Reissue 1984), the Supreme Court retries factual questions de novo on the record and reaches conclusions independent of those reached by the district court.
O'Keefe v. Tabitha, Inc. 574

3. While absences due to illness may not constitute an employee's misconduct, an employee's chronic and excessive absenteeism demonstrates a wanton and willful disregard of the employer's interests for the purpose of Neb. Rev. Stat. § 48-628(b) (Reissue 1984).
O'Keefe v. Tabitha, Inc. 574

4. A labor contract is irrelevant to the determination of the existence of misconduct, because, generally, private labor agreements may not render an unemployment compensation law ineffectual.
O'Keefe v. Tabitha, Inc. 574

5. Neb. Rev. Stat. § 48-627 (Cum. Supp. 1986) describes the weekly requirements for continuing to be eligible for unemployment compensation benefits. It is not concerned with reasons why a claimant became unemployed or with threshold questions of eligibility.
Ponderosa Villa v. Hughes 627

6. The result of finding a claimant "unavailable for work" under Neb. Rev. Stat. § 48-627(c) (Cum. Supp. 1986) is to disqualify the

claimant from unemployment benefits only for the week he or she was unavailable.
Ponderosa Villa v. Hughes 627

7. Neb. Rev. Stat. § 48-628(c) (Cum. Supp. 1986) applies when an unemployed person refuses an offer of suitable work and chooses to remain unemployed, and is not applicable when an employed person voluntarily leaves over a change in working conditions.
Ponderosa Villa v. Hughes 627

8. The correct inquiry when an employed person refuses a demotion and leaves is whether good cause existed to voluntarily sever the employment relationship. Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1986).
Ponderosa Villa v. Hughes 627

9. In appeals under Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1986), we review the causes de novo on the record, retry the issues of fact, and come to independent conclusions regarding the findings challenged.
Ponderosa Villa v. Hughes 627

10. To avoid disqualification under Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1986), the employee who voluntarily severed the employment relationship has the burden of proving that the leaving was with good cause.
Ponderosa Villa v. Hughes 627

11. Where the terms of a demotion, not the result of employee misconduct, substantially changed almost every aspect of an employee's job to her detriment, good cause existed to leave.
Ponderosa Villa v. Hughes 627

Escape

Nebraska's escape statute, Neb. Rev. Stat. § 28-912 (Reissue 1985), defines one offense and sets out factors which, if present, change the range of the penalty.
State v. Heathman 19

Estoppel

A person who contracts with a corporation is estopped from later denying its corporate existence.
Forker Solar, Inc. v. Knoblauch 143

Evidence

1. To be admissible as evidence in his trial, an accused's statements must have been voluntarily made and must not have been the product of any inducement, no matter how slight.
State v. Bowersmith 6

2. Ordinarily, the overruling of a motion in limine does not eliminate the need to object to the introduction of evidence in order to preserve error.
State v. Borchardt 47

3. Evidence of a test result cannot be characterized as "scientific" or

qualify as "technical or other specialized knowledge," and thus within the purview of Neb. Rev. Stat. § 27-702 (Reissue 1985), unless and until it is established that the test result demonstrates what it is claimed to demonstrate.
State v. Borchardt 47

4. In resolving a challenge to the sufficiency of the evidence, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such is for the trier of fact and must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Borchardt 47
State v. Baker 130

5. Generally, as a practical matter, no criminal investigation is complete until sufficient facts have been obtained to justify the arrest and conviction of the defendant.
State v. Nissen 60

6. In an evidentiary hearing, as a bench trial provided by Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985) for postconviction relief, the trial judge, as the "trier of fact," resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony.
State v. Williams 114

7. What was previously characterized as hearsay available for the purpose of impeachment only has now become substantive evidence of fact contained in the statement, provided the requirements prescribed by Neb. Evid. R. 801(4)(a)(i) are satisfied. Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985).
State v. Williams 114

8. Subject to the exception specified in Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)), a witness' inconsistent statement may be admissible evidence to aid the jury in evaluating that witness' credibility, but a witness' inconsistent statement is not substantive evidence of the matter asserted unless such statement is otherwise admissible under the Nebraska Evidence Rules.
State v. Williams 114

9. The admission or exclusion of evidence is a matter left largely to the sound discretion of the trial judge.
State v. Kern 177

10. In second degree murder cases malice and intent may be inferred from the evidence relating to the circumstances of the criminal act.
State v. Moniz 198

11. An express waiver made in court or preparatory to trial by the party or his attorney conceding for the purposes of the trial the

truth of some alleged fact has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted, so that the one party need offer no evidence to prove it and the other is not allowed to disprove it.
State v. Davis 205
12. A concession or stipulation as to a fact made for the purpose of trial has the force and effect of an established fact, binding on the party making the same as well as on the court, unless the court in its reasonable discretion allows the concession to be later withdrawn, explained, or modified if it appears to have been made by improvidence or mistake.
State v. Davis 205
13. Parties are bound by stipulations voluntarily made, and relief from such stipulations after judgment is warranted only under exceptional circumstances.
State v. Davis 205
14. An accused may by stipulation waive the necessity of proof of all or any part of the case which the State has alleged against him and having done so, he cannot complain of evidence which he has stipulated into the record.
State v. Davis 205
15. The plaintiff must present sufficient evidence to allow the trier of fact to estimate the actual damages with a reasonable degree of certainty and exactness.
Kahl v. Frederick 212
16. The receipt of evidence which may later be excluded because of a difficult or complicated rule of law does not constitute judicial misconduct.
State v. Palmer 282
17. A defendant may offer any evidence on the issue of mitigation, even though the mitigating factor is not specifically listed in Neb. Rev. Stat. § 29-2523(2) (Reissue 1985).
State v. Palmer 282
18. In a prosecution for a crime of violence, the defendant's spouse may be called to testify against the defendant as to any matter, including confidential communications. Neb. Rev. Stat. § 27-505(3)(a) (Reissue 1985).
State v. Burchett 444
19. An accomplice's testimony is admissible notwithstanding the fact that the testimony is procured by means of a plea bargain.
State v. Burchett 444
20. The promise of leniency or otherwise favorable prosecutorial treatment goes only to the credibility of the accomplice's testimony, not to its admissibility.
State v. Burchett 444
21. Generally, it is only where the prosecution has bargained for false

or specific testimony, or a specific result, that an accomplice's testimony is so tainted as to require its preclusion.
State v. Burchett 444

22. Determinations as to the qualifications of a person to be a witness or the admissibility of evidence are matters left to the sound discretion of the trial court, whose rulings will not be upset absent an abuse of discretion.
State v. Burchett 444
State v. Clancy 492

23. One alleging negligence has the burden to prove such negligence. Establishing that an accident has occurred does not prove a case of negligence. Negligence is not presumed and must be proved by evidence, direct or circumstantial.
Holden v. Urban 472

24. Evidence obtained in the implied consent context is not testimonial or communicative and does not fall within the privilege against self-incrimination.
State v. Bishop 522

25. A demurrer ore tenus is an objection to the receipt of evidence.
Lease Northwest v. Davis 617

26. A photocopy of a writing is admissible in evidence to the same extent as the original unless a genuine question is raised as to the authenticity of the original or, under the circumstances, it would be unfair to admit the duplicate in lieu of the original. The burden of raising an issue as to the authenticity of the original or the unfairness of the circumstances is on the party opposing admission.
State v. Frederiksen 653

27. The doctrine of res ipsa loquitur is that where the instrumentality causing the injury is shown to be under the defendant's exclusive control and management and the accident is one that in the ordinary course of things does not occur if those who have its management or control use proper care, reasonable evidence is afforded, in the absence of an explanation by the defendant, that the accident arose from want of proper care.
Beatty v. Davis 663

28. If specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of res ipsa loquitur is not applicable.
Beatty v. Davis 663

29. At a hearing to determine whether the State had violated its agreement for immunity and restricted evidence or information, the State must present a prima facie case that it has fulfilled its agreement with the defendant, that is, demonstrate that the State's evidence, to be adduced at the defendant's trial, was obtained from a source or sources independent of the defendant and not by direct or indirect use of information obtained from the defendant

as the result of defendant's agreement for immunity and restricted evidence or information.
State v. Copple 672

30. Prima facie proof of a case is less stringent than proof by a preponderance of the evidence. A "prima facie" case requires only enough evidence to take the question to the jury, whereas "preponderance of the evidence" requires proof which leads the jury to find the existence of the contested fact is more probable than its nonexistence.
State v. Copple 672

31. If a prosecutor has a duty to disclose a statement in response to a general discovery request, it must derive from the obviously exculpatory character of the evidence.
State v. Tweedy 715

32. In order for an omitted statement to be considered material, it must create a reasonable doubt as to the defendant's guilt that did not otherwise exist. That the evidence "might" influence the outcome is insufficient.
State v. Tweedy 715

33. Where omitted evidence would have been cumulative and repetitive, the defendant suffered no prejudice because of the omission.
State v. Tweedy 715

34. When the sufficiency of the evidence as to criminal intent is questioned, the law is settled that independent evidence of specific intent is not required. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
State v. Tweedy 715

35. "Competent evidence" is that which tends to establish the fact in issue; that which is admissible and relevant on the point in issue.
State v. Burling 725

36. Determining whether evidence, if believed, is sufficient to sustain a conviction is a judicial function.
State v. Burling 725

37. The Legislature may not declare the weight to be given to evidence or what evidence shall be conclusive proof of an issue of fact.
State v. Burling 725

38. Whether evidence is of probative value is a legal question, the judicial analysis and resolution of which the Legislature cannot impair.
State v. Burling 725

39. In viewing a matter on appeal we are guided by the rule that where evidence is in conflict or reasonable minds may differ, it is normally within the province of the jury to decide issues of fact.
Chirnside v. Lincoln Tel. & Tel. Co. 784

40. One who claims the existence of a constructive trust has the burden of proof to establish the existence of a constructive trust by evidence which is clear, satisfactory, and convincing in character.
In re Estate of Redpath 845
41. The transcript of the proceeding before a mental health board may not be treated as evidence before the board, the district court, or this court unless the facts in the transcript are offered as evidence, are not objected to, and are reviewed by the trier of fact.
In re Interest of Kinnebrew 885
42. In a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal.
State v. Pointer 892
State v. Roggenkamp 914
43. If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error.
State v. Roggenkamp 914
44. A party who has stipulated to the admission of evidence cannot on appeal complain about evidence admitted pursuant to and in accordance with such stipulation.
State v. Roggenkamp 914

Expert Witnesses

1. The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion.
State v. Borchardt 47
2. The proportionality of a death sentence is for court determination and is not a subject for expert testimony.
State v. Palmer 282
3. The meaning of words used by medical experts at times presents a problem of interpretation which may be resolved by the sense in which they were used.
Hayes v. A.M. Cohron, Inc. 579
4. Whether a witness is qualified as an expert is a preliminary question for a trial court. Neb. Evid. R. 104(1) (Neb. Rev. Stat. § 27-104(1) (Reissue 1985)). Determination of a witness' qualification as an expert is a matter within the sound discretion of a trial court, whose ruling will be upheld unless such ruling constitutes an abuse of discretion.
State v. Copple 672
5. When the record presents nothing more than conflicting medical testimony, the Supreme Court will not substitute its judgment for that of the Workers' Compensation Court.
Ward v. City of Mitchell 711

6. Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion, and where the opinion is based on the facts shown not to be true the opinion lacks probative value.
Latek v. K Mart Corp. 807
7. In proving the dangerousness of a mentally ill person as manifested by "evidence of inability to provide for his basic human needs," within the meaning of Neb. Rev. Stat. § 83-1009(2) (Cum. Supp. 1986), expert testimony may be used to prove such a condition.
In re Interest of Kinnebrew 885

Fair Employment Practices

1. In a discrimination suit brought under the provisions of Neb. Rev. Stat. § 48-1104 (Reissue 1984) of the Nebraska Fair Employment Practice Act, the following is the procedure to be followed in presentation of evidence relevant to a question about discrimination against a disabled person: First, the complainant has the burden of proving a prima facie case of discrimination. Second, if the complainant succeeds in proving that prima facie case, the burden shifts to the respondent to articulate some legitimate, nondiscriminatory reason for the complainant's rejection or discharge from employment. Third, should the respondent carry the burden, the complainant must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the respondent were not its true reasons, but were a pretext for discrimination.
Father Flanagan's Boys' Home v. Goerke 731
2. Under Neb. Rev. Stat. § 48-1101 (Reissue 1984), "disability" designates a protected class regarding employment in Nebraska. By virtue of Neb. Rev. Stat. § 48-1102(8) (Reissue 1984), "epilepsy" is included within the definition of a "disability," but only if such epilepsy is "unrelated to such person's ability to engage in a particular occupation."
Father Flanagan's Boys' Home v. Goerke 731

False Imprisonment

Merchants cannot claim protection from civil liability in accord with Neb. Rev. Stat. § 29-402.01 (Reissue 1985) where the detention of a suspected shoplifter was unreasonable because it continued after the detainers knew that their suspicions were groundless and that they had made a mistake.
Latek v. K Mart Corp. 807

False Reporting

1. The language of Neb. Rev. Stat. § 28-907(1)(a) (Reissue 1985), "to impede the investigation of an actual criminal matter," includes

the impeding of the gathering of information as to the identity of a defendant named in an arrest warrant.
State v. Nissen 60
2. Law enforcement officers have a legitimate right to question persons about the identity of the subject of an arrest warrant before they arrest the suspect; and although persons so questioned may have the right to refuse to answer such inquiry, if they choose to answer they may not give false information without subjecting themselves to criminal liability.
State v. Nissen 60
3. To commit the crime of false reporting one need not actually impede a police investigation, but must furnish false information with the intent to impede the investigation of a criminal matter.
State v. Gonzales 659

Final Orders

1. This court will not interfere on appeal with a final order made by the district court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof.
State v. Steele 476
2. A decree of foreclosure is a final order for purposes of appeal to this court.
Leseberg v. Meints 533

Foreclosure

1. A decree of foreclosure is a final order for purposes of appeal to this court.
Leseberg v. Meints 533
2. The time for redemption, as such phrase is used in Neb. Rev. Stat. § 77-1902 (Reissue 1986), is the 3 years immediately following a delinquent tax sale. An action to foreclose a tax lien pursuant to § 77-1902 can only be brought within the 90 days immediately after expiration of the time for redemption.
County of Lancaster v. Maser 566

Fraud

1. The elements of fraud are (1) a false representation of material fact, (2) knowledge that the representation was false or made in reckless disregard as to its truthfulness or falsity, (3) an intent to induce another to act, (4) a justifiable reliance on the representation, and (5) injury or damage resulting from such reliance.
Knoell v. Huff 90
2. To maintain an action for damages for false representations, the plaintiff must allege and prove, by a preponderance of evidence, the following elements: (1) that a representation was made; (2) that the representation was false; (3) that the representation was

known to be false when made, or was 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 on it; (5) that the plaintiff reasonably did so rely; and (6) that the plaintiff suffered damage as a result.
Forker Solar, Inc. v. Knoblauch 143
Nelson v. Cheney 756

3. A person is justified in relying upon a representation made to him as a positive statement of fact, when an investigation would be required to ascertain its falsity.
Forker Solar, Inc. v. Knoblauch 143

4. In an action for fraud a party may recover such damages as will compensate him for the loss or injury actually caused by the fraud and will place him in the same position as he would have been in had the fraud not occurred.
Forker Solar, Inc. v. Knoblauch 143

5. Neb. Rev. Stat. §§ 44-515 to 44-521 (Reissue 1984) do not prevent an insurer from rescinding an automobile liability insurance policy for material misrepresentations made by the insured in the application for the policy.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

6. Neb. Rev. Stat. § 44-358 (Reissue 1984) limits but does not eliminate the right of an insurer to rescind an automobile liability insurance policy for fraud in the application.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

7. An accident resulting in injury or damage to a third person does not destroy the right of an insurer to rescind an automobile liability insurance policy for fraud in the application.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

8. In order to maintain an action for damages for fraudulent concealment or false representation by suppression or concealment in the vendor/purchaser setting, the plaintiff must allege and prove by a preponderance of the evidence the following elements: (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled as to the true condition of the property; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result.
Nelson v. Cheney 756

Good Cause

1. The correct inquiry when an employed person refuses a demotion and leaves is whether good cause existed to voluntarily sever the

employment relationship. Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1986).
Ponderosa Villa v. Hughes 627
2. To avoid disqualification under Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1986), the employee who voluntarily severed the employment relationship has the burden of proving that the leaving was with good cause.
Ponderosa Villa v. Hughes 627
3. Where the terms of a demotion, not the result of employee misconduct, substantially changed almost every aspect of an employee's job to her detriment, good cause existed to leave.
Ponderosa Villa v. Hughes 627

Guaranty

1. A guarantee who holds an unconditional guaranty has no obligation to proceed against the security prior to seeking recovery under the guaranty contract.
Lease Northwest v. Davis 617
2. The modification of a guaranty of such a nature as would substantially change the liability of the parties is an affirmative defense which must be pled.
Lease Northwest v. Davis 617
3. A guarantor is not discharged by an extension of time for payment or performance of the principal obligation if he consents thereto, as where the contract of guaranty expressly or impliedly provides for the extension.
First Nat. Bank v. Benedict Consol. Indus. 860
4. With an unconditional guaranty of payment, the holder is not required to first seek collection or satisfaction against the maker, but is authorized to go directly against the guarantors.
First Nat. Bank v. Benedict Consol. Indus. 860

Habeas Corpus

1. A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. Where the evidence is in irreconcilable conflict, we consider the findings of the trial court.
Gaughan v. Gilliam 836
2. A question present in every habeas corpus case for custody of a child is the welfare and best interests of the child.
Gaughan v. Gilliam 836

Hearsay

1. A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the witness' testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)).
State v. Williams 114

2. What was previously characterized as hearsay available for the purpose of impeachment only has now become substantive evidence of fact contained in the statement, provided the requirements prescribed by Neb. Evid. R. 801(4)(a)(i) are satisfied. Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985).
State v. Williams 114

3. "(1) A statement is (a) an oral or written assertion or (b) nonverbal conduct of a person if it is intended by him as an assertion. . . . (3) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Neb. Evid. R. 801 (Neb. Rev. Stat. § 27-801 (Reissue 1985)).
State v. Copple 672

Highways

A driver of a motor vehicle about to enter a street or highway protected by stop signs is required to come to a full stop as near the right-of-way line as possible before driving onto such street or highway. After having stopped, such driver shall yield the right-of-way to any vehicle which is approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves his vehicle into or across such intersection.
Chlopek v. Schmall 78

Homicide

1. Premeditation, or the design and purpose to kill, exists when the intent to kill is formed before the act causing the death, and not merely simultaneously with that act.
State v. Kern 177

2. No particular length of time is required in order for premeditation to exist; the time used in premeditating may be so short as to be instantaneous, and the intent to kill may be formed at any moment before the killing.
State v. Kern 177

3. Where first degree murder is charged, the elements of both premeditation and intent are for the jury.
State v. Kern 177

4. One who knows he or she may retreat with complete safety may not resort to the use of deadly force in self-defense.
State v. Moniz 198

5. In second degree murder cases malice and intent may be inferred from the evidence relating to the circumstances of the criminal act.
State v. Moniz 198

6. In a prosecution for first degree murder, the State may use peremptory challenges to remove jurors who are opposed to the death penalty.
State v. Burchett 444

7. Prosecutions for felonies, including murder, may be had on informations filed by the county attorney.
State v. Burchett 444

Hypnosis

A witness is not rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case. Such a witness may testify with regard to those matters which he or she was able to recall and relate prior to hypnosis, provided that there is sufficient evidence to satisfy the court that the evidence was known and related prior to hypnosis.
State v. Palmer 282

Identification Procedures

1. The right to counsel at a police lineup attaches only at or after the time when adversary judicial proceedings have been initiated against the defendant by way of complaint, indictment, or information.
State v. Evans 64

2. Each case must be considered on its own facts, and convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.
State v. Palmer 282

3. The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.
State v. Palmer 282

Impeachment

What was previously characterized as hearsay available for the purpose of impeachment only has now become substantive evidence of fact contained in the statement, provided the requirements prescribed by Neb. Evid. R. 801(4)(a)(i) are satisfied. Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985).
State v. Williams 114

Implied Consent

1. There is no requirement in this jurisdiction that *Miranda* warnings be given prior to a request to submit to a chemical test of blood, breath, or urine.
   State v. Bishop 522
2. Under the implied consent law, a driver is not entitled to consult with an attorney, nor is a delay in the test required should a driver request to consult with an attorney.
   State v. Bishop 522
3. Evidence obtained in the implied consent context is not testimonial or communicative and does not fall within the privilege against self-incrimination.
   State v. Bishop 522

Immunity

At a hearing to determine whether the State had violated its agreement for immunity and restricted evidence or information, the State must present a prima facie case that it has fulfilled its agreement with the defendant, that is, demonstrate that the State's evidence, to be adduced at the defendant's trial, was obtained from a source or sources independent of the defendant and not by direct or indirect use of information obtained from the defendant as the result of defendant's agreement for immunity and restricted evidence or information.
State v. Copple 672

Independent Contractor

For the purpose of determining unemployment tax liability, the common-law definition of an independent contractor is superseded by the definition found in Neb. Rev. Stat. § 48-604(5) (Reissue 1984).
Commissioner of Labor v. Lyric Co. 190

Indictments and Informations

1. The nature of the crime charged in the information must be such as to give the defendant notice that he or she could at the same time face the lesser-included offense charge.
   State v. Pribil 28
2. Just as a wrong date in an information will not preclude a defendant from being sentenced as a habitual criminal if the record discloses the defendant could not have been misled or confused, so, too, a wrong date in a complaint will not preclude a defendant from being sentenced as one who has previously been convicted of driving while under the influence of alcohol if the record discloses that the defendant could not have been misled or confused.
   State v. Jameson 38

3. The right to counsel at a police lineup attaches only at or after the time when adversary judicial proceedings have been initiated against the defendant by way of complaint, indictment, or information.
State v. Evans 64

4. A plea of guilty embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional, except the defense that the indictment, information, or complaint is not sufficient to charge an offense.
State v. Kennedy 164

5. Prosecutions for felonies, including murder, may be had on informations filed by the county attorney.
State v. Burchett 444

Innkeepers

The proprietor of a place of business who holds it out to the public for entry for his business purposes is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm.
Vice v. Darm Corp. 1

Insurance

1. The cancellation of an insurance policy is not a rescission, since a rescission avoids the contract ab initio. A cancellation merely terminates the policy as of the time when the cancellation becomes effective.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

2. Unless a cancellation statute is manifestly all-inclusive, a statute specifying the instances under which a party to an insurance contract may cancel it does not make cancellation the exclusive remedy, and it is not in derogation of other remedial rights which are recognized and implemented by other provisions of law.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

3. Neb. Rev. Stat. §§ 44-515 to 44-521 (Reissue 1984) do not prevent an insurer from rescinding an automobile liability insurance policy for material misrepresentations made by the insured in the application for the policy.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

4. Neb. Rev. Stat. § 44-358 (Reissue 1984) limits but does not eliminate the right of an insurer to rescind an automobile liability

insurance policy for fraud in the application.
Glockel v. State Farm Mut. Auto. Ins. Co. 598
5. An accident resulting in injury or damage to a third person does not destroy the right of an insurer to rescind an automobile liability insurance policy for fraud in the application.
Glockel v. State Farm Mut. Auto. Ins. Co. 598
6. Some act or conduct amounting to a recognition of the continued validity of an insurance policy as a binding obligation upon an insurer is necessary to constitute an effective waiver of the policy provision for forfeiture for nonpayment of premiums.
Bohannon v. Guardsman Life Ins. Co. 701
7. An insurer, with full knowledge of the nonpayment of a monthly premium, which nevertheless demands and receives payment of the premium for the succeeding month, may have waived the policy provision for forfeiture for nonpayment of the preceding monthly premium.
Bohannon v. Guardsman Life Ins. Co. 701
8. An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made.
Waylett v. United Servs. Auto. Assn. 741
9. An insurance policy is to be construed as any other contract; if its terms are clear, they are to be applied according to their plain and ordinary meaning.
Waylett v. United Servs. Auto. Assn. 741
10. The parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.
Waylett v. United Servs. Auto. Assn. 741

Intent

1. Intent is the state of mind operative at the time of an action.
State v. Robb 14
2. Intent may be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his or her conduct.
State v. Robb 14
3. The law presumes that one of sound mind intends the obvious and probable consequences of his or her voluntary acts.
State v. Robb 14
4. No exact limitation of time can be fixed as to when evidence of other crimes, wrongs, or acts tending to prove intent to commit the offense charged is remote.
State v. Kern 177
5. Premeditation, or the design and purpose to kill, exists when the intent to kill is formed before the act causing the death, and not merely simultaneously with that act.
State v. Kern 177

6. No particular length of time is required in order for premeditation to exist; the time used in premeditating may be so short as to be instantaneous, and the intent to kill may be formed at any moment before the killing.
State v. Kern 177

7. Where first degree murder is charged, the elements of both premeditation and intent are for the jury.
State v. Kern 177

8. An unambiguous antenuptial agreement which neither expressly nor by reasonable implication indicates an intention of the parties that it be valid upon divorce shall not be valid and binding upon the dissolution of marriage.
Busekist v. Busekist 510

9. To commit the crime of false reporting one need not actually impede a police investigation, but must furnish false information with the intent to impede the investigation of a criminal matter.
State v. Gonzales 659

10. When the sufficiency of the evidence as to criminal intent is questioned, the law is settled that independent evidence of specific intent is not required. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
State v. Tweedy 715

11. An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made.
Waylett v. United Servs. Auto. Assn. 741

12. One who proves he or she met the durational residency requirement for jurisdiction in divorce proceedings set out in Neb. Rev. Stat. § 42-349 (Reissue 1984) shall be permitted the inference that such residency was with the intention to make Nebraska a permanent home, absent a showing that the residency was a sham and not bona fide.
Rector v. Rector 800

13. The cardinal rule concerning a decedent's will is the requirement that the intention of the testator or testatrix shall be given effect, unless the maker of the will attempts to accomplish a purpose, or to make a disposition, contrary to some rule of law or public policy.
In re Estate of Walker 812

14. To arrive at a testator's or testatrix's intention expressed in a will, a court must examine the decedent's will in its entirety, consider and liberally interpret every provision in a will, employ the generally accepted literal and grammatical meaning of words used in the will, and assume that the maker of the will understood words stated in the will.
In re Estate of Walker 812

15. A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.
In re Estate of Redpath 845

Interest

Where the parties have contracted for the payment of a particular lawful rate of interest, such contract controls and the rate thus fixed is recoverable in accordance with the terms of the contract.
Lease Northwest v. Davis 617

Joint Accounts

1. If the trustee makes a withdrawal from the mixed account for an admittedly personal purpose, for example, to pay his living expenses or his individual debts, or for an unknown purpose, such withdrawal will be charged to the personal part of the account as long as there remains any cash or credit in such personal portion of the account. It will be only after the personal credit or cash is exhausted that withdrawals for personal or unknown purposes will be charged to the trust side of the account.
In re Estate of Redpath 845

2. A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.
In re Estate of Redpath 845

Judges

1. The receipt of evidence which may later be excluded because of a difficult or complicated rule of law does not constitute judicial misconduct.
State v. Palmer 282

2. Neb. Rev. Stat. § 24-519 (Reissue 1985) expressly denies to an associate county judge who is not an attorney at law the power to construe a will.
In re Estate of Walker 812

Judgments

1. The findings of a court in a law action in which a jury has been waived have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
Chlopek v. Schmall 78
Marathon Realty Corp. v. Gavin 458

2. Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, the Supreme Court will affirm.
Kahl v. Frederick 212

3. If a lower court does not have subject matter jurisdiction and, therefore, has no power to entertain the proceedings or decide a question, an appellate court lacks jurisdiction to review or evaluate an evidentiary determination for an act outside the jurisdiction of the court whose judgment or order is appealed.
In re Interest of L.D. et al. 249
4. Although an extrajurisdictional act of a lower court cannot vest the appellate court with jurisdiction to review or evaluate an evidentiary determination involved in such act, an appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power to enter the judgment or final order sought to be reviewed.
In re Interest of L.D. et al. 249
5. On appeal of a county court's judgment rendered in a bench trial of a law action, the district court reviews the case for error appearing on the record made in the county court.
Holden v. Urban 472
6. A county court's factual findings in a bench trial of a law action have the effect of a verdict and will not be set aside unless such findings are clearly erroneous.
Holden v. Urban 472
7. A judgment is the final consideration and determination of a court on matters submitted to it in an action or proceeding.
Black v. Sioux City Foundry Co. 824
8. In order that a confession of judgment may be binding on the plaintiff, it is essential that he, either expressly or impliedly, assent thereto; if it is made without his request, knowledge, or consent, and entered at the instance of the debtor alone, it will have no validity unless the creditor ratifies or accepts it.
In re Estate of Redpath 845

Juries

1. To secure a change of venue the defendant must show that pretrial publicity has made it impossible to secure a fair and impartial jury.
State v. Heathman 19
2. Witness credibility and the weight to be given a witness' testimony are matters for evaluation and determination by the jury.
State v. Williams 114
3. There is no constitutional requirement that the death penalty be imposed by a jury.
State v. Palmer 282
4. Lack of jury members of the same race as the defendant, standing alone, does not support a claim of improper racial composition of the jury.
State v. Falkner 490
5. All that the Constitution forbids is systematic exclusion of identifiable segments of the community from jury panels and

from the juries ultimately drawn from those panels. The burden is on the defendant to allege and prove such systematic exclusion.
State v. Falkner 490

6. In viewing a matter on appeal we are guided by the rule that where evidence is in conflict or reasonable minds may differ, it is normally within the province of the jury to decide issues of fact.
Chirnside v. Lincoln Tel. & Tel. Co. 784

Jurisdiction

1. Litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent.
In re Interest of L.D. et al. 249
Black v. Sioux City Foundry Co. 824

2. Whether a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter.
In re Interest of L.D. et al. 249

3. Where lack of subject matter jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of the reviewing court to raise and determine the issue of jurisdiction sua sponte.
In re Interest of L.D. et al. 249

4. Verification of a pleading constitutes no part of a pleading and, ordinarily, is not necessary to vest jurisdiction in a court.
In re Interest of L.D. et al. 249

5. If a lower court does not have subject matter jurisdiction and, therefore, has no power to entertain the proceedings or decide a question, an appellate court lacks jurisdiction to review or evaluate an evidentiary determination for an act outside the jurisdiction of the court whose judgment or order is appealed.
In re Interest of L.D. et al. 249

6. Although an extrajurisdictional act of a lower court cannot vest the appellate court with jurisdiction to review or evaluate an evidentiary determination involved in such act, an appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power to enter the judgment or final order sought to be reviewed.
In re Interest of L.D. et al. 249

7. Concerning a contract claim against a city of the primary class, Neb. Rev. Stat. § 15-840 (Reissue 1983) requires that such claim be filed with the city clerk and disallowed before a claimant, pursuant to Neb. Rev. Stat. § 15-841 (Reissue 1983), may timely appeal from the city's disallowance and thereby become entitled to invoke a district court's power to adjudicate the merit of the disallowed claim.
Andrews v. City of Lincoln 748

8. If a district court lacks power to adjudicate whether a claim is meritorious, the Supreme Court also lacks power to determine the merit of the claim which was the subject matter of the proceedings in the district court.
Andrews v. City of Lincoln 748
In re Complaint of Fecht 752
9. The Nebraska Public Service Commission lacks jurisdiction to construe the provisions of Neb. Rev. Stat. § 88-503(3)(b) (Supp. 1983) or of any bond provided pursuant thereto.
In re Complaint of Fecht 752
10. One who proves he or she met the durational residency requirement for jurisdiction in divorce proceedings set out in Neb. Rev. Stat. § 42-349 (Reissue 1984) shall be permitted the inference that such residency was with the intention to make Nebraska a permanent home, absent a showing that the residency was a sham and not bona fide.
Rector v. Rector 800

Juror Qualifications

1. A juror need not be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinion and render a verdict based on the evidence presented in court.
State v. Kern 177
2. Neb. Rev. Stat. § 29-2006(3) (Reissue 1985) held constitutional.
State v. Burchett 444
3. Prospective jurors who are unable to fairly determine guilt because of their opposition to capital punishment are not a cognizable group.
State v. Burchett 444
4. In a prosecution for first degree murder, the State may use peremptory challenges to remove jurors who are opposed to the death penalty.
State v. Burchett 444

Jury Instructions

1. Even though a lesser-included offense charge is wrongfully included in the court's instructions to the jury, where the defendant is found guilty of the greater crime, he or she has not been prejudiced by the erroneous instruction.
State v. Pribil 28
2. In a prosecution for a felony, error cannot be predicated upon the failure of the trial court to define a lesser offense included in the crime charged unless requested to do so.
State v. Pribil 28
3. It is the duty of a trial court to instruct as to the law applicable to the case. Neither the defense nor the prosecution has the option of precluding the court from carrying out this duty in hopes of

forcing an "all or nothing" verdict.
State v. Pribil 28

4. The trial court may instruct on a lesser-included offense over the objection of the defendant if the information or complaint charging the crime is such as to give the defendant notice that he or she could at the same time face the lesser-included offense charge. To the extent that *McConnell v. State*, 77 Neb. 773, 110 N.W. 666 (1906), contains language to the contrary, such language is expressly disapproved.
State v. Pribil 28

5. Either the State or the defendant may request a lesser-included offense instruction where it is supported by the pleadings and the evidence. However, absent such a request, it is not error for the trial court to fail to give such instruction even though warranted.
State v. Pribil 28

6. Where the plaintiff claims damages for lost wages, and the trial court instructs the jury that the plaintiff can recover damages for wages lost due to the inability of the plaintiff to work, it is not error to refuse to instruct that the plaintiff has a duty to mitigate damages.
Beatty v. Davis 663

7. Counsel has the duty of tendering a more specific instruction where one is desired.
Beatty v. Davis 663

8. Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury. All other instructions must be read together, and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.
State v. Copple 672

9. In determining the sufficiency of jury instructions on appeal, this court will read the instructions as a whole, and when they fairly submit the case and the jury could not have been misled, there is no prejudicial error.
Steed v. Oak Ridge Equestrian Ctr. 792

10. It is not error for the trial court to refuse a requested instruction when it has, on its own motion, fairly and fully instructed the jury on a party's theory of the case.
Steed v. Oak Ridge Equestrian Ctr. 792

11. Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence. Ordinarily, it is error to

submit to the jury an issue which is not pleaded in the case.
Steed v. Oak Ridge Equestrian Ctr. 792

Jury Trials

1. Notwithstanding constitutional mandates regarding a jury trial, such as the sixth amendment to the U.S. Constitution and article I, §§ 6 and 11, of the Nebraska Constitution, there is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of imprisonment of 6 months or less.
State v. Kennedy 164
2. The U.S. Constitution, through the due process clause of the 14th amendment, requires the states to provide a trial by jury whenever the 6th amendment would so require if the case were in federal court.
State v. Bishop 522
State v. Lafler 613
3. A voluntary waiver of the constitutional right to a jury trial must be express and intelligent.
State v. Bishop 522
4. A demand is required to invoke the statutory right to a jury trial for a petty offense in county court. A failure to file a timely request in accordance with the rules of court constitutes a waiver of the statutory right to a jury trial.
State v. Bishop 522
State v. Lafler 613
5. An offense for which the maximum penalty is imprisonment for more than 6 months is a serious offense for which the accused is constitutionally entitled to a jury trial.
State v. Lafler 613
6. A waiver of the constitutional right to a jury trial cannot be presumed from a silent record.
State v. Lafler 613

Juvenile Courts

1. The Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1984), must be liberally construed to accomplish its purposes serving the best interests of juveniles within the act.
In re Interest of L.D. et al. 249
2. Where there is a dispute in the evidence, this court will give great weight to the juvenile court's findings because it heard and observed the parties and witnesses.
In re Interest of J.W. 897

Labor and Labor Relations

A labor contract is irrelevant to the determination of the existence of misconduct, because, generally, private labor agreements may not

render an unemployment compensation law ineffectual.
O'Keefe v. Tabitha, Inc. 574

Laches

A judgment will not be set aside on the application of a party who has, by his own laches, failed to avail himself of an opportunity to defend.
Forker Solar, Inc. v. Knoblauch 143

Legislature

1. If the legislature has made a reasonable classification, one that is not a mere cloak or cover for an arbitrary exemption of certain persons or a certain class of persons, but a natural and proper selection of those who, upon a reasonable view of the mischiefs to be met, should be subject to the regulations prescribed, and the law is made to operate generally and uniformly upon all of the class so constituted, the constitutional provision in question is not violated.
School Dist. No. 46 v. City of Bellevue 543
2. The fixing of boundaries of school districts is exclusively a legislative function, and it may be properly delegated to a subordinate agency, providing the Legislature prescribes the manner and the standards under which the power of the designated board may be exercised. The Legislature may delegate this authority provided it states the purpose for doing so and sets up reasonable standards to guide the agency which is to administer it.
School Dist. No. 46 v. City of Bellevue 543
3. One of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give effect to that intent.
County of Lancaster v. Maser 566
4. When statutory language is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the intent of the lawmakers.
County of Lancaster v. Maser 566
5. In determining the intent of the Legislature, the Supreme Court considers the history of the legislation and the reasonableness of an interpretation, weighed against an unreasonable or absurd construction evidently not intended by the Legislature.
County of Lancaster v. Maser 566
6. Legislative history includes the record of a floor explanation or debate, which is an extrinsic, secondary source in statutory interpretation.
County of Lancaster v. Maser 566
7. The Legislature may not declare the weight to be given to evidence or what evidence shall be conclusive proof of an issue of fact.
State v. Burling 725

8. Whether evidence is of probative value is a legal question, the judicial analysis and resolution of which the Legislature cannot impair.
State v. Burling 725

Lesser-Included Offenses

1. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
State v. Pribil 28

2. When some of the elements of the crime charged in the information, without the addition of any element irrelevant to the original crime charged, *may* constitute another crime or crimes, such other crime or crimes are included within the crime charged.
State v. Pribil 28

3. Where the lesser offense may be committed in two or more independent ways, one type may be a lesser-included offense even though the remaining type or types are not.
State v. Pribil 28

4. The nature of the crime charged in the information must be such as to give the defendant notice that he or she could at the same time face the lesser-included offense charge.
State v. Pribil 28

5. Even though a lesser-included offense charge is wrongfully included in the court's instructions to the jury, where the defendant is found guilty of the greater crime, he or she has not been prejudiced by the erroneous instruction.
State v. Pribil 28

6. In a prosecution for a felony, error cannot be predicated upon the failure of the trial court to define a lesser offense included in the crime charged unless requested to do so.
State v. Pribil 28

7. The trial court may instruct on a lesser-included offense over the objection of the defendant if the information or complaint charging the crime is such as to give the defendant notice that he or she could at the same time face the lesser-included offense charge. To the extent that *McConnell v. State*, 77 Neb. 773, 110 N.W. 666 (1906), contains language to the contrary, such language is expressly disapproved.
State v. Pribil 28

8. Either the State or the defendant may request a lesser-included offense instruction where it is supported by the pleadings and the evidence. However, absent such a request, it is not error for the trial court to fail to give such instruction even though warranted.
State v. Pribil 28

Liability

1. The proprietor of a place of business who holds it out to the public for entry for his business purposes is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm.
   Vice v. Darm Corp. 1

2. The modification of a guaranty of such a nature as would substantially change the liability of the parties is an affirmative defense which must be pled.
   Lease Northwest v. Davis 617

3. Merchants cannot claim protection from civil liability in accord with Neb. Rev. Stat. § 29-402.01 (Reissue 1985) where the detention of a suspected shoplifter was unreasonable because it continued after the detainers knew that their suspicions were groundless and that they had made a mistake.
   Latek v. K Mart Corp. 807

4. An action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (1982), may be based on the theory of respondeat superior or on a theory of direct negligence.
   Naidoo v. Union Pacific Railroad 853

Liens

The time for redemption, as such phrase is used in Neb. Rev. Stat. § 77-1902 (Reissue 1986), is the 3 years immediately following a delinquent tax sale. An action to foreclose a tax lien pursuant to § 77-1902 can only be brought within the 90 days immediately after expiration of the time for redemption.
County of Lancaster v. Maser 566

Mandamus

A writ of mandamus is not an available remedy when there is a plain and adequate remedy at law.
Olson v. County of Dakota 516

Marriage

In a prosecution for a crime of violence, the defendant's spouse may be called to testify against the defendant as to any matter, including confidential communications. Neb. Rev. Stat. § 27-505(3)(a) (Reissue 1985).
State v. Burchett 444

Medical Malpractice

The Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§ 44-2801 to 44-2855 (Reissue 1984), does not have application to acts of negligence committed by otherwise qualified health care providers outside the boundaries of this state.
Harper v. Silva 645

Mental Competency

The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding.
State v. Davis 771

Mental Health

1. This court will not interfere on appeal with a final order made by the district court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof.
State v. Steele 476
2. A district court reviews the determination of a mental health board de novo on the record.
In re Interest of Kinnebrew 885
3. The standard of review of this court, in mental health proceedings, requires that a final order made by the district court be affirmed unless this court can say, as a matter of law, that the order is not supported by clear and convincing evidence.
In re Interest of Kinnebrew 885
4. The transcript of the proceeding before a mental health board may not be treated as evidence before the board, the district court, or this court unless the facts in the transcript are offered as evidence, are not objected to, and are reviewed by the trier of fact.
In re Interest of Kinnebrew 885
5. In proving the dangerousness of a mentally ill person as manifested by "evidence of inability to provide for his basic human needs," within the meaning of Neb. Rev. Stat. § 83-1009(2) (Cum. Supp. 1986), expert testimony may be used to prove such a condition.
In re Interest of Kinnebrew 885

Minors

1. The Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1984), must be liberally construed to accomplish its purposes serving the best interests of juveniles within the act.
In re Interest of L.D. et al. 249
2. An adjudication under Neb. Rev. Stat. § 43-247 (Reissue 1984) of the Nebraska Juvenile Code is an appealable order.
In re Interest of L.D. et al. 249

Miranda Rights

1. Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."
   State v. Bowersmith 6
2. The *Miranda* warnings are procedural safeguards intended to secure the privilege against compelled self-incrimination.
   State v. Evans 64
3. There is no requirement in this jurisdiction that *Miranda* warnings be given prior to a request to submit to a chemical test of blood, breath, or urine.
   State v. Bishop 522

Modification of Decree

1. A proceeding to modify a child support order is not a retrial of the original case nor a review of the original decree.
   Wagner v. Wagner 155
2. The paramount issue in child support cases, whether originally or in proceedings for modification, remains the best interests of the children.
   Wagner v. Wagner 155
3. Increased age of children alone will not furnish a satisfactory basis for a modification of child support unless accompanied by competent evidence of the actual increase in the cost of maintaining the children.
   Wagner v. Wagner 155
4. Although as a general rule a decree awarding child support will not be modified because of a change of circumstances which was in the contemplation of the parties at the time the original or preceding order was made, we limit that rule to include only those anticipated changes which were specifically noted on the record made at the time of entry of the previous order. To the extent that the language of *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985), has been misinterpreted, that interpretation is expressly disapproved.
   Wagner v. Wagner 155
5. Questions relating to the modification of child support are initially entrusted to the sound discretion of the trial court, and, although on appeal we are required to review the record de novo, in the absence of an abuse of discretion, the decision of the trial court will be affirmed.
   Wagner v. Wagner 155
6. A significant increase in the appellant's income, along with the increased ages of the children and the inability of the appellee to afford to pay the children's bills on the current support payment,

meets the requirement of a material change in circumstances and supports the trial court's decision to modify child support payments.
Wilson v. Wilson 589

Motions for Continuance

1. Absent an abuse of discretion, the decision of a trial judge on a motion for continuance will be upheld on appeal.
State v. Polyascko 272
2. A motion for continuance is addressed to the court's sound discretion, and absent a showing of an abuse of that discretion the trial court's ruling will not be disturbed on appeal.
State v. Sluyter 768
3. There is no abuse of discretion by the court in denying a continuance unless it clearly appears that the defendant suffered prejudice as a result of that denial.
State v. Sluyter 768

Motions for Mistrial

1. The determination of whether to grant a motion for mistrial lies within the sound discretion of the trial court.
State v. Borchardt 47
2. A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of other incompetent matters are examples of occurrences which may constitute such events.
State v. Borchardt 47
3. Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike improper material is sustained and the jury is admonished to disregard such material.
State v. Borchardt 47
4. Determination whether to grant a mistrial is a matter within the sound discretion of a trial court, whose ruling regarding a mistrial will be upheld unless such ruling constitutes an abuse of discretion.
State v. Clancy 492

Motions for New Trial

New evidence offered in support of a motion for new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a new verdict.
State v. Koch 926

Motions to Suppress

This court will not overturn the trial court's factual findings when

determining the correctness of the trial court's rulings on the suppression of evidence unless those findings are clearly wrong.
State v. Bowersmith 6
State v. Copple 672

Motions to Vacate

1. Factors to be considered in determining whether a trial court abused its discretion in rendering a default judgment include the promptness of the motion to vacate, the negligence or want of diligence of the party moving to vacate, and the avoidance of unnecessary delays and frivolous proceedings.
Forker Solar, Inc. v. Knoblauch 143

2. One who seeks to set aside a default judgment against him must show that neither he nor his attorney was negligent in failing to appear and defend.
Forker Solar, Inc. v. Knoblauch 143

3. A judgment will not be set aside on the application of a party who has, by his own laches, failed to avail himself of an opportunity to defend.
Forker Solar, Inc. v. Knoblauch 143

Motor Vehicles

1. It is a general rule that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway, at any time, at a speed or in such manner that it cannot be stopped or its course be changed in time to avoid a collision with an object or obstruction discernible within his range of vision in the direction he is traveling.
Chlopek v. Schmall 78

2. The basis of the foregoing rule is that the driver of an automobile is legally and mandatorily obligated to keep such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop it and avoid collision with any object in front of him.
Chlopek v. Schmall 78

3. A driver of a motor vehicle about to enter a street or highway protected by stop signs is required to come to a full stop as near the right-of-way line as possible before driving onto such street or highway. After having stopped, such driver shall yield the right-of-way to any vehicle which is approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves his vehicle into or across such intersection.
Chlopek v. Schmall 78

Municipal Corporations

1. When an employee of the city, whose duties in part are to help apprehend persons using marijuana, himself engages in such activity, such action does constitute an act unbecoming an incumbent of the particular position, does affect the efficient

conduct of the business of the city, and is not in the best interest of the city government.
Ostwald v. City of Omaha 530

2. Concerning a contract claim against a city of the primary class, Neb. Rev. Stat. § 15-840 (Reissue 1983) requires that such claim be filed with the city clerk and disallowed before a claimant, pursuant to Neb. Rev. Stat. § 15-841 (Reissue 1983), may timely appeal from the city's disallowance and thereby become entitled to invoke a district court's power to adjudicate the merit of the disallowed claim.
Andrews v. City of Lincoln 748

Negligence

1. The proprietor of a place of business who holds it out to the public for entry for his business purposes is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm.
Vice v. Darm Corp. 1

2. It is a general rule that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway, at any time, at a speed or in such manner that it cannot be stopped or its course be changed in time to avoid a collision with an object or obstruction discernible within his range of vision in the direction he is traveling.
Chlopek v. Schmall 78

3. The basis of the foregoing rule is that the driver of an automobile is legally and mandatorily obligated to keep such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop it and avoid collision with any object in front of him.
Chlopek v. Schmall 78

4. In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury, a failure to discharge that duty, and injury resulting from the failure. The petition must allege these essential elements and the proof must support the allegations, or there can be no recovery.
Knoell v. Huff 90
Holden v. Urban 472

5. One alleging negligence has the burden to prove such negligence. Establishing that an accident has occurred does not prove a case of

negligence. Negligence is not presumed and must be proved by evidence, direct or circumstantial.
Holden v. Urban 472

6. Foreseeability is a factor in establishing a defendant's duty.
Holden v. Urban 472

7. The doctrine of res ipsa loquitur is that where the instrumentality causing the injury is shown to be under the defendant's exclusive control and management and the accident is one that in the ordinary course of things does not occur if those who have its management or control use proper care, reasonable evidence is afforded, in the absence of an explanation by the defendant, that the accident arose from want of proper care.
Beatty v. Davis 663

8. If specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of res ipsa loquitur is not applicable.
Beatty v. Davis 663

9. An action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (1982), may be based on the theory of respondeat superior or on a theory of direct negligence.
Naidoo v. Union Pacific Railroad 853

New Trial

While any one of several errors may not, in and of itself, warrant a reversal, if all of the errors in the aggregate establish a defendant did not receive a fair trial, a new trial must be granted.
State v. Kern 177

Notice

1. A guarantor, being one "who owes payment or other performance of the obligation secured," is a "debtor" as defined in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980), and is thus entitled to notice of sale of collateral under the provisions of Neb. U.C.C. § 9-504(3) (Reissue 1980).
Deutsche Credit Corp. v. Hi-Bo Farms, Inc. 463

2. An ambiguity in a notice sent pursuant to the requirements of Neb. U.C.C. § 9-504(3) (Reissue 1980) is to be resolved against the drafter of the notice.
Deutsche Credit Corp. v. Hi-Bo Farms, Inc. 463

3. A reasonably diligent search for the purpose of justifying service by publication does not require the use of all possible or conceivable means of discovery, but is such an inquiry as a reasonably prudent person would make in view of the circumstances and must extend to those places where information is likely to be obtained and to those persons who, in the ordinary

course of events, would be likely to receive news of or from the absent person.
In re Interest of A.W. 764
4. Whether all reasonable means to qualify a search as a "reasonably diligent" one have been exhausted must be determined by the circumstances of each particular case.
In re Interest of A.W. 764

Options to Buy or Sell

1. A broker is not entitled to a commission for producing a prospective buyer willing to execute only an option to purchase realty.
Marathon Realty Corp. v. Gavin 458
2. Once an option to purchase is exercised, it becomes a contract for the purchase and sale of the realty.
Marathon Realty Corp. v. Gavin 458
3. Neb. Rev. Stat. § 36-107 (Reissue 1984) requires that every contract between the owner and any broker or agent employed to sell land is void unless the contract is in writing and subscribed by both the owner and the broker or agent; the contract must also describe the land to be sold and set forth the compensation to be allowed by the owner in case of sale by the broker or agent.
Marathon Realty Corp. v. Gavin 458
4. One who is a joint owner of realty but represents himself or herself to be the sole owner thereof may not avoid full payment of an agreed commission on the ground that another also has an interest in the property.
Marathon Realty Corp. v. Gavin 458
5. A broker's right to compensation cannot be impaired by either the subsequent inability or unwillingness of a purported owner to consummate the sale on the terms prescribed or by said owner's inability to convey good title to real estate because of the failure to obtain a joinder in the conveyance by a third party who has an interest in the land.
Marathon Realty Corp. v. Gavin 458

Other Acts

1. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character.
State v. Robb 14
State v. Kern 177
State v. Clancy 492
State v. Kenny 638

2. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) permits evidence of other crimes, wrongs, or acts if such is relevant for any purpose other than to show defendant's propensity or disposition to commit the crime charged.
State v. Kern 177
State v. Clancy 492
3. Evidence of other crimes, wrongs, or acts may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the accused's guilt of the offense in question.
State v. Kern 177
4. The admissibility of evidence concerning other crimes, wrongs, or acts must be determined upon the facts of each case.
State v. Kern 177
5. No exact limitation of time can be fixed as to when evidence of other crimes, wrongs, or acts tending to prove intent to commit the offense charged is remote.
State v. Kern 177
6. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Neb. Evid. R. 404(2) (Neb. Rev. Stat. § 27-404(2) (Reissue 1985)).
State v. Clancy 492
7. The "purposes" set forth in Neb. Evid. R. 404(2) (Neb. Rev. Stat. § 27-404(2) (Reissue 1985)) are not exhaustive or mutually exclusive but are illustrative only, and are not pigeonholes for admission of evidence pertaining to "other acts."
State v. Clancy 492
8. Under Neb. Evid. R. 404(2), a defendant's attempted intimidation or intimidation of a State's informant or witness is relevant evidence concerning the defendant's conscious guilt that a crime has been committed. Neb. Rev. Stat. § 27-404(2) (Reissue 1985).
State v. Clancy 492

Parental Rights

1. One need not have physical possession of a child to demonstrate the existence of the neglect contemplated by Neb. Rev. Stat. § 43-292(2) (Reissue 1984), which provides for the termination of parental rights when the parents have "substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection."
In re Interest of J.N.V. 108
2. An order terminating parental rights is reviewed de novo on the record in this court.
In re Interest of D.J. et al. 226
In re Interest of J.S., S.C., and L.S. 234
In re Interest of J.W. 897

3. An order terminating parental rights must be supported by clear and convincing evidence, and the primary consideration in such cases is the best interests of the children.
In re Interest of D.J. et al. 226
In re Interest of J.S., S.C., and L.S. 234
In re Interest of J.W. 897
4. An order terminating parental rights must be supported by clear and convincing evidence and should be made only as a last resort when no reasonable alternative exists.
In re Interest of J.S., S.C., and L.S. 234
5. A child should not be left suspended in foster care and should not be required to exist in a wholly inadequate home. Further, a child cannot be made to await uncertain parental maturity.
In re Interest of J.S., S.C., and L.S. 234
6. The burden is on a natural parent challenging the validity of a relinquishment to prove that it was not voluntarily given.
Gaughan v. Gilliam 836
7. In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption signed by a natural parent knowingly, intelligently, and voluntarily is valid.
Gaughan v. Gilliam 836
8. The mere fact that a mother of a child might be influenced by the real concern expressed by friends or family for the welfare of both the mother and the child does not necessarily mean that a relinquishment executed by such mother is the product of threats, coercion, fraud, or duress.
Gaughan v. Gilliam 836

Perjury

A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the witness' testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)).
State v. Williams 114

Photographs

1. Each case must be considered on its own facts, and convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.
State v. Palmer 282

2. The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.
State v. Palmer 282

Plea Bargains

1. An accomplice's testimony is admissible notwithstanding the fact that the testimony is procured by means of a plea bargain.
State v. Burchett 444
2. The promise of leniency or otherwise favorable prosecutorial treatment goes only to the credibility of the accomplice's testimony, not to its admissibility.
State v. Burchett 444
3. Generally, it is only where the prosecution has bargained for false or specific testimony, or a specific result, that an accomplice's testimony is so tainted as to require its preclusion.
State v. Burchett 444
4. The State may withdraw from a plea arrangement at any time prior to, but not after, actual entry of the defendant's guilty plea or before the defendant's other action constituting detrimental reliance on the plea arrangement.
State v. Dillon 503

Plea in Abatement

Any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence.
State v. Baker 130

Pleadings

1. Ordinarily, the overruling of a motion in limine does not eliminate the need to object to the introduction of evidence in order to preserve error.
State v. Borchardt 47
2. One wishing to preserve error on the basis of remarks contained in an opening statement generally must object to the questioned remarks when made, notwithstanding the overruling of a motion in limine.
State v. Borchardt 47
3. A pleading may be amended in furtherance of justice, to conform to the proof, if the proposed amendment does not change substantially the claim or defense. The decision to allow or deny such amendment rests in the sound discretion of the court.
Chlopek v. Schmall 78

4. The right to amend or correct a defect in a pleading is not without limitation.
Knoell v. Huff 90
5. A cause of action pleaded by amendment ordinarily relates back to the original pleading, provided that claimant seeks recovery on the same general set of facts.
Forker Solar, Inc. v. Knoblauch 143
6. The theory of recovery is not itself a cause of action. If the general facts upon which the right to recover is based are the same, the amendment relates back to the original pleading.
Forker Solar, Inc. v. Knoblauch 143
7. A general denial does not put corporate character in issue.
Forker Solar, Inc. v. Knoblauch 143
8. A petition, as a pleading, is a plaintiff's or claimant's written statement of fact which invokes the jurisdiction of a court, sets out a cause of action, and seeks relief.
In re Interest of L.D. et al. 249
9. Verification of a pleading constitutes no part of a pleading and, ordinarily, is not necessary to vest jurisdiction in a court.
In re Interest of L.D. et al. 249
10. As any other formal matter, an absence of, or defect in, verification is waived by failure to make a proper and timely objection.
In re Interest of L.D. et al. 249
11. Proper pleading requires a petition to state in logical and legal form the facts which constitute the plaintiff's cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute.
Holden v. Urban 472
12. The Supreme Court disposes of an appeal on the basis of the theory presented by the pleadings on which the case was tried.
Holden v. Urban 472
13. Generally, this court will not consider for the first time on appeal issues not properly raised in the pleadings nor litigated at trial.
Leseberg v. Meints 533
14. An affirmative defense must be specifically pled to be considered.
Lease Northwest v. Davis 617
15. Matters which seek to avoid a valid contract are affirmative defenses.
Lease Northwest v. Davis 617
16. The modification of a guaranty of such a nature as would substantially change the liability of the parties is an affirmative defense which must be pled.
Lease Northwest v. Davis 617
17. The burden of both pleading and proving affirmative defenses is upon the defendants, and when they fail to do so they cannot

recover upon mere argument alone.
First Nat. Bank v. Benedict Consol. Indus. 860

Pleas

1. A plea of guilty embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional, except the defense that the indictment, information, or complaint is not sufficient to charge an offense.
State v. Kennedy 164
2. A valid guilty plea waives the right to a trial, whether a trial by jury or without a jury, and waives the right to counsel, including the right to court-appointed counsel in an otherwise appropriate case.
State v. Kennedy 164
3. A factual basis for a guilty plea may be established by inquiry of the defendant.
State v. Kennedy 164
4. The withdrawal of a plea is a matter addressed to the discretion of the trial court, and the trial court's ruling will not be disturbed on appeal absent an abuse of that discretion.
State v. Suffredini 220
State v. Hoffman 830
5. A factual basis for a plea may be determined from the statements of the county attorney.
State v. Suffredini 220
6. A sentencing judge is not required to inform a criminal defendant that a sentence which need not be imposed consecutively to any other may nonetheless, in the judge's discretion, be so imposed.
State v. Suffredini 220
7. After the entry of a plea of no contest but before sentencing, the trial court should allow a defendant to withdraw his or her plea for any fair and just reason, provided the prosecution would not be substantially prejudiced by its reliance upon the plea.
State v. Suffredini 220
State v. Hoffman 830
8. While a more severe punishment cannot be exacted because a defendant pleads not guilty and puts the State to the expense of a trial, a defendant nonetheless has no absolute right to a reduced sentence because he saves the State the expense of going to trial.
State v. Suffredini 220
9. The standard for accepting a plea of guilty is that it must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant, is made understandingly, and has a factual basis.
State v. Joubert 411
10. Before accepting a plea of guilty the trial court should examine the defendant sufficiently to determine whether he understands the

nature of the charge, the possible penalty, and the effect of his plea.
State v. Joubert 411
11. Whether a defendant's guilty plea, which results in a conviction later used as the basis for application of an enhanced penalty, has been made understandingly, intelligently, and voluntarily is not an issue in the Supreme Court's review concerning the validity of an enhanced punishment imposed on a defendant.
State v. Davis 518
12. The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding.
State v. Davis 771
13. The burden is upon the defendant to establish by clear and convincing evidence the grounds for withdrawing a plea.
State v. Hoffman 830

Police Officers and Sheriffs

1. Generally, as a practical matter, no criminal investigation is complete until sufficient facts have been obtained to justify the arrest and conviction of the defendant.
State v. Nissen 60
2. The obligation of an officer making an arrest under a warrant is twofold: to apprehend the person named in the warrant and to avoid interfering with one not involved.
State v. Nissen 60
3. The language of Neb. Rev. Stat. § 28-907(1)(a) (Reissue 1985), "to impede the investigation of an actual criminal matter," includes the impeding of the gathering of information as to the identity of a defendant named in an arrest warrant.
State v. Nissen 60
4. Law enforcement officers have a legitimate right to question persons about the identity of the subject of an arrest warrant before they arrest the suspect; and although persons so questioned may have the right to refuse to answer such inquiry, if they choose to answer they may not give false information without subjecting themselves to criminal liability.
State v. Nissen 60
5. The lawfulness of an arrest without a warrant must be based on probable cause, which exists where the facts and circumstances within an officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed.
State v. Roggenkamp 914
6. If the facts available to the officer at the time of the arrest would warrant a person of reasonable caution in the belief the action was

appropriate, then probable cause exists.
State v. Roggenkamp 914

Postconviction

1. Defendant in a postconviction case bears the burden of establishing a basis for relief, and a conviction will not be set aside in the absence of a showing that an error created actual prejudice rather than merely the possibility of prejudice.
State v. Cole 10
2. A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal.
State v. Cole 10
State v. Evans 64
State v. Lytle 486
State v. Falkner 490
3. Issues which were known to defendant and counsel at the time of trial and were capable of being raised in a direct appeal, but were not raised in defendant's direct appeal, are not proper grounds for postconviction relief.
State v. Cole 10
4. It is within the discretion of the district court to determine whether counsel shall be appointed in a postconviction proceeding to represent defendant on appeal to this court, and in the absence of a showing of abuse of discretion, the failure to appoint counsel is not error.
State v. Cole 10
5. An evidentiary hearing on a motion for postconviction relief is not required if the motion, files, and records of the case show the defendant is not entitled to relief.
State v. Evans 64
State v. Bean 278
State v. Lytle 486
6. Postconviction motions cannot be used to obtain a further review of issues already litigated, nor shall a defendant be permitted to rephrase issues already presented to achieve that end.
State v. Evans 64
7. Once a motion for postconviction relief has been judicially determined, any subsequent motions for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of the filing of the prior motion.
State v. Evans 64
8. In an evidentiary hearing, as a bench trial provided by Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985) for postconviction relief, the trial judge, as the "trier of fact," resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony.
State v. Williams 114

9. In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld, unless such findings are clearly erroneous.
State v. Williams 114
State v. Dillon 503

10. Any matter which can be determined from the record on direct appeal is considered by the Nebraska Supreme Court when ruling on a motion filed pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986). Any such matter is not subject to relitigation in an action brought pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985).
State v. Bean 278
State v. Wilson 721

11. In order to state a cause of action for postconviction relief, the motion must allege facts which, if proved, constitute an infringement of a prisoner's constitutional rights; allegations which are mere conclusions are not sufficient.
State v. Bean 278
State v. Lytle 486

12. To obtain postconviction relief the defendant has the burden of proof to establish the grounds for such relief, and the findings of the district court will not be disturbed on appeal unless clearly erroneous.
State v. Fries 482

13. To establish ineffectiveness of counsel as a ground for postconviction relief, the defendant must prove that his counsel failed to perform at least as well as an attorney in the area with ordinary training and skill in the criminal law.
State v. Fries 482

14. To obtain postconviction relief on the ground of ineffectiveness of counsel, the defendant must show that counsel's action or inaction prejudiced the defense of the case and that there is a reasonable probability that, but for counsel's errors, the result of the case would have been different.
State v. Fries 482

15. When a defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.
State v. Lytle 486

16. The Postconviction Act cannot be used as a substitute for appeal or as a further review of issues already litigated.
State v. Falkner 490

17. A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal, or which were known to the defendant and counsel at the time of trial and which were capable of being raised, but were not raised, in the defendant's direct appeal.
State v. Dillon 503

Prejudgment Interest

Prejudgment interest is interest due, pursuant to statute, prior to the rendition of a judgment. In the case of a written instrument, it is allowed on liquidated claims pursuant to the provisions of Neb. Rev. Stat. § 45-104 (Reissue 1984).
Lease Northwest v. Davis 617

Presumptions

1. The law presumes that one of sound mind intends the obvious and probable consequences of his or her voluntary acts.
State v. Robb 14
2. There is a presumption of prejudice involving a defendant's constitutional right to effective assistance of counsel when a defendant demonstrates (1) counsel actively represented conflicting interests and (2) an actual conflict of interest adversely affected performance by the defendant's lawyer. Such conflicts of interest must be shown to have resulted in counsel's conduct detrimental to the defense.
State v. Williams 114
3. When a trustee wrongfully commingles trust money with his own and makes payments from the common fund, it will be presumed that he paid out his own money, and not the trust money.
In re Estate of Redpath 845

Pretrial Procedure

1. No one has a vested right in a procedure; procedural matters can be changed at any time before trial and are binding on the defendant.
State v. Palmer 282
2. If a prosecutor has a duty to disclose a statement in response to a general discovery request, it must derive from the obviously exculpatory character of the evidence.
State v. Tweedy 715
3. In a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal.
State v. Pointer 892
State v. Roggenkamp 914

Prior Convictions

1. Just as a wrong date in an information will not preclude a

defendant from being sentenced as a habitual criminal if the record discloses the defendant could not have been misled or confused, so, too, a wrong date in a complaint will not preclude a defendant from being sentenced as one who has previously been convicted of driving while under the influence of alcohol if the record discloses that the defendant could not have been misled or confused.
State v. Jameson 38

2. The State's burden in proving valid prior convictions for enhancement purposes is only to show that the defendant had or knowingly and voluntarily waived counsel at the time of such convictions.
State v. Foster 267
State v. Thompson 922

3. A sufficiently complete checklist or other docket entry may be used to establish a valid waiver of counsel for enhancement purposes.
State v. Foster 267

4. To use a prior conviction as a basis for enhancement, the State need only show that the convicted defendant had, or waived, counsel at the time of such prior conviction. Other objections to the validity of such prior conviction constitute collateral attacks on that prior conviction and must be raised either by direct appeal from the prior conviction or in separate proceedings commenced expressly for the purpose of setting aside such prior conviction as an invalid judgment.
State v. Davis 518

5. Whether a defendant's guilty plea, which results in a conviction later used as the basis for application of an enhanced penalty, has been made understandingly, intelligently, and voluntarily is not an issue in the Supreme Court's review concerning the validity of an enhanced punishment imposed on a defendant.
State v. Davis 518

6. Existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the accused's testimony and duly authenticated records maintained by the courts or penal and custodial authorities.
State v. Davis 518

Prior Statements

1. A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the witness' testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)).
State v. Williams 114

2. What was previously characterized as hearsay available for the purpose of impeachment only has now become substantive evidence of fact contained in the statement, provided the requirements prescribed by Neb. Evid. R. 801(4)(a)(i) are satisfied. Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985).
State v. Williams 114
3. Subject to the exception specified in Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)), a witness' inconsistent statement may be admissible evidence to aid the jury in evaluating that witness' credibility, but a witness' inconsistent statement is not substantive evidence of the matter asserted unless such statement is otherwise admissible under the Nebraska Evidence Rules.
State v. Williams 114

Probable Cause

1. The test of probable cause for a warrantless arrest is whether, at the time of the arrest, the officer had knowledge of facts and circumstances based on reasonably trustworthy information which was sufficient to warrant a prudent man in believing the defendant had committed or was committing an offense.
State v. Evans 64
State v. Bishop 522
State v. Roggenkamp 914
2. If the facts available to the officer at the time of the arrest would warrant a person of reasonable caution in the belief the action was appropriate, then probable cause exists.
State v. Roggenkamp 914

Probation and Parole

1. The granting of probation as opposed to imposing a jail sentence is a matter left for the discretion of the trial court.
State v. Kane 245
2. Motions to revoke probation must be filed in the sentencing court. Where a probationer was tried, convicted, and sentenced in the county court, it is the county court, not the district court which served in its appellate capacity, that has jurisdiction to hear a motion to revoke probation.
State v. Daniels 264
3. Whether to grant probation instead of a jail sentence is a matter left to the trial court's discretion. Absent an abuse of discretion, a sentence imposed within the statutory limits will be upheld on appeal.
State v. Tweedy 715

Proof

1. Defendant in a postconviction case bears the burden of establishing a basis for relief, and a conviction will not be set aside

in the absence of a showing that an error created actual prejudice rather than merely the possibility of prejudice.
State v. Cole 10

2. In second degree murder cases malice and intent may be inferred from the evidence relating to the circumstances of the criminal act.
State v. Moniz 198

3. A criminal conviction may be based upon the uncorroborated statements of an accomplice.
State v. Burchett 444

4. One alleging negligence has the burden to prove such negligence. Establishing that an accident has occurred does not prove a case of negligence. Negligence is not presumed and must be proved by evidence, direct or circumstantial.
Holden v. Urban 472

5. To establish ineffectiveness of counsel as a ground for postconviction relief, the defendant must prove that his counsel failed to perform at least as well as an attorney in the area with ordinary training and skill in the criminal law.
State v. Fries 482

6. To obtain postconviction relief on the ground of ineffectiveness of counsel, the defendant must show that counsel's action or inaction prejudiced the defense of the case and that there is a reasonable probability that, but for counsel's errors, the result of the case would have been different.
State v. Fries 482

7. When a defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.
State v. Lytle 486

8. Where value of goods is an element of the crime charged and there is a market for the goods, the value to be proved is the market value at the time and place of the alleged crime.
State v. Clancy 492

9. Existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the accused's testimony and duly authenticated records maintained by the courts or penal and custodial authorities.
State v. Davis 518

10. A workers' compensation plaintiff has the burden of proving that

an injury resulted from an accident arising out of and in the course of employment.
Hayes v. A.M. Cohron, Inc. 579

11. If it is claimed that the injury was the result of employment exertion, the evidence must show that the employment contributed to the cause of the injury in some material and substantial degree.
Hayes v. A.M. Cohron, Inc. 579

12. The presence of a preexisting condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment.
Hayes v. A.M. Cohron, Inc. 579

13. To avoid disqualification under Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1986), the employee who voluntarily severed the employment relationship has the burden of proving that the leaving was with good cause.
Ponderosa Villa v. Hughes 627

14. A photocopy of a writing is admissible in evidence to the same extent as the original unless a genuine question is raised as to the authenticity of the original or, under the circumstances, it would be unfair to admit the duplicate in lieu of the original. The burden of raising an issue as to the authenticity of the original or the unfairness of the circumstances is on the party opposing admission.
State v. Frederiksen 653

15. Prima facie proof of a case is less stringent than proof by a preponderance of the evidence. A "prima facie" case requires only enough evidence to take the question to the jury, whereas "preponderance of the evidence" requires proof which leads the jury to find the existence of the contested fact is more probable than its nonexistence.
State v. Copple 672

16. For admission of a coconspirator's act as evidence against a defendant-coconspirator being tried for a crime other than the conspiracy itself, the trial court must first determine whether the State has proved a prima facie case that (1) a conspiracy existed, (2) the defendant and the witness were members of the conspiracy, and (3) the witness' act was done during and in furtherance of the conspiracy.
State v. Copple 672

17. An alcohol-related violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984) may be proved by establishing that one was in actual physical control of a motor vehicle while under the influence of alcohol or that one was in actual physical control of a motor vehicle while having ten-hundredths of 1 percent by weight

of alcohol in his or her body fluid.
State v. Burling 725

18. In a discrimination suit brought under the provisions of Neb. Rev. Stat. § 48-1104 (Reissue 1984) of the Nebraska Fair Employment Practice Act, the following is the procedure to be followed in presentation of evidence relevant to a question about discrimination against a disabled person: First, the complainant has the burden of proving a prima facie case of discrimination. Second, if the complainant succeeds in proving that prima facie case, the burden shifts to the respondent to articulate some legitimate, nondiscriminatory reason for the complainant's rejection or discharge from employment. Third, should the respondent carry the burden, the complainant must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the respondent were not its true reasons, but were a pretext for discrimination.
Father Flanagan's Boys' Home v. Goerke 731

19. Impairment of earning capacity is an item of general damage, and proof may be had under general allegations of injury and damage. Proof of an actual loss of wages or earnings is not essential to a recovery for loss of earning capacity.
Chirnside v. Lincoln Tel. & Tel. Co. 784

20. It is necessary to prove the existence of at least an implied agreement, to establish a conspiracy.
Steed v. Oak Ridge Equestrian Ctr. 792

21. The burden is on a natural parent challenging the validity of a relinquishment to prove that it was not voluntarily given.
Gaughan v. Gilliam 836

22. One who claims the existence of a constructive trust has the burden of proof to establish the existence of a constructive trust by evidence which is clear, satisfactory, and convincing in character.
In re Estate of Redpath 845

23. As a general rule, provided the property can be traced or identified, any third person who has obtained trust property or its product by a transfer made in violation of the trust may be subject to a constructive trust. It is necessary, however, that the property can be traced or identified.
In re Estate of Redpath 845

24. The burden of both pleading and proving affirmative defenses is upon the defendants, and when they fail to do so they cannot recover upon mere argument alone.
First Nat. Bank v. Benedict Consol. Indus. 860

25. To recover from the Second Injury Fund, Neb. Rev. Stat. § 48-128 (Reissue 1984), a claimant must prove by a preponderance of evidence (1) a prior permanent partial disability, (2) a second or

subsequent injury which is compensable, causing permanent disability, and (3) the combination of permanent disabilities existing after such second or subsequent injury is substantially greater in degree or percentage than permanent disability from the second or subsequent injury, considered by itself and not in conjunction with the prior permanent disability.
Norris v. Iowa Beef Processors 867

26. One claiming against the Second Injury Fund, Neb. Rev. Stat. § 48-128 (Reissue 1984), has the burden to prove that the combination of permanent disabilities is substantially greater in degree or percentage than the permanent disability from the second or subsequent compensable injury considered by itself.
Norris v. Iowa Beef Processors 867

27. In addition to establishing an employee's decrease or loss of earning power or diminished employability, a claimant seeking payment from the Second Injury Fund must also establish that, after the second or subsequent compensable injury, an employee's combined permanent disabilities are *substantially greater* than the permanent disability from the last compensable injury considered by itself.
Norris v. Iowa Beef Processors 867

28. In proving the dangerousness of a mentally ill person as manifested by "evidence of inability to provide for his basic human needs," within the meaning of Neb. Rev. Stat. § 83-1009(2) (Cum. Supp. 1986), expert testimony may be used to prove such a condition.
In re Interest of Kinnebrew 885

29. The State's burden in proving valid prior convictions for enhancement purposes is only to show that defendant had or knowingly and voluntarily waived counsel at the time of such convictions.
State v. Thompson 922

Property

1. Where the damage to personal property can, at a reasonable cost, be repaired and the property restored to substantially its condition immediately before the damage occurred, and the cost of repair does not exceed the difference in market value of the property before and after the injury, then the measure of damages is the reasonable cost of repair plus the reasonable value of the loss of use of the property for the reasonable amount of time required to complete the repair.
Chlopek v. Schmall 78

2. Where the damage to personal property is such that it cannot be repaired and the property thereby restored to substantially its condition immediately before the damage occurred, or when the reasonable cost of repair exceeds the difference in market value of

the property immediately before and immediately after the injury, the measure of damages is the lost market value plus the reasonable value of the loss of use of the property for the reasonable amount of time required to obtain a suitable replacement.
Chlopek v. Schmall 78

3. The reasonable value of the loss of use of personal property is generally the fair rental value of property of a like or similar nature or the amount actually paid for rental, whichever is less.
Chlopek v. Schmall 78

4. Where property used for commercial or business purposes cannot be rented, then loss of profits may establish the reasonable value of the loss of use.
Chlopek v. Schmall 78

5. To the extent that any prior cases would limit the total compensation for damage to personal property to the fair market value of the property immediately before the injury, they are expressly overruled.
Chlopek v. Schmall 78

6. As a general rule, provided the property can be traced or identified, any third person who has obtained trust property or its product by a transfer made in violation of the trust may be subject to a constructive trust. It is necessary, however, that the property can be traced or identified.
In re Estate of Redpath 845

Property Division

It is the rule in Nebraska that the division of property and the awarding of alimony in marriage dissolution cases are matters entrusted to the sound discretion of the trial judge. On appeal these matters will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.
Busekist v. Busekist 510

Prosecuting Attorneys

1. The responsibility of a public prosecutor differs from that of the usual advocate; his or her duty is to seek justice, not merely to convict. This special duty exists because (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial, the prosecutor is not only an advocate but he or she also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in

private practice; the prosecutor should make timely disclosure to the defense of available evidence known to him or her that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused.
State v. Borchardt 47

2. Generally, for prosecutorial misconduct to warrant vacation of a conviction, there must be evidence of prejudice to the defendant's right to a fair and impartial trial.
State v. Evans 64

3. That a county attorney vigorously prosecutes one accused of a crime does not constitute prosecutorial misconduct.
State v. Palmer 282

4. If a prosecutor has a duty to disclose a statement in response to a general discovery request, it must derive from the obviously exculpatory character of the evidence.
State v. Tweedy 715

Public Officers and Employees

When an employee of the city, whose duties in part are to help apprehend persons using marijuana, himself engages in such activity, such action does constitute an act unbecoming an incumbent of the particular position, does affect the efficient conduct of the business of the city, and is not in the best interest of the city government.
Ostwald v. City of Omaha 530

Public Service Commission

The Nebraska Public Service Commission lacks jurisdiction to construe the provisions of Neb. Rev. Stat. § 88-503(3)(b) (Supp. 1983) or of any bond provided pursuant thereto.
In re Complaint of Fecht 752

Ratification

In order that a confession of judgment may be binding on the plaintiff, it is essential that he, either expressly or impliedly, assent thereto; if it is made without his request, knowledge, or consent, and entered at the instance of the debtor alone, it will have no validity unless the creditor ratifies or accepts it.
In re Estate of Redpath 845

Real Estate

1. In order for a broker employed to secure a purchaser of realty to recover a commission, his or her efforts must be the efficient procuring cause of the sale.
Marathon Realty Corp. v. Gavin 458

2. The efforts of a broker employed to secure a purchaser of realty

have been the efficient procuring cause of the sale when the broker has secured a prospective purchaser who is ready, willing, and able to buy the property on terms and conditions upon which the broker is authorized to secure a purchaser, or on terms acceptable to the seller.
Marathon Realty Corp. v. Gavin 458
3. Efforts which produce a series of unbroken, continuous events culminating in the sale of realty are the efficient procuring cause of the sale, notwithstanding the fact that such efforts may not be the sole cause of the sale.
Marathon Realty Corp. v. Gavin 458
4. A broker is not entitled to a commission for producing a prospective buyer willing to execute only an option to purchase realty.
Marathon Realty Corp. v. Gavin 458
5. Once an option to purchase is exercised, it becomes a contract for the purchase and sale of the realty.
Marathon Realty Corp. v. Gavin 458
6. Neb. Rev. Stat. § 36-107 (Reissue 1984) requires that every contract between the owner and any broker or agent employed to sell land is void unless the contract is in writing and subscribed by both the owner and the broker or agent; the contract must also describe the land to be sold and set forth the compensation to be allowed by the owner in case of sale by the broker or agent.
Marathon Realty Corp. v. Gavin 458
7. One who is a joint owner of realty but represents himself or herself to be the sole owner thereof may not avoid full payment of an agreed commission on the ground that another also has an interest in the property.
Marathon Realty Corp. v. Gavin 458
8. The general measure of damages for a breach of contract to convey land is the difference between the market value of the land at the time of the breach and the price set out in the contract.
Turner v. Alberts 632
9. The exception to the general rule is that where it appears that special damages have also arisen from the breach, the damages recoverable are such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time the contract was made.
Turner v. Alberts 632

Records

1. A checklist or other 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. Foster 267
2. 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 impart absolute verity.
State v. Foster 267

3. A brief may not expand the evidentiary record and must limit itself to arguments supported by the record.
Father Flanagan's Boys' Home v. Goerke 731

Redemption

The time for redemption, as such phrase is used in Neb. Rev. Stat. § 77-1902 (Reissue 1986), is the 3 years immediately following a delinquent tax sale. An action to foreclose a tax lien pursuant to § 77-1902 can only be brought within the 90 days immediately after expiration of the time for redemption.
County of Lancaster v. Maser 566

Rescission

1. The cancellation of an insurance policy is not a rescission, since a rescission avoids the contract ab initio. A cancellation merely terminates the policy as of the time when the cancellation becomes effective.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

2. Neb. Rev. Stat. §§ 44-515 to 44-521 (Reissue 1984) do not prevent an insurer from rescinding an automobile liability insurance policy for material misrepresentations made by the insured in the application for the policy.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

3. Neb. Rev. Stat. § 44-358 (Reissue 1984) limits but does not eliminate the right of an insurer to rescind an automobile liability insurance policy for fraud in the application.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

4. An accident resulting in injury or damage to a third person does not destroy the right of an insurer to rescind an automobile liability insurance policy for fraud in the application.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

Restitution

Restitution ordered by a court pursuant to Neb. Rev. Stat. § 29-2280 (Cum. Supp. 1986) is a criminal penalty imposed as punishment for the crime, not an administrative or civil penalty as is restitution under Neb. Rev. Stat. § 28-427 (Reissue 1985).
State v. Duran 774

Right to Counsel

1. The right to counsel at a police lineup attaches only at or after the time when adversary judicial proceedings have been initiated against the defendant by way of complaint, indictment, or information.
State v. Evans 64

2. As a result of Neb. Const. art. I, § 11, and U.S. Const. amend. VI, the right to counsel is the right to effective assistance of counsel. For effective assistance of counsel a defendant is constitutionally entitled to a lawyer's representation free from conflicting interests.
State v. Williams 114
3. Once a defendant has been informed of his right to retained or appointed counsel, there is no requirement that the court advise the defendant, on each subsequent court appearance, of the same right.
State v. Tharp 126
4. A valid guilty plea waives the right to a trial, whether a trial by jury or without a jury, and waives the right to counsel, including the right to court-appointed counsel in an otherwise appropriate case.
State v. Kennedy 164
5. The State's burden in proving valid prior convictions for enhancement purposes is only to show that the defendant had or knowingly and voluntarily waived counsel at the time of such convictions.
State v. Foster 267
State v. Thompson 922
6. A sufficiently complete checklist or other docket entry may be used to establish a valid waiver of counsel for enhancement purposes.
State v. Foster 267
7. To use a prior conviction as a basis for enhancement, the State need only show that the convicted defendant had, or waived, counsel at the time of such prior conviction. Other objections to the validity of such prior conviction constitute collateral attacks on that prior conviction and must be raised either by direct appeal from the prior conviction or in separate proceedings commenced expressly for the purpose of setting aside such prior conviction as an invalid judgment.
State v. Davis 518
8. Under the implied consent law, a driver is not entitled to consult with an attorney, nor is a delay in the test required should a driver request to consult with an attorney.
State v. Bishop 522
9. Indigency, as used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), means the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family.
State v. Lafler 613
10. In determining whether a criminal defendant is indigent as the term is used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), a

court is to consider the seriousness of the offense; the defendant's income; the availability to the defendant of other resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits; normal living expenses; outstanding debts; and the number and age of dependents.
State v. Lafler 613

11. The right of an indigent defendant to have counsel does not give him the right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel.
State v. Hoffman 830

Rules of Evidence

1. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character.
State v. Robb 14
State v. Kern 177
State v. Clancy 492
State v. Kenny 638

2. Evidence of a test result cannot be characterized as "scientific" or qualify as "technical or other specialized knowledge," and thus within the purview of Neb. Rev. Stat. § 27-702 (Reissue 1985), unless and until it is established that the test result demonstrates what it is claimed to demonstrate.
State v. Borchardt 47

3. The credibility of a witness may be attacked by any party, including the party calling him. Neb. Evid. R. 607 (Neb. Rev. Stat. § 27-607 (Reissue 1985)).
State v. Williams 114

4. A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the witness' testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)).
State v. Williams 114

5. What was previously characterized as hearsay available for the purpose of impeachment only has now become substantive evidence of fact contained in the statement, provided the requirements prescribed by Neb. Evid. R. 801(4)(a)(i) are satisfied. Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985).
State v. Williams 114

6. Subject to the exception specified in Neb. Evid. R. 801(4)(a)(i)

(Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)), a witness' inconsistent statement may be admissible evidence to aid the jury in evaluating that witness' credibility, but a witness' inconsistent statement is not substantive evidence of the matter asserted unless such statement is otherwise admissible under the Nebraska Evidence Rules.
State v. Williams 114

7. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) permits evidence of other crimes, wrongs, or acts if such is relevant for any purpose other than to show defendant's propensity or disposition to commit the crime charged.
State v. Kern 177

8. Evidence of other crimes, wrongs, or acts may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the accused's guilt of the offense in question.
State v. Kern 177

9. The admissibility of evidence concerning other crimes, wrongs, or acts must be determined upon the facts of each case.
State v. Kern 177

10. No exact limitation of time can be fixed as to when evidence of other crimes, wrongs, or acts tending to prove intent to commit the offense charged is remote.
State v. Kern 177

11. The traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.
State v. Palmer 282

12. In a prosecution for a crime of violence, the defendant's spouse may be called to testify against the defendant as to any matter, including confidential communications. Neb. Rev. Stat. § 27-505(3)(a) (Reissue 1985).
State v. Burchett 444

13. 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 1985)).
State v. Clancy 492
State v. Copple 672

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

accident. Neb. Evid. R. 404(2) (Neb. Rev. Stat. § 27-404(2) (Reissue 1985)).
State v. Clancy 492

15. The "purposes" set forth in Neb. Evid. R. 404(2) (Neb. Rev. Stat. § 27-404(2) (Reissue 1985)) are not exhaustive or mutually exclusive but are illustrative only, and are not pigeonholes for admission of evidence pertaining to "other acts."
State v. Clancy 492

16. Under Neb. Evid. R. 404(2), a defendant's attempted intimidation or intimidation of a State's informant or witness is relevant evidence concerning the defendant's conscious guilt that a crime has been committed. Neb. Rev. Stat. § 27-404(2) (Reissue 1985).
State v. Clancy 492

17. "(1) A statement is (a) an oral or written assertion or (b) nonverbal conduct of a person if it is intended by him as an assertion. . . . (3) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Neb. Evid. R. 801 (Neb. Rev. Stat. § 27-801 (Reissue 1985)).
State v. Copple 672

18. Whether the State has established a prima facie case of conspiracy, thereby constituting anything within execution or furtherance of the common purpose as the act of every coconspirator, is a preliminary question for the trial court concerning admissibility of evidence. Neb. Evid. R. 104(1) (Neb. Rev. Stat. § 27-104(1) (Reissue 1985)).
State v. Copple 672

19. When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given in evidence.
Chirnside v. Lincoln Tel. & Tel. Co. 784

20. Generally, the rule of completeness is concerned with the danger of admitting a statement out of context. When this danger is not present it is not an abuse of discretion to fail to require the production of the remainder or, if it cannot be produced, to fail to exclude all the evidence.
Chirnside v. Lincoln Tel. & Tel. Co. 784

21. Error may not be predicated on a ruling which admits evidence unless a substantial right of a party is affected and a timely objection appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context. Neb. Evid. R. 103(1)(a) (Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1985)).
State v. Roggenkamp 914

Rules of the Supreme Court

1. Relief granted pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986) constitutes the disposition of a direct appeal on its merits.
   State v. Bean 278
2. In disposing of a case under Neb. Ct. R. of Prac. 3B (rev. 1986), the Nebraska Supreme Court examines the entire record, not only to resolve those matters which are specifically called to its attention by counsel but also to determine whether any possible errors exist.
   State v. Bean 278
3. Any matter which can be determined from the record on direct appeal is considered by the Nebraska Supreme Court when ruling on a motion filed pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986). Any such matter is not subject to relitigation in an action brought pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985).
   State v. Bean 278
   State v. Wilson 721

Sales

1. In order for a broker employed to secure a purchaser of realty to recover a commission, his or her efforts must be the efficient procuring cause of the sale.
   Marathon Realty Corp. v. Gavin 458
2. The efforts of a broker employed to secure a purchaser of realty have been the efficient procuring cause of the sale when the broker has secured a prospective purchaser who is ready, willing, and able to buy the property on terms and conditions upon which the broker is authorized to secure a purchaser, or on terms acceptable to the seller.
   Marathon Realty Corp. v. Gavin 458
3. Efforts which produce a series of unbroken, continuous events culminating in the sale of realty are the efficient procuring cause of the sale, notwithstanding the fact that such efforts may not be the sole cause of the sale.
   Marathon Realty Corp. v. Gavin 458
4. A broker is not entitled to a commission for producing a prospective buyer willing to execute only an option to purchase realty.
   Marathon Realty Corp. v. Gavin 458
5. Once an option to purchase is exercised, it becomes a contract for the purchase and sale of the realty.
   Marathon Realty Corp. v. Gavin 458
6. Neb. Rev. Stat. § 36-107 (Reissue 1984) requires that every contract between the owner and any broker or agent employed to sell land is void unless the contract is in writing and subscribed by both the owner and the broker or agent; the contract must also

describe the land to be sold and set forth the compensation to be allowed by the owner in case of sale by the broker or agent.
Marathon Realty Corp. v. Gavin 458

7. One who is a joint owner of realty but represents himself or herself to be the sole owner thereof may not avoid full payment of an agreed commission on the ground that another also has an interest in the property.
Marathon Realty Corp. v. Gavin 458

8. A broker's right to compensation cannot be impaired by either the subsequent inability or unwillingness of a purported owner to consummate the sale on the terms prescribed or by said owner's inability to convey good title to real estate because of the failure to obtain a joinder in the conveyance by a third party who has an interest in the land.
Marathon Realty Corp. v. Gavin 458

Schools and School Districts

1. Notwithstanding that the statute provides that a school district is a body corporate, possesses the usual powers of a corporation for public purposes, and may sue and be sued, it is the law of this state that a school district may not maintain an action involving a change in the boundaries of a school district.
School Dist. No. 46 v. City of Bellevue 543

2. The fixing of boundaries of school districts is exclusively a legislative function, and it may be properly delegated to a subordinate agency, providing the Legislature prescribes the manner and the standards under which the power of the designated board may be exercised. The Legislature may delegate this authority provided it states the purpose for doing so and sets up reasonable standards to guide the agency which is to administer it.
School Dist. No. 46 v. City of Bellevue 543

Search and Seizure

1. Determinations as to whether a person has been seized, in the constitutional sense, are questions of fact.
State v. Bowersmith 6

2. Fourth amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.
State v. Kenny 638

3. A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his fourth amendment rights infringed.
State v. Kenny 638

Second Injury Fund

1. Under the statutory scheme of Neb. Rev. Stat. § 48-128 (Reissue

1984), the amount payable from the Second Injury Fund is, ordinarily, the difference between the weekly benefits payable for permanent disability from a second injury which is compensable and the weekly benefits payable for the combined permanent disabilities from a previous injury and such second injury.
Norris v. Iowa Beef Processors 867

2. To recover from the Second Injury Fund, Neb. Rev. Stat. § 48-128 (Reissue 1984), a claimant must prove by a preponderance of evidence (1) a prior permanent partial disability, (2) a second or subsequent injury which is compensable, causing permanent disability, and (3) the combination of permanent disabilities existing after such second or subsequent injury is substantially greater in degree or percentage than permanent disability from the second or subsequent injury, considered by itself and not in conjunction with the prior permanent disability.
Norris v. Iowa Beef Processors 867

3. One claiming against the Second Injury Fund, Neb. Rev. Stat. § 48-128 (Reissue 1984), has the burden to prove that the combination of permanent disabilities is substantially greater in degree or percentage than the permanent disability from the second or subsequent compensable injury considered by itself.
Norris v. Iowa Beef Processors 867

4. Whether a combination of permanent disabilities, within the purview of Neb. Rev. Stat. § 48-128 (Reissue 1984), is substantially greater than permanent disability from a second or subsequent compensable injury is a question of fact.
Norris v. Iowa Beef Processors 867

5. With the exception of increased disability resulting from additional injury to the same specific member of the body, as classified by Neb. Rev. Stat. § 48-121(3) (Reissue 1984), *disability*, for the purpose of Neb. Rev. Stat. § 48-128 (Reissue 1984) means the decrease or loss of earning power (capacity) or diminished employability.
Norris v. Iowa Beef Processors 867

6. In addition to establishing an employee's decrease or loss of earning power or diminished employability, a claimant seeking payment from the Second Injury Fund must also establish that, after the second or subsequent compensable injury, an employee's combined permanent disabilities are *substantially greater* than the permanent disability from the last compensable injury considered by itself.
Norris v. Iowa Beef Processors 867

7. Under Neb. Rev. Stat. § 48-128 (Reissue 1984), a combination of permanent disabilities is "substantially greater" than permanent disability from the second or subsequent injury when the resulting permanent disability from all causes combined is substantially

greater than the disability resulting solely from the second or subsequent compensable injury.
Norris v. Iowa Beef Processors 867

8. For the combination of permanent disabilities necessary to sustain a claim against the Second Injury Fund, the prior permanent partial disability or disabilities must interact with the effects of the second or subsequent compensable injury and enhance the permanent disability that otherwise results from the later compensable injury alone.
Norris v. Iowa Beef Processors 867

Securities Regulation

The Securities Act of Nebraska, Neb. Rev. Stat. §§ 8-1101 et seq. (Reissue 1983), is not the exclusive remedy under Nebraska law in cases involving the sale of securities.
Knoell v. Huff 90

Security Interests

1. A guarantor, being one "who owes payment or other performance of the obligation secured," is a "debtor" as defined in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980), and is thus entitled to notice of sale of collateral under the provisions of Neb. U.C.C. § 9-504(3) (Reissue 1980).
Deutsche Credit Corp. v. Hi-Bo Farms, Inc. 463

2. An ambiguity in a notice sent pursuant to the requirements of Neb. U.C.C. § 9-504(3) (Reissue 1980) is to be resolved against the drafter of the notice.
Deutsche Credit Corp. v. Hi-Bo Farms, Inc. 463

3. A guarantee who holds an unconditional guaranty has no obligation to proceed against the security prior to seeking recovery under the guaranty contract.
Lease Northwest v. Davis 617

Self-Defense

One who knows he or she may retreat with complete safety may not resort to the use of deadly force in self-defense.
State v. Moniz 198

Self-Incrimination

1. The *Miranda* warnings are procedural safeguards intended to secure the privilege against compelled self-incrimination.
State v. Evans 64

2. Evidence obtained in the implied consent context is not testimonial or communicative and does not fall within the privilege against self-incrimination.
State v. Bishop 522

Sentences

1. Nebraska's escape statute, Neb. Rev. Stat. § 28-912 (Reissue 1985), defines one offense and sets out factors which, if present, change the range of the penalty.
   State v. Heathman 19
2. A sentencing judge is not required to inform a criminal defendant that a sentence which need not be imposed consecutively to any other may nonetheless, in the judge's discretion, be so imposed.
   State v. Suffredini 220
3. While a more severe punishment cannot be exacted because a defendant pleads not guilty and puts the State to the expense of a trial, a defendant nonetheless has no absolute right to a reduced sentence because he saves the State the expense of going to trial.
   State v. Suffredini 220
4. Absent an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.
   State v. Suffredini 220
   State v. Kane 245
   State v. Kenny 638
   State v. Gonzales 659
   State v. Tweedy 715
5. The granting of probation as opposed to imposing a jail sentence is a matter left for the discretion of the trial court.
   State v. Kane 245
   State v. Tweedy 715
6. In a general sense an ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed.
   State v. Palmer 282
7. Not all retroactive legislation is in violation of the prohibition against ex post facto laws.
   State v. Palmer 282
8. A legislature may not enact any law which imposes a punishment for an act which was not punishable at the time it was committed or imposes additional punishment to that then prescribed.
   State v. Palmer 282
9. The traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.
   State v. Palmer 282
10. The proportionality review made under the requirements of Neb. Rev. Stat. §§ 29-2521.01, 29-2521.02, and 29-2521.03 (Reissue 1985) is limited to a comparison of the facts and circumstances of the death penalty-imposed case under review with those of all applicable cases in which the death penalty was imposed.
    State v. Palmer 282
    State v. Joubert 411

11. Any serious assaultive or terrorizing criminal activity committed by the accused prior to the time of the offense may properly be considered when deciding the applicability of Neb. Rev. Stat. § 29-2523(1)(a) (Reissue 1985).
State v. Joubert 411
12. A defendant may offer any evidence on the issue of mitigation, even though the mitigating factor is not specifically listed in Neb. Rev. Stat. § 29-2523(2) (Reissue 1985).
State v. Joubert 411
13. 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. Joubert 411
14. Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), that a murder be "especially heinous, atrocious, cruel" or manifest "exceptional depravity by ordinary standards of morality and intelligence," describes in the disjunctive at least two distinct components of the aggravating circumstance which may operate in conjunction with or independent of one another.
State v. Joubert 411
15. The presence of any of the components of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) will sustain a finding that aggravating circumstance (1)(d) exists.
State v. Joubert 411
16. The words "especially heinous, atrocious, cruel," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), mean a conscienceless or pitiless crime which is unnecessarily torturous to the victim.
State v. Joubert 411
17. The phrase "exceptional depravity," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), refers and 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. Joubert 411
18. For the purpose of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), "exceptional depravity" exists when the act is totally and senselessly bereft of any regard for human life as shown by the presence of the following circumstances, either separately or collectively: (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. Consequently, where one or more of those five factors are present, there may be a finding of "exceptional depravity."
State v. Joubert 411
19. An offense for which the maximum penalty is imprisonment for

more than 6 months is a serious offense for which the accused is constitutionally entitled to a jury trial.
State v. Lafler 613

20. A law which changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed is an ex post facto law and insofar as it affects the punishment of the party to his disadvantage is void.
State v. Duran 774

21. Restitution ordered by a court pursuant to Neb. Rev. Stat. § 29-2280 (Cum. Supp. 1986) is a criminal penalty imposed as punishment for the crime, not an administrative or civil penalty as is restitution under Neb. Rev. Stat. § 28-427 (Reissue 1985).
State v. Duran 774

22. A court is without authority to impose a criminal penalty for a crime unless the law authorizing such penalty was effective on or before the date of the commission of the crime.
State v. Duran 774

23. Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.
State v. Painter 905
State v. Thompson 922

24. The State has the right to appeal a district court modification of a sentence imposed by a county court.
State v. Thompson 922

Service of Process

1. A reasonably diligent search for the purpose of justifying service by publication does not require the use of all possible or conceivable means of discovery, but is such an inquiry as a reasonably prudent person would make in view of the circumstances and must extend to those places where information is likely to be obtained and to those persons who, in the ordinary course of events, would be likely to receive news of or from the absent person.
In re Interest of A.W. 764

2. Whether all reasonable means to qualify a search as a "reasonably diligent" one have been exhausted must be determined by the circumstances of each particular case.
In re Interest of A.W. 764

Sexual Assault

A victim need not be independently corroborated on the particular acts constituting a sexual assault, but must be corroborated on the

material circumstances and facts tending to support the victim's testimony.
State v. Polyascko 272

Speedy Trial

1. The right to a speedy trial does not include the time after the defendant has been found guilty and before he is sentenced.
State v. Jameson 38
2. With certain periods of exclusion, Neb. Rev. Stat. § 29-1207 (Reissue 1985) requires that persons indicted or informed against for any offense be tried within 6 months of the filing of the information.
State v. Wilcox 138
3. Generally, the time from filing to final disposition of the defendant's pretrial motions is excluded in calculating the last permissible day for trial. Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1985).
State v. Wilcox 138
4. Judicial delay, absent a showing of good cause, does not toll the speedy trial statute.
State v. Wilcox 138
5. Regarding tolling of the speedy trial statute, the State has the burden to establish that the time comes within one of the exclusions; a failure to carry that burden warrants reversal.
State v. Wilcox 138
6. The right to a speedy trial does not grant a defendant the right to demand immediate attention or first priority.
State v. Wilcox 138
7. A defendant must accept delay as a consequence of making pretrial motions, where delay is not inordinate or unreasonable.
State v. Wilcox 138
8. Where a single pretrial motion of the defendant was under advisement for more than 1 year 3 months 23 days, the defendant was subjected to unreasonable, inordinate delay.
State v. Wilcox 138
9. The defendant is entitled to discharge of the offense charged where he was not tried within 6 months of the filing of the information. Neb. Rev. Stat. § 29-1208 (Reissue 1985).
State v. Wilcox 138

Standing

1. Notwithstanding that the statute provides that a school district is a body corporate, possesses the usual powers of a corporation for public purposes, and may sue and be sued, it is the law of this state that a school district may not maintain an action involving a change in the boundaries of a school district.
School Dist. No. 46 v. City of Bellevue 543
2. Irrespective of standing to challenge a statute for vagueness, an

individual may have standing to assert that a statute is overbroad when such statute reaches a substantial amount of constitutionally protected conduct.
State v. Copple 672

3. In determining whether standing exists for a facial challenge to a statute as overbroad, a court must first determine whether the statute reaches a substantial amount of constitutionally protected conduct. If the statutory proscription does not reach a substantial amount of constitutionally protected conduct, there is no standing to challenge a statute on the basis that the statute is overbroad, and such challenge must fail.
State v. Copple 672

4. In order to have standing 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 a law as applied to the conduct of others.
State v. Copple 672

Statutes

1. Where the same word is used repeatedly in the same act, unless the context requires otherwise, the word is to have the same meaning.
Knoell v. Huff 90

2. The Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1984), must be liberally construed to accomplish its purposes serving the best interests of juveniles within the act.
In re Interest of L.D. et al. 249

3. In a general sense an ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed.
State v. Palmer 282

4. Not all retroactive legislation is in violation of the prohibition against ex post facto laws.
State v. Palmer 282

5. A legislature may not enact any law which imposes a punishment for an act which was not punishable at the time it was committed or imposes additional punishment to that then prescribed.
State v. Palmer 282

6. Statutes which simply enlarge the class of person who may be competent to testify in criminal cases are not ex post facto in their application to prosecutions for crimes committed prior to their passage, for they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefor than was prescribed at the time of its commission, nor do they alter the degree, or lessen the amount or measure, of the

proof which was made necessary to conviction when the crime was committed.
State v. Palmer 282
7. In the absence of anything indicating the contrary, statutory language is to be given its plain and ordinary meaning.
State v. Palmer 282
8. Where the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language.
State v. Palmer 282
Watson v. Avco Financial Servs. 778
9. Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), that a murder be "especially heinous, atrocious, cruel" or "manifest exceptional depravity by ordinary standards of morality and intelligence," describes in the disjunctive at least two distinct components of the aggravating circumstance which may operate in conjunction with or independent of one another.
State v. Palmer 282
10. Penal statutes are to be strictly construed, and it is not for us to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there.
State v. Steele 476
11. A provision of a statute which does not relate to the essence of the thing to be done but governs the time or manner of performance is generally considered to be directory as opposed to mandatory.
State v. Steele 476
12. If the statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the legislature to accomplish that end.
School Dist. No. 46 v. City of Bellevue 543
13. If the legislature has made a reasonable classification, one that is not a mere cloak or cover for an arbitrary exemption of certain persons or a certain class of persons, but a natural and proper selection of those who, upon a reasonable view of the mischiefs to be met, should be subject to the regulations prescribed, and the law is made to operate generally and uniformly upon all of the class so constituted, the constitutional provision in question is not violated.
School Dist. No. 46 v. City of Bellevue 543
14. One of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give effect to that intent.
County of Lancaster v. Maser 566
15. When statutory language is ambiguous and must be construed,

recourse should be had to the legislative history for the purpose of discovering the intent of the lawmakers.
County of Lancaster v. Maser 566

16. In determining the intent of the Legislature, the Supreme Court considers the history of the legislation and the reasonableness of an interpretation, weighed against an unreasonable or absurd construction evidently not intended by the Legislature.
County of Lancaster v. Maser 566

17. Legislative history includes the record of a floor explanation or debate, which is an extrinsic, secondary source in statutory interpretation.
County of Lancaster v. Maser 566

18. Unless a cancellation statute is manifestly all-inclusive, a statute specifying the instances under which a party to an insurance contract may cancel it does not make cancellation the exclusive remedy, and it is not in derogation of other remedial rights which are recognized and implemented by other provisions of law.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

19. A statute which is clear and precise, and therefore not vague, may nonetheless fail to pass constitutional muster by virtue of being overbroad in the sense that it prohibits the exercise of constitutionally protected conduct.
State v. Copple 672

20. Irrespective of standing to challenge a statute for vagueness, an individual may have standing to assert that a statute is overbroad when such statute reaches a substantial amount of constitutionally protected conduct.
State v. Copple 672

21. In determining whether standing exists for a facial challenge to a statute as overbroad, a court must first determine whether the statute reaches a substantial amount of constitutionally protected conduct. If the statutory proscription does not reach a substantial amount of constitutionally protected conduct, there is no standing to challenge a statute on the basis that the statute is overbroad, and such challenge must fail.
State v. Copple 672

22. In order to have standing 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 a law as applied to the conduct of others.
State v. Copple 672

23. An essential purpose of a penal statute is to provide notice to the ordinary person concerning conduct which is proscribed as criminal. When a penal statute supplies an ordinary person with notice concerning conduct forbidden as criminal, such statute

meets the constitutional standard of due process.
State v. Copple 672

24. Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.
State v. Painter 905
State v. Thompson 922

Stipulations

1. An express waiver made in court or preparatory to trial by the party or his attorney conceding for the purposes of the trial the truth of some alleged fact has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted, so that the one party need offer no evidence to prove it and the other is not allowed to disprove it.
State v. Davis 205

2. A concession or stipulation as to a fact made for the purpose of trial has the force and effect of an established fact, binding on the party making the same as well as on the court, unless the court in its reasonable discretion allows the concession to be later withdrawn, explained, or modified if it appears to have been made by improvidence or mistake.
State v. Davis 205

3. Parties are bound by stipulations voluntarily made, and relief from such stipulations after judgment is warranted only under exceptional circumstances.
State v. Davis 205

4. An accused may by stipulation waive the necessity of proof of all or any part of the case which the State has alleged against him and having done so, he cannot complain of evidence which he has stipulated into the record.
State v. Davis 205

5. A party who has stipulated to the admission of evidence cannot on appeal complain about evidence admitted pursuant to and in accordance with such stipulation.
State v. Roggenkamp 914

Summary Judgment

1. Summary judgment is to be granted to the moving party where there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and the moving party is entitled to judgment as a matter of law.
Deutsche Credit Corp. v. Hi-Bo Farms, Inc. 463
Naidoo v. Union Pacific Railroad 853

2. In considering a motion for summary judgment, the evidence is to

be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all the favorable inferences which may reasonably be drawn from the evidence.
Deutsche Credit Corp. v. Hi-Bo Farms, Inc. 463
Naidoo v. Union Pacific Railroad 853

3. The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists; that party must therefore produce enough evidence to demonstrate his entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion.
Deutsche Credit Corp. v. Hi-Bo Farms, Inc. 463
Naidoo v. Union Pacific Railroad 853

4. The requirements to sustain a motion for summary judgment are the same whether one party or both parties have moved for summary judgment. Those requirements are that there be no genuine issue of material fact, nor any genuine issue regarding the ultimate inferences to be drawn therefrom, and that the moving party is entitled to judgment as a matter of law.
Bohannon v. Guardsman Life Ins. Co. 701

Supreme Court

1. The proportionality review made under the requirements of Neb. Rev. Stat. §§ 29-2521.01, 29-2521.02, and 29-2521.03 (Reissue 1985) is limited to a comparison of the facts and circumstances of the death penalty-imposed case under review with those of all applicable cases in which the death penalty was imposed.
State v. Palmer 282

2. The Nebraska Supreme Court acquires no jurisdiction of a cause appealed from a tribunal which lacked subject matter jurisdiction.
In re Complaint of Fecht 752

Taxation

1. A property owner's exclusive remedy for relief from overvaluation of property for tax purposes is by protest to the county board of equalization. An appeal may then be taken to the district court from the order of the county board of equalization fixing the assessed value of the property.
Olson v. County of Dakota 516

2. A collateral attack on valuation of property for tax purposes is permissible only if the assessment is partially or entirely void.
Olson v. County of Dakota 516

Tax Sale

The time for redemption, as such phrase is used in Neb. Rev. Stat. § 77-1902 (Reissue 1986), is the 3 years immediately following a delinquent tax sale. An action to foreclose a tax lien pursuant

to § 77-1902 can only be brought within the 90 days immediately after expiration of the time for redemption.
County of Lancaster v. Maser 566

Termination of Employment

When an employee of the city, whose duties in part are to help apprehend persons using marijuana, himself engages in such activity, such action does constitute an act unbecoming an incumbent of the particular position, does affect the efficient conduct of the business of the city, and is not in the best interest of the city government.
Ostwald v. City of Omaha 530

Theft

Where value of goods is an element of the crime charged and there is a market for the goods, the value to be proved is the market value at the time and place of the alleged crime.
State v. Clancy 492

Time

1. The right to a speedy trial does not include the time after the defendant has been found guilty and before he is sentenced.
State v. Jameson 38
2. The time for redemption, as such phrase is used in Neb. Rev. Stat. § 77-1902 (Reissue 1986), is the 3 years immediately following a delinquent tax sale. An action to foreclose a tax lien pursuant to § 77-1902 can only be brought within the 90 days immediately after expiration of the time for redemption.
County of Lancaster v. Maser 566
3. A guarantor is not discharged by an extension of time for payment or performance of the principal obligation if he consents thereto, as where the contract of guaranty expressly or impliedly provides for the extension.
First Nat. Bank v. Benedict Consol. Indus. 860

Trial

1. Ordinarily, the overruling of a motion in limine does not eliminate the need to object to the introduction of evidence in order to preserve error.
State v. Borchardt 47
2. One wishing to preserve error on the basis of remarks contained in an opening statement generally must object to the questioned remarks when made, notwithstanding the overruling of a motion in limine.
State v. Borchardt 47
3. A litigant may rely on a trial judge's announcement of what he or she will permit an opponent to do.
State v. Borchardt 47

4. Evidence of a test result cannot be characterized as "scientific" or qualify as "technical or other specialized knowledge," and thus within the purview of Neb. Rev. Stat. § 27-702 (Reissue 1985), unless and until it is established that the test result demonstrates what it is claimed to demonstrate.
State v. Borchardt 47

5. In resolving a challenge to the sufficiency of the evidence, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such is for the trier of fact and must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Borchardt 47

6. The decision as to whether to call a witness is a matter of trial strategy within counsel's judgment.
State v. Evans 64

7. In an evidentiary hearing, as a bench trial provided by Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985) for postconviction relief, the trial judge, as the "trier of fact," resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony.
State v. Williams 114

8. A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the witness' testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)).
State v. Williams 114

9. A valid guilty plea waives the right to a trial, whether a trial by jury or without a jury, and waives the right to counsel, including the right to court-appointed counsel in an otherwise appropriate case.
State v. Kennedy 164

10. The admission or exclusion of evidence is a matter left largely to the sound discretion of the trial judge.
State v. Kern 177

11. Where first degree murder is charged, the elements of both premeditation and intent are for the jury.
State v. Kern 177

12. An express waiver made in court or preparatory to trial by the party or his attorney conceding for the purposes of the trial the truth of some alleged fact has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted, so that the one party need offer no evidence to prove it and the other is not allowed to disprove it.
State v. Davis 205

13. A concession or stipulation as to a fact made for the purpose of trial has the force and effect of an established fact, binding on the party making the same as well as on the court, unless the court in its reasonable discretion allows the concession to be later withdrawn, explained, or modified if it appears to have been made by improvidence or mistake.
State v. Davis 205
14. Parties are bound by stipulations voluntarily made, and relief from such stipulations after judgment is warranted only under exceptional circumstances.
State v. Davis 205
15. An accused may by stipulation waive the necessity of proof of all or any part of the case which the State has alleged against him and having done so, he cannot complain of evidence which he has stipulated into the record.
State v. Davis 205
16. While a more severe punishment cannot be exacted because a defendant pleads not guilty and puts the State to the expense of a trial, a defendant nonetheless has no absolute right to a reduced sentence because he saves the State the expense of going to trial.
State v. Suffredini 220
17. No one has a vested right in a procedure; procedural matters can be changed at any time before trial and are binding on the defendant.
State v. Palmer 282
18. The receipt of evidence which may later be excluded because of a difficult or complicated rule of law does not constitute judicial misconduct.
State v. Palmer 282
19. Determinations as to the qualifications of a person to be a witness or the admissibility of evidence are matters left to the sound discretion of the trial court, whose rulings will not be upset absent an abuse of discretion.
State v. Burchett 444
State v. Clancy 492
20. The decision to call, or not to call, a particular witness is a matter of trial strategy. Even if that choice proves ineffective, it will not, without more, sustain a finding of ineffectiveness of counsel.
State v. Fries 482
21. Lack of jury members of the same race as the defendant, standing alone, does not support a claim of improper racial composition of the jury.
State v. Falkner 490
22. All that the Constitution forbids is systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels. The burden is

on the defendant to allege and prove such systematic exclusion.
State v. Falkner 490

23. Generally, this court will not consider for the first time on appeal issues not properly raised in the pleadings nor litigated at trial.
Leseberg v. Meints 533

24. "(1) A statement is (a) an oral or written assertion or (b) nonverbal conduct of a person if it is intended by him as an assertion. . . . (3) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Neb. Evid. R. 801 (Neb. Rev. Stat. § 27-801 (Reissue 1985)).
State v. Copple 672

25. Prima facie proof of a case is less stringent than proof by a preponderance of the evidence. A "prima facie" case requires only enough evidence to take the question to the jury, whereas "preponderance of the evidence" requires proof which leads the jury to find the existence of the contested fact is more probable than its nonexistence.
State v. Copple 672

26. When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given in evidence.
Chirnside v. Lincoln Tel. & Tel. Co. 784

27. Generally, the rule of completeness is concerned with the danger of admitting a statement out of context. When this danger is not present it is not an abuse of discretion to fail to require the production of the remainder or, if it cannot be produced, to fail to exclude all the evidence.
Chirnside v. Lincoln Tel. & Tel. Co. 784

28. Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion, and where the opinion is based on the facts shown not to be true the opinion lacks probative value.
Latek v. K Mart Corp. 807

29. In a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal.
State v. Pointer 892
State v. Roggenkamp 914

30. It is within the sound discretion of the trial court to allow testimony from a witness who is in violation of a sequestration order.
State v. Pointer 892

31. Error may not be predicated on a ruling which admits evidence unless a substantial right of a party is affected and a timely objection appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context. Neb. Evid. R. 103(1)(a) (Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1985)).
State v. Roggenkamp 914

32. If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error.
State v. Roggenkamp 914

33. A party who has stipulated to the admission of evidence cannot on appeal complain about evidence admitted pursuant to and in accordance with such stipulation.
State v. Roggenkamp 914

Trusts

1. One who claims the existence of a constructive trust has the burden of proof to establish the existence of a constructive trust by evidence which is clear, satisfactory, and convincing in character.
In re Estate of Redpath 845

2. As a general rule, provided the property can be traced or identified, any third person who has obtained trust property or its product by a transfer made in violation of the trust may be subject to a constructive trust. It is necessary, however, that the property can be traced or identified.
In re Estate of Redpath 845

3. If the trustee makes a withdrawal from the mixed account for an admittedly personal purpose, for example, to pay his living expenses or his individual debts, or for an unknown purpose, such withdrawal will be charged to the personal part of the account as long as there remains any cash or credit in such personal portion of the account. It will be only after the personal credit or cash is exhausted that withdrawals for personal or unknown purposes will be charged to the trust side of the account.
In re Estate of Redpath 845

4. When a trustee wrongfully commingles trust money with his own and makes payments from the common fund, it will be presumed that he paid out his own money, and not the trust money.
In re Estate of Redpath 845

Uniform Commercial Code

1. A guarantor, being one "who owes payment or other performance of the obligation secured," is a "debtor" as defined in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980), and is thus entitled to notice

of sale of collateral under the provisions of Neb. U.C.C. § 9-504(3) (Reissue 1980).
Deutsche Credit Corp. v. Hi-Bo Farms, Inc. 463

2. An ambiguity in a notice sent pursuant to the requirements of Neb. U.C.C. § 9-504(3) (Reissue 1980) is to be resolved against the drafter of the notice.
Deutsche Credit Corp. v. Hi-Bo Farms, Inc. 463

Valuation

1. A property owner's exclusive remedy for relief from overvaluation of property for tax purposes is by protest to the county board of equalization. An appeal may then be taken to the district court from the order of the county board of equalization fixing the assessed value of the property.
Olson v. County of Dakota 516

2. A collateral attack on valuation of property for tax purposes is permissible only if the assessment is partially or entirely void.
Olson v. County of Dakota 516

Value of Goods

Where value of goods is an element of the crime charged and there is a market for the goods, the value to be proved is the market value at the time and place of the alleged crime.
State v. Clancy 492

Vendor and Vendee

In order to maintain an action for damages for fraudulent concealment or false representation by suppression or concealment in the vendor/purchaser setting, the plaintiff must allege and prove by a preponderance of the evidence the following elements: (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled as to the true condition of the property; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result.
Nelson v. Cheney 756

Venue

1. To secure a change of venue the defendant must show that pretrial publicity has made it impossible to secure a fair and impartial jury.
State v. Heathman 19

2. A motion for change of venue filed pursuant to Neb. Rev. Stat. § 29-1301.01 (Reissue 1985) is addressed to the sound discretion of the trial court, whose ruling will not be disturbed absent a clear abuse of that discretion.
State v. Kern 177

3. A trial court abuses its discretion in denying a motion for change of venue where the defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial.
State v. Kern 177

4. The factors used to determine whether a change of venue should have been granted due to pretrial publicity include 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 selection of the jury; the number of challenges exercised during the voir dire; the severity of the offense charged; and the size of the area from which the venire is drawn.
State v. Kern 177

Verdicts

1. After a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of the evidence if the evidence sustains some rational theory of guilt.
State v. Borchardt 47
State v. Painter 905

2. In reviewing the sufficiency of the evidence, it is not within this court's province to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Baker 130
State v. Palmer 282
State v. Burchett 444

3. After a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence if the evidence sustains some rational theory of guilt.
State v. Kern 177

4. A guilty verdict will not be reversed by this court on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law.
State v. Painter 905

Wages

The wage rate is to be computed according to the contract of hire in force at the time of the accident.
Hayes v. A.M. Cohron, Inc. 579

Waiver

1. A waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.
State v. Kennedy 164

2. A voluntary waiver, knowingly and intelligently made, must affirmatively appear from the record, before a court may conclude that a defendant has waived a right constitutionally guaranteed or granted by statute.
State v. Kennedy 164

3. A plea of guilty embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional, except the defense that the indictment, information, or complaint is not sufficient to charge an offense.
State v. Kennedy 164

4. A valid guilty plea waives the right to a trial, whether a trial by jury or without a jury, and waives the right to counsel, including the right to court-appointed counsel in an otherwise appropriate case.
State v. Kennedy 164

5. An express waiver made in court or preparatory to trial by the party or his attorney conceding for the purposes of the trial the truth of some alleged fact has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted, so that the one party need offer no evidence to prove it and the other is not allowed to disprove it.
State v. Davis 205

6. A concession or stipulation as to a fact made for the purpose of trial has the force and effect of an established fact, binding on the party making the same as well as on the court, unless the court in its reasonable discretion allows the concession to be later withdrawn, explained, or modified if it appears to have been made by improvidence or mistake.
State v. Davis 205

7. Parties are bound by stipulations voluntarily made, and relief from such stipulations after judgment is warranted only under exceptional circumstances.
State v. Davis 205

8. An accused may by stipulation waive the necessity of proof of all or any part of the case which the State has alleged against him and having done so, he cannot complain of evidence which he has stipulated into the record.
State v. Davis 205

9. As any other formal matter, an absence of, or defect in, verification is waived by failure to make a proper and timely objection.
In re Interest of L.D. et al. 249

10. A sufficiently complete checklist or other docket entry may be used to establish a valid waiver of counsel for enhancement purposes.
State v. Foster 267

11. To use a prior conviction as a basis for enhancement, the State need only show that the convicted defendant had, or waived, counsel at the time of such prior conviction. Other objections to the validity of such prior conviction constitute collateral attacks on that prior conviction and must be raised either by direct appeal from the prior conviction or in separate proceedings commenced expressly for the purpose of setting aside such prior conviction as an invalid judgment.
State v. Davis 518

12. A voluntary waiver of the constitutional right to a jury trial must be express and intelligent.
State v. Bishop 522

13. A demand is required to invoke the statutory right to a jury trial for a petty offense in county court. A failure to file a timely request in accordance with the rules of court constitutes a waiver of the statutory right to a jury trial.
State v. Bishop 522
State v. Lafler 613

14. A waiver of the constitutional right to a jury trial cannot be presumed from a silent record.
State v. Lafler 613

15. Some act or conduct amounting to a recognition of the continued validity of an insurance policy as a binding obligation upon an insurer is necessary to constitute an effective waiver of the policy provision for forfeiture for nonpayment of premiums.
Bohannon v. Guardsman Life Ins. Co. 701

16. An insurer, with full knowledge of the nonpayment of a monthly premium, which nevertheless demands and receives payment of the premium for the succeeding month, may have waived the policy provision for forfeiture for nonpayment of the preceding monthly premium.
Bohannon v. Guardsman Life Ins. Co. 701

Wills

1. The cardinal rule concerning a decedent's will is the requirement that the intention of the testator or testatrix shall be given effect, unless the maker of the will attempts to accomplish a purpose, or to make a disposition, contrary to some rule of law or public policy.
In re Estate of Walker 812

2. To arrive at a testator's or testatrix's intention expressed in a will, a court must examine the decedent's will in its entirety, consider and liberally interpret every provision in a will, employ the generally accepted literal and grammatical meaning of words used in the

will, and assume that the maker of the will understood words stated in the will.
In re Estate of Walker 812

3. When language in a will is clear and unambiguous, construction of a will is unnecessary and impermissible. As a corollary of this rule, when ambiguity exists in a testamentary provision, construction of a will is necessary.
In re Estate of Walker 812

4. Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings.
In re Estate of Walker 812

5. A patent ambiguity is one which exists on the face of an instrument.
In re Estate of Walker 812

6. *Construction* includes the process of determining the correct sense, real meaning, or proper explanation of an ambiguous term, phrase, or provision in a written instrument.
In re Estate of Walker 812

7. When patent ambiguity exists in a will, a court must resolve such ambiguity as a matter of law.
In re Estate of Walker 812

8. Neb. Rev. Stat. § 24-519 (Reissue 1985) expressly denies to an associate county judge who is not an attorney at law the power to construe a will.
In re Estate of Walker 812

Witnesses

1. The decision as to whether to call a witness is a matter of trial strategy within counsel's judgment.
State v. Evans 64

2. In an evidentiary hearing, as a bench trial provided by Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985) for postconviction relief, the trial judge, as the "trier of fact," resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony.
State v. Williams 114

3. The credibility of a witness may be attacked by any party, including the party calling him. Neb. Evid. R. 607 (Neb. Rev. Stat. § 27-607 (Reissue 1985)).
State v. Williams 114

4. A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the witness' testimony and was given under oath subject to the penalty of

perjury at a trial, hearing, or other proceeding, or in a deposition. Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)).
State v. Williams 114

5. Subject to the exception specified in Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)), a witness' inconsistent statement may be admissible evidence to aid the jury in evaluating that witness' credibility, but a witness' inconsistent statement is not substantive evidence of the matter asserted unless such statement is otherwise admissible under the Nebraska Evidence Rules.
State v. Williams 114

6. Witness credibility and the weight to be given a witness' testimony are matters for evaluation and determination by the jury.
State v. Williams 114

7. A witness is not rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case. Such a witness may testify with regard to those matters which he or she was able to recall and relate prior to hypnosis, provided that there is sufficient evidence to satisfy the court that the evidence was known and related prior to hypnosis.
State v. Palmer 282

8. In a prosecution for a crime of violence, the defendant's spouse may be called to testify against the defendant as to any matter, including confidential communications. Neb. Rev. Stat. § 27-505(3)(a) (Reissue 1985).
State v. Burchett 444

9. An accomplice's testimony is admissible notwithstanding the fact that the testimony is procured by means of a plea bargain.
State v. Burchett 444

10. The promise of leniency or otherwise favorable prosecutorial treatment goes only to the credibility of the accomplice's testimony, not to its admissibility.
State v. Burchett 444

11. Generally, it is only where the prosecution has bargained for false or specific testimony, or a specific result, that an accomplice's testimony is so tainted as to require its preclusion.
State v. Burchett 444

12. Determinations as to the qualifications of a person to be a witness or the admissibility of evidence are matters left to the sound discretion of the trial court, whose rulings will not be upset absent an abuse of discretion.
State v. Burchett 444

13. The decision to call, or not to call, a particular witness is a matter of trial strategy. Even if that choice proves ineffective, it will not, without more, sustain a finding of ineffectiveness of counsel.
State v. Fries 482

14. Under Neb. Evid. R. 404(2), a defendant's attempted intimidation or intimidation of a State's informant or witness is relevant evidence concerning the defendant's conscious guilt that a crime has been committed. Neb. Rev. Stat. § 27-404(2) (Reissue 1985).
State v. Clancy 492

15. At a hearing to determine whether the State had violated its agreement for immunity and restricted evidence or information, the State must present a prima facie case that it has fulfilled its agreement with the defendant, that is, demonstrate that the State's evidence, to be adduced at the defendant's trial, was obtained from a source or sources independent of the defendant and not by direct or indirect use of information obtained from the defendant as the result of defendant's agreement for immunity and restricted evidence or information.
State v. Copple 672

16. Whether a witness is qualified as an expert is a preliminary question for a trial court. Neb. Evid. R. 104(1) (Neb. Rev. Stat. § 27-104(1) (Reissue 1985)). Determination of a witness' qualification as an expert is a matter within the sound discretion of a trial court, whose ruling will be upheld unless such ruling constitutes an abuse of discretion.
State v. Copple 672

17. As the "trier of fact," the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony. Entering into a resolution by the Workers' Compensation Court regarding any conflict of evidence are factors such as the respective interests of the parties in the lawsuit; demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by the witnesses; the extent to which the testimony of the various witnesses was corroborated; and the reasonableness or unreasonableness of statements of such witnesses.
Norris v. Iowa Beef Processors 867

18. It is within the sound discretion of the trial court to allow testimony from a witness who is in violation of a sequestration order.
State v. Pointer 892

Words and Phrases

1. Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."
State v. Bowersmith 6

2. Intent is the state of mind operative at the time of an action.
State v. Robb 14

3. Evidence of a test result cannot be characterized as "scientific" or qualify as "technical or other specialized knowledge," and thus within the purview of Neb. Rev. Stat. § 27-702 (Reissue 1985), unless and until it is established that the test result demonstrates what it is claimed to demonstrate.
State v. Borchardt 47
4. The language of Neb. Rev. Stat. § 28-907(1)(a) (Reissue 1985), "to impede the investigation of an actual criminal matter," includes the impeding of the gathering of information as to the identity of a defendant named in an arrest warrant.
State v. Nissen 60
5. In cases of alleged ineffective assistance of counsel, prejudice has been characterized as a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
State v. Williams 114
6. A waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.
State v. Kennedy 164
7. A petition, as a pleading, is a plaintiff's or claimant's written statement of fact which invokes the jurisdiction of a court, sets out a cause of action, and seeks relief.
In re Interest of K.D. et al. 249
8. A "crime" is an act or omission for which one is subject to punishment by public authority.
State v. Palmer 282
9. "Violence" is the exertion of physical force so as to injure or abuse.
State v. Palmer 282
10. "Crime of violence" is an act which injures or abuses through the use of physical force and which subjects the actor to punishment by public authority.
State v. Palmer 282
11. Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), that a murder be "especially heinous, atrocious, cruel" or "manifest exceptional depravity by ordinary standards of morality and intelligence," describes in the disjunctive at least two distinct components of the aggravating circumstance which may operate in conjunction with or independent of one another.
State v. Palmer 282
12. The words "especially heinous, atrocious, cruel," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), mean a conscienceless or pitiless crime which is unnecessarily torturous to the victim.
State v. Palmer 282

13. The phrase "exceptional depravity," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), refers and 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 282

14. For the purpose of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), "exceptional depravity" exists when the act is totally and senselessly bereft of any regard for human life as shown by the presence of the following circumstances, either separately or collectively: (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.
State v. Palmer 282

15. A guarantor, being one "who owes payment or other performance of the obligation secured," is a "debtor" as defined in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980), and is thus entitled to notice of sale of collateral under the provisions of Neb. U.C.C. § 9-504(3) (Reissue 1980).
Deutsche Credit Corp. v. Hi-Bo Farms, Inc. 463

16. 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 1985)).
State v. Clancy 492
State v. Copple 672

17. The definition of "accident," as used in Neb. Rev. Stat. § 48-101 (Reissue 1984), includes injuries resulting from activities which create a series of repeated traumas ultimately producing disability.
Hayes v. A.M. Cohron, Inc. 579

18. The meaning of words used by medical experts at times presents a problem of interpretation which may be resolved by the sense in which they were used.
Hayes v. A.M. Cohron, Inc. 579

19. The cancellation of an insurance policy is not a rescission, since a rescission avoids the contract ab initio. A cancellation merely terminates the policy as of the time when the cancellation becomes effective.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

20. Indigency, as used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), means the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family.
State v. Lafler 613

21. A demurrer ore tenus is an objection to the receipt of evidence.
Lease Northwest v. Davis 617

22. "(1) A statement is (a) an oral or written assertion or (b) nonverbal conduct of a person if it is intended by him as an assertion. . . . (3) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Neb. Evid. R. 801 (Neb. Rev. Stat. § 27-801 (Reissue 1985)).
State v. Copple 672

23. *Conceal* means to hide, secrete, or withhold from knowledge of others; to withhold from utterance or declaration; to cover or keep from sight; to hide or withdraw from observation, cover or keep from sight, or prevent discovery. The word *conceal* pertains to affirmative action likely to prevent or intended to prevent knowledge of a fact and has reference to some advantage to the concealing party or a disadvantage to some interested party from whom the fact is withheld.
State v. Copple 672

24. As used in Neb. Rev. Stat. § 39-669.07 (Reissue 1984), the phrase "under the influence of alcoholic liquor" means after the ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner.
State v. Burling 725

25. "Competent evidence" is that which tends to establish the fact in issue; that which is admissible and relevant on the point in issue.
State v. Burling 725

26. Under Neb. Rev. Stat. § 48-1101 (Reissue 1984), "disability" designates a protected class regarding employment in Nebraska. By virtue of Neb. Rev. Stat. § 48-1102(8) (Reissue 1984), "epilepsy" is included within the definition of a "disability," but only if such epilepsy is "unrelated to such person's ability to engage in a particular occupation."
Father Flanagan's Boys' Home v. Goerke 731

27. The principal element of a conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another.
Steed v. Oak Ridge Equestrian Ctr. 792

28. Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings.
In re Estate of Walker 812

29. A patent ambiguity is one which exists on the face of an instrument.
In re Estate of Walker 812

30. *Construction* includes the process of determining the correct sense, real meaning, or proper explanation of an ambiguous term,

phrase, or provision in a written instrument.
In re Estate of Walker 812

31. A judgment is the final consideration and determination of a court on matters submitted to it in an action or proceeding.
Black v. Sioux City Foundry Co. 824

32. With the exception of increased disability resulting from additional injury to the same specific member of the body, as classified by Neb. Rev. Stat. § 48-121(3) (Reissue 1984), *disability*, for the purpose of Neb. Rev. Stat. § 48-128 (Reissue 1984) means the decrease or loss of earning power (capacity) or diminished employability.
Norris v. Iowa Beef Processors 867

33. Under Neb. Rev. Stat. § 48-128 (Reissue 1984), a combination of permanent disabilities is "substantially greater" than permanent disability from the second or subsequent injury when the resulting permanent disability from all causes combined is substantially greater than the disability resulting solely from the second or subsequent compensable injury.
Norris v. Iowa Beef Processors 867

Workers' Compensation

1. The definition of "accident," as used in Neb. Rev. Stat. § 48-101 (Reissue 1984), includes injuries resulting from activities which create a series of repeated traumas ultimately producing disability.
Hayes v. A.M. Cohron, Inc. 579

2. Neb. Rev. Stat. § 48-168 (Reissue 1984) provides, among other things, that the compensation court shall not be bound by any technical or formal rules of procedure.
Hayes v. A.M. Cohron, Inc. 579

3. A workers' compensation plaintiff has the burden of proving that an injury resulted from an accident arising out of and in the course of employment.
Hayes v. A.M. Cohron, Inc. 579

4. If it is claimed that the injury was the result of employment exertion, the evidence must show that the employment contributed to the cause of the injury in some material and substantial degree.
Hayes v. A.M. Cohron, Inc. 579

5. The presence of a preexisting condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment.
Hayes v. A.M. Cohron, Inc. 579

6. The wage rate is to be computed according to the contract of hire in force at the time of the accident.
Hayes v. A.M. Cohron, Inc. 579

7. The findings of fact made by the compensation court have the

same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
Bender v. Norfolk Iron & Metal Co. 706
Norris v. Iowa Beef Processors 867

8. The right of an injured workman to receive vocational rehabilitation benefits depends upon his inability to perform work for which he has previous training and experience.
Bender v. Norfolk Iron & Metal Co. 706

9. Factual determinations of the Workers' Compensation Court will not be set aside on appeal unless they are clearly wrong.
Ward v. City of Mitchell 711

10. We must consider the evidence in the light most favorable to the successful party, when testing the sufficiency of the evidence supporting the Workers' Compensation Court's findings of fact.
Ward v. City of Mitchell 711
Norris v. Iowa Beef Processors 867

11. When the record presents nothing more than conflicting medical testimony, the Supreme Court will not substitute its judgment for that of the Workers' Compensation Court.
Ward v. City of Mitchell 711

12. There is no procedure under the Nebraska Workers' Compensation Act which authorizes the compensation court to clarify an award on rehearing when more than 10 days have elapsed from the date on which the findings were made in the rehearing.
Black v. Sioux City Foundry Co. 824

13. In the absence of specific statutory authority to correct an ambiguity by a procedure other than as described in Neb. Rev. Stat. § 48-180 (Reissue 1984), the compensation court does not have authority to enter an order revising one of its awards.
Black v. Sioux City Foundry Co. 824

14. Under the statutory scheme of Neb. Rev. Stat. § 48-128 (Reissue 1984), the amount payable from the Second Injury Fund is, ordinarily, the difference between the weekly benefits payable for permanent disability from a second injury which is compensable and the weekly benefits payable for the combined permanent disabilities from a previous injury and such second injury.
Norris v. Iowa Beef Processors 867

15. To recover from the Second Injury Fund, Neb. Rev. Stat. § 48-128 (Reissue 1984), a claimant must prove by a preponderance of evidence (1) a prior permanent partial disability, (2) a second or subsequent injury which is compensable, causing permanent disability, and (3) the combination of permanent disabilities existing after such second or subsequent injury is substantially greater in degree or percentage than permanent disability from the second or subsequent injury, considered by itself and not in

conjunction with the prior permanent disability.
Norris v. Iowa Beef Processors 867
16. One claiming against the Second Injury Fund, Neb. Rev. Stat. § 48-128 (Reissue 1984), has the burden to prove that the combination of permanent disabilities is substantially greater in degree or percentage than the permanent disability from the second or subsequent compensable injury considered by itself.
Norris v. Iowa Beef Processors 867
17. Whether a combination of permanent disabilities, within the purview of Neb. Rev. Stat. § 48-128 (Reissue 1984), is substantially greater than permanent disability from a second or subsequent compensable injury is a question of fact.
Norris v. Iowa Beef Processors 867
18. Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly wrong. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, Neb. Rev. Stat. § 48-185 (Reissue 1984) precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court.
Norris v. Iowa Beef Processors 867
19. As the "trier of fact," the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony. Entering into a resolution by the Workers' Compensation Court regarding any conflict of evidence are factors such as the respective interests of the parties in the lawsuit; demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by the witnesses; the extent to which the testimony of the various witnesses was corroborated; and the reasonableness or unreasonableness of statements of such witnesses.
Norris v. Iowa Beef Processors 867
20. With the exception of increased disability resulting from additional injury to the same specific member of the body, as classified by Neb. Rev. Stat. § 48-121(3) (Reissue 1984), *disability*, for the purpose of Neb. Rev. Stat. § 48-128 (Reissue 1984) means the decrease or loss of earning power (capacity) or diminished employability.
Norris v. Iowa Beef Processors 867
21. In addition to establishing an employee's decrease or loss of earning power or diminished employability, a claimant seeking payment from the Second Injury Fund must also establish that, after the second or subsequent compensable injury, an employee's combined permanent disabilities are *substantially greater* than the

permanent disability from the last compensable injury considered by itself.
Norris v. Iowa Beef Processors 867
22. Under Neb. Rev. Stat. § 48-128 (Reissue 1984), a combination of permanent disabilities is "substantially greater" than permanent disability from the second or subsequent injury when the resulting permanent disability from all causes combined is substantially greater than the disability resulting solely from the second or subsequent compensable injury.
Norris v. Iowa Beef Processors 867
23. For the combination of permanent disabilities necessary to sustain a claim against the Second Injury Fund, the prior permanent partial disability or disabilities must interact with the effects of the second or subsequent compensable injury and enhance the permanent disability that otherwise results from the later compensable injury alone.
Norris v. Iowa Beef Processors 867
24. In an appeal after rehearing in the Nebraska Workers' Compensation Court, the Supreme Court will consider only those issues or questions properly presented and disposed in the Nebraska Workers' Compensation Court.
Norris v. Iowa Beef Processors 867