Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub
07/25/2026 09:15 PM CDT

REPORTS OF CASES

DECIDED BETWEEN

MARCH 20, 1987 and JULY 16, 1987

IN THE

Supreme Court of Nebraska

VOLUME CCXXV

TRINA SOLLARS

OFFICIAL REPORTER

PUBLISHED BY

THE STATE OF NEBRASKA

LINCOLN

1988

Copyright A. D. 1988

BY TRINA SOLLARS, REPORTER OF THE SUPREME COURT

For the benefit of the State of Nebraska

SUPREME COURT
DURING THE PERIOD OF THESE REPORTS

NORMAN KRIVOSHA, Chief Justice
LESLIE BOSLAUGH, Associate Justice
C. THOMAS WHITE, Associate Justice
WILLIAM C. HASTINGS, Associate Justice
D. NICK CAPORALE, Associate Justice
THOMAS M. SHANAHAN, Associate Justice
JOHN T. GRANT, Associate Justice

TRINA SOLLARS	Acting Reporter
STEVEN R. SCHROEDER	Administrative Assistant
MAUREEN HUTFLESS	Administrative Assistant[1]
JILL GUSTAFSON	Administrative Assistant
LANET ASMUSSEN	Acting Clerk
JOHN D. CARIOTTO	Acting Clerk[2]
JAN CULVER	Deputy Clerk
KENNETH A. WADE	Acting Deputy Clerk[3]
JO FRIEDLI	Bailiff[4]
JUDY DIETZ	Appellate Clerk
PAMELA J. KRAUS	Appellate Clerk

[1]Appointed May 1, 1987
[2]Until June 22, 1987
[3]Until June 22, 1987
[4]Appointed May 13, 1987

DEPARTMENT OF JUSTICE

ROBERT M. SPIRE ..... Attorney General
A. EUGENE CRUMP ..... Deputy Attorney General
JOHN R. THOMPSON ..... Deputy Attorney General, Tort Claims
BERNARD L. PACKETT ..... Assistant Attorney General
MELVIN K. KAMMERLOHR ..... Assistant Attorney General
WARREN D. LICHTY, JR. ..... Assistant Attorney General
HAROLD I. MOSHER ..... Assistant Attorney General
GARY R. WELCH ..... Assistant Attorney General
ROYCE N. HARPER ..... Assistant Attorney General
WILLIAM J. ORESTER ..... Assistant Attorney General
ROBERT G. AVEY ..... Assistant Attorney General
JOHN E. BROWN ..... Assistant Attorney General
MARILYN B. HUTCHINSON ..... Assistant Attorney General
SHARON M. LINDGREN ..... Assistant Attorney General
LYNNE RAE FRITZ ..... Assistant Attorney General
DALE A. COMER ..... Assistant Attorney General
MARTEL J. BUNDY ..... Assistant Attorney General
MARK D. STARR ..... Assistant Attorney General
LINDA L. WILLARD ..... Assistant Attorney General
L. JAY BARTEL ..... Assistant Attorney General
JILL GRADWOHL SCHROEDER ..... Assistant Attorney General
LEROY W. SIEVERS ..... Assistant Attorney General
CHARLES E. LOWE ..... Assistant Attorney General
YVONNE E. GATES ..... Assistant Attorney General
LAURA L. FREPPEL ..... Assistant Attorney General
JANIE C. CASTANEDA ..... Assistant Attorney General
WILLIAM L. HOWLAND ..... Assistant Attorney General
SUSAN M. UGAI ..... Assistant Attorney General
STEVEN J. MOELLER ..... Assistant Attorney General
JAMES H. SPEARS ..... Assistant Attorney General
FREDRICK F. NEID ..... Assistant Attorney General
JEFFERY T. SCHROEDER ..... Assistant Attorney General
LISA D. MARTIN-PRICE ..... Assistant Attorney General
ELAINE A. CATLIN ..... Assistant Attorney General
MARIE C. PAWOL ..... Assistant Attorney General

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Johnson, Pawnee, Nemaha, and Richardson	Robert T. Finn	Tecumseh
Second	Sarpy, Cass, and Otoe	Ronald E. Reagan	Papillion
		Raymond J. Case	Plattsmouth
		George A. Thompson	Papillion
Third	Lancaster	Robert R. Camp	Lincoln
		William D. Blue	Lincoln
		Dale E. Fahrnbruch	Lincoln
		Donald E. Endacott	Lincoln
		Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
Fourth	Douglas	Donald J. Hamilton	Omaha
		James A. Buckley	Omaha
		John E. Clark	Omaha
		James M. Murphy	Omaha
		Jerry M. Gitnick	Omaha
		Paul J. Hickman	Omaha
		Keith Howard	Omaha
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		Lawrence Corrigan	Omaha
		Theodore L. Carlson	Omaha
		J. Patrick Mullen	Omaha
Fifth	Hamilton, Polk, York, Butler, Seward, and Saunders	William H. Norton	Osceola
		Bryce Bartu	Seward
Sixth	Burt, Thurston, Dodge, and Washington	Mark J. Fuhrman	Fremont
		Darvid D. Quist	Blair
Seventh	Fillmore, Saline, Thayer, and Nuckolls	Orville L. Coady	Hebron

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Eighth	Dakota, Dixon, and Cedar	Robert E. Otte	Dakota City
Ninth	Knox, Antelope, Cuming, Pierce, Madison, Stanton, and Wayne	Merritt C. Warren Richard P. Garden	Creighton Norfolk
Tenth	Adams, Clay, Phelps, Kearney, Harlan, Franklin, and Webster	Bernard Sprague William G. Cambridge	Red Cloud Hastings
Eleventh	Hall and Howard	Joseph D. Martin William H. Riley	Grand Island Grand Island
Twelfth	Sherman and Buffalo	DeWayne Wolf	Kearney
Thirteenth	McPherson, Logan, Lincoln, Dawson, Keith, Arthur, Hooker, and Thomas	Donald E. Rowlands II John P. Murphy	North Platte North Platte
Fourteenth	Chase, Hayes, Frontier, Furnas, Red Willow, Hitchcock, Perkins, Gosper, and Dundy	Jack H. Hendrix	McCook
Fifteenth	Brown, Keya Paha, Boyd, Rock, Holt, and Cherry	Edward E. Hannon	O'Neill
Sixteenth	Sheridan, Grant, Dawes, Box Butte, Morrill, and Sioux	Robert R. Moran Paul D. Empson	Alliance Chadron
Seventeenth	Scotts Bluff	Alfred J. Kortum Robert O. Hippe	Gering Gering
Eighteenth	Jefferson and Gage	William B. Rist	Beatrice
Nineteenth	Banner, Kimball, Cheyenne, Garden, and Deuel	John D. Knapp	Kimball
Twentieth	Blaine, Loup, Garfield, Greeley, Wheeler, Valley, and Custer	Ronald D. Olberding	Burwell
Twenty-first	Boone, Platte, Colfax, Nance, and Merrick	John C. Whitehead John M. Brower	Columbus Fullerton

ATTORNEYS

Admitted Since the Publication of Volume 224

JOHN LAWRENCE APKER
MELCHIOR BALTAZAR
BRADLEY ALAN BEAM
THEODORA MAYE ALLISON BEAM
JEFFREY ALLEN BOEHLERT
MICHAEL JOSEPH COLABELLO
THAINE MAURICE CROWN, JR.
JAMES ELLIOT DAWSON
J. ANTHONY DERUNGS
ALAN DEAN DIETRICH
SUSAN LESLIE DURHAM
MARY JANE EGR
ANN CLARE FLETCHER
PATRICK MICHAEL FORD
TRENTON D. HAMPTON
THOMAS J. HELGET
WALTER CURTIS HEWETT
MARTIN KEITH HOLLAND
EVERETT E. HOYT
DOUGLAS DENTON JOHNSON
DANIEL P. KAPSAK
PHILLIP J. KAVANAUGH
DENISE KAY KNEIFL
TERESA CHRISTINE KOPRIVA
DOUGLAS E. KOZENY
SHEILAH LORRAINE LAPE
PHILIP JOHN MAHONEY
REBECCA LYNN MASER
THOMAS MORGAN MCNEELY, JR.
DANIEL OLIVER MINGUS
KAREN ANN MORAUSKI
GARY DEAN OLSON
LISA ANNE PENLAND
BRUCE R. RIEKER
DAVID JONATHAN RILEY
MATTHEW JOSEPH SEVERIN
JOHN KARL SHUNK
CONNIE MAE SKRIVANEK
JEANETTE SMITH
MARTHA JANE SMITH
BETH L. TALLON
CAROL L. TANKO
MARIE ANGELA VANDERHEIDEN
MICHAEL CORNELL WALLACE
BETH ELAINE WALSTON
MICHAEL R. WORTMAN

TABLE OF CASES REPORTED

Adams County; Lemburg v. 289
Affiliated FM Ins. Co.; United States Fire Ins. Co. v. 218
Aldridge v. School Dist. of North Platte 580
Andersen v. Andersen 439
Anderson v. Gunter 637
Arbor Manor, Inc.; Maly v. 276

Bailey; State v. 66
Banks v. Mercy Villa Care Center 751
Bird Head; State v. 822
Bituminous Casualty Corp. v. Deyle 82
Blaser v. Blaser 104
Board of Equal.; Gordman Properties Co. v. 169
Boren v. State Farm Mut. Auto. Ins. Co. 503
Brown; State v. 418
Brunken v. City of Omaha 410
Buffalo Cty. Bd. of Equal.; Campus Lt. Hse. Min. v. 271
Burke; State v. 625
Byram; State ex rel. NSBA v. 673

C.G.C.S., In re Interest of 605
C.R.S., In re Interest of 436
Campus Lt. Hse. Min. v. Buffalo Cty. Bd. of Equal. 271
Carlson; State v. 490
Central Reserve Life; Malerbi v. 543
Chilton Accts. Rec. Mgmt. v. Project Life Min. 482
City of Omaha; Brunken v. 410
City of Omaha; Thies v. 817

Dahl v. Dahl 501
Department of Public Institutions; Rocek v. 247
Desai; Havlicek v. 222
Deyle; Bituminous Casualty Corp. v. 82
Ditloff v. State Farm Fire & Cas. Co. 375
Dodge County Bd. of Equal.; Fremont Plaza v. 303
Donnelson; State v. 41

El-Tabech; State v. 395

Farmers Co-op Exch.; InterSystems, Inc. v. 497
Farmers State Bank v. Farmland Foods 1

Farmland Foods; Farmers State Bank v. 1
First Nat. Bank of Omaha v. Hagebush 711
First West Side Bank v. Hiddleston 563
Ford Motor Co.; Lawson v. 725
Fordyce Co-op Credit Assn.; Pick v. 714
Fredericks v. Western Livestock Auction Co. 211
Fremont Plaza v. Dodge County Bd. of Equal. 303

Gallagher v. Omaha Public Power Dist. 354
Gerber v. Gerber 611
Gillette; Little v. 70
Gilmore v. Nebraska Crime Vict. Rep. Bd. 640
Goeres v. Rosberg 811
Goodyear Tire & Rubber Co.; Tlamka v. 789
Gordman Properties Co. v. Board of Equal. 169
Great Plains Container Co. v. Hiatt 558
Gross; State v. 798
Guerzon v. Jensen 712
Gunter; Anderson v. 637
Gunter; Nichols v. 638
Gunter; Wounded Shield v. 327

Hagebush; First Nat. Bank of Omaha v. 711
Hammond v. Streeter 491
Harper; State v. 300
Havlicek v. Desai 222
Heaton; State v. 702
Hess; State v. 91
Hettinger; Nichol v. 812
Hewson v. Stevenson 254
Hiatt; Great Plains Container Co. v. 558
Hicks; State v. 322
Hiddleston; First West Side Bank v. 563
High; State v. 690
High; State v. 695
Hodge and Carpenter; State v. 94
Hvistendahl; State v. 315

In re Application of Renzenberger, Inc. 30
In re Application of S.R.S. and M.B.S. 759
In re Complaint Against Kelly 583
In re Estate of Thompson 643
In re Estate of Tjaden 19
In re Guardianship and Conservatorship of Sim 181
In re Interest of C.G.C.S. 605
In re Interest of C.R.S. 436
In re Interest of K.L.N. and M.J.N. 595
In re Interest of L.H. 706

In re Interest of R.A. and V.A. 157
In re Interest of S.H., L.H., and A.H. 452
InterSystems, Inc. v. Farmers Co-op Exch. 497

Jackson; State v. 843
Jackson v. Jensen 671
Jensen; Guerzon v. 712
Jensen; Jackson v. 671
Johannes v. McNeil Real Estate Fund VIII 283
Johnson Abstract & Title; Shanks v. 649
Johnston v. Panhandle Co-op Assn. 732

K.L.N. and M.J.N., In re Interest of 595
K.S.R. v. Novak & Sons, Inc. 498
Kandt, State ex rel. v. North Platte Baptist Church 657
Kelly, In re Complaint Against 583
Kimberling v. Omaha Public Power Dist. 744
Kingery Constr. Co.; Williams v. 235
Kinney; State ex rel. NSBA v. 340
Kometscher; Misle Chevrolet Co. v. 804
Kriegler; State v. 486
Kuhn; State v. 300

L.H., In re Interest of 706
Lafler; State v. 362
Lambelet v. Novak 229
Laue; State v. 57
Laue; State v. 526
Lawson v. Ford Motor Co. 725
Lemburg v. Adams County 289
Lincoln East Bancshares v. Rierden 440
Little v. Gillette 70
Lynn v. Metropolitan Utilities Dist. 121

Malerbi v. Central Reserve Life 543
Mallette v. Taylor & Martin, Inc. 385
Malmkar; Wendell's, Inc. v. 341
Maly v. Arbor Manor, Inc. 276
Marshall v. Radiology Assoc. 75
McGowan Grain v. Sanburg 129
McMullin Transfer v. State 109
McNeil Real Estate Fund VIII; Johannes v. 283
Mecum; State v. 293
Meints; State v. 335
Mendoza v. Omaha Meat Processors 771
Mercy Villa Care Center; Banks v. 751
Mertens; White v. 241
Metropolitan Utilities Dist.; Lynn v. 121

Miller; State ex rel. NSBA v. 261
Miller; State v. 269
Misle Chevrolet Co. v. Kometscher 804
Munderloh; Nebraska Public Power Dist. v. 205

Nebraska Crime Vict. Rep. Bd.; Gilmore v. 640
Nebraska Public Power Dist. v. Munderloh 205
Nebraska State Bank v. Rasmussen 81
Nichol v. Hettinger 812
Nichols v. Gunter 638
Nickel v. Nickel 384
Nickel v. Nickel 810
Norquay v. Union Pacific Railroad 527
North Platte Baptist Church; State ex rel. Kandt v. 657
North Platte, School Dist. of; Aldridge v. 580
Novak & Sons, Inc.; K.S.R. v. 498
Novak; Lambelet v. 229
NSBA, State ex rel. v. Byram 673
NSBA, State ex rel. v. Kinney 340
NSBA, State ex rel. v. Miller 261
NSBA, State ex rel. v. Roubicek 509

Omaha, City of; Brunken v. 410
Omaha, City of; Thies v. 817
Omaha Meat Processors; Mendoza v. 771
Omaha Public Power Dist.; Gallagher v. 354
Omaha Public Power Dist.; Kimberling v. 744

Panhandle Co-op Assn.; Johnston v. 732
Paul; State v. 432
Pecha; State v. 673
Perez v. Perez 605
Peterson; Seagren v. 747
Pick v. Fordyce Co-op Credit Assn. 714
Polly v. Ray D. Hilderman & Co. 662
Project Life Min.; Chilton Accts. Rec. Mgmt. v. 482

R.A. and V.A., In re Interest of 157
Radiology Assoc.; Marshall v. 75
Rasmussen; Nebraska State Bank v. 81
Ray D. Hilderman & Co.; Polly v. 662
Renzenberger, Inc.; In re Application of 30
Richter; State v. 837
Richter; State v. 871
Rierden; Lincoln East Bancshares v. 440
Robinson; State v. 156
Rocek v. Department of Public Institutions 247
Rosberg; Goeres v. 811

Roubicek; State ex rel. NSBA v. 509
Rubek; State v. 477

S.H., L.H., and A.H., In re Interest of 452
S.R.S. and M.B.S., In re Application of 759
Sanburg; McGowan Grain v. 129
School Dist. of North Platte; Aldridge v. 580
Scott; State v. 146
Seagren v. Peterson 747
Seemann v. Seemann 116
Shanks v. Johnson Abstract & Title 649
Sianouthai; State v. 62
Sim, In re Guardianship and Conservatorship of 181
Smith v. Smith 93
Smith v. Weaver 569
Staman v. Staman 864
State ex rel. Kandt v. North Platte Baptist Church 657
State ex rel. NSBA v. Byram 673
State ex rel. NSBA v. Kinney 340
State ex rel. NSBA v. Miller 261
State ex rel. NSBA v. Roubicek 509
State Farm Fire & Cas. Co.; Ditloff v. 375
State Farm Mut. Auto. Ins. Co.; Boren v. 503
State; McMullin Transfer v. 109
State v. Bailey 66
State v. Bird Head 822
State v. Brown 418
State v. Burke 625
State v. Carlson 490
State v. Donnelson 41
State v. El-Tabech 395
State v. Gross 798
State v. Harper 300
State v. Heaton 702
State v. Hess 91
State v. Hicks 322
State v. High 690
State v. High 695
State v. Hodge and Carpenter 94
State v. Hvistendahl 315
State v. Jackson 843
State v. Kriegler 486
State v. Kuhn 300
State v. Lafler 362
State v. Laue 57
State v. Laue 526
State v. Mecum 293

State v. Meints 335
State v. Miller 269
State v. Paul 432
State v. Pecha 673
State v. Richter 837
State v. Richter 871
State v. Robinson 156
State v. Rubek 477
State v. Scott 146
State v. Sianouthai 62
State v. Thornton 875
State v. Threet 682
State v. Tyler 622
State v. Vaughn 38
State v. Vrtiska 454
State v. Walker 794
State v. Wiley 55
State v. Wilson 466
Stevenson; Hewson v. 254
Streeter; Hammond v. 491

Taylor & Martin, Inc.; Mallette v. 385
Thies v. City of Omaha 817
Thompson, In re Estate of 643
Thornton; State v. 875
Threet; State v. 682
Tjaden, In re Estate of 19
Tlamka v. Goodyear Tire & Rubber Co. 789
Tyler; State v. 622

Union Pacific Railroad; Norquay v. 527
United States Fire Ins. Co. v. Affiliated FM Ins. Co. 218

Vaughn; State v. 38
Vega v. Vega 821
Vrtiska; State v. 454

Walker; State v. 794
Weaver; Smith v. 569
Wendell's, Inc. v. Malmkar 341
Western Livestock Auction Co.; Fredericks v. 211
White v. Mertens 241
Wiley; State v. 55
Williams v. Kingery Constr. Co. 235
Wilson; State v. 466
Wounded Shield v. Gunter 327

CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 83-058: **Shakey's v. Ferreyra.** Stipulation allowed; appeal dismissed.

No. 85-743: **Edelman v. Moore.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 85-841: **Eliason v. Devaney.** By order of the court, case dismissed for lack of final order.

No. 86-046: **Powell v. Powell.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 86-190: **Campbell v. Campbell.** Stipulation allowed; appeal dismissed.

No. 86-207: **Johnston v. Panhandle Cooperative Assn.** By order of the court, appeal dismissed as moot.

No. 86-357: **First Federal Savings & Loan Assn. v. Hall.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-372: **Twin Valley Coop. v. Dikeman.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-521: **State v. Jaeger.** Judgment affirmed; see Rule 7A.

No. 86-527: **Toy National Bank of Sioux City v. Tetherow.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-572: **Cook v. Cook.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-625: **State v. Margeas.** Judgment affirmed; see Rule 7A.

No. 86-639: **Albrecht v. Harms.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-651: **State v. Buckmaster.** Judgment affirmed; see Rule 7A.

No. 86-660: **State v. Tygart.** Motion of appellee for

summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-686: **Bank of Steinauer v. Holecek.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-687: **Bank of Steinauer v. Dobrovolny.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-693: **Metropolitan Life Ins. v. Barelmann.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-696: **Commercial Federal Savings & Loan Assn. v. McMartin.** Motion of appellee for summary dismissal sustained; appeal dismissed as moot; see Rule 7B(1).

No. 86-710: **Brennan v. Monson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-732: **State v. Ball.** Judgment affirmed; see Rule 7A.

No. 86-762: **Bury v. First National Bank of Omaha.** Stipulation allowed; appeal dismissed.

No. 86-763: **State v. Rupert.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-768: **Penrod v. Penrod.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-769: **Larsen v. Travelers Ins. Co.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-775: **State v. Taylor.** Judgment affirmed; see Rule 7A.

No. 86-781: **Sartoria Farms v. Fread.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-786: **Federal Land Bank of Omaha v. Young.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 86-788: **State v. Collins.** Stipulation waiving oral argument allowed; exceptions overruled.

No. 86-790: **Kerrigan v. Kerrigan.** By order of the court, appeal dismissed for failure to file a proper brief.

No. 86-799: **Brantley v. Bemis Bag Co.** Motion of appellant

to dismiss appeal sustained; appeal dismissed.

No. 86-801: **Taylor v. Pathology Center P.C.** Stipulation allowed; appeal dismissed.

Nos. 86-830, 86-831: **State v. Perez.** Judgment affirmed; see Rule 7A.

No. 86-839: **State ex rel. Spire v. Cobb.** Stipulation allowed; appeal dismissed.

No. 86-840: **Horn v. Horn.** Stipulation allowed; appeal dismissed.

No. 86-846: **State v. Barfoot.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-850: **State v. Van DeMark.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-852: **Oetting v. Commissioner of Labor.** Stipulation allowed; appeal dismissed.

No. 86-876: **Parker v. Skagway Dept. Store.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. 86-887, 86-951: **Educational Serv. Unit No. 15 Education Assn. v. Educational Serv. Unit No. 15.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 86-889: **State v. Long.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-891: **Miller v. Empire Construction Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-893: **Lorenz v. Wilkins.** Stipulation allowed; appeal dismissed with prejudice.

No. 86-894: **State v. Wesley.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-902: **State v. Dreith.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-916: **Federal Land Bank of Omaha v. Kurkowski.** Motion of appellant to remove receiver is denied. On court's own motion appeal is dismissed.

No. 86-928: **State v. Wilson.** Judgment affirmed; see Rule 7A.

No. 86-932: **Craig v. Craig.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-938: **State v. Herman.** Judgment affirmed; see Rule 7A.

Nos. 86-939, 86-940: **State v. Green.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-942: **State Troopers Assn. v. Nebraska State Patrol.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 86-945: **State v. Whitebeaver.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-947: **State v. Striker.** Judgment affirmed; see Rule 7A.

No. 86-948: **State v. Motter.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-954: **State v. Otte.** Judgment affirmed; see Rule 7A.

No. 86-956: **State v. Wilson.** Judgment affirmed; see Rule 7A.

No. 86-966: **Kula v. Nance County.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-967: **State v. Dodge.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-969: **Vyskocil v. Vyskocil.** Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. 86-974: **State v. Miller.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-986: **Toy National Bank of Sioux City v. Tetherow.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-988: **Gauthier v. Clay Center Cooperative Grain.** Joint motion and stipulation for order reversing and remanding to Nebraska Public Service Commission sustained.

No. 86-991: **Roberts v. Haase.** By order of the court, appeal

dismissed for failure to file briefs.

No. 86-995: **State v. Carlson.** Judgment affirmed; see Rule 7A.

No. 86-999: **State v. Domingus.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-1005: **Keene v. Keene.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 86-1007: **State v. Washington.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-1008: **State v. Morris.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-1009: **State v. Barker.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-1010: **State v. Williams.** Judgment affirmed; see Rule 7A.

No. 86-1014: **State v. Rosberg.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

Nos. 86-1018, 86-1030, 87-063: **In re Interest of Phillips.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-1029: **State v. Limon.** Judgment affirmed; see Rule 7A.

No. 86-1038: **In re Estate of Werner.** Stipulation allowed; appeal dismissed.

No. 86-1041: **State v. Noyes.** Judgment affirmed; see Rule 7A.

No. 86-1043: **State v. Rankin.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-1047: **State v. Andrews.** Judgment affirmed; see Rule

7A.

Nos. 86-1050, 86-1051: **State v. Thompson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-1054: **State v. Rosberg.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 86-1057: **Steffgen v. Barth.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 86-1058: **Steffgen v. Barth.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 86-1060: **State v. Sisson.** Judgment affirmed; see Rule 7A.

No. 86-1061: **Walker v. Robinette.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 86-1065: **Travelers Insurance Company v. Nelson.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 86-1066: **Platte Valley Federal Savings & Loan Assn. v. Magallanes.** On court's own motion, judgment summarily affirmed; see Rule 7A.

No. 86-1072: **Thomas v. Lewis.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-1076: **Aguilar v. Dahmer.** Stipulation allowed; appeal dismissed.

No. 86-1082: **State v. Nykiel.** Judgment affirmed; see Rule 7A.

Nos. 86-1087, 86-1088: **State v. Babcock.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-1090: **Smith v. City of Omaha Employees Retirement System.** Stipulation allowed; appeal dismissed.

No. 86-1091: **Johnson v. Sehi.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 86-1093: **Akbar v. Adams.** On court's own motion, judgment summarily affirmed; see Rule 7A.

No. 86-1094: **Hoffman v. Lutheran Health Services.**

Stipulation allowed; appeal dismissed.

No. 86-1098: **State v. Hall.** By order of the court, appeal summarily dismissed; see Rule 7A.

No. 86-1099: **Toy National Bank of Sioux City v. Tetherow.** Motion of appellee for summary dismissal sustained; see Rule 7B(2).

No. 86-1101: **Mulligan v. Moody.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 86-1104: **Sorich v. Gunter.** By order of the court, appeal dismissed; see Rule 7A.

No. 86-1108: **Hohlen v. Hohlen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-003: **State v. Stokes.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-005: **Hughes v. Rockwell International.** Stipulation allowed; appeal dismissed without prejudice.

No. 87-011: **Henke v. Henke.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 87-017: **Muhleka v. Wilson.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-018: **First Westside Bank v. Hall.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-023: **State v. Canaday.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-026: **State v. Martinez.** Judgment affirmed; see Rule 7A.

No. 87-030: **State v. Vasquez.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-031: **IFG Leasing Co. v. Kirkendall.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-032: **Lacy v. Young.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-036: **Ramos v. Voss.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-039: **State v. Martinez.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-044: **State v. Johnson.** Judgment affirmed; see Rule 7A.

No. 87-050: **Schneider Auto v. Hoffmann Cattle Co.**

Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-051: **Rhoades Cooper v. State.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-054: **State v. Quindt.** Judgment affirmed; see Rule 7A.

No. 87-055: **State ex rel. Tyler v. Gunter.** By order of the court, judgment summarily affirmed; see Rule 7A.

No. 87-060: **State v. Richards.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-061: **Kurtz v. Mobil Oil Corp.** Stipulation allowed; appeal dismissed.

No. 87-062: **Dawkins v. Buchanan.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-076: **Adolph's Auto Parts Co. v. Midlands Automotive Warehouse.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-080: **Metropolitan Life Insurance Co. v. Waller.** Judgment affirmed; see Rule 7A.

No. 87-084: **State v. Bozman.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-085: **State v. McPherson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-086: **State v. Rein.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-087: **State v. Wright.** Judgment affirmed; see Rule 7A.

No. 87-088: **State v. Alt.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-089: **State v. Raszler.** Stipulation allowed; appeal dismissed.

No. 87-092: **Steskal v. Special Dispatch of Omaha, Inc.** Motion of appellant to dismiss appeal sustained; appeal

dismissed.

No. 87-098: **Cass Construction Co. v. Brennan.** Stipulation allowed; appeal dismissed.

No. 87-099: **Dowty v. Lippencott Industries.** Stipulation allowed; appeal dismissed.

No. 87-100: **Shotkoski v. Loup River Inn, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-101: **Hauptman v. Hauptman.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 87-104: **State ex rel. Equal Opportunity Commission v. City of Omaha.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-111: **Water Conservation Systems v. NSBA.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-112: **First National Bank & Trust Co. of Fremont v. Prinz Grain & Feed.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-117: **Fisher v. Stuckey.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-119: **Platte Valley Federal Savings & Loan Assn. v. Magallanes.** On court's own motion, judgment summarily affirmed; see Rule 7A.

No. 87-120: **State ex rel. Tyler v. Moody.** On court's own motion, judgment summarily affirmed; see Rule 7A.

No. 87-122: **Alliance Railroad Employees Credit Union v. Anderson.** Motion of appellees for summary dismissal sustained; appeal dismissed as premature.

No. 87-125: **State v. Tramble.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-129: **State v. Zach.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-138: **Bren v. B & B Transportation.** Stipulation allowed; appeal dismissed.

No. 87-140: **Tyler v. Peart.** Motion of appellant to dismiss

appeal sustained; appeal dismissed.

No. 87-145: **State v. Christiansen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-148: **Sapulpa Tank Co. v. Escco, Inc.** Stipulation allowed; appeal dismissed.

No. 87-151: **State v. Welker.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-161: **State v. Koss.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-163: **State v. Worl.** Stipulation allowed; appeal dismissed.

No. 87-166: **State v. Dickenson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-167: **Commission of Industrial Relations v. Nebraska State Patrol.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-168: **Brown v. Leitner.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-170: **State v. Schroeder.** Judgment affirmed; see Rule 7A.

No. 87-171: **State v. Bouzek.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-178: **Tuttle v. Internorth, Inc.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-181: **State v. Tyler.** By order of the court, appeal dismissed; see Rule 7A.

No. 87-184: **O'Connell v. O'Connell.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-185: **Vandebrug v. Mills.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-190: **State v. Bolander.** Judgment affirmed; see Rule 7A.

No. 87-192: **State v. Julian.** Motion of appellee for summary

affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-193: **State v. Cappellano.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-205: **State v. Brown.** By order of the court, appeal dismissed for lack of jurisdiction.

No. 87-211: **State v. Webb.** Judgment affirmed; see Rule 7A.

No. 87-212: **Willison v. Platte Township in Dodge County.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-213: **Willison v. Platte Township in Dodge County.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-217: **Dixon v. Dixon.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 87-218: **Nebraska State Patrol v. State Troopers Assn.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-219: **State v. Tichota.** By order of the court, appeal dismissed for failure to timely pay docket fee.

No. 87-231: **State v. Maire.** Judgment affirmed; see Rule 7A.

No. 87-232: **State v. Means.** Judgment affirmed; see Rule 7A.

No. 87-233: **Tyler v. Lincoln Regional Center.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-235: **In re Adoption of Uribe.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-237: **Weltikol v. Weltikol.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 87-239: **State v. Titsworth.** Judgment affirmed; see Rule 7A.

No. 87-241: **State v. Fristo.** Judgment affirmed; see Rule 7A.

No. 87-245: **State v. Lamotte.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-261: **Green v. Green.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 87-262: **Johnson v. Goldsby.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-283: **Elliott v. Elliott.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 87-297: **State v. Radin.** Judgment affirmed; see Rule 7A.

No. 87-303: **Tyler v. Exstrom.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-304: **Tyler v. Mumgaard.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-315: **Dorsey v. Jordan.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-324: **Brauer v. National Old Line Insurance Company.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-331: **Cleveland v. Cleveland.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-337: **Water Conservation Systems Co. v. NSBA.** Judgment affirmed; see Rule 7A.

No. 87-346: **Abdouch v. Theiss.** Motion of appellee to dismiss appeal sustained; appeal dismissed.

No. 87-348: **Washington County Bank v. Anderson.** Stipulation allowed; appeal dismissed.

No. 87-350: **Sigwing v. Sigwing.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 87-358: **Imperial Mall Limited v. Board of Equalization.** Stipulation allowed; appeal dismissed.

No. 87-359: **State v. Coffman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-364: **Tyler v. Daws.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-371: **State v. Keller.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-376: **State v. Wood.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-380: **Glover v. School District of Lincoln.** Stipulation allowed; appeal dismissed.

No. 87-382: **Herman Leasing, Inc. v. Root.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-402: **State ex rel. Tyler v. Grammer.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-403: **Tyler v. Pacheco.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-412: **Pearson v. Butterfield.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-452: **Jones v. Hasenyager.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 87-480: **State v. Daly.** Stipulation allowed; appeal dismissed.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

FARMERS STATE BANK, APPELLANT, V. FARMLAND FOODS, INC., DOING BUSINESS AS FARMLAND INDUSTRIES, APPELLEE.

402 N.W.2d 277

Filed March 20, 1987. No. 85-250.

1. **Verdicts: Appeal and Error.** A jury verdict will not be disturbed on appeal unless it is clearly erroneous and against the preponderance of the evidence.
2. **Waiver: Words and Phrases.** Waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right.
3. **Security Interests: Waiver: Estoppel.** Performance under a security agreement, including the failure of the secured party to rebuke the debtor or object to the debtor's conduct in selling collateral in violation of the terms of the security agreement, may amount to a waiver of the lender's contractual right to require its written consent to a sale of collateral.
4. _____: _____: _____. Whether the secured party's conduct constitutes a waiver of its right to require written consent to a sale of collateral is a question of fact.

Appeal from the District Court for Polk County: WILLIAM H. NORTON, Judge. Affirmed.

Knudsen, Berkheimer, Richardson & Endacott, for appellant.

David R. Webb and Brian F. Beckner, for appellee.

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

GRANT, J.

Plaintiff-appellant, Farmers State Bank (hereafter Bank), brought this action for conversion against the defendant-appellee, Farmland Foods, Inc. (Farmland), for damages

based on Farmland's purchase of hogs which were subject to the Bank's security interest. Farmland answered, generally denying it was liable to the Bank in any amount and setting out various defenses to the Bank's action, including the defense that the Bank had impliedly consented to the sale of hogs to Farmland and thus waived the Bank's security interest in that collateral. The case was tried to a jury. At the close of all of the evidence, both the Bank and Farmland moved for a directed verdict. The trial court overruled Farmland's motion and sustained the Bank's motion in part, after finding that the acts of Farmland constituted a conversion for which Farmland could possibly be liable. The issue of Farmland's liability was submitted to the jury for its determination as to Farmland's defenses of waiver, consent, estoppel, and ratification. The jury returned a verdict for Farmland. The Bank timely appealed to this court.

Appellant Bank assigns as error the trial court's actions in submitting to the jury the issues of waiver, estoppel, consent, and ratification and in failing to properly instruct the jury on the issue of waiver by estoppel. For the reasons hereinafter set out, we affirm.

Evidence adduced at trial shows the following. For approximately 15 years ending in the latter part of 1983, David Hopwood was engaged in a hog-raising operation described as a farrow-to-finish operation. The hogs would be raised from birth until they reached market weight, at approximately 5 to 6 months, and would then be sold at market.

In February of 1977 Hopwood approached appellant Bank to obtain financing for his operation. The Bank initially loaned Hopwood approximately $86,000. At that time Hopwood signed a security agreement with the Bank pledging his hogs, among other farm assets, as collateral. The security agreement contained various warranties. One such warranty stated "DEBTOR [Hopwood] WARRANTS AND COVENANTS: . . . (3) Not to sell, transfer or dispose of the Collateral . . . without the prior written consent of the Secured Party [the Bank]."

Despite this requirement for written consent prior to any sale of collateral, Hopwood sold his hogs on over 130 occasions between February 2, 1977, and February 1983, without first

obtaining the Bank's consent. The president of the Bank testified that Hopwood was never questioned about his practice of selling the collateral without having obtained permission, nor did the Bank ever require Hopwood to obtain prior consent to any sale. The Bank president further testified that complying with the provision requiring written consent prior to the sale of the collateral was "humanly impossible" and "physically impossible." He explained the circumstances surrounding a typical sale of a farmer's collateral. The farmer would call the buyer for a quote of the current market price. Depending on the market condition, this quoted price was subject to change if not accepted immediately. Requiring the farmer to obtain permission from the secured party before a sale at the quoted price rather than immediately accepting the offer would require a great deal of the farmer's time and might result in a change in price before the intended sale would be completed. In order for the farmer to keep most of his time available for his farming work and to avoid this possible drop in prices, he must be able to accept the quoted price immediately.

Hopwood testified that between February 2, 1977, through February of 1983, he sold hogs to the defendant, Farmland, approximately 10 to 15 times a year. These sales ranged from 20 to 40 hogs per sale. Hopwood testified that he would check on the price Farmland was paying, and if this was satisfactory, Hopwood would immediately sell and deliver the hogs to Farmland. Hopwood would then take the collateral sale proceeds to the Bank and have these proceeds applied against his loan. During all this time, the Bank was aware of Hopwood's sales to Farmland because Farmland checks were applied to Hopwood's loan with the Bank. Hopwood testified that he never sought permission to sell his collateral in this manner, nor was he ever reprimanded by the Bank for not having done so. After the proceeds were applied to his loan, Hopwood would usually borrow more money for his continuing operation.

On some occasions Hopwood was unable to speak with a loan officer. On these occasions he would deposit the proceeds directly into his farm account rather than giving the proceeds to the Bank for application to reduce the loan account balance.

Then, a few days later, he would return to the Bank and have those proceeds applied to his loan. As an example, the testimony showed that such a procedure was followed in sales on October 25, November 8, and November 9, 1982. The proceeds of these sales were deposited in Hopwood's farm account. Hopwood returned to the Bank on November 16, 1982, and had these deposits applied toward his loan. While there was testimony that the Bank told Hopwood at this time that these direct deposits into his farm account were a violation of the security agreement, Hopwood testified that he did not recall there being any reprimand or censure by officials of the Bank, that, in fact, the November 16, 1982, incident was not isolated, and that on two or three other occasions when direct deposits to his farm account were made, there was no complaint.

The present case concerns six specific sales made by Hopwood to Farmland between April 30 and June 17, 1983. The six sales were of 155 hogs for a price of $16,612.01. The proceeds from these sales were deposited directly into Hopwood's farm account. Rather than returning to the Bank and having these proceeds applied to his loan balance and then borrowing additional funds from the Bank, Hopwood used the proceeds to pay for feed for the hogs and other farm operation expenses. The Bank became aware of these sales in July of 1983, after a state bank examiner noticed a lack of activity on Hopwood's loan sheet. Hopwood was called into the Bank to discuss this inactivity. At this time a plan for an orderly liquidation of the collateral was suggested. Additional funds were advanced by the Bank to Hopwood in order to keep the operation going until the liquidation could be complete. Hopwood continued to sell his hogs just as he had done before the plan for liquidation, until November of 1983, when he filed for bankruptcy. At this point appellant Bank requested all future checks for the sale of collateral be issued jointly to Hopwood and the Bank. Farmland complied with this request on all sales after that time. The Bank then sought to recover the proceeds from the six disputed sales between April 30 and June 17, 1983, in an action for conversion against Farmland.

This court has often held that a jury verdict will not be

disturbed on appeal unless it is clearly erroneous and against the preponderance of the evidence and so clearly contrary to findings that it is the duty of the reviewing court to correct it. Further, a jury verdict is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party. *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 363 N.W.2d 155 (1985). The district court did not err in submitting to the jury the issue of waiver.

The controlling issue to be determined is whether the Bank, by its conduct over a long period of time, has consented to the sale of the Bank's collateral without its written consent and has thus, by implication, waived its rights in the collateral. The Bank contends that Hopwood did not have express consent to sell the collateral. Consent, however, may be established by implication arising from a course of conduct as well as expressly, and such consent operates as a waiver of the security interest. See, *Hedrick Savings Bank v. Myers*, 229 N.W.2d 252 (Iowa 1975); *United States v. Central Livestock Association, Inc.*, 349 F. Supp. 1033 (D.N.D. 1972); *Moffett Bros. & Andrews Commission Co. v. Kent*, 5 S.W.2d 395 (Mo. 1928).

Waiver has been defined as a "voluntary and intentional relinquishment or abandonment of a known existing legal right . . . *or such conduct as warrants an inference of the relinquishment of such right* . . . ." (Emphasis supplied.) *Five Points Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 677, 681, 350 N.W.2d 549, 552 (1984).

We determine that the evidence as presented in this case was sufficient to support the finding of such conduct that would warrant an inference of the relinquishment of the Bank's right in the collateral in question. There was evidence from which the jury could have found that the Bank, by its long course of conduct of not requiring Hopwood to obtain the Bank's consent to sell collateral, had consented to such sales and thus waived its security interest in the collateral. Despite the covenant not to sell the collateral without prior written consent, Hopwood sold his hogs on more than 130 occasions over a 6-year period without having first obtained the consent of the Bank. Testimony of the bank president showed the Bank was fully aware of these sales. Hopwood testified that the Bank

never requested compliance with this provision of the security agreement. The Bank was also aware of the occasional deposit of the proceeds directly into Hopwood's farm expense account rather than immediate application toward the loan balance. While the evidence is conflicting, it was sufficient for the jury to determine "by clear and convincing evidence" that the Bank had never reprimanded or rebuked Hopwood for his actions. *Five Points Bank v. Scoular-Bishop Grain Co., supra* at 682, 350 N.W.2d at 552. The Bank was fully aware of its right to require the prior written consent for the sale of collateral, yet it so acted as to waive its right.

The appellant Bank argues the security interest continued in the proceeds, and relies on Neb. U.C.C. § 9-306(2) (Reissue 1980), which states:

> Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement *or otherwise*, and also continues in any identifiable proceeds including collections received by the debtor.

(Emphasis supplied.)

It is clear the security agreement involved in this controversy did not authorize the sale of collateral except by prior written consent. Farmland relies on the "*or otherwise*" language in its contention that the Bank had waived its security interest. That language, "or otherwise," was specifically before this court in *State Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 379, 349 N.W.2d 912 (1984), and in *Five Points Bank v. Scoular-Bishop Grain Co., supra.* In *Five Points* at 680, 350 N.W.2d at 551, we reaffirmed the holding in *State Bank v. Scoular-Bishop Grain Co., supra*, and stated that "it was a factual question whether a bank's prior course of dealing with the debtor might create an implied agreement amounting to a waiver of the security interest . . . ."

In this case we hold that the Bank's performance under the Bank-Hopwood security agreement was such that the Bank's conduct constituted, in effect, an amendment to the security agreement, in that the Bank waived its right to require its

written consent to any sale of collateral by Hopwood. On over 130 occasions over 6 years (or approximately twice each month during that time), the Bank acquiesced in Hopwood's method of doing business and consented to it. On at least five occasions the Bank acquiesced not only in the sale of collateral but in Hopwood's failure to immediately apply the proceeds of such sales to the loan owing to the Bank. After 6 years of such conduct, the Bank would now have the courts hold that its business conduct in the marketplace is completely immaterial and that if such conduct results in a loss to the Bank, the Bank is entitled, as a matter of law, to point to the security agreement of 1977 and rely on the words of that agreement that there can be no waiver. We hold that the facts in this case were such as to permit the jury to find that the Bank, by its conduct, waived its contractual right with Hopwood to require that the Bank give written consent to any sale of collateral.

In so holding, we are cognizant of the Bank's contention that its practice of not enforcing the prior written consent provision cannot be construed as a waiver of that provision. The Bank argues that a course of dealing is not applicable to show waiver when it is inconsistent with the express terms in the agreement. Neb. U.C.C. § 1-205(4) (Reissue 1980) provides:

> The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

The Bank relies on this court's rulings in *Garden City Production Credit Assn. v. Lannan*, 186 Neb. 668, 186 N.W.2d 99 (1971), and *Farmers State Bank v. Edison Non-Stock Coop. Assn.*, 190 Neb. 789, 212 N.W.2d 625 (1973), for support in its contention that mere acquiescence or failure to rebuke the seller is not sufficient to override the express terms of § 1-205(4). We hold that the Bank's reliance on this section is misplaced. Section 1-205(4) deals with a course of dealing and trade usage. Under § 1-205(1), course of dealing is restricted to a sequence of conduct between the parties *previous to the agreement*. See § 1-205, comment 2. See, also, Dugan, *Buyer-Secured Party*

Conflicts Under Section 9-307(1) of the Uniform Commercial Code, 46 U. Colo. L. Rev. 333, 340 (1975), where the author states: "Section 1-205 simply does not attempt to deal with the legal consequences of *post-agreement* events such as those which the Code defines elsewhere as 'course of performance' [Neb. U.C.C. § 2-208(1) and (3) (Reissue 1980)] . . . ."

In the case at bar there was no need to know the conduct of the parties before the contract was entered into between Hopwood and the Bank to determine the meaning of that contract. The terms of that contract were clear. The question to be determined is whether the Bank's performance, after that contract was signed, operated to amend the contract. The conduct which might be found to be a waiver of the prior written consent provision occurred continuously *after* this agreement was reached. Such postagreement course of performance is not governed by § 1-205(4). See Burke, *Secured Transactions*, 32 Bus. Law. 1133, 1146 (1977), where the author states: "Section 1-205(4) controls only the interpretation and construction of the written security agreement and should not prevent the introduction of evidence to show that an express term of the agreement has been waived by the secured creditor."

Section 1-205, comment 2, states:

> Course of dealing under subsection (1) is restricted, literally, to a sequence of conduct between the parties previous to the agreement. However, the provisions of the act on course of performance make it clear that a sequence of conduct after or under the agreement may have equivalent meaning. (Section 2-208).

Although § 2-208 generally deals with sales, its terms are made relevant to the security agreement of the parties by the terms of Neb. U.C.C. § 1-201(3) (Reissue 1980), which sets out a general definition as follows:

> "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this act (sections 1-205 and 2-208). Whether an agreement has legal consequences is determined by the provisions of this act, if applicable; otherwise by the law of contracts

(section 1-103).

The court may look to Neb. U.C.C. § 1-103 (Reissue 1980), which provides: "Unless displaced by the particular provisions of this act, the principles of law and equity, including the law merchant and the law relative to capacity to contract . . . shall supplement its provisions."

The code has thus made provisions for dealing with preagreement dealing and postagreement performance. Section 2-208(3) has more relevant application to this situation than does § 1-205(4), which pertains to *preagreement* dealing between the parties. Section 2-208(3) provides: "Subject to the provisions of the next section [Neb. U.C.C. § 2-209 (Reissue 1980)] on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance."

We hold that performance under a security agreement, including the failure of the secured party to rebuke the debtor or object to the debtor's conduct in selling collateral in violation of the terms of the security agreement, may amount to a waiver of the lender's contractual right to require its written consent to a sale of collateral. Whether the secured party's conduct constitutes a waiver of its right to require written consent to a sale of collateral is a question of fact.

Under precode law, conduct such as that of the Bank in the case at bar could have been held to constitute a waiver of the security interest. See, *Charterbank Butler v. Central Cooperatives*, 667 S.W.2d 463 (Mo. App. 1984); *Commercial Credit Corporation v. Blau*, 393 S.W.2d 558 (Mo. 1965); *First Nat. Bank & Trust Co. v. Stock Yards Loan Co.*, 65 F.2d 226 (8th Cir. 1933), *cert. denied* 290 U.S. 648, 54 S. Ct. 87, 78 L. Ed. 576. Since this precode concept of waiver is not specifically displaced by the code, under § 1-103 it must be treated as supplementing the code. The Bank contends that before there can be a waiver, it must be shown that Farmland had knowledge of the Bank's conduct with respect to Hopwood's operations. However, in *First Nat. Bank & Trust Co. v. Stock Yards Loan Co., supra* at 229, the court states: "When a mortgagee under a chattel mortgage allows the mortgagor to retain possession of the property and to sell the same at will, the mortgagee waives

his lien, and this is true whether the purchaser knew of the existence *of the chattel mortgage or not*." (Emphasis supplied.) We agree with that concept where there is a long course of conduct. To the extent they hold otherwise, this court overrules the cases of *Garden City Production Credit Assn. v. Lannan*, 186 Neb. 668, 186 N.W.2d 99 (1971), and *Farmers State Bank v. Edison Non-Stock Coop. Assn.*, 190 Neb. 789, 212 N.W.2d 625 (1973).

We hold, then, that the jury could have found by clear and convincing evidence that the course of performance between the Bank and Hopwood was a waiver of the security interest in the collateral sold to appellee on the six occasions between April 30 and June 17, 1983. The Bank was fully aware of its right to require written consent before the sale of collateral, yet it never exercised this right nor reprimanded the seller for failure to obtain written consent. The Bank was not concerned with this written consent provision and did not rely on it.

Since the issue of waiver is dispositive of this controversy, we need not consider the other assignment of error. The judgment of the district court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority in this case. I do so on two grounds. First, I believe we are in error to overrule *Garden City Production Credit Assn. v. Lannan*, 186 Neb. 668, 186 N.W.2d 99 (1971), the leading case in the nation on this subject. Second, I believe that the result reached by the majority in this case is not supported by logic or reason.

While I recognize that there is some split of authority on this subject (see Annot., What Constitutes Secured Party's Authorization to Transfer Collateral Free of Lien Under UCC § 9-306(2), 37 A.L.R.4th 787 (1985)), I believe that the position adopted by this court more than 15 years ago represents the better reasoned position on this subject. In view of the fact that most jurisdictions which follow our earlier longstanding rule cite *Garden City Production Credit Assn. v. Lannan, supra*, as the basis for their decisions, apparently many other jurisdictions agree. Furthermore, I do not believe that anything that we said in *State Bank v. Scoular-Bishop Grain Co.*, 217

Neb. 379, 349 N.W.2d 912 (1984), or *Five Points Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 677, 350 N.W.2d 549 (1984), is contrary to our earlier holding in *Garden City Production Credit Assn. v. Lannan, supra*, nor does it require us to overrule our holding in *Garden City Production Credit Assn. v. Lannan*.

It is clear in this case, as noted by the majority, that there was no express waiver by Farmers State Bank. Nor, in my view, can there be said to be an implied waiver sufficient to cause us to ignore the clear language of the security instrument. The majority makes much of the fact that between April 30 and June 17, 1983, a period of 49 days, six sales were effected by the debtor without the Bank's protest and without the Bank's knowledge. This is suggested by the majority to be sufficient evidence that the Bank had impliedly waived its security. Yet the record discloses that these six transactions were a part of some 60 to 90 sales to Farmland Foods, Inc., conducted over the previous 6-year period in which payment was always made to the Bank following the sale of the livestock. Furthermore, once the Bank learned of the six sales without payment, it did rebuke the debtor and take action. It is apparently the majority's view that the Bank's lien was waived long ago, even though it was being paid. It is simply difficult for me to conclude that six sales conducted without the Bank's actual knowledge within a 49-day period while the debtor is having severe financial difficulty should be the criteria by which we determine the intent of the lender and should be permitted to overshadow 10 times that number of sales where just the opposite result was effected.

The record in this case is clear that the Bank had no knowledge of the six sales before they were made, nor did it learn of the sales until *all* six had been completed. The majority's suggestion that the Bank's failure to rebuke the debtor evidenced implied approval does not wash when the record discloses that the Bank did not know of these six sales until all were completed and, upon learning of the sales, took action.

In my view, the difficulty with the majority opinion is that it has confused an implied waiver of the lien on the security with a waiver by the Bank of a requirement that the lender obtain

permission to sell in writing before proceeding to sell the security. It appears to me that one might more effectively argue that the Bank obviously did not intend to waive its lien when it waived its requirement that permission to sell be in writing, in view of the fact that everyone is presumed to know the law and the Bank knew that under the provisions of Neb. U.C.C. § 9-306(2) (Reissue 1980) and this court's consistent interpretation of that section more than 12 years earlier, as expressed in *Garden City Production Credit Assn. v. Lannan*, 186 Neb. 668, 186 N.W.2d 99 (1971), the sales were all subject to the Bank's lien. That is precisely what § 9-306(2) provides and what it intends to accomplish. Section 9-306(2) does not prohibit the sale of property nor suggest that the mere sale of the property implies that the lien is to be waived. To the contrary, it provides that the security interest continues in the collateral, notwithstanding the sale. To therefore suggest that because the Bank waived a requirement that consent for the sale be in writing, it also waived its lien is not an accurate statement of the law generally recognized throughout the country.

While the records fail to disclose actual authorization by the Bank to sell, it seems to me that the most one can glean from the evidence is that the Bank impliedly consented to the sale of the livestock conditioned upon the debtor's delivering the proceeds of the sale to the Bank, as he had done in the previous 60 to 90 sales. This does not constitute evidence of an intent by the Bank to waive its lien on the security.

As I have suggested earlier, I do not believe that our decision in either *State Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 379, 349 N.W.2d 912 (1984), or *Five Points Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 677, 350 N.W.2d 549 (1984), compels the result reached by the majority today. In *State Bank v. Scoular-Bishop, supra*, we reversed the decision of the district court and remanded the cause for a new trial because the district court had refused to permit the buyer to introduce evidence showing an express waiver and, instead, directed a verdict for the lender. What the purchaser intended to present by way of evidence were oral conversations with bank officers, bank records, checks, deposit slips, checking account summary, notes and renewal notes, other farm product sales,

disability ledger cards, and livestock inspection reports, which may have established that the Bank had in fact waived its lien. In reaching our conclusion in *State Bank v. Scoular-Bishop, supra* at 388, 349 N.W.2d at 917, we nevertheless said:

> "[A]n implied agreement should be found with extreme hesitancy and should generally be limited to the situation of a prior course of dealing with the debtor permitting disposition. The issue is a question of fact, but the trial court should carefully consider the written prohibition against disposition found in the security agreement as an important factor in the factual determination and should determine the matter in favor of the written prohibition unless such conclusion is unreasonable under the circumstances."

The evidence in *State Bank v. Scoular-Bishop, supra*, was to the effect that there had been actual conversations between the debtor and the bank. Yet this court did not overrule *Garden City Production Credit Assn. v. Lannan, supra*, and, in fact, cautioned the trier of fact to find an implied waiver only with extreme hesitancy.

To the same extent, in *Five Points Bank v. Scoular-Bishop, supra*, we reversed and remanded the cause for a new trial because the evidence disclosed that the debtor was encouraged by the bank to minimize his operating loan by obtaining his fertilizer by credit on an open account. Moreover, the bank refused to lend the borrower money for repairs to his farm equipment, acknowledging that the debtor would have to have another advance on his corn crop from someone else. We simply concluded in *Five Points Bank v. Scoular-Bishop, supra*, that it was a question of fact whether the discussion and conduct between the bank and the borrower constituted authorization. Again, we did not suggest we should overrule *Garden City Production Credit Assn. v. Lannan*, 186 Neb. 668, 186 N.W.2d 99 (1971), but, quite to the contrary, suggested that our position was consistent. We merely suggested that it was a question of fact as to whether there had been authorization. *State Bank v. Scoular-Bishop* and *Five Points Bank v. Scoular-Bishop* are not at all similar to the facts in this case.

The real difficulty with the majority opinion is that we are

not writing on a clean slate. The law as declared by this court in *Garden City Production Credit Assn. v. Lannan, supra*, has been the law of this jurisdiction for more than 15 years. During all of that time, the Legislature has not seen fit to amend, in any substantive manner, the law, as did, for instance, the Legislature of the State of New Mexico after the New Mexico Supreme Court decided the case of *Clovis National Bank v. Thomas*, 77 N.M. 554, 425 P.2d 726 (1967), contrary to our position in *Garden City Production Credit Assn. v. Lannan, supra*, and consistent with the majority opinion herein.

While the record does not disclose the fact, one may assume that multiple security agreements have been executed in this state, and farmers have been permitted to sell their livestock as they must, based upon the lender's understanding of our holding in *Garden City Production Credit Assn. v. Lannan, supra*. Yet, with one stroke of the eraser, we now clean the slate and cause all of those security instruments to become invalid because of what we term to be a course of dealing and, therefore, implied consent.

I believe what we earlier said in *Garden City Production Credit Assn. v. Lannan* has even greater applicability today and continues, in my mind, to make good sense.

> The evidence reveals a typical farm-ranch operation contemplating a course of dealing in the sale of farm products, and the necessity of securing credit financing for such an operation. The Uniform Commercial Code, whatever else its objects may be, was designed to close the gap in the classic conflict between the lender and the innocent purchaser and furnish acceptable, certain, and suitable standards which would promote the necessity of and the fluidity of farm credit financing in the modern context, and at the same time facilitate the sale and exchange of collateral by furnishing a definable and ascertainable standard which purchasers could rely on. Case application is in its genesis, but an examination of the textual and court authority supports such an approach to an examination of cases in a specific factual context. See Uniform Commercial Code Bibliography, 1969 (published by the Joint Committee on Continuing Legal

> Education of the American Law Institute and the American Bar Association), "Article 9—Secured Transactions," pp. 87 to 101.

186 Neb. at 671-72, 186 N.W.2d at 102.

We went on further in *Garden City Production Credit Assn. v. Lannan, supra* at 673, 186 N.W.2d at 102, to say:

> We must assume that section 9-306(2), U.C.C., was drafted with an awareness of the practical realities of farm credit financing, the market movement of chattel property, and the practical problems of a simultaneous sale and payment. This provision of the code must clearly have been designed to accommodate and to fit the practical realities of financing a farming and business operation contemplating the raising, feeding, and processing, and sale of livestock and tangible chattel property. It is uncontested in the present case that there was strict compliance with the filing and notice provisions of the code. Lannan, the purchaser, was bound by the provisions of the code and must ordinarily take the risk of a failure to make the appropriate investigation contemplated by its provisions.

It appears to me that the language of *Garden City Production Credit Assn. v. Lannan*, 186 Neb. 668, 186 N.W.2d 99 (1971), is even stronger today as it applies in the instant case where the purchaser testified that it was not even aware that a lien could be obtained on the farm commodities purchased or that such a filing had been made.

Some of our neighboring states which also have had occasion to examine this issue have, likewise, concluded that our earlier decision in *Garden City Production Credit Assn. v. Lannan* was the better rule. In *North Cent. Kan. Prod. Cred. Ass'n v. Washington Sales Co.*, 223 Kan. 689, 694, 577 P.2d 35, 39 (1978), the Supreme Court of Kansas said:

> We have carefully examined the cases and authorities cited by industrious counsel in the original briefs and those *amicus curiae* (all of whose briefs were most helpful), as well as others which our research uncovered. The division of authority is sharp. Some cases support the rationale of *Clovis National Bank v. Thomas*, 77 N.M. 554, 425 P.2d

726 (1967); others—and most writers on the subject—follow *Garden City Production Credit Assn. v. Lannan*, 186 Neb. 668, 186 N.W.2d 99 (1971).

The Kansas Supreme Court then went on to point out that following the decision by the New Mexico Supreme Court in *Clovis National Bank v. Thomas*, 77 N.M. 554, 425 P.2d 726 (1967), "the New Mexico legislature repudiated the *Clovis* doctrine" by amending the Uniform Commercial Code as it applied in New Mexico. 223 Kan. at 694, 577 P.2d at 39. The Kansas Supreme Court then went on in *North Cent. Kan. Prod. Cred. Ass'n v. Washington Sales Co., supra* at 696, 577 P.2d at 41, to say:

> The *Clovis* decision, as we pointed out earlier, is no longer applicable in the jurisdiction where it was adopted. Be that as it may, we do not think its rationale follows the intent of the framers of the Uniform Commercial Code, particularly as expressed in the sections of the code set forth above. We conclude that a ruling, following the *Clovis* doctrine, would hinder "the granting of credit to the capital-intensive agricultural industry" in this state; that such a holding is not in the spirit of the UCC, is not required by its terms, and would not be in the public interest. We therefore follow the rationale of *Lannan*, supra, and find no waiver of a security interest, and no consent to the sales here involved, by PCA's failure to remonstrate with Uffman, following his sales of milk and wheat.

Similarly, the Minnesota Supreme Court in *Wabasso State Bank v. Caldwell Packing Co.*, 308 Minn. 349, 350, 251 N.W.2d 321, 322 (1976), said:

> The question presented is whether one who finances farming operations and takes a security interest in cattle under an agreement which prohibits the sale of the collateral without the financier's prior written approval authorizes the borrower to sell the collateral by not objecting to a course of dealing in which the borrower has previously sold collateral without consent.

In concluding that a waiver did not occur, the Minnesota court said at 353, 251 N.W.2d at 323-24: "Article 9 of the

Uniform Commercial Code established a recording system which permits a creditor, by filing a financing statement, to rely upon the secured position set out in his written security agreement."

The Minnesota Supreme Court then discussed the argument raised by the purchaser to the effect that the bank could have easily protected itself by informing its farm loan debtors that it expected them to adhere to the terms of the security agreement and by reprimanding those who failed to do so, as now suggested by the majority herein. In rejecting that argument the Minnesota Supreme Court said at 354, 251 N.W.2d at 324:

> The fallacy in this argument is that it ignores the realities of the situation. The bank was not made aware of the sales of collateral before they occurred. Farmers would simply notify the bank of the sales when they came in with the proceeds to pay off the loan. At this point, not only was the bank not harmed by the sale but it was presented with an accomplished fact.
>
> Examining the options open to both the bank and the purchasers of the cattle, we have no difficulty in determining which party was in a better position to protect its interests. On the one hand, the bank had complied with all of the provisions of Article 9. It did not rebuke those farmers who sold collateral without authorization, since after the fact such action would have had little effect. It had no prior knowledge of Marczak's plans to sell his cattle. On the other hand, the defendants had constructive notice of the bank's security interest and after checking the records, a simple phone call would have determined whether the bank had authorized Marczak's sale. Alternatively, when paying Marczak for the cattle, defendants could have named Marczak and the bank as joint payees on their check. Either action would have fully protected the bank and defendants. In any event, this is not a case of detrimental reliance since defendants had no way of knowing whether or not the bank had reminded Marczak of the necessity for prior approval of sales.

The Minnesota court then concluded by quoting at length from our decision in *Garden City Production Credit Assn. v.*

Lannan, 186 Neb. 668, 186 N.W.2d 99 (1971).

As the majority observes, and as the record in this case establishes, requiring the borrower to obtain written consent from the Bank at 6 a.m. when livestock must be taken to market is not a realistic approach to the situation, nor does it permit the U.C.C., if so interpreted, to deal with the realities of life. We are here given two choices—shall we grant to the lender the benefits of his security, or shall we protect the purchaser who is rewarded by his failure to check the records. As a matter of fact, our decision today would seem to indicate that there is greater benefit in refusing to be provided any information if one wishes to purchase free and clear. What did the purchaser rely upon in making its purchase, and how was it misled by the lender?

I have no difficulty in concluding that by permitting the farmer to sell his livestock without first obtaining written consent, the Bank has waived the requirement for written consent. I have greater difficulty, however, in concluding that by simply waiving one of the requirements for sale, the Bank has thereby impliedly waived its entire security in the property and the benefits of § 9-306(2).

By waiving the requirement that the borrower must obtain written consent, the Bank may not declare the loan in default for failure to obtain such written consent. Nor may the Bank sue the debtor for conversion. It does not necessarily follow, however, that by waiving its right to declare the loan in default by reason of the borrower's failing to obtain written consent before sale or its right to sue the debtor for conversion that the lender impliedly intended to give up its security.

In passing, I must further disagree with the majority's discussion in this case of the effect of Neb. U.C.C. § 1-205 (Reissue 1980). While it may be true that § 1-205 is relevant only with regard to preagreement dealings between the parties, it is not true in this case that all of the dealings herein are postagreement. The transactions between the Bank and the debtor have gone on for nearly 6 years. During that time a host of agreements have been signed and a number of practices conducted. I fear that the majority opinion in this case may be misunderstood to mean that if the parties execute renewal

documents or subsequent loan agreements, the evidence regarding the manner in which they dealt with each other prior to the execution of the last renewal agreement would not be relevant. Certainly that is not what § 1-205(4) means, nor what it is intended to say.

I am not unmindful that the 1985 Legislature has amended Neb. U.C.C. § 9-307 (Cum. Supp. 1986). I purposely make no comment with regard to that because it is not relevant to the instant case.

For all of these reasons, therefore, I would not have overruled our holding in *Garden City Production Credit Assn. v. Lannan*, 186 Neb. 668, 186 N.W.2d 99 (1971), and I would have concluded that the evidence in this case was insufficient to submit to the jury the question of implied waiver. I would therefore have reversed and remanded.

I am authorized to state that CAPORALE and SHANAHAN, JJ., join in this dissent.

IN RE ESTATE OF ELIZABETH TJADEN, DECEASED.
EDWARD HINRICHS, APPELLEE, V. DONALD MAMMEN ET AL., APPELLANTS, FRANK L. BRUNING, PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH TJADEN, DECEASED, ET AL., APPELLEES.
402 N.W.2d 288

Filed March 20, 1987. No. 85-589.

1. **Decedents' Estates: Wills: Intent.** The cardinal rule concerning a decedent's will is the requirement that the intention of the testator 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 intention expressed in a will, a court must examine the decedent's will in its entirety, consider and liberally interpret every provision in the 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. _____: _____: _____. When intention is expressed in clear language used in a testator's will, a court must give full force and effect to the testator's intention so expressed.

4. _____: _____: _____. Generally, a term of art used in reference to a devise or other testamentary disposition or provision has a technical but, nonetheless, clear meaning used in a decedent's will.
5. **Words and Phrases.** *Any* usually means "all" or "every."
6. **Decedents' Estates: Wills: Words and Phrases.** "By right of representation" means a devisee is entitled to take or receive a share of an estate on a per stirpes basis.
7. _____: _____: _____. A distribution per stirpes is one in which the heirs or devisees take proportionate shares of the share of the ancestor through whom they claim as the ancestor's representatives. As such representatives, the heirs or devisees will be entitled to take just as much as such ancestor would have taken and no more.
8. _____: _____: _____. In a per stirpes distribution, ordinarily applicable in an intestate's estate, there is a division of property among a class or group of distributees who take the share which a decedent would have taken if such decedent were alive, taking such share by the right of representing the decedent.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Reversed and remanded with direction.

Joe T. Vosoba of Steinacher, Vosoba & Hanson, for appellants.

Annette E. Mason of Ross & Mason, P.C., for appellee Hinrichs.

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

SHANAHAN, J.

On September 14, 1973, when Elizabeth Tjaden executed her will, her sister Anna Lucht, and John Mammen, Elizabeth's brother, were alive, but the following were dead: Elizabeth's two brothers—Meino and George Mammen; her sister Tena Hinrichs; and Elizabeth's nephew Ervin Mammen, who was George Mammen's son.

When Elizabeth signed her will, there were five living sons of George Mammen—Leonard, Delbert, Donald, Wilber, and Edward Mammen, the Mammen brothers. Tena Hinrichs' three surviving children were alive when Elizabeth signed her will, namely, Dale and Edward Hinrichs and their sister, Mildred Margaret Cooke.

After Elizabeth had signed her will but before her death, the following died: John Mammen, Anna Lucht, Dale Hinrichs,

and Mildred Margaret Cooke. No child survived John Mammen, Dale Hinrichs, or Mildred Margaret Cooke, but children surviving Anna Lucht were her three children and eight grandchildren (children of Anna's two deceased children). Thus, none of Elizabeth Tjaden's brothers and sisters survived Elizabeth.

When Elizabeth Tjaden died in 1983, her will was admitted to probate in the county court for Thayer County. After the direction that all Elizabeth's estate be converted into cash, Elizabeth Tjaden's will provides:

> THIRD. . . .
>
> . . . .
>
> F. All the balance and remainder of the proceeds and funds realized and obtained by the conversion into cash by my executors of all my real and personal property, I give and bequeath to the following persons and with shares therein as follows:
>
> [1] To my brother John Mammen, a one-fifth (1/5) share thereof.
>
> [2] To Harry Mammen, Clarence Mammen and Rozella Brower, the children of my deceased brother Meino Mammen: to each of them a one-fifteenth (1/15) share thereof.
>
> [3] To my sister Mrs. Anna Lucht, a one-fifth (1/5) share thereof,
>
> [4] To Mildred Margaret Cooke, Edward J. Hinrichs and Dale H. Hinrichs, the children of my deceased sister Tena Hinrichs: to each of them a one-fifteenth (1/15th) share thereof.
>
> [5] To Leonard Mammen, Delbert Mammen, Donald Mammen, Wilber Mammen and Edward Mammen, sons of my deceased brother George Mammen: to each of them a one-thirtieth (1/30) share thereof.
>
> [6] To Joan Mammen and Alice Mammen, daughters of my deceased nephew Ervin Mammen: to each of them a one-sixtieth (1/60) share thereof.
>
> . . . .
>
> FIFTH. In the event of the death in my lifetime of any beneficiary under this Will who is not survived by any

> child or by a child or a deceased child of such beneficiary dying in my lifetime, who survive me, I direct that the share in my estate by this Will given to said beneficiary dying in my lifetime shall not lapse, but shall descend to my brothers and sister who survive me, in equal shares, and to the child or children of deceased brothers and sisters of mine who survive me, by right of representation, and to the child or children of a deceased child of a deceased brother or sister of mine who survive me, also by right of representation.

Edward Hinrichs, son of Tena Hinrichs and survivor of Mildred Margaret Cooke and Dale Hinrichs, filed an "Application for the Construction of the Will of Elizabeth Tjaden." In his application, Edward Hinrichs asserted that, pursuant to paragraph THIRD F[4] of the will, he was entitled to a 1/15 share of Elizabeth Tjaden's estate, and, in accordance with paragraph FIFTH of the will, was also entitled to the separate 1/15 shares devised to Mildred Margaret Cooke and Dale Hinrichs, both of whom had predeceased Elizabeth. After an evidential hearing establishing the relationships and the priority of deaths concerning Elizabeth's devisees who had predeceased Elizabeth, the county court entered its order of distribution, stating:

> The Court then turns to the determination of the intent of the decedent, that is, construction of Paragraph FIFTH. This Court is of the opinion that the clear intent of the testator was to provide for a division by a "per stirpes" division among identified beneficiaries, their issue or descendents. Clearly, the decedent intended to divide her estate, after specific requests [sic], equally among her brothers and sisters and the issue of deceased brothers and sisters or the issue of deceased issue of deceased brothers and sisters. At the time of the making of her Will, she knew that only one brother, John Mammen, and one sister, Anna Lucht, could survive her. Therefore, if her intent was to divide her estate into shares based on brothers and sisters who survived her, then she could have easily provided that her estate be divided equally between John Mammen and Anna Lucht, or the survivor of those

two if one would predecease her. She could then have provided that if both John Mammen and Anna Lucht predeceased her, then the estate would have been divided in the next degree of kinship, namely, her nieces and nephews . . . . However, she did not do this. She provided for an equal share to her brother and sister, John and Anna, "and to the child or children of deceased brothers and sisters of mine who survive me, by right of representation." By using the word "and," she clearly intended to divide the share of predeceased beneficiaries based on the number of brothers and sisters she had originally had with the children of her predeceased brothers and sisters sharing that share that their mother or father would have received. . . . The intent of the testator herein, Elizabeth Tjaden, clearly is . . . to utilize the term "right of representation" as actually a division "per stirpes" among the issue or descendants or identified relatives, namely, her five brothers and sisters. . . . The decedent further provided that also by right of representation (i.e. per stirpes), that if nieces or nephews who were issue of her predeceased brothers and sisters were likewise deceased, then their children would share in [sic] a per stirpes basis.

The Court, therefore, holds that by utilizing the term "right of representation," the decedent clearly intended descent by a per stirpes method.

Having resolved the issue of the intent of the testator, the Court then turns to actual distribution. The Court finds that the share of John Mammen does not lapse, but rather is divided into four shares equally and then distributed to the issue of Meino Mammen, Anna Lucht, Tena Hinrichs and George Mammen, per stirpes. The Court finds likewise that the share of Mildred Margaret Cooke and Dale H. Hinrichs respectively do [sic] not lapse but are instead to be divided into equal one-fourth shares of distribution to the issue of Meino Mammen, Anna Lucht, Tena Hinrichs and George Mammen on a per stirpes basis. Distribution of the one-fifth share of John Mammen and distribution of the 1/15th share of Mildred

> Margaret Cooke and Dale H. Hinrichs are therefore to be distributed by the personal representatives in accordance with this order. There is no basis for distribution of the shares of Mildred Margaret Cooke and Dale H. Hinrichs to [Edward] Hinrichs.

Edward Hinrichs appealed to the district court, claiming he was "entitled to inherit the shares of his deceased brother and sister [Dale Hinrichs and Mildred Margaret Cooke]." The "Judge's Minutes" of the district court contain the following excerpt:

> Even though paragraph FIFTH of the will is ambiguous, it is consistent and can be read to agree with paragraph THIRD (F). There can be no doubt that she [Elizabeth Tjaden] intended that no devise should laspe [sic].
>
> . . . [Paragraph THIRD] clearly expresses that she intended to give her property to her brothers and sisters, and to their issue, equally. It is difficult to imagine that she would have thought differently just because a niece & nephew died without issue.

The "Journal Entry" corresponding to the same date as the "Judge's Minutes" recites:

> [T]he Court finds for appellant Hinrichs.
>
> Tena Hinrich's [sic] issue take one-fourth (1/4) and Anna Lucht's issue take one-fourth (1/4), George Mammen's issue take one-fourth (1/4) and the issue of Meino Mammen take one-fourth (1/4).
>
> The Personal Representative is hereby ordered to distribute said shares in accordance with this finding. In so far [sic] as the County Court's finding is in conflict with this determination, the same is so modified.

The district court's order is slightly ambiguous in its statement: "Tena Hinrich's [sic] issue take one-fourth." To what the "one-fourth" refers is uncertain. However, as will be illustrated in this opinion, the 1/4 declared by the district court refers to Edward Hinrichs' share in Elizabeth Tjaden's total estate, and necessarily includes Edward Hinrichs' acquisition of the entire distributive shares devised to Dale Hinrichs and Mildred Margaret Cooke. Otherwise, as will be shown, Edward Hinrichs' 1/4 of the combined Dale Hinrichs-Mildred Margaret

Cooke distributive shares coincides exactly with the county court's order, which the district court modified as requested in Edward Hinrichs' appeal.

In the appeal to this court, all parties agree that John Mammen's share should be divided into fourths and distributed as part of the devises to the children of Anna Lucht, Meino Mammen, George Mammen, and Tena Hinrichs, so that such distribution will ultimately be made on a per stirpes basis. With the exception of Delbert, the Mammen brothers have appealed the district court's judgment, contending that John Mammen's 1/5 share, as well as the shares of Dale Hinrichs and Mildred Margaret Cooke (1/15 to each), should be distributed among the children of Anna, Meino, George, and Tena "by right of representation" in accordance with the county court's order for distribution. Brief for Appellants at 13. Edward Hinrichs maintains that he alone should take the shares of Dale Hinrichs and Mildred Margaret Cooke "as the only living representative of Tena Hinrichs' share of the estate." Brief for Appellee at 10.

Conditioned on survival of all devisees under paragraph THIRD F of Elizabeth Tjaden's will, and with 60 as the common denominator for the fractions expressed in paragraph THIRD F of that will, the following shares are taken under Elizabeth Tjaden's will:

(1) John Mammen, 12/60;

(2) Children of Meino Mammen, 12/60, that is, a 4/60 share to each of Meino's three children;

(3) Anna Lucht, 12/60;

(4) Children of Tena Hinrichs, 12/60, that is, a 4/60 share to each of Tena's three children;

(5) Children of George Mammen, 10/60, that is, a 2/60 share to each of George's five children; and

(6) Children of Ervin Mammen, 2/60, that is, a 1/60 share to each of Ervin's two children.

The effect of the district court's judgment was recognition of a 15/60 interest taken by Edward Hinrichs as the sole survivor of Tena Hinrichs and the survivor of Mildred Margaret Cooke and Dale Hinrichs, Tena's children. As an analysis of the district court's decision, Edward Hinrichs' share includes 1/4 of John Mammen's share, or a 3/60 share (1/4 of 12/60), plus 8/60

(combined 4/60 shares of Mildred Margaret Cooke and Dale Hinrichs) and the 4/60 (1/15) share taken outright by Edward Hinrichs as Tena Hinrichs' child. In that manner, Edward Hinrichs, according to the district court, was entitled to a 15/60 share, 1/4, or 25 percent, of the estate of Elizabeth Tjaden, deceased.

However, if the county court is correct, as the Mammen brothers contend, Edward Hinrichs' share of Elizabeth Tjaden's estate is not 25 percent but 15 percent, that is, 1/4 of John Mammen's share, or a 3/60 share, and Edward Hinrichs' outright 4/60 (1/15) share, plus Edward Hinrichs' share based on a per stirpes distribution of the combined shares of Dale Hinrichs and Mildred Margaret Cooke, which is 1/4 of 8/60, or 2/60. Therefore, according to the county court's order, Edward Hinrichs' share is 9/60 (3/60 plus 4/60 plus 2/60), or 15 percent, of Elizabeth Tjaden's estate.

As stated in Neb. Rev. Stat. § 30-2209(49) (Reissue 1985), a definitional section of the Nebraska Probate Code: "Testator means the maker of a will."

The cardinal rule concerning a decedent's will is the requirement that the intention of the testator 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*, 224 Neb. 812, 402 N.W.2d 251 (1987).

To arrive at a testator's intention expressed in a will, a court must examine the decedent's will in its entirety, consider and liberally interpret every provision in the 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, supra.*

When intention is expressed in clear language used in a testator's will, a court must give full force and effect to the testator's intention so expressed. See *Seybert v. Seybert*, 118 Neb. 246, 224 N.W. 1 (1929). Generally, a term of art used in reference to a devise or other testamentary disposition or provision has a technical but, nonetheless, clear meaning used in a decedent's will. See *In re Testamentary Trust of Criss*, 213

Neb. 379, 329 N.W.2d 842 (1983).

Paragraph FIFTH of Elizabeth Tjaden's will contains an antilapse provision applicable to "any beneficiary." In popular parlance, *any* usually means "all" or "every." See *McKay v. Equitable Life Assurance Society of U.S.*, 421 P.2d 166 (Wyo. 1966). See, also, *Mills v. State*, 53 Neb. 263, 73 N.W. 761 (1898). Without a doubt, Elizabeth intended that paragraph FIFTH of her will applied to all "beneficiaries" (devisees), including Dale Hinrichs and Mildred Margaret Cooke.

Neb. Rev. Stat. § 30-2306 (Reissue 1985) of the Nebraska Probate Code provides:

> If representation is called for by this code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner.

"By right of representation" means a devisee is entitled to take or receive a share of an estate on a "per stirpes" basis. See, *Siders v. Siders*, 169 Mass. 523, 48 N.E. 277 (1897); *Bradlee v. Converse*, 318 Mass. 117, 60 N.E.2d 345 (1945); *Hungerpiller et al. v. Keller et al.*, 192 S.C. 329, 6 S.E.2d 741 (1940). G. Thompson, The Law of Wills § 317 at 476 (3d ed. 1947) states: "A distribution per stirpes is one in which the beneficiaries take proportionate shares of the share of the ancestor through whom they claim as his [or her] representative. As such representatives, they will be entitled to take just as much as such ancestor would have taken and no more."

As this court stated in *Gaughen v. Gaughen*, 172 Neb. 740, 745, 112 N.W.2d 285, 288 (1961):

> Distribution per stirpes is a division with reference to the intermediate course of descent from the ancestor. It gives the beneficiaries each a share in the property to be distributed, not necessarily equal, but the proper fraction of the fraction to which the person through whom he claims from the ancestor would have been entitled.

See, also, *Norway National Bank v. Oates*, 297 A.2d 898, 904 (Me. 1972) ("A per stirpal distribution intends that the more

remote descendant share in the distribution through the share of his ancestor").

Thus, in a per stirpes distribution, ordinarily applicable in an intestate's estate, there is a division of property among a class or group of distributees who take the share which a decedent would have taken if such decedent were alive, taking such share by the right of representing the decedent. See, *Buxton v. Noble*, 146 Kan. 671, 73 P.2d 43 (1937); *Shoch's Estate*, 271 Pa. 165, 114 A. 505 (1921); *Gee, for an Opinion*, 44 R.I. 132, 115 A. 716 (1922).

By the clear language of paragraph FIFTH of her will, Elizabeth Tjaden manifestly intended that the share of any devisee who died during Elizabeth's lifetime shall be distributed equally among Elizabeth's surviving siblings *and* each class of devisees comprised of the surviving child or children, as well as grandchildren, of Elizabeth's siblings who had failed to survive her. That class of devisees is entitled to share in Elizabeth's estate by representation, taking the share which would have been taken by Elizabeth's sibling if such sibling had survived Elizabeth. Therefore, Elizabeth Tjaden specified not only the extent of each distributive share of her estate but the basis on which the devisees received such distributive share in her estate. Under paragraph FIFTH of Elizabeth's will, each class or group of devisees was entitled to share equally in the distributive share of every deceased but childless "beneficiary" (devisee). Consequently, by Elizabeth's will, there might be as many separate classes of devisees as there were siblings who died before Elizabeth but had a surviving child, children, or grandchildren. In the actualities of this case, there are four such classes or groups of devisees, because there are four of Elizabeth's deceased siblings who have a surviving child, children, or grandchildren. Since no sibling has survived Elizabeth, only the various classes or groups of children or grandchildren of Elizabeth's deceased siblings remained as devisees designated in paragraph FIFTH of Elizabeth's will. As noted, there are four such classes or groups surviving Elizabeth—the children of Elizabeth's deceased brother, Meino; the children and grandchildren of her deceased brother, George; the children and grandchildren of Anna Lucht,

deceased; and Tena's surviving child, Edward Hinrichs. Under paragraph FIFTH of Elizabeth Tjaden's will, the individual shares of Dale Hinrichs and Mildred Margaret Cooke ($^{4}/_{60}$ to each, or $^{8}/_{60}$ combined) were distributable equally among those four separate classes or groups of devisees designated in paragraph FIFTH—$^{1}/_{4}$ of $^{8}/_{60}$, or $^{2}/_{60}$ ($^{1}/_{30}$), to each such class or group of devisees, which is the distribution correctly ordered by the county court. We note the comment by the county court: "There is no basis for distribution of the shares of Mildred Margaret Cooke and Dale H. Hinrichs to [Edward] Hinrichs." We construe that comment as the county court's observation that the separate or individual shares of Dale Hinrichs and Mildred Margaret Cooke are not totally, immediately, and directly distributable to Edward Hinrichs, but, rather, are eventually distributable to Edward Hinrichs in a per stirpes distribution, that is, by representation.

For the reasons set forth above, the district court's order is incorrect and is reversed with direction to reinstate and affirm the county court's order for distribution.

REVERSED AND REMANDED WITH DIRECTION.

IN RE APPLICATION OF RENZENBERGER, INC. RENZENBERGER, INC., APPELLEE, V. BROWN'S CREW CAR OF WYOMING, INC., DOING BUSINESS AS ARMADILLO EXPRESS, APPELLANT, SEBASTIAN LOMBARDO, DOING BUSINESS AS FALLS CITY CAB, APPELLEE.

402 N.W.2d 294

Filed March 20, 1987. No. 85-749.

1. **Public Service Commission: Appeal and Error.** In an appeal from an order of the Public Service Commission, the Supreme Court examines the record to determine whether the commission acted within the scope of its authority and whether evidence shows that the order in question was unreasonable or arbitrary.
2. _____: _____. If there is evidence to sustain the findings and action of the Public Service Commission, the Supreme Court cannot intervene. Where the commission's finding is against all evidence, the Supreme Court may hold that such finding by the commission is arbitrary.
3. **Administrative Law.** A commission's or agency's action is arbitrary if taken in disregard of facts or circumstances and without some basis which would lead a reasonable and honest person to the same conclusion.
4. **Public Service Commission: Motor Carriers: Proof.** An applicant for a certificate issuable pursuant to Neb. Rev. Stat. § 75-311 (Reissue 1986) has the burden to prove that the proposed service is or will be required by the present or future public convenience and necessity.
5. **Public Service Commission: Motor Carriers.** Regarding a proposed service to be authorized pursuant to Neb. Rev. Stat. § 75-311 (Reissue 1986), existence of an adequate and satisfactory service by motor carriers already in the area is complete negation of a public need and demand for added service by another carrier.
6. **Public Service Commission: Motor Carriers: Proof: Words and Phrases.** Public demand or need, which an applicant must prove to obtain a certificate from the Public Service Commission pursuant to Neb. Rev. Stat. § 75-311 (Reissue 1986), is a present actual need or a need which will likely occur within the reasonably immediate or foreseeable future. A certificate of public convenience and necessity cannot be granted on the basis of future needs which are speculative or improbable.

Appeal from the Nebraska Public Service Commission. Reversed.

Bradford E. Kistler of Nelson & Harding, for appellant.

Lavern R. Holdeman of Peterson Nelson Johanns Morris & Holdeman, for appellee Renzenberger, Inc.

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

SHANAHAN, J.

Brown's Crew Car of Wyoming, Inc. (Brown), doing business as Armadillo Express, protested issuance of a Nebraska Public Service Commission certificate of public convenience and necessity to Renzenberger, Inc., for authority to transport train crews within Nebraska. See Neb. Rev. Stat. § 75-311 (Reissue 1986) (issuance of a certificate of public convenience and necessity). Brown appeals the commission's granting the requested authority to Renzenberger.

Renzenberger, a Kansas corporation transporting train crews, operates interstate under federal authority and intrastate under authority from Kansas and Missouri. Pursuant to a contract with Missouri Pacific Railroad Company, as its sole customer, Renzenberger transports train crews within Kansas and Missouri and sometimes provides interstate service from points in Kansas to Falls City, Richardson County, Nebraska, a terminal for Missouri Pacific.

When it applied for Nebraska authority, Renzenberger had 12 drivers and 12 1-ton vans to transport train crews with their luggage, and offered such service around the clock, 7 days a week. Renzenberger asserts that Nebraska authority is necessary because it is unable to provide complete service for its customer, Missouri Pacific.

Since 1978 Brown has held Nebraska authority to transport train crews between all points in Nebraska, subject to a restriction preventing transportation between Omaha and Fremont involving train crews of Union Pacific Railroad Company. Another carrier provides transportation for the Union Pacific between Omaha and Fremont. Brown also holds federal authority for interstate operation and intrastate authority from Iowa and Wyoming.

Brown has contracts with the Union Pacific and Burlington Northern railroads for transportation of those railroads' train crews within Nebraska. Additionally, on a "call-on-demand" basis, Brown serves the Chicago and North Western railroad and "KATY" railroad in their Nebraska operations. Brown has

sought crew-transportation business from Missouri Pacific and would provide such service, if requested, but Missouri Pacific has declined Brown's service. Brown has 20 employees and operates 14 vehicles stationed in four Nebraska cities—Lincoln in eastern Nebraska, Grand Island and Ravenna in the central part of the state, and Gering in western Nebraska. Brown's service is supplied around the clock, 7 days a week.

At the commission hearing, Brown's president, Joe C. Brown, Jr., testified that the company's business had decreased drastically throughout the year preceding Renzenberger's application. Brown's Nebraska operations were at a subcapacity level, although capacity was reached in 1985 when a heavy rain washed out a part of Burlington Northern's tracks in Nebraska. If Renzenberger's application were granted, Brown testified, his company would suffer loss of revenue. Brown has never received a complaint from Burlington Northern regarding Brown's service and can provide additional equipment, if needed, to meet increased demands for its services.

Another protestant was Sebastian Lombardo, doing business as Falls City Cab, who held Nebraska authority to transport passengers from Richardson County (Falls City) to points within Nebraska and to supply transportation for crews of Missouri Pacific and Burlington Northern within the cab company's authorized area. (The cab company does not appeal issuance of the certificate to Renzenberger because Renzenberger's authority, as hereinafter reflected, excluded operation in Richardson County.)

In support of its application, Renzenberger called a witness, William E. Thompson, Burlington Northern's trainmaster responsible for that railroad's operation in the eastern half of Nebraska. Thompson had no knowledge about Burlington Northern's transportation needs in western Nebraska. However, Thompson testified that Burlington Northern has a daily need for transportation of its train crews and uses Brown to fulfill that need. Thompson also testified that Burlington Northern was satisfied with, and would continue to use, Brown's service. Further, Thompson testified that a solitary carrier could meet Burlington Northern's needs if such carrier

were large enough. According to Thompson, in its eastern district of Nebraska, Burlington Northern has received satisfactory service from two carriers, one of which is Falls City Cab.

When asked the reason for Burlington Northern's support of Renzenberger's application, Thompson explained:

> A Well, basically, we just — we'd like to have a backup company in case the need should arise.
>
> Q Okay. Have you — has there been a need shown in the past for a backup company?
>
> A I couldn't specifically state any time. Generally I think what we're looking at is in case of a natural catastrophe, such as a flood or maybe a major derailment
>
> . . . .
>
> . . . .
>
> Q But using them as a backup presently, then, there's no particular need for their service at the present time other than just a backup.
>
> A As I understand it, yes.

Referring to Burlington Northern's transportation needs, Thompson further testified: "[W]e've been satisfied with the service of [Brown and Falls City Cab]. We just basically would like to have a backup service available in the state of Nebraska."

James A. Anthony, district manager in charge of contract matters for Missouri Pacific's central district, which includes Nebraska, testified in support of Renzenberger's application. Missouri Pacific operates a main line out of Omaha, through Falls City, and into Kansas, but is considering abandonment of its branch line to Hastings, Nebraska. Missouri Pacific's "home terminal" for its Nebraska main line is Falls City, headquarters for crews working along that line. Although Renzenberger's service includes interstate transportation of Missouri Pacific's crews from Falls City to Kansas City, Missouri Pacific has contracted with Falls City Cab for intrastate transportation of train crews within Nebraska and will continue to use the cab company for such service. Regarding Omaha and Lincoln, other sources of transportation are available to move Missouri Pacific's train crews to their dispatch points. Anthony testified that Missouri Pacific's train crews, on an average, require

transportation once a day, generally from Falls City to Omaha. When asked whether Missouri Pacific's transportation needs were going to increase in the future, Anthony responded: "Let me just say that I'm not aware of any changes in the immediate future — very immediate future, I'm not aware of any changes." As expressed by Anthony, Missouri Pacific believed Renzenberger would provide more efficient service if Renzenberger held Nebraska authority in addition to interstate authority, and competitive bidding for transportation of train crews was desirable.

The Public Service Commission concluded:

> The applicant's [Renzenberger's] evidence of the demand for the proposed services was not overwhelming. At best the applicant's witnesses tend to look upon the proposed service as a back-up service to the services being provided by the protestants. The protestant Brown did not adduce persuasive evidence that the authorization of the applicant to perform the proposed service would seriously impair the operations of Brown; however, the testimony of the Falls City Cab Company was convincing that further erosion of the economic base of its operations would imperil the existing taxi service in Falls City. It is apparent that the service authorized should be restricted to deny the applicant authority to serve Richardson County and any authority to serve points in Nebraska with trips that originate or terminate in Richardson County.

The Public Service Commission then determined that Renzenberger was fit, willing, and able to perform the service of a common carrier and Renzenberger's "proposed intrastate service is or will be required by the present or future public convenience and necessity . . . ." When the Public Service Commission issued a certificate to Renzenberger, Brown appealed, assigning that the commission erred in failing to find that adequate and satisfactory service by motor carriers, already in the area to be served, was complete negation of public need and demand for Renzenberger's added service; in finding that the certificate of authority granted to Renzenberger is or will be required by the present or future public convenience and necessity; and in deciding that Brown

did not adduce persuasive evidence that authorization for Renzenberger would seriously impair Brown's operations.

In an appeal from an order of the Public Service Commission, the Supreme Court examines the record to determine whether the commission acted within the scope of its authority and whether evidence shows that the order in question was unreasonable or arbitrary. *In re Application of Red Carpet Limo. Serv., Inc.*, 221 Neb. 340, 377 N.W.2d 91 (1985); *In re Application of Amsberry, Inc.*, 220 Neb. 353, 370 N.W.2d 109 (1985); *In re Application of Crusader Coach Lines*, 213 Neb. 53, 327 N.W.2d 98 (1982). If there is evidence to sustain the findings and action of the Public Service Commission, the Supreme Court cannot intervene. Where the commission's finding is against all evidence, the Supreme Court may hold that such finding by the commission is arbitrary. *In re Application of Red Carpet Limo. Serv., Inc., supra*. See, also, *In re Application of Greyhound Lines, Inc.*, 209 Neb. 430, 308 N.W.2d 336 (1981). A commission's or agency's action is arbitrary if taken in disregard of facts or circumstances and without some basis which would lead a reasonable and honest person to the same conclusion. *In re Appeal of Levos*, 214 Neb. 507, 335 N.W.2d 262 (1983); *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985). An applicant for a certificate issuable pursuant to § 75-311 has the burden to prove that the proposed service is or will be required by the present or future public convenience and necessity. *In re Application of Red Carpet Limo. Serv., Inc., supra; In re Application of Amsberry, Inc., supra*.

> Whether there is public convenience and necessity for issuance of a commission certificate depends on answers to three questions: " '[W]hether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by [the] applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to public interest.' " *Black Hills Stage Lines, Inc. v. Greyhound Corp.*, 174 Neb. 425, 429, 118 N.W.2d 498, 500 (1962). "The question of the adequacy of service of

> existing carriers is implicit in the issue of whether or not convenience and necessity demand the service of an additional carrier in the field. Obviously the existence of an adequate and satisfactory service by motor carriers already in the area is complete negation of a public need and demand for added service by another carrier." *In re Application of Canada*, 154 Neb. 256, 261, 47 N.W.2d 507, 510 (1951); *Schmunk v. West Nebraska Express*, 159 Neb. 134, 65 N.W.2d 386 (1954).

In re Application of Amsberry, Inc., supra at 357-58, 370 N.W.2d at 112.

In deciding that Renzenberger's proposed service responded to a public demand or need, the Public Service Commission stated: "The applicant's evidence of the demand for the proposed service was not overwhelming." Renzenberger's evidence about demand or need for service was not overwhelming, because such evidence was nonexistent. Existing service by Brown and Falls City Cab was adequate and satisfactory and, therefore, operated as a complete negation of a public need and demand for the added service of another carrier. See *In re Application of Amsberry, Inc., supra.* Burlington Northern acknowledged its satisfaction with the service of Brown as well as satisfactory service by Falls City Cab and the railroad's intention to continue use of those motor carriers. If a sole carrier were large enough, such carrier would fulfill the needs of Burlington Northern. It was uncontradicted that Brown has the capacity to meet all present needs of any railroad in Nebraska and could supply additional equipment, if needed. Missouri Pacific had daily need of transportation, generally from Falls City to Omaha, but finds Falls City Cab sufficient for that purpose. Renzenberger does not quarrel with the commission's order specifically precluding Renzenberger's transportation of train crews regarding Richardson County, where Falls City is located.

Public demand or need, which an applicant must prove to obtain a certificate from the Public Service Commission pursuant to § 75-311, is a present actual need or a need which will likely occur within the reasonably immediate or foreseeable future. A certificate of public convenience and necessity cannot

be granted on the basis of future needs which are speculative or improbable. See, *Highway Express Lines, Inc. v. Pa. P. U. C.*, 195 Pa. Super. 92, 169 A.2d 798 (1961); *Kentucky Utilities Company v. Public Service Com'n*, 390 S.W.2d 168 (Ky. 1965); *State ex rel. Eldon Miller, Inc. v. Public Serv. Com'n*, 471 S.W.2d 483 (Mo. App. 1971). Any rule otherwise would bind the present with certificated service based on speculation and mere possibility of demand or need, a foundation not of fact but fantasy. In reference to a certificate based on future need, possibility is not equivalent to probability. Ordinarily, the more prospectively remote a proposed service is in relation to the application for authority, the less likely and more doubtful is need or demand for the service to be authorized. In the case before us, events effected by the elements of nature at indefinite and infrequent intervals and a random derailment are insufficient predicates for probability concerning a certificate issuable in response to public convenience and necessity, present or future. As the Public Service Commission observed: "At best [Renzenberger's] witnesses tend to look upon the proposed service as a back-up," which certainly indicates that the subject service is, in fact, being adequately supplied to rail carriers in Nebraska. There was no demonstrated need for a "back-up" service based on actual experience. Burlington Northern's factually unsupported desire does not rise to the level of a need, actual or probable. Also, at least three motor carriers satisfactorily supply transportation of train crews within Nebraska. Nothing indicates that Brown, as one of those motor carriers, cannot meet the needs of railroads in Nebraska.

Renzenberger has failed to show that existing authorized carriers are unable to supply the proposed service and has also failed to demonstrate any demand or need which requires issuance of a certificate to Renzenberger for public convenience and necessity, present or future. Consequently, the Public Service Commission acted arbitrarily in issuing Renzenberger a certificate of public convenience and necessity. Under the circumstances, there is no necessity to address any question about impairment of Brown's operations as a consequence of a certificate issued to Renzenberger. We, therefore, reverse and

set aside the Public Service Commission's order issuing such certificate to Renzenberger.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM L. VAUGHN, APPELLANT.
402 N.W.2d 300

Filed March 20, 1987. No. 86-440.

1. **Burglary: Proof.** In proving the crime of burglary, no actual theft or asportation of property is required.
2. **Burglary: Intent.** Intent sufficient to support a conviction for burglary may be inferred from the facts and circumstances surrounding an illegal entry into improvements on real estate.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

James S. Jansen, for appellant.

Robert M. Spire, Attorney General, and Linda L. Willard, for appellee.

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

GRANT, J.

Defendant, William L. Vaughn, was charged in the district court for Douglas County with burglary, a Class III felony, as defined in Neb. Rev. Stat. § 28-507(1) (Reissue 1985). Vaughn appeals from the order of the district court which found him "not responsible by reason of insanity at the time of the offense charged." The court then stated in its order, "This verdict of acquittal is entered on the grounds of insanity alone." Defendant timely appealed, alleging, "The District Court erred in finding that the State established beyond a reasonable doubt, that the Defendant entered the building in question with the requisite intent to commit a felony, or to steal property of value." We affirm.

On July 2, 1985, the State filed an information charging the

defendant with burglary, allegedly committed on June 19, 1985. On July 11 the court ordered a psychiatric examination to determine if the defendant was competent to stand trial. At a hearing on November 19, 1985, the court received a psychiatric report from the Lincoln Regional Center with the opinion that defendant was not competent to stand trial. At defendant's request to have a further independent psychiatric evaluation, the court ordered a second examination, which was conducted on December 13, 1985.

At another hearing held on February 14, 1986, the report of the second examination was received. This report set out the psychiatrist's opinion that so long as defendant took an appropriate antipsychotic medication he was competent to stand trial. The court found defendant competent to stand trial.

On February 26, 1986, the defendant filed a "Notice of Defendant's Intention to Rely Upon Insanity Defense." On March 13, 1986, defendant appeared in court with his attorney. The county attorney was present, as was defendant's mother. Defendant waived a jury trial, and after carefully examining defendant, the court accepted the waiver. Defendant, through his attorney, orally pled "[n]ot guilty and not responsible by reason of insanity." The parties, through their counsel, stipulated to the evidence to be considered by the court. The State offered the police reports in the matter, "with the understanding that if the witnesses named . . . in these reports, were called to testify, they would testify in conformity with the statements and interviews, and so forth, attributed to them in these reports." On behalf of defendant, the report of defendant's psychiatrist, dated January 21, 1986, was offered and received in evidence.

The evidence before the court showed that on June 19, 1985, witnesses observed defendant entering a residence by the removal of a combination window screen and the raising of a kitchen window in the rear of the house. These witnesses stopped a police cruiser driving by and informed the officer of the defendant's entry into the house. Defendant was apprehended inside the house by this officer.

The daughter of the owner of the residence stated that nothing was missing from the house. This witness stated that

the only things changed after defendant's entry into the residence were that a telephone that had been on the bed had been moved to the bedroom floor, and a key which had been on the desk in her bedroom was found on the front porch, along with clothing in two bags which was the property of defendant.

Based on this evidence, the court found the defendant was not responsible by reason of insanity, entered an order of acquittal, and ordered a hearing pursuant to Neb. Rev. Stat. § 29-3701 (Reissue 1985). Defendant does not challenge those proceedings.

We first note that the court did not make the finding, attacked as error in defendant's assignment of error, "that the State established beyond a reasonable doubt, that the Defendant entered the building in question with the requisite intent . . . to steal property of value." Defendant's position apparently is that there was no evidence of any taking of property and that the trial court should never have reached the point of determining defendant was not responsible by reason of insanity because the facts before the court did not show that defendant had the intent "to commit any felony or with intent to steal property of any value," and, therefore, the court should merely have found defendant not guilty.

We need not consider the issue raised by defendant, because our examination of the record shows there was before the court sufficient evidence to convict the defendant of burglary, if believed by the court, and a verdict of acquittal because of defendant's insanity was appropriate if the court determined that defendant was not responsible for his acts at the time of the alleged crime because of defendant's mental condition.

Section 28-507(1) states: "A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value." In this case the elements of a willful, malicious, and forcible entry of an improvement on real estate have been established beyond any doubt. The only remaining question is whether the facts could be considered to establish that defendant (absent his later-determined insanity) entered the residence with intent to steal "property of any value."

We have held that in proving the crime of burglary, "No actual theft or asportation of property is required." *State v. Carter*, 205 Neb. 407, 409, 288 N.W.2d 35, 36 (1980). Intent sufficient to support a conviction for burglary may be inferred from the facts and circumstances surrounding an illegal entry into improvements on real estate. *State v. Coburn*, 218 Neb. 144, 352 N.W.2d 605 (1984).

In the case at bar, the evidence showed that defendant had taken a key from a bedroom to the front porch. With nothing further, the court could have regarded such evidence as sufficient to find criminal intent to steal property of value.

If the court so viewed the evidence, and then considered psychiatric evidence offered by defendant that on the day of the crime defendant "was not responsible for his acts . . . because of his mental illness," there was ample evidence to support the court's finding of acquittal.

In so holding, we do not consider the effect of a defendant's appealing from an order which he asked for as a part of his requested disposition of the case against him. In civil cases, that consideration has been addressed in *Morris v. Morris*, 201 Neb. 479, 268 N.W.2d 431 (1978), and *Saum v. L. R. Foy Constr. Co., Inc.*, 190 Neb. 783, 212 N.W.2d 648 (1973).

There was no error in the judgment of the trial court, and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARWOOD L. DONNELSON, APPELLANT.

402 N.W.2d 302

Filed March 20, 1987. No. 86-492.

1. **Directed Verdict: Convictions.** A trial court will be justified in directing a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony is of so weak or doubtful a character that conviction based thereon could not be sustained.
2. **Circumstantial Evidence: Convictions.** Circumstantial evidence is sufficient to

support a conviction if the evidence and reasonable inferences that may be drawn from such evidence establish the defendant's guilt beyond a reasonable doubt.

3. **Expert Witnesses: Death: Proof.** Contradictory medical opinions as to the cause of death in a criminal case do not establish, of themselves, that the State has failed to prove the cause of death beyond a reasonable doubt.
4. **Motions for Continuance: Appeal and Error.** A motion for a continuance of a trial is addressed to the sound discretion of the trial court, and that ruling will not be disturbed on appeal in the absence of a showing of an abuse of that discretion.
5. **Motions for New Trial: Appeal and Error.** The granting or refusal of a motion for a new trial is left to the sound discretion of the trial court.
6. **Sentences: Probation and Parole.** The granting of probation as opposed to imposing a jail sentence is a matter left to the sound discretion of the trial court.

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

Robert B. Creager of Berry, Anderson, Creager & Wittstruck, for appellant.

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

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

GRANT, J.

The defendant, Garwood L. Donnelson, appeals his conviction by a jury of manslaughter in violation of Neb. Rev. Stat. § 28-305 (Reissue 1985). The defendant alleges the district court erred in failing to grant a continuance to allow defendant to properly prepare for the State's expert testimony; in failing to grant defendant's motion for dismissal of the charge against him because of insufficiency of the evidence; in failing to grant a new trial based on a posttrial affidavit concerning testimony of two of the State's expert witnesses; and in failing to sentence the defendant to probation, rather than imprisonment. We affirm.

The record discloses the following. In an information filed September 4, 1985, the defendant, Garwood Donnelson, was charged with manslaughter in the death of Carolyn Witthoff. The defendant had been present when the deceased suffered an injury which led to her death due to a subdural hematoma.

After a trial to a jury, the defendant was found guilty of killing Carolyn Witthoff without malice, either upon a sudden quarrel or unintentionally while in the commission of an unlawful act. The defendant was sentenced to imprisonment in the Department of Correctional Services for a term of 3 years.

The evidence before the jury was largely circumstantial. No one else was present at the time of the death other than the defendant. He alleges Mrs. Witthoff apparently fell while extremely intoxicated and suffered the injury from which she died.

Evidence adduced before the jury showed the following. In approximately 1971 the defendant became acquainted with the deceased's husband though their involvement in various political activities. The defendant and his wife became friends with Mr. and Mrs. Witthoff. The couples took vacation trips together. In approximately 1976, the relationship between the defendant and Mrs. Witthoff changed. Their meetings were infrequent at first, meeting at bars and sometimes at conventions. In 1980, while the couples were on a trip to Europe, the defendant's wife became aware of a new closeness in the relationship between defendant and Mrs. Witthoff. An unpleasant scene followed, and the defendant's wife discontinued her friendship with Mrs. Witthoff. Mrs. Witthoff and the defendant continued seeing one another. Their meetings became more frequent, and in 1980 defendant and Mrs. Witthoff rented a small apartment in Lincoln, Nebraska. Each of them continued to reside in their respective marital houses. The apartment rent was divided between the two. A pattern developed. For about 2 years before August 31, 1985, the defendant and Mrs. Witthoff met at the apartment for lunch two or three times a week. They would also meet in the evenings after work two or three times a week, and they would spend nearly every Saturday together at the apartment. A typical Saturday meeting would include meeting for lunch and drinks. The couple would spend the balance of the afternoon at the apartment drinking, sleeping, and engaging in sexual relations. This relationship continued until August 31, 1985, a Saturday.

On that day, the defendant and Mrs. Witthoff met at the apartment about noon. They consumed alcoholic drinks,

talked, and had lunch around 1 or 1:30 p.m. Over the next 4 hours the couple slept and engaged in sexual relations. At approximately 5 p.m. the defendant decided to leave. He got dressed and left the apartment to call a cab to go to his home. He testified he walked for about a block, then turned around and walked back to the apartment. A resident of the apartment house testified that at approximately 5:45 p.m., as the witness was leaving his apartment located directly across the hall from the deceased's apartment, he saw Mrs. Witthoff, standing in the doorway, unclothed. Upon seeing the witness, Mrs. Witthoff closed her door immediately. The witness observed no injuries on her body at that time. As the witness left the building he observed the defendant walking away from the building, and then turning back toward the building. The witness paid his rent to the landlady in the next apartment building and returned to his apartment for about 15 minutes. The witness then left to buy groceries and returned in about 45 minutes, stayed about 15 minutes, and left again at approximately 7 p.m. Upon his return to his apartment at approximately 8:30 p.m., he saw a police car in front of the apartment. During his presence in his apartment during his various returns, the witness heard no unusual noises in Mrs. Witthoff's apartment.

Defendant testified that he returned to the apartment because he thought Mrs. Witthoff may have begun getting dressed and she could drive him home. She had not begun getting dressed, and the defendant removed his clothing and the two resumed drinking.

The defendant testified that as Mrs. Witthoff was walking through the apartment she bounced off a table, knocking a lamp onto the floor and breaking it. The two of them then attempted to pick up the broken glass, at which time, the defendant testified, he cut his thumb. A piece of glass with blood on it was recovered from the trash can.

The defendant testified that he then passed out again, and that upon awaking at approximately 8:30 p.m., he saw Mrs. Witthoff lying on her back on the floor. The defendant testified he could not really see Mrs. Witthoff clearly because he did not have his glasses on. When he knelt over her he noticed a black substance around her mouth. He felt that it was blood. He

testified he next jumped up, put his clothes on, and ran upstairs to get someone to phone 911.

A witness for the State, John Phillips, testified that at approximately 8:15 p.m. on the evening in question he was entering the apartment building when he heard a loud conversation taking place in the lower level of the building. He testified that this was unusual because he normally could not hear voices as he entered the building.

At approximately 8:30 p.m., the defendant knocked at the door of Blanche Cejka, the occupant of the apartment just above the apartment rented by defendant and Mrs. Witthoff. Defendant stated that a woman was dying downstairs and requested that Cejka call 911. Cejka could not recognize the man at her door at first, but when he returned a few minutes later and again asked her to call 911, she recognized the man as the defendant. She testified that the second time defendant talked to her, she asked defendant what the problem was and the defendant said a "tantrum," or something to that effect.

Officer Joseph Lefler of the Lincoln Police Department was called to the scene. He was directed to the apartment. The officer met defendant at the door to the apartment house and defendant accompanied him to the apartment, where defendant unlocked the door. The officer talked to defendant, and testified the defendant appeared intoxicated but not "falling down drunk." As Officer Lefler entered the apartment he saw Mrs. Witthoff lying on the floor, unclothed, with blood around her chin and neck. She appeared to be unconscious and was having trouble breathing. The officer testified that as he was examining Mrs. Witthoff, the defendant was sitting on the couch smoking a cigarette, and appeared "nonchalant" about what was happening. When asked by Officer Lefler what had happened to her, the defendant replied she had cut her chin on a light bulb of a lamp.

Two additional officers arrived on the scene and removed the defendant to make room for the medical personnel. The defendant was escorted to a police cruiser. When asked who the victim was, the defendant replied she was his mistress, and that a lamp got broken and he did not remember what happened. The defendant was then taken to the police station.

Medical personnel who arrived at the scene found Mrs. Witthoff unconscious and not responsive to stimuli. They observed a soft area on the back of her head and a deep laceration on her chin. A member of the Mobile Heart Team testified that he noticed the wound on the chin when he felt an irregularity of the skin and a wetness there. He said he pushed on the wound but did not remember entering the wound itself when applying gauze to it. The medical personnel placed a respiratory aid device on the victim and transported her to the hospital.

The defendant was taken to the police station, where he talked to a detective after waiving his *Miranda* rights. The defendant told the detective that both he and the victim were married to others, and "this was our pad." The defendant said to the detective that his "life was ruined." The defendant also told the detective, "[T]his is going to destroy me and her, too. . . . I didn't try to kill the woman for crying out loud. I was surprised." Defendant also stated to the detective, "I'm ruined. If she dies, I'm going to be charged." Defendant admitted that he and the victim had been drinking all afternoon and that "she wouldn't let me leave." Defendant also told the detective that "they had had an argument but that it wasn't violent." The detective asked defendant what happened, and defendant told him that he and Mrs. Witthoff were in the apartment, "but I don't know how it happened." Defendant then told the detective, "I have blood on my hands and on my pants."

After the defendant removed his shirt and pants, the detective observed three red marks on the defendant's shoulder blade, as well as a fresh scratch on the defendant's left thigh and a scratch on his right elbow. The defendant testified he did not know the scratches were there, but felt the scratch on the thigh may have come from sitting on a piece of glass on the couch. No blood was found on the couch. The detective also observed bloodspots on the defendant's pants.

An investigation of the apartment was subsequently conducted by another detective. He saw an area of broken glass on the floor, near a small table. On the table was a gooseneck lamp with a broken bulb and no shade. The broken glass on the floor of the apartment was of two types: white frosted glass

from a light bulb and yellow glass from a glass lampshade. Several pieces of glass were recovered from the garbage can, with one being covered by droplets of blood. This detective also observed a globe sitting on the table, but not properly fitting in its holder. A pair of men's eyeglasses was found on the floor underneath the table. Bloodstains were located throughout various areas of the apartment, including on the oriental rug, on the sink in the bathroom, and on several items of women's clothing. One of the towels in the bathroom was damp throughout, with blood on two areas. The toilet lid was down, and inside the toilet was tissue containing blood.

Mrs. Witthoff was taken to Lincoln General Hospital. The victim was unconscious and unresponsive to painful stimuli. The laceration under her chin was treated. Blood alcohol tests were taken, indicating alcohol in the victim's blood in excess of 0.32 percent. After taking x rays and running other tests, a doctor concluded Mrs. Witthoff's unconscious state was due to a head injury. A neurosurgeon was consulted to determine if surgery would benefit Mrs. Witthoff. Due to the amount of cerebral damage, surgical intervention was deemed inappropriate. Mrs. Witthoff was maintained on life support until the 3d of September, when she was pronounced brain dead and, with the consent of the family, removed from the respirator.

An autopsy of the body was performed by Dr. John Porterfield, a coroner's physician for Lancaster County. Dr. Porterfield is a pathologist, and board certified in clinical and anatomical pathology. He testified the wound under the chin was caused by blunt trauma rather than an incision and that he determined the cause of death was due to "massive bilateral . . . subdural hemorrhage and the complications thereof." He testified that an injury to the head, over the right ear, was, in his opinion, also due to "blunt trauma without pattern." Dr. Porterfield testified that the lamp in the room could have caused the wound on the chin but that he did not have an opinion as to the manner of death. Dr. Porterfield also testified there were two separate traumas, one to the head and one to the chin, and that he could not determine if a wound on the lip was a part of the chin injury. The head injury was the size of a

human hand.

Dr. Porterfield also testified that there was bruising in the scalp, but no bruises on the brain itself. He then described the results of a blow to the right side of Mrs. Witthoff's head, which was called a "coup injury." The doctor then stated, "Injuries to the opposite side of the head sustained by a blow [are] referred to as a contrecoup type injury." Dr. Porterfield then set out the usefulness of the coup-contrecoup concept in determining the manner in which the injury was received. The doctor described the phenomenon as follows:

> But the basic theory behind it all is that if you sustain a blow to the head (gesturing) on the right side, let's say by a 2 by 4 since we're talking about blunt trauma, then if that head is stationary, it's not moving, then the injury to the covering of the brain, whether it be the dura mater or the leptomeninges or the brain itself, and it can be any or all of those, the injury that's sustained by such a blow is going to be on that same side directly underneath the blow whereas in a contrecoup injury, the injury being on the opposite side of the head implies that the brain, that — or rather the head was in motion at the time the injury occurred. For example, the most common example of this would be if somebody falls. If they fall and hit the head on that same 2 by 4, then the main injury is on the opposite side of the head. There could also be injury on the same side of the head but the main injury very frequently in these situations is on the opposite side of the head or a contrecoup injury.

The doctor explained that, in his opinion, the phenomenon occurs because, in a fall, as the falling person's head stops moving the brain inside the skull continues to move and "can frequently produce an injury on the opposite side of the head." The doctor further explained that, in his opinion, if the head is stationary and a moving object strikes the head, the coup-contrecoup result will not be seen. Dr. Porterfield testified that an injury to the left side of Mrs. Witthoff's head was a contrecoup injury. Dr. Porterfield considered that the deceased's head was moving when the injury was sustained. He did not know what put the head in motion, but stated that such

results are often caused by falls.

In addition to the testimony of the coroner's physician, several other expert witnesses testified for the State and for the defendant.

Dr. Mary Case, a physician from St. Louis, Missouri, who was board certified in anatomical pathology, forensic pathology, and neuropathology, Dr. Blaine Roffman, a physician specializing in pathology, and Dr. Joel Kirkpatrick, a neuropathologist, were also called as expert witnesses for the State, with Dr. Kirkpatrick testifying on rebuttal.

In explaining her qualifications, Dr. Case stated that she was one of three physicians in the nation qualified in all three specialties set out above. She testified that neuropathology is the study of the nervous system, including the brain, and forensic pathology is a specialty for the study of sudden and unexpected types of death, to attempt to determine the manner of death. Anatomical pathology had been earlier described as the study of tissues removed from a body.

In addition to her academic background, Dr. Case testified that she had done between 7,000 and 8,000 autopsies during the time from approximately 1975 to trial and that, in addition, she was consulted on and yearly looked at 600 to 800 brains removed in autopsies by other doctors.

Dr. Case then described the records and data she examined in connection with the death of Mrs. Witthoff. She examined a diagram of the scene of the incident and a partial taping of that scene, various sperm reports, the coroner's physician's report, laboratory reports, the autopsy report and the videotape of that report, x rays, the CAT scan, and brain tissues taken from the deceased.

Dr. Case set out her opinion as to Mrs. Witthoff's death as follows:

> The cause of death of this woman is a head injury in which she sustained injury to the right side of the head, it producing very severe internal injury that was a subdural hemorrhage as well as shearing injuries within the brain itself, tearing axons. Now, this is not an injury that you see with the eye but whenever you have any injury to the brain of whatever type, any movement, any commotion to the

> brain causes shearing forces and disconnections are made. This was a massive head injury that produced a massive amount of subdural hemorrhage and it caused a very rapid increase in intercranial pressure and so the cause of death is what I refer to as a closed head injury and the nature of which was a massive subdural hemorrhage.

Dr. Case then described, generally, falling head injuries and her concept of the coup-contrecoup phenomenon described by Dr. Porterfield. Dr. Case then testified in great detail as to the physical makeup of the skull and the brain within. Dr. Case disagreed with Dr. Porterfield's conclusion that the injuries to Mrs. Witthoff were the result of a fall. She agreed that "[t]he contrecoup injury is the marker for the fall."

Dr. Case testified that she observed two scalp bruises on the right side of the head and one on the left side, as well as the laceration on the chin. In her opinion the injury to the left side was not a contrecoup injury, and the cause of death was the massive injury to the right side of the head. It was her opinion, to a reasonable degree of medical certainty, that this injury to the right side of the victim's head was caused by a blow and not a fall. It was also her opinion that the laceration on the chin was the result of a blow, rather than a fall.

Dr. Case further testified that she did not know the exact moment the blow to the head was struck, but that the blow was inflicted

> sometime like in the evening hours of 8:30, somewhere around there an individual was having difficulty because the ambulance was called because at that time the individual was unconscious. Sometime immediately before that unless they had let that person lay there unconscious for several hours which I can't conceive because this woman would have been dead. That blow was struck shortly before that ambulance was called for her in other words. But I could not give you that precise minute.

Dr. Case also addressed the concept of "lucid interval," which basically means a "loss of consciousness and the regaining of consciousness and then another loss of consciousness." The idea of a lucid interval had been used to explain more than one falling injury. Dr. Case's opinion was

that that approach "makes no sense in this concept," because the lucid interval idea should not be used in terms of a subdural hemorrhage (the cause of death in Mrs. Witthoff's case, as agreed to by all the physicians), but usually in cases of epidural hemorrhage.

Dr. Roffman testified that it was his opinion, to a reasonable degree of medical certainty, that the trauma to the chin was caused by a blunt force. Furthermore, he testified it was highly unusual for a wound such as that to have occurred in a fall, but did not have an opinion as to whether the fatal injury was sustained in a fall or was the result of a blow.

Dr. Kirkpatrick testified it was his opinion the injury to the victim's chin was a result of an object's striking her chin rather than a fall. He further testified that it was his opinion, with a reasonable degree of medical certainty, that the injuries to the head of the victim were sustained from multiple blows to the head, as distinguished from falls.

Testifying for the defendant were Dr. William Eckert, a physician from Wichita, Kansas, specializing in forensic pathology, and Dr. George McClellan, from Omaha, Nebraska, a physician specializing in pathology and neuropathology. Both of these physicians were fully qualified as experts in their fields. Dr. Eckert testified that he observed four possible areas of trauma to the victim's head. In his opinion these wounds were nonassaultive and could best be explained by a series of falls. Dr. McClellan testified he observed three or four areas of trauma to the head. He testified that in his opinion the trauma to the head was not greater than what would be caused by a fall. He testified with a reasonable degree of medical certainty that the injuries could have been caused by a fall or blow, but in his opinion a fall was more probable.

The defendant assigns as error the lower court's failing to grant defendant's motion to dismiss the case against him because of the insufficiency of the evidence to sustain a verdict of guilty. We have held that a trial court will be justified in directing a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony is of so weak or doubtful a character that conviction based thereon could not be sustained.

State v. Kane, 224 Neb. 245, 397 N.W.2d 628 (1986); *State v. Bridger*, 223 Neb. 250, 388 N.W.2d 831 (1986). The evidence in this case is largely circumstantial. Circumstantial evidence, however, is sufficient to support a conviction if the evidence and any reasonable inferences that may be drawn from such evidence establish the defendant's guilt beyond a reasonable doubt. *State v. Ellis*, 223 Neb. 779, 393 N.W.2d 719 (1986); *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981).

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 is for the trier of fact, the jury in this case, and the jury verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Kane, supra.* While there was evidence to the contrary, the evidence adduced by the State was sufficient to prove the defendant's guilt beyond a reasonable doubt. A review of the evidence discloses that admissible expert testimony was adduced showing that the injuries causing the victim's death were the result of having received blows to the head rather than having sustained them from a fall. The jury was properly instructed as to the weight to be given expert testimony. It was told it could adopt, or not, the conclusions of the experts. The jury chose to adopt those conclusions which supported the conviction.

There was also testimony with regard to the condition of the apartment. Such testimony, if believed, was consistent with the showing of a struggle in the apartment. Additionally, there was evidence of defendant's statement to the police that he did not mean to kill the victim; that he and Mrs. Witthoff had had an argument, although it was not "violent"; and defendant's volunteered statement that "I didn't try to kill the woman for crying out loud." We hold that the evidence in the case at bar, although largely circumstantial, is sufficient, when taken as a whole, to prove defendant's guilt beyond a reasonable doubt. The trial court did not err in refusing to grant defendant's motion for a directed verdict. There was sufficient evidence, if believed, to constitute proof beyond a reasonable doubt that defendant was guilty of the crime of manslaughter.

Insofar as defendant implies that the adducing of expert

testimony supporting a not guilty verdict renders the State's evidence insufficient to prove defendant's guilt beyond a reasonable doubt, this court has held to the contrary. In *State v. Miner*, 216 Neb. 309, 343 N.W.2d 899 (1984), we held that contradictory medical opinions only create credibility guidelines which, in the *Miner* case and in this case, the jury resolved against the defendant. Contradictory medical opinions as to the cause of death in a criminal case do not establish, of themselves, that the State has failed to prove the cause of death beyond a reasonable doubt. The resolution of such factual disputes is not subject to reconsideration on appeal.

Defendant also assigns as error the court's failure to grant a continuance for defense counsel to properly prepare for the testimony of one of the State's expert witnesses. Such a motion for a continuance of a trial is addressed to the sound discretion of the trial court, and that ruling will not be disturbed on appeal in the absence of a showing of an abuse of that discretion. *State v. Richter*, 221 Neb. 487, 378 N.W.2d 175 (1985); *State v. Broomhall*, 221 Neb. 27, 374 N.W.2d 845 (1985). The record shows the trial court required that the expert witnesses were made available to opposing counsel for questioning before their trial testimony, and every effort was made to accommodate counsel in connection with preparing for the testimony of the expert witnesses. Our reading of the record shows skilled cross-examination of the State's expert witnesses. Neither party was subjected to surprise testimony at the trial. We have held that there is no abuse of discretion by the trial court in denying a continuance unless it clearly appears that the defendant suffered prejudice as a result of that denial. *State v. Sluyter*, 224 Neb. 768, 401 N.W.2d 480 (1987). No prejudice to defendant clearly appeared in this case. With regard to the court's refusal to grant the continuance, we find no abuse of discretion, and therefore no error.

The defendant also assigns as error the court's refusal to grant a motion for new trial. Again, the granting or refusal of such a motion for a new trial is left to the sound discretion of the trial court, and in the absence of an abuse of that discretion the determination will not be disturbed. *State v. Bideaux*, 219 Neb.

718, 365 N.W.2d 830 (1985); *State v. Tainter*, 218 Neb. 855, 359 N.W.2d 795 (1984). Furthermore, the new evidence on which the motion is based must be of such a potent nature that it would have probably produced a substantially different verdict. *State v. Bideaux, supra; State v. Ferris*, 216 Neb. 606, 344 N.W.2d 668 (1984). The evidence on which this motion is based is an affidavit of Dr. Dawson regarding the testimony of Dr. Case. Dr. Dawson was one of the authors of a medical journal article concerning the "coup-contrecoup phenomenon," and his affidavit stated generally that he did not agree with the testimony of Dr. Case. That evidence had been directly refuted by evidence adduced by defendant, and the proposed Dawson testimony would have been subject to the scrutiny of the jury to the same extent as was the testimony of the other experts. We cannot say that it probably would have chosen to accept his conclusions over those of Dr. Case. The defendant presented evidence which would have supported an acquittal, and the Dawson testimony would have been cumulative. The record does not show that the verdict would have been different if the Dawson testimony was available. This assignment of error is without merit.

Finally, the defendant alleges the court abused its discretion in failing to sentence the defendant to probation. The granting of probation as opposed to imposing a jail sentence is a matter which is left to the sound discretion of the trial court. Absent a showing of abuse of that discretion, this court will not disturb the determination of the trial court. *State v. Kane*, 224 Neb. 245, 397 N.W.2d 628 (1986); *State v. Bovill*, 223 Neb. 764, 393 N.W.2d 715 (1986); *State v. Gillette*, 218 Neb. 672, 357 N.W.2d 472 (1984). The crime of manslaughter is a Class III felony, for which the maximum punishment is 20 years' imprisonment, or a $25,000 fine, or both. The minimum sentence is 1 year's imprisonment. The defendant was sentenced to 3 years' imprisonment. We hold the court did not abuse its discretion in failing to grant the defendant probation. The judgment and sentence of the lower court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RANDY R. WILEY, APPELLANT.
402 N.W.2d 311

Filed March 20, 1987. No. 86-649.

Pleas. The taking of the steps set out by this court in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), is sufficient to assure that a plea represents a voluntary and intelligent choice among the alternate courses of action open to a criminal defendant.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

Dennis R. Hurley and, on brief, John C. Kinney of Ryan & Scoville, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder, for appellee.

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

WHITE, J.

This is an appeal from the district court for Dakota County. Appellant, Randy R. Wiley, pled guilty to one count of assault in the first degree in violation of Neb. Rev. Stat. § 28-308 (Reissue 1985) and was sentenced to 5 to 15 years at hard labor to the Nebraska Department of Correctional Services. The facts relevant to this appeal are as follows.

Wiley was arraigned on November 5, 1985, and at that time was advised that he was charged with one count of assault in the first degree pursuant to § 28-308, a Class III felony. The appellant was advised of his constitutional rights against self-incrimination, to a speedy and public trial by jury, to be informed of the nature of the charges against him and the possible penalties, to counsel, and to call witnesses in his favor. Wiley was informed of the nature of the charges against him and of the possible penalties. Several times the trial judge inquired as to whether Wiley understood the proceedings, to which Wiley responded in the affirmative. Wiley then entered a plea of not guilty, which was accepted by the court.

Although not in the record before us, Wiley alleges that at some point he was offered the opportunity to plead guilty to a

Class IV felony in return for having the charge of assault in the first degree dropped. Wiley refused to change his plea.

Appellant again appeared before the district court on June 23, 1986, for the purpose of changing his plea. Wiley appeared with counsel and was this time charged with attempted murder in the second degree in violation of Neb. Rev. Stat. § 28-201 (Reissue 1985), a Class II felony. The county attorney revealed the terms of the plea agreement which had been entered between the county attorney and Wiley. The terms of the agreement provided that Wiley would plead guilty to assault in the first degree, a Class III felony, and in return the State would drop the attempted murder charge and refrain from bringing a related charge of car theft. The county attorney agreed not to comment during sentencing. Wiley was advised of his constitutional rights to trial by jury, to confront witnesses against him, and against self-incrimination. Wiley was again advised of the possible penalties. Appellant stated throughout the proceedings that he understood and provided a factual basis for the plea. He stated that his attorney had explained to him the nature of the charges and the plea agreement. Appellant pled guilty, and his plea was accepted by the court.

His sole assignment of error contends that his guilty plea was not freely, voluntarily, or intelligently given. We affirm.

Upon a close review of the record we find that between the arraignment and the plea taking, Wiley was advised at least once of each of the rights which he must be informed of pursuant to our decisions in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), and *State v. Hoffman*, 224 Neb. 830, 401 N.W.2d 683 (1987). In *Irish, supra* at 820, 394 N.W.2d at 883, we stated:

> The rule to be distilled from the foregoing holdings, thus, is that in order to support a finding that a plea of guilty or nolo contendere has been entered freely, intelligently, voluntarily, and understandingly,
>
> 1. The court must
>
> a. inform the defendant concerning (1) the nature of the charge; (2) the right to assistance of counsel; (3) the right to confront witnesses against the defendant; (4) the right to a jury trial; and (5) the privilege against

self-incrimination; and

b. examine the defendant to determine that he or she understands the foregoing.

2. Additionally, the record must establish that

a. there is a factual basis for the plea; and

b. the defendant knew the range of penalties for the crime with which he or she is charged.

We conclude that the taking of the foregoing steps is sufficient to assure that a plea represents a voluntary and intelligent choice among the alternative courses of action open to a criminal defendant, the ultimate standard by which pleas of guilty or nolo contendere are to be tested. *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971).

The record establishes that the district court carefully explained to Wiley each of his rights and repeatedly inquired as to whether he understood the proceedings. Wiley had counsel and stated at each proceeding that his counsel had explained the nature of the charges. We find, therefore, that Wiley made a knowing, intelligent, and voluntary guilty plea. His assignment of error is without merit.

In his brief Wiley also argues that his district court counsel was ineffective. As he does not specifically assign ineffective assistance of counsel as error, we will not consider his argument at this time. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986); *Klug v. Smith*, 223 Neb. 202, 388 N.W.2d 515 (1986).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KEVIN L. LAUE, APPELLANT.

402 N.W.2d 313

Filed March 20, 1987. No. 86-733.

1. **Convictions: Appeal and Error.** In determining the sufficiency of 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

verdict 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.

2. **Convictions: Circumstantial Evidence: Minors: Alcoholic Liquors.** Circumstantial evidence can be sufficient to sustain a conviction of a minor in possession in violation of Neb. Rev. Stat. § 53-180.02 (Reissue 1984).
3. **Convictions: Circumstantial Evidence.** 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.
4. _____: _____. Circumstantial evidence is sufficient to support a conviction if such evidence and the reasonable inferences that may be drawn therefrom establish the defendant's guilt beyond a reasonable doubt.
5. **Criminal Law: Appeal and Error.** Where a judge serves as the trier of fact in a criminal case, the factual findings will not be disturbed on appeal unless clearly wrong.

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

Thomas L. Morrissey of Morrissey, Morrissey & Dalluge, for appellant.

Robert M. Spire, Attorney General, and Elaine A. Catlin, for appellee.

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

KRIVOSHA, C.J.

The appellant, Kevin L. Laue, was charged by complaint in the county court for Johnson County, Nebraska, with possession of alcoholic liquor by a minor, in violation of Neb. Rev. Stat. § 53-180.02 (Reissue 1984). Laue, having previously pled not guilty, was tried by the court and found guilty as charged. He was sentenced to serve three consecutive weekends in the Johnson County jail and ordered to pay a $350 fine. Laue appealed to the district court for Johnson County, Nebraska, which affirmed the judgment of conviction but modified the sentence from three consecutive weekends to 7 consecutive days in jail.

While Laue enumerates three assignments of error, in fact there is but one issue on appeal. Laue's contention is that the evidence was insufficient to establish guilt beyond a reasonable doubt. For reasons more fully set out hereinafter, we believe that the evidence was sufficient, and the conviction and

sentence should be affirmed.

The record discloses that on November 8, 1985, local law enforcement officers in Johnson County, apparently suspecting that a party was to be held at a vacant farmstead and that minors in possession of alcohol would be present, obtained a search warrant. Among the authorities was Trooper Kenneth Miller, a member of the Nebraska State Patrol. Trooper Miller arrived at the premises at approximately 8:40 p.m. The farmhouse was located approximately 150 to 200 feet off the county roadway. Trooper Miller positioned himself on the lane between the vacant house and the roadway. As vehicles committed themselves to turning into the lane, the vehicles were stopped and identification documents were checked by the officers. No issue is raised about the validity of the warrant or the manner in which it was served, and that fact is therefore not before us in this case.

According to the testimony, perhaps as many as 10 vehicles turned into the farmstead before Laue's vehicle was stopped. Trooper Miller testified that he first observed Laue's vehicle when it was behind a vehicle that had committed itself to turning left into the driveway of the farmstead. After the vehicle traveling in front of his car was stopped, Laue proceeded to back his automobile away. Trooper Miller moved toward the vehicle and ordered Laue to stop. At this point Trooper Miller was some 20 to 30 feet from the driver's seat of Laue's vehicle. Notwithstanding the instruction to stop, the vehicle continued to back up "at a higher rate of speed." At that point Trooper Miller ran to his patrol car, which was located some 50 feet away and which had its engine running, and proceeded to pursue the Laue vehicle. The Laue vehicle backed up a distance of some 200 yards and then came to a stop, where it remained for a few seconds.

Trooper Miller testified that he "saw some motion going on on the driver's side of the vehicle," though he could not, because of the glare of the lights, describe it in any greater detail. At that point, Laue's vehicle proceeded to move back toward the patrol car. After stopping Laue's vehicle, Trooper Miller identified Laue as the sole occupant of the vehicle. The trooper then had Laue get out of his car and, together, they

walked back to the place where the vehicle had originally stopped. At that location Trooper Miller observed a paper sack with a bottle in it that was lying along the edge of the road. The bottle was a sealed bottle of Peachtree schnapps. Upon seeing the bottle, Trooper Miller said to Laue, "[I]t didn't quite make it to the ditch," to which Laue responded, "I guess I didn't get it far enough." Trooper Miller then confiscated the items found along the ditch, including the bottle of schnapps, as well as an open carton of Budweiser beer and an open can of Budweiser beer.

Trooper Miller further testified that after he had Laue follow him to the farmstead, he detected the odor of an alcoholic beverage coming from Laue.

Trooper Miller admitted on cross-examination that he never saw any of the alcoholic beverages in the hands, vehicle, or actual possession of Laue and further testified that a number of minors, some of whom had alcohol in their automobiles, were driving up the roadway. However, Trooper Miller testified that he did not see any of these other vehicles stop at or near the same location at which Laue stopped his vehicle and at which the alcoholic beverages were found. There was no question that Laue was a minor at the time the alleged offense occurred.

As we have already indicated, we believe that the evidence, although circumstantial, was nevertheless sufficient to sustain the conviction. That conclusion is reached in part upon the fact that we have consistently held that

> in determining the sufficiency of 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 verdict 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. Goodon, 219 Neb. 186, 188, 361 N.W.2d 537, 539 (1985). See, also, *State v. Kane*, 224 Neb. 245, 397 N.W.2d 628 (1986).

Furthermore, we have held that circumstantial evidence can be sufficient to sustain a conviction of a minor in possession in

violation of § 53-180.02. See, *State v. Harris*, 218 Neb. 75, 352 N.W.2d 581 (1984); *State v. Embrey*, 188 Neb. 649, 198 N.W.2d 322 (1972). When relying upon circumstantial evidence, it is not necessary for the State to disprove every hypothesis but that of guilt. 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. See, *State v. Tate*, 222 Neb. 586, 385 N.W.2d 456 (1986); *State v. Wilkening*, 222 Neb. 107, 382 N.W.2d 340 (1986); *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981).

And, further, we have recently held that circumstantial evidence is sufficient to support a conviction if such evidence and the reasonable inferences that may be drawn therefrom establish the defendant's guilt beyond a reasonable doubt. See *State v. Kane, supra*.

In the instant case there are present circumstances from which a rational inference of Laue's possession of alcoholic liquor could be deduced, thereby establishing guilt beyond a reasonable doubt. Laue was the sole occupant of the vehicle which Trooper Miller stopped. For no other apparent reason the vehicle quickly backed up, then came to a halt, then, again, moved forward following Trooper Miller's order to stop. At the location where the vehicle had momentarily come to a halt, a bottle of alcoholic liquor was found. And, when being told by Trooper Miller, "[I]t didn't quite make it to the ditch," Laue stated, "I guess I didn't get it far enough." It would not take much to deduce what Laue meant.

Laue has cited us to the case of *State v. Eberhardt*, 176 Neb. 18, 125 N.W.2d 1 (1963), wherein we reversed a conviction based upon circumstantial evidence. The facts, however, are not the same as in the instant case. In *Eberhardt* there were several occupants in the vehicle and no evidence that the defendant was aware that the alcohol was present in the vehicle. In reversing the conviction we said at 23, 125 N.W.2d at 4:

> There was no evidence that prior thereto the appellant knew or was conscious of its [the alcohol's] presence in the automobile. There is evidence of what might be regarded as somewhat equivocal responses to questions asked by the police officer, but none of them could be regarded as

> admissions of consciousness or knowledge theretofore that the beer was in the automobile.

We do not believe the facts in this case are similar to *Eberhardt*. Laue's comments to Trooper Miller, combined with the facts, and the presence of the odor of an alcoholic beverage on his person, are evidence of knowledge. The trier of fact found the evidence sufficient. We have said that where a judge serves as the trier of fact in a criminal case, the factual findings will not be disturbed on appeal unless clearly wrong. See *State v. Moniz*, 224 Neb. 198, 397 N.W.2d 37 (1986). We are unable to say that the findings of fact in this case, under the evidence, were clearly wrong. For that reason the judgment of the court finding Laue guilty of the crime charged is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAMNGEVNE SIANOUTHAI, APPELLANT.

402 N.W.2d 316

Filed March 20, 1987. No. 86-767.

1. **Pleas.** In order to support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, the record must establish, among other things, that there exists a factual basis for the plea.
2. **Sentences.** A criminal sentence must be proportionate to the crime for which a defendant has been convicted.
3. _____. As a practical matter, it is the minimum portion of an indeterminate sentence which measures its severity.
4. **Sentences: Appeal and Error.** A sentence which is constitutional and within statutory limits will not be disturbed on appeal absent an abuse of discretion.
5. _____: _____. In reviewing a sentence the question is not whether someone else in a different case received a lesser sentence, but whether the defendant in the subject case received an appropriate sentence.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

William L. Binkard and, on brief, John C. Kinney of Ryan & Scoville, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellee.

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

CAPORALE, J.

Defendant, Lamngevne Sianouthai, was charged with assault in the second degree upon Randy Boden, in violation of Neb. Rev. Stat. § 28-309(1)(a) (Reissue 1985). Upon pleading guilty, he was so adjudged and sentenced to imprisonment for a term of 15 to 45 months. Defendant assigns as errors the district court's (1) adjudication of guilt and (2) imposition of a sentence which defendant claims to be excessive. We affirm.

The presentence investigation shows that on May 26, 1986, defendant drove in an erratic manner and nearly caused a collision with a vehicle in which Larry Mahr and Randy Boden were traveling. Mahr avoided the collision by driving onto the shoulder of the highway, and "made a gesture" at defendant. Although Mahr then sped away from the scene, defendant caught up to the Mahr vehicle, made his own responsive gesture, and too sped away.

Mahr later stopped for a traffic light; defendant thereupon pulled his vehicle onto the median separating the lanes of traffic. Defendant then got out of his vehicle and approached the Mahr vehicle. This caused Mahr to open the door of his vehicle and place his foot on the ground as if to get out. As a consequence, defendant retreated to his vehicle, whereupon Mahr pulled his leg back into his vehicle and shut the door.

The traffic light turned green, and after Mahr had driven forward approximately 3 or 4 feet, defendant picked up a chunk of concrete curbing and shattered the rear driver's side window of Mahr's vehicle. Both Mahr and Boden then alighted from the vehicle, whereupon defendant threw more chunks of curbing, which had a 7- to 8-inch diameter, and struck both Mahr and Boden.

While Mahr and Boden were attempting to stop the defendant, two other men joined in to help defendant. One of these men, who was not known to defendant, had a handgun which he pointed directly at Mahr and Boden. Fortunately, the

police arrived shortly thereafter and averted any further violence.

Pursuant to a plea bargain whereunder defendant agreed to pay $377.99 in restitution for the damage to Mahr's vehicle and the State agreed to dismiss a criminal mischief charge and another second degree assault charge, defendant pled guilty to the subject charge.

One commits a second degree assault if he or she "[i]ntentionally or knowingly causes bodily injury to another person with a dangerous instrument." § 28-309(1)(a).

Defendant's argument in connection with the first assignment of error, that the trial court erred in adjudging him guilty, is based on the rule that in order to support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, the record must establish, among other things, that there exists a factual basis for the plea. *State v. Wiley, ante* p. 55, 402 N.W.2d 311 (1987); *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). Defendant claims that the factual basis is deficient in that there was no showing Boden suffered any bodily injury. While defendant correctly states the applicable rule, he misreads the record. In stating the factual bases for the plea, the prosecutor said, "Mr. Boden tried to avoid the rock, and [it] did hit him in the lower back *causing him injury* . . . ." (Emphasis supplied.) Defendant did not contradict the assertion that Boden did in fact sustain injury. There is therefore no merit to the first assignment of error.

In connection with the second assignment, the claim that the sentence is excessive, defendant argues that the sentence imposed is disproportionate to the crime and to sentences imposed in similar cases.

The offense charged is a Class IV felony and, as such, carries a maximum penalty of imprisonment for 5 years, or a $10,000 fine, or both such fine and imprisonment. No minimum penalty is required. Neb. Rev. Stat. § 28-105 (Reissue 1985).

As to the first portion of his argument, defendant relies upon *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983), which reiterated the principle that a criminal sentence must be proportionate to the crime for which a defendant has been convicted. *Solem* ruled that a sentence of life

imprisonment without the possibility of parole, imposed under a recidivist statute, for uttering a $100 no-account check was grossly disproportionate to the crime and, thus, cruel and unusual, notwithstanding the fact that the defendant therein had six previous felony convictions.

The situation presented by this case, however, is not at all like that presented in *Solem*. The crime in *Solem* was a relatively minor economic one; the crime in the present case was one against the person of another with a dangerous weapon, such being any object which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury. *State v. Hatwan*, 208 Neb. 450, 303 N.W.2d 779 (1981). The period of imprisonment in *Solem* was for life, without the possibility of parole; the maximum period of imprisonment imposed in this case is less than that authorized by statute. Moreover, as a practical matter, it is the minimum portion of an indeterminate sentence which measures its severity. *State v. King*, 196 Neb. 821, 246 N.W.2d 477 (1976). The sentence imposed is not so disproportionate to the crime that it can be characterized as cruel and unusual.

Defendant next argues, however, that the sentence is nonetheless excessive as being disproportionate to other sentences imposed for similar offenses. While defendant does not suggest what he thinks an appropriate sentence would be, he refers us to *State v. Gregory*, 220 Neb. 778, 371 N.W.2d 754 (1985), which held that imprisonment for a period of 1 year on each of two convictions, one for first degree assault and the other for using a firearm to commit a felony, did not constitute abuses of discretion. Defendant's argument appears to be that if 1 year is adequate punishment for the more serious offense of first degree assault, 15 to 45 months is too much for second degree assault.

He again in part relies upon *Solem*, which states that in making a "cruel and unusual" analysis under the eighth amendment, it may be useful to compare the sentence under consideration with sentences imposed on other criminals in the same jurisdiction, as well as with those imposed in other jurisdictions. *Solem* also recognizes, however, that reviewing courts should grant substantial deference to the broad

authority legislatures necessarily possess in determining the types and limits of punishments, as well as to the discretion that trial courts possess in sentencing convicted criminals. Once it is determined that the sentence prescribed by statute is constitutional and that the sentence imposed is within statutory limits, it will not be disturbed on appeal absent an abuse of discretion. *State v. Suffredini*, 224 Neb. 220, 397 N.W.2d 51 (1986). Thus, the question is whether the defendant in this case received an appropriate sentence, not whether someone else in a different case received a lesser sentence. See, *State v. Whitmore*, 221 Neb. 450, 378 N.W.2d 150 (1985); *State v. Morrow*, 220 Neb. 247, 369 N.W.2d 89 (1985).

Defendant points out that in his 5 years of residence in this country, he has acquired no prior criminal history, although he has had some traffic offenses. While some reasonable minds might well conclude that imprisonment for one who has no prior history of violent criminal conduct is not warranted under the circumstances presented in this case, other such minds might equally well conclude that the sentence imposed for one who escalated an exchange of gestures into an event wherein he hurled hunks of concrete at others demonstrates such a lack of control as to warrant firm treatment. Under the circumstances, we cannot say the punishment imposed constitutes an abuse of discretion. There is, therefore, no merit to the second assignment of error.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. DARRYL E. BAILEY, RUSSELL E. JOHNSTON, AND JAMES EVERT MURPHY, APPELLEES.

402 N.W.2d 319

Filed March 20, 1987. No. 86-1075.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Appeal dismissed.

Charles A. Kandt, Lincoln County Attorney, for appellant.

Patrick B. Hays, James R. Nisley, and Ronald A. Ruff, for appellees.

HASTINGS, J.

Under the authority of Neb. Rev. Stat. § 29-824 (Reissue 1985), the county attorney for Lincoln County has appealed an order of the district court which had sustained the defendants' various motions to suppress evidence.

At the outset, a procedural problem relating to the jurisdiction of this court must be faced. Involved are three criminal prosecutions: *State v. Murphy, State v. Johnston*, and *State v. Bailey*, each separately docketed in the district court. An individual motion to suppress evidence was filed in each case; however, the only order suppressing evidence found in the transcript is one entered by the district court in the case of *State v. Bailey*.

Section 29-824 provides that the county attorney may appeal an order of the district court suppressing evidence by filing an application with the Clerk of the Supreme Court asking for a summary review.

Neb. Rev. Stat. § 29-825 (Reissue 1985) provides in part:

> The application shall be filed with the Clerk of the Supreme Court within such time as may be ordered by the district court, which in fixing such time shall take into consideration the length of time required to prepare the necessary transcript, and shall also consider whether the defendant is in jail or whether he is on bail, but in no event shall more than thirty days be given in which to file such application.

Neb. Rev. Stat. § 29-826 (Reissue 1985) provides:

> In making an order granting a motion to suppress and to return property, the district court shall in such order fix a time, not exceeding ten days, in which the county attorney or other prosecuting officer may file a notice with the clerk of such court of his intention to seek a review of the order. Upon the filing of such notice the district court shall fix the time in which the application for review shall be filed with the Clerk of the Supreme Court, and shall make an appropriate order for custody of the

property pending completion of the review.

The order of the district court suppressing evidence was entered on November 25, 1986. No time was fixed in that order within which the county attorney might file the notice with the clerk of the district court of his intention to seek a review of that order. However, a notice of intention to seek summary review of the order was drafted in *State v. Bailey* and was filed by the State in the district court on December 1, 1986. That notice, however, named Murphy, Johnston, and Bailey as defendants.

According to a letter, in the file of the Supreme Court, from the Clerk of this court, dated December 5, 1986, the clerk of the district court for Lincoln County was advised that the notice of appeal and the $50 docket fee were being returned because the rules of the Supreme Court require that absent an order of consolidation in the district court, all cases must be separately docketed.

Later, on motion by the county attorney, an order of the district court was entered on December 8, 1986, consolidating the three cases. Thereafter, the county attorney filed a consolidated notice of appeal in the office of the clerk of the district court on December 16, 1986. Following that filing, the district court, on December 17, entered an order directing that the application for review shall be filed with the Clerk of the Supreme Court on or before December 29, 1986.

The application for summary review was in fact not filed in this court until January 2, 1987. The State's motion to extend the filing date for the application for review, filing date in the district court unknown, was denied by order of the district court on January 5, 1987, because of lack of jurisdiction. A motion was then filed in this court on January 8 requesting an extension of the date for filing the application, upon which ruling was reserved by this court.

The effect of the various filing requirements of these statutory sections has not previously been construed. However, the State urges that the rule to be applied in this case is that one applicable in general to appeals to this court, Neb. Rev. Stat. § 25-1912 (Reissue 1985). That rule provides that the only requirements to vest jurisdiction in this court are the filing of a notice of appeal and the depositing of the docket fee with the

clerk of the district court.

Such an argument has a logical basis. The only requirement to vest jurisdiction in this court on a § 29-824 appeal is to file in the district court the notice required by § 29-826 within the time fixed by that court, but not to exceed 10 days from the entry of the order of suppression.

However, that does not answer the immediate problem. It appears that the notice filed on December 1, although well within the 10-day requirement, may have been an ineffective filing because it attempted to appeal three different cases with one notice.

County of Hall v. Engleman, 182 Neb. 676, 156 N.W.2d 801 (1968), perhaps lends some comfort to the State's position. In that case, a foreclosure of tax sale certificates, the county of Hall included in one petition several causes of action, each involving separate and different parcels of land. On appeal the county filed a single notice of appeal and paid a single docket fee in each of the three appeals.

In approving that procedure, this court said: "Where more than one tax sale certificate or tax lien is disposed of in a single decree, a single notice of appeal and docket fee is all that is required to lodge jurisdiction of the case in the Supreme Court." *Id.* at 679, 156 N.W.2d at 803.

However, the *Engleman* court went on to say:

> Where, however, such certificates and liens are tried separately and result in separate decrees, each requires a separate notice of appeal and docket fee to lodge jurisdiction of the appeal in this court. If a defendant in one cause of action appeals, he must file a notice of appeal and pay the docket fee to perfect his appeal.

Id.

As suggested earlier, it is not known whether there was a single decree or order entered in the district court, which would mean that the first notice of appeal based on that order was effective, or whether there was an order in each case, in which event the first notice was ineffective and the second notice was filed out of time.

However, assuming jurisdiction, there is yet another reason why the State's appeal must be dismissed. The *Engleman*

appeals were dismissed because of a failure to file a cost bond within 1 month, with no application supported by good cause for an extension of that time for filing. The failure of the State to file its application for summary review within the time provided for by the district court falls within the same category as the failure to file a cost bond. The court may, in its discretion, extend the filing date for good cause shown, but is not required to do so.

The showing made by the State in support of its request to extend the filing date for its application for summary review is unsupported by a showing of good cause and is denied. Accordingly, the appeal is dismissed.

APPEAL DISMISSED.

CHRISTINE M. LITTLE, APPELLEE AND CROSS-APPELLANT, V. JAMES L. GILLETTE, APPELLEE AND CROSS-APPELLEE, FIRST SECURITY BANK AND TRUST CO., A NEBRASKA BANKING CORPORATION, APPELLANT AND CROSS-APPELLEE.

402 N.W.2d 852

Filed March 27, 1987. No. 85-569.

1. **Expert Witnesses: Appeal and Error.** Absent an abuse of discretion, a trial judge's ruling regarding the admissibility of expert testimony will not be reversed.
2. **Expert Witnesses: Juries: Property.** The general rule is that when a properly qualified expert witness testifies as to the value of property, the jury determines the weight and credibility of what the expert considers in coming to a conclusion.
3. **Pretrial Procedure: Appeal and Error.** Without objection or exception to the report of pretrial conference, there is nothing preserved for appellate review regarding the trial court's specification of issues to be resolved at trial.

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

Thomas J. Culhane and Tamra L. Wilson of Erickson & Sederstrom, P.C., for appellant.

Stephen Speicher, for appellee Little.

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

WHITE, J.

In the original appeal, *Little v. Gillette*, 218 Neb. 271, 354 N.W.2d 147 (1984) (*Little I*), we remanded this cause to the district court for retrial on the issue of damages with respect to a claim of misrepresentation of profit-making potential. The case comes before us for a second time, with both sides appealing aspects of the district court for Gage County's handling of the damages issues. Specifically, the appellant, First Security Bank and Trust Co. (Bank), argues that the jury's award of $121,858 in damages is not supported by the evidence, and the cross-appellant, Christine M. Little Koenig (Little), argues that the district court erred in refusing to allow Little to prove or conduct discovery with respect to special damages. We affirm.

A detailed recitation of the facts concerning the purchase by Little of a fast-food restaurant is included in our opinion disposing of the issues raised in *Little I*. The facts necessary to understand the issues now before us follow.

In *Little I, supra*, we decided that Little had a viable cause of action under the facts of the case and that the jury's determination that the plaintiff was entitled to recover for damages suffered due to the fraudulent representations made to her was not clearly wrong and should be upheld. However, we found it necessary to reverse the jury's verdict of $43,220.30 because it was not supported by the record. We remanded the cause for a new trial "as to all the issues of damages raised by the pleadings." *Id.* at 279, 354 N.W.2d at 153. Judgment on the mandate was filed on October 4, 1984, in the district court for Gage County.

On April 15, 1985, a pretrial conference was held, at which the issue of special damages was discussed. The trial judge considered each measure of consequential damages put forth by the plaintiff to be improper, and so advised the parties. The pretrial report also provided that "[i]f exceptions be taken in writing duly served and filed within seven days from this date, the undersigned judge, upon notice, will settle them. If no

exceptions be taken, the foregoing report shall govern and be effective in all further proceedings in the case." No timely exceptions were taken from the report on the pretrial conference.

At retrial Little testified that James Gillette represented to her that she could net $10,000 per month operating a Mexican fast-food business and that she relied on that representation when she purchased the building. She also testified that Gillette placed no limit on the length of time she could expect to receive such profits.

The measure of general damages specified in *Little I* was the "benefit of the bargain" rule, or the difference between the value of the property purchased if it was as represented and the property's actual value. Two experts testified for the plaintiff as to those values. The first, Frank Frost, a real estate appraiser experienced in assessing businesses, stated that he examined the demographics for Beatrice restaurants and that Little's restaurant would never do well because of its poor location. He also testified that in 1979 and 1980 fast-food investors were asking and getting a rate of return on their investments of 16½ percent per year, which meant that investors expected to recover their investment and some profit in around 6 years. Considering $10,000 per month income, the value of the investment would be approximately $725,000, using the income approach of valuing the property ($10,000 per month, or $120,000 per year, equals 16½ percent of investment's value plus some profit; investment's value equals approximately $725,000).

The second expert witness for the plaintiff was Clay Singleton. He considered a cash-flow of $10,000 a month, assumed that the cash-flow would endure at that rate for 10 to 20 years, and further assumed interest rates. He felt that 10 to 20 years was a reasonable range of duration because Little signed a 10-year note to purchase the property and because the franchisor gave the franchise to Beatrice Taco Corporation for 20 years. He considered the appropriate ranges of interest to be between 12 and 20 percent. Using the most pessimistic set of figures together, and the most optimistic set of figures together, Singleton came up with a range of between $503,096 and

$896,333 for the "as represented" value of the business.

Both of the plaintiff's experts felt that, due to the substantial losses suffered by Little at this location, the actual value of the business was zero.

The defendant's expert witness, Frank Wilson, a real estate appraiser, first took issue with the plaintiff's representation of the "actual" value of the business. He used three approaches. First, he calculated the value of the square footage of the building to be $105 per square foot, by comparing the restaurant to 14 larger buildings. The "actual" value calculated this way, in his opinion, was $87,000. Second, he used depreciation and the cost approach to conclude that the actual value of the building was $92,000. The third approach he used was the income capitalization approach. Using trade journals to determine the profits of similar businesses, he determined the "actual" value to be $88,000. On cross-examination Wilson admitted that seeing the expense sheets for Little's operation lowered his opinion of the "actual" value.

In Wilson's opinion of the "as represented" value, he assumed a net income of $10,000 for a duration of only 6 months. He presumed that $10,000 a month would be $8,000 in excess of profits made by a typical similar operation, and further presumed that ruinous competing facilities would be erected within 6 months, thereby reducing the excess income, for an "as represented" value of $136,000. Wilson admitted on cross-examination that if the operation netted $10,000 a month for more than 6 months, the "as represented" value would be increased. The jury awarded Little $121,858.

The defendant-appellant assigns three errors, all of which are based upon the lack of direct evidence about duration. It argues that the evidence does not support the verdict, that the plaintiff's expert testimony should not have been admitted and should have been stricken, and that it should have been granted motions for judgment notwithstanding the verdict and for a new trial.

Appellant complains on appeal that both of the plaintiff's expert witnesses assumed a duration of profits as part of the basis of their opinions; therefore, the opinions were speculative and not based on facts in evidence, and should not have been

admitted. *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979).

The general rule is that when a properly qualified expert witness testifies as to the value of property, the jury determines the weight and credibility of what the expert considers in coming to a conclusion. *Kohl v. State of Nebraska*, 214 Neb. 348, 334 N.W.2d 173 (1983). Unlike in *Latek v. K Mart Corp.*, 224 Neb. 807, 401 N.W.2d 503 (1987), here the assumptions used by the plaintiff's experts were not proven untrue or to be without any basis in fact. Frost based his duration of 6 years on data known to him, showing that investors expect to recoup their investment in around 6 years, implying that it would be reasonable for Little to expect that her business, if it profited as represented, would maintain that profit for 6 years. Singleton used as durations the terms of the note and franchise agreement. Similarly, the duration used by the defendant's expert was also an assumption based on a theory of ruinous competition. Each had a different basis for his opinion of what the duration should be. Absent an abuse of discretion, a trial judge's ruling regarding the admissibility of expert testimony will not be reversed. *Weiss v. Autumn Hills Inv. Co.*, 223 Neb. 885, 395 N.W.2d 481 (1986).

We have stated in *Iske v. Metropolitan Utilities Dist.*, 183 Neb. 34, 157 N.W.2d 887 (1968), that this court is not a superexpert and will not lay down categorically which factors and principles an expert may or may not consider. Such matters go to the weight and credibility of the opinion itself and not to its admissibility. *Id.* Whether the plaintiff's experts' assumptions regarding duration were the most credible was properly left to the jury. We observe no abuse of discretion on the part of the trial judge in his decision to admit the expert testimony. We hold that the plaintiff's expert testimony was properly admitted, as was the defendant's expert testimony. The verdict is adequately supported by the evidence, and is affirmed.

On cross-appeal the appellee assigns as error the refusal of the district court to allow her to conduct discovery and prove certain special damages. Each issue of special damages was discussed at the pretrial conference and was determined by the

district court to be improper under the circumstances of the case. No timely exception to the report of the pretrial conference was taken. In *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 684-85, 380 N.W.2d 268, 274 (1986), we stated:

> Without . . . objection or exception to the report of pretrial conference, there is nothing preserved for appellate review regarding the trial court's specification of issues to be resolved at trial. Any claimed error based on the issues specified by the trial court was waived by . . . failure to object to the report on the pretrial conference and cannot be asserted for review by this court.

See, also, *Hasenauer v. Durbin*, 216 Neb. 714, 346 N.W.2d 695 (1984). This rule is applicable to the issues raised on cross-appeal. The award and judgment of the trial court are affirmed.

AFFIRMED.

LOIS MARSHALL, PERSONAL REPRESENTATIVE OF THE ESTATE OF J. NISSLEY MARSHALL, DECEASED, APPELLANT, V. RADIOLOGY ASSOCIATES, P.C., A NEBRASKA CORPORATION, ET AL., APPELLEES.

402 N.W.2d 855

Filed March 27, 1987. No. 85-626.

1. **Summary Judgment.** Summary judgment is proper when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.
2. _____. On a motion for summary judgment, the moving party must make a prima facie showing that if the evidence were uncontroverted at trial, he would be entitled to judgment as a matter of law. Such a showing shifts the burden of producing evidence as to a factual issue to the party opposing the motion. The court then views the evidence in a light most favorable to the party opposing the motion and decides only whether there is an issue of fact, not how such an issue should be decided.
3. **Expert Witnesses: Physicians and Surgeons: Proof: Negligence.** Expert testimony is usually required to prove that a specific manner of treatment or exercise of skill by a physician, surgeon, or other professional demonstrated a failure to use reasonable care.

4. **Summary Judgment: Affidavits.** An affidavit offered in resistance to a motion for summary judgment must be made on personal knowledge, must set forth such facts as would be admissible in evidence in detail and with precision, and must show affirmatively that the affiant is competent to testify to the matters stated therein.

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

Thomas A. Gleason, for appellant.

Robert M. Slovek and Thomas J. Shomaker of Sodoro, Daly & Sodoro, for appellee Radiology Associates.

Kenneth C. Stephan of Knudsen, Berkheimer, Richardson & Endacott, for appellees Policky and Reed.

Robert T. Grimit of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Wolcott.

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

BOSLAUGH, J.

Lois Marshall, as personal representative of the estate of J. Nissley Marshall, deceased, commenced this action to recover damages for the wrongful death of the decedent, alleged to have been caused by the negligence of the defendants. The defendants Drs. David B. Policky, George J. Wolcott, and Jerry A. Reed are physicians who treated the deceased. The defendant Radiology Associates, P.C., furnished medical services to the deceased.

The trial court sustained the separate motions for summary judgment filed by the defendants and dismissed the plaintiff's amended petition as to all of the defendants. The plaintiff has appealed.

The action arose out of the following undisputed facts.

The decedent Marshall was hospitalized on February 21, 1980, after suffering some type of seizure. He spent 4 days in the hospital, underwent testing, and was released. The personal representative testified, by way of deposition, that the doctors were unable to determine the cause of the seizure and thought it may have been a blood clot which had dissolved.

Upon his return home the decedent resumed his normal activities, until May 24, 1980. On that day he suddenly became unable to walk and was taken to St. Elizabeth's Community Health Center. While there he was under the care of Drs. Policky and Reed, who called in Dr. Wolcott for neurological consultation.

After considering the decedent's history, various clinical findings, the neurological consultation, and CAT scan results, the doctors concurred in a diagnosis of an inoperable left frontal lobe brain tumor. The decedent was then transferred to Lincoln General Hospital on June 4, 1980, to receive cobalt treatments. The doctors continued to treat him until June 27, 1980, when he was transferred to the Veterans Administration Medical Center. The decedent died there on July 24, 1980.

An autopsy was performed the same day. No evidence of a brain tumor was found, and it was discovered that the decedent had actually died of a brain abscess. Dr. Skworcow, who performed the autopsy, testified by deposition that the primary source of the infection could not be identified. He testified that his earlier statement that "the case was originally misdiagnosed as a brain tumor and treated by cobalt" was meant only as a statement that there was a discrepancy between the clinical and pathological diagnoses, and did not imply negligence or carelessness on the part of any physician. The personal representative was notified of the results of the autopsy by a letter from the Veterans Administration dated August 7, 1980.

A notice of claim against the defendants was filed with the Director of Insurance pursuant to the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§ 44-2801 et seq. (Reissue 1978), on July 23, 1982. A medical review panel was convened on December 15, 1983, to consider the claim. The parties submitted written evidence to the panel prior to the hearing and presented oral arguments at the hearing. The plaintiff claimed the defendants were negligent and deviated from the applicable standard of care by failing to use reasonable care in the diagnosis of the decedent's medical condition and in failing to use reasonable care in treating it. After considering the evidence, the panel unanimously concluded that none of the defendants had deviated from the

existing standard of care.

The plaintiff then commenced this action on March 20, 1984. An amended petition was filed on May 4, 1984. The plaintiff alleged the facts summarized above and that the defendants failed to use reasonable care to properly diagnose and treat the decedent's condition and, therefore, proximately caused his death. The plaintiff sought to recover burial expenses in the amount of $3,500 and general damages for loss of companionship and pecuniary loss.

The defendants answered separately, each denying the allegations of negligence and affirmatively alleging that the plaintiff's claims were barred by the statute of limitations. Each defendant then moved for summary judgment.

A hearing on the motions was held December 10, 1984. The defendants introduced affidavits of the defendants Drs. Reed, Policky, and Wolcott and of Dr. Quentin Bradley, which separately stated that each defendant had met the applicable standard of care. Defendants Drs. Policky and Reed introduced an affidavit of Dr. Robert Haag, which stated he had personally reviewed the case and believed these doctors had not deviated from the applicable standard of care. The defendants also introduced the depositions of the autopsy physician, Dr. Skworcow; of the personal representative; and of Dr. Richard Gelwick, the physician who had treated the defendant at the Veterans Administration Medical Center. All of the pleadings and discovery material were also introduced. The plaintiff submitted only an affidavit of her attorney, with attached exhibits.

The trial court found that the defendants had made a prima facie showing that there was no genuine issue of material fact, which the plaintiff had failed to rebut, and that § 44-2828 barred the plaintiff's claims. The plaintiff's motion for a new trial was overruled July 1, 1985, and this appeal followed.

The plaintiff has assigned as error the trial court's findings that her claims were barred by § 44-2828 and that she failed to rebut the defendants' prima facie showing that no genuine issue of material fact existed.

It is clear from the record that summary judgment was properly granted on the ground that the plaintiff failed to

present sufficient evidence to rebut the defendants' prima facie showing. As that finding is dispositive of the matter, we need not consider the statute of limitations issue.

Summary judgment is proper when there is no genuine issue as to any material fact in the case. Neb. Rev. Stat. § 25-1332 (Reissue 1985). The moving party must make a prima facie showing that if the evidence were uncontroverted at trial, he would be entitled to judgment as a matter of law. *Reifschneider v. Nebraska Methodist Hosp.*, 222 Neb. 782, 387 N.W.2d 486 (1986); *Hanzlik v. Paustian*, 211 Neb. 322, 318 N.W.2d 712 (1982). Such a showing shifts the burden of producing evidence as to a factual issue to the party opposing the motion. *Reifschneider, supra.* The court then views the evidence in a light most favorable to the party opposing the motion and decides only whether there is an issue of fact, not how such an issue should be decided. See *Hanzlik, supra.* Summary judgment should be granted only when the issue is clear beyond doubt. *Hanzlik, supra* (citing *Scheideler v. Elias*, 209 Neb. 601, 309 N.W.2d 67 (1981)).

The affidavits introduced by the defendants stated that each defendant had met the applicable standard of care. Defendants Drs. Policky and Reed also introduced the affidavit of Dr. Haag in which he stated that, after having personally reviewed the case, it was his opinion both doctors had not deviated from the applicable standard of care. This evidence was sufficient to establish a prima facie showing on the issue of negligence. See, *Reifschneider, supra; Hanzlik, supra.* The burden then shifted to plaintiff to introduce competent evidence to rebut the evidence of the defendants and show that there was a genuine issue of fact.

In *Reifschneider* we stated that expert testimony is usually required to prove that a specific manner of treatment or exercise of skill by a physician, surgeon, or other professional demonstrated a failure to use reasonable care. Therefore, to rebut the defendants' evidence, plaintiff was required to produce expert testimony to show the defendants' treatment of the decedent demonstrated a failure to use reasonable care.

The only evidence presented by the plaintiff was the affidavit of her attorney which stated that Dr. Sheldon Wieder, a medical

doctor licensed in Mississippi, had been retained to testify as an expert witness. An unsigned letter, purportedly containing Dr. Wieder's analysis and opinions of the case, was attached to the affidavit. The plaintiff contends this was competent evidence and sufficient to establish there was an issue of fact.

In *Hanzlik v. Paustian*, 216 Neb. 575, 344 N.W.2d 649 (1984), we described the criteria by which the competence of an affidavit introduced to oppose a motion for summary judgment must be evaluated. Such an affidavit " 'must be made on personal knowledge, must set forth such facts as would be admissible in evidence in detail and with precision, and must show affirmatively that the affiant is competent to testify to the matters stated therein.' " *Id.* at 580, 344 N.W.2d at 652 (quoting *In re Freeholders Petition*, 210 Neb. 583, 316 N.W.2d 294 (1982)).

The affidavit in this case did not meet these requirements. The affiant was the plaintiff's attorney. The only expert testimony presented was the unsigned letter attached to the affidavit. The affiant had no personal knowledge of the facts and opinions contained in that letter. The attached letter was hearsay which would not have been admissible at trial. See *Cillessen Constr. v. Scotts Bluff Co. Hous. Auth.*, 217 Neb. 39, 348 N.W.2d 418 (1984). Finally, the affiant was not competent to testify at the trial, and there was no affirmative showing that Dr. Wieder would have been competent to testify at trial.

In addition, the attorney's statement that Dr. Wieder had been retained to testify at trial was insufficient. In *McFarland v. King*, 216 Neb. 92, 341 N.W.2d 920 (1983), we held that the plaintiff's attorney's affidavit which stated that an expert witness would be called at trial to reconstruct an accident scene did not meet the statutory requirements that the affidavit be made on personal knowledge and set forth facts which would be admissible in evidence.

In *Hanzlik v. Paustian*, 216 Neb. 575, 344 N.W.2d 649 (1984), the plaintiff's attorney's affidavit contained excerpts from two portions of the physician defendant's entries in his "Doctor's Orders and Progress Notes." The entries contained recommendations to employ certain procedures which, the plaintiff alleged, the defendant failed to employ. The affidavit

further stated that experts would testify on the plaintiff's behalf at trial. We held the affidavit was an impermissible attempt by a lay witness to interpret medical testimony concerning negligence and, therefore, was not competent evidence.

A similar situation is presented in this case. The plaintiff was attempting to bootstrap the exhibit attached to her attorney's affidavit into competent expert medical testimony. Such a result would circumvent the statutory requirements and permit the court to consider inadmissible hearsay. Plaintiff's position is not aided by the fact that the trial court admitted the affidavit into evidence. The trial court correctly admitted the affidavit but considered only those portions of the affidavit which were competent and relevant to the issues before it. See *Christensen v. Christensen*, 191 Neb. 355, 215 N.W.2d 111 (1974).

For the reasons stated, the judgment of the trial court is affirmed.

AFFIRMED.

NEBRASKA STATE BANK, A NEBRASKA CORPORATION, APPELLEE, V. WALTER RASMUSSEN AND EVA RASMUSSEN, APPELLANTS.

402 N.W.2d 688

Filed March 27, 1987. No. 85-655.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

Donald A. Fitch, for appellants.

Daniel L. Hartnett of Crary, Huff, Clem, Raby & Inkster, P.C., for appellee.

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

PER CURIAM.

Walter Rasmussen and Eva Rasmussen appeal from the judgment entered in a trial where a jury was waived in the

district court for Dakota County, Nebraska. Judgment was entered in favor of the appellee, Nebraska State Bank, in the bank's action against the appellants for a debt covered by appellants' guaranty. Both parties presented evidence to support their respective contentions concerning the guaranty.

As this court expressed in *H & L Equip. v. Schardt*, 217 Neb. 653, 653-54, 349 N.W.2d 924, 925 (1984):

> In a law action tried to the court, the findings of the trial court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. In a nonjury law action the evidence must be considered in the light most favorable to the successful party, with conflicts resolved in favor of the successful party, who is entitled to the benefit of every inference which can be reasonably deduced from the evidence.

There is evidence to support the trial court's findings. The findings of the trial court are not clearly wrong. The judgment of the trial court is affirmed.

AFFIRMED.

BITUMINOUS CASUALTY CORPORATION, APPELLANT, V. THEODORE C. DEYLE, APPELLEE.

402 N.W.2d 859

Filed March 27, 1987. No. 86-087.

1. **Workers' Compensation: Appeal and Error.** The Workers' Compensation Court is the sole judge of the weight and credibility of all of the evidence and, on appeal from an award of the Nebraska Workers' Compensation Court, the Supreme Court does not reweigh the facts but accords the findings of the compensation court the same force and effect as a jury verdict in a civil case. The findings will not be set aside where they are supported by the evidence and are not clearly wrong.
2. _____: _____. In testing the sufficiency of the evidence to support the 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. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom.

3. **Workers' Compensation.** Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved.
4. _____. In determining whether a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard.
5. **Workers' Compensation: Words and Phrases.** The term "arising out of the employment" in the Workers' Compensation Act covers all risks of accident from causative acts done or occurring within the scope or sphere of the employment. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment.
6. **Corporations: Employer and Employee.** A corporation is a complete entity separate and distinguishable from its stockholders and officers and may, if it sees fit, have one of the latter serve it in the capacity of an ordinary employee.
7. **Workers' Compensation: Wages: Words and Phrases.** Wherever in the Nebraska Workers' Compensation Act 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. It shall not include gratuities received from the employer or others, nor shall it include board, lodging, or similar advantages received from the employer, unless the money value of such advantages shall have been fixed by the parties at the time of hiring.

Appeal from the Nebraska Workers' Compensation Court. Affirmed as modified.

Joni R. Kerr of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Jeffrey H. Jacobsen of Jacobsen, Orr, Nelson & Wright, P.C., for appellee.

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

KRIVOSHA, C.J.

Bituminous Casualty Corporation (Bituminous) appeals from a judgment and order entered by the Nebraska Workers' Compensation Court directing Bituminous to pay workers' compensation benefits to the appellee, Theodore C. Deyle. The appellee, Deyle, is the president, general manager, and majority

stockholder of the insured, Deyle Construction Company (company). In addition to Deyle, the other stockholders are members of his family. The company builds homes, duplexes, small office buildings, and other small projects.

In 1959 or 1960 the company offices were moved from Holdrege, Nebraska, to Kearney, Nebraska, and a previous office building was moved from Holdrege to a lot at Johnson Lake, Nebraska, and used as a cabin. The Johnson Lake lot was leased by Deyle personally but was used for company-related entertainment as well as by Deyle and members of his family. The expenses of the cabin were paid by the company. Since 1979 Deyle received no cash wages or any bonus from the company. Instead, as president of the company, he arranged with the company to permit him to buy properties constructed by the company at cost and to resell or lease them, keeping the profit. During the course of the hearings, Deyle testified that over the past 7 years the difference between the cost of the properties constructed by the company and the retail value averaged $47,000 per year. Deyle also testified that during this same time he was provided a pickup truck by the company, as well as insurance and the use of a telephone in his home, having a value of some $3,000 per year. Deyle conceded, however, that he did not report any of this "income" as earned income for federal or state income tax purposes, nor did the company report these benefits as salary paid to Deyle.

Deyle's claim for workers' compensation benefits arose out of an accident which occurred on August 4, 1984, at Johnson Lake. Deyle and the company foreman, LaVern McConnell, had received reports that a storm had caused damage to the cabin and adjoining property. Deyle and the foreman went to the lake property to determine the extent of the damage. Deyle and McConnell took company equipment with them to the lake in order to clean up the storm damage. It appeared that the damage consisted primarily of limbs blown onto Deyle's lot from trees on an adjacent lot. The evidence would support a finding made by the Workers' Compensation Court that while Deyle was making repairs, a tree limb struck the ladder on which he was standing, causing him to fall to the ground. He sustained injuries to his back and was transferred to Omaha for

treatment. While hospitalized, he was diagnosed as having a fracture of the L-1 vertebral body. A laminectomy and posterior spinal fusion were performed on Deyle on August 6, 1984. Eventually, Deyle was transferred to the rehabilitation center at Immanuel Hospital, where he continued to be seen by a physician. He was also seen by a specialist in rehabilitation medicine. Deyle was discharged from the hospital on September 28, 1984. He continued to be seen by both the surgeon and the rehabilitation specialist.

The surgeon who had performed the laminectomy and fusion testified that, in his opinion, Deyle sustained a disability equal to 75 to 80 percent of the body as a whole. Included in that percentage was disability based upon bowel, bladder, and sexual dysfunction. In April of 1985, Deyle was seen by the rehabilitation specialist, who at that time determined that Deyle had sustained disability equal to 43 percent of the body as a whole.

Following a hearing to a single judge of the Workers' Compensation Court, an award was entered in favor of Deyle and against Bituminous. A motion for rehearing was filed by Bituminous, and rehearing was thereafter had before a three-judge panel. Following that hearing an award was again entered in favor of Deyle and against Bituminous. In making its award the three-judge workers' compensation panel found that Deyle had suffered injuries to his back as a result of an accident arising out of and in the course of his employment. He was awarded medical and hospital expenses totaling $61,229.67. The panel further determined that Deyle was temporarily totally disabled from and after August 5, 1984, to the date of the rehearing and would remain so for an indefinite period of time. Based upon what Deyle claimed were his "in kind" wages, the panel determined that Deyle was entitled to temporary total disability benefits of $200 per week. The panel further awarded an attorney fee in the amount of $1,250 and interest on the award as provided for in Neb. Rev. Stat. § 48-125(2) (Reissue 1984).

In appealing to this court, Bituminous assigns as error the following: (1) That the evidence fails to establish that the injury sustained by Deyle arose out of and in the course of his

employment with Deyle Construction Company; (2) That the evidence fails to establish that Deyle's average weekly wage was equivalent to $958.91, thereby entitling him to weekly benefits of $200 per week; and (3) That the Nebraska Workers' Compensation Court erred in determining that Deyle remained temporarily totally disabled from and after August 5, 1984, to the date of the rehearing. We believe that but for the three-judge panel's determination as to the amount of Deyle's average weekly wage and his weekly benefits, the judgment is in all other respects correct and should be affirmed as modified.

In proceeding to consider this matter and analyze the record before us, we note that we are bound by the law to the effect that the Workers' Compensation Court is the sole judge of the weight and credibility of all of the evidence and that, on appeal from an award of the Nebraska Workers' Compensation Court, this court does not reweigh the facts but accords the findings of the compensation court the same force and effect as a jury verdict in a civil case. The findings will not be set aside where they are supported by the evidence and are not clearly wrong. See, *Farber v. Mass Merchandisers, Inc.*, 223 Neb. 331, 389 N.W.2d 313 (1986); *Snyder v. IBP, Inc.*, 222 Neb. 534, 385 N.W.2d 424 (1986); *Laffin v. Nelson Enterprize*, 222 Neb. 226, 382 N.W.2d 371 (1986).

As prescribed in part by Neb. Rev. Stat. § 48-185 (Reissue 1984):

> A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award.

See, also, *Knudsen v. Metropolitan Utilities Dist.*, 220 Neb. 902, 374 N.W.2d 56 (1985); *Hare v. Watts Trucking Service*, 220 Neb. 403, 370 N.W.2d 143 (1985).

And in that regard we are further bound by the rule that

> "[i]n 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."

Hollinger v. Consolidated Motor Freight, 223 Neb. 449, 452-53, 390 N.W.2d 518, 521 (1986). See, also, *Oham v. Aaron Corp.*, 222 Neb. 28, 382 N.W.2d 12 (1986).

With those principles in mind, then, we turn first to the question of whether the Workers' Compensation Court erred in finding that the injury suffered by Deyle arose out of and in the course of his employment.

The record seems fairly clear that under Nebraska law, but for the executive position held by Deyle, there would be little question that the accident arose out of and in the course of Deyle's occupation. That is to say that if Deyle was only an employee of the company and had been directed to the lake and instructed to clear the area of debris, no one would seriously contend that this accident did not arise out of and in the course of his employment. See, *Wilson Concrete Co. v. Rork*, 216 Neb. 447, 343 N.W.2d 764 (1984); *Chrisman v. Farmers Coop. Assn.*, 179 Neb. 891, 140 N.W.2d 809 (1966); *Sentor v. City of Lincoln*, 124 Neb. 403, 246 N.W. 924 (1933). As we observed in *Meyer v. First United Methodist Church*, 206 Neb. 607, 610-11, 294 N.W.2d 611, 613-14 (1980):

> "The term 'in the course of' refers to the time, place, and circumstances of the accident. [Citations omitted.] 'The course of employment requirement tests work-connection as to time, place and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment.' 1 Larson, Workmen's Compensation Law, § 14.00 (1978). We therefore must focus on the activity which gave rise to the injury for which compensation is claimed and examine that activity by itself to determine whether compensation may be allowed."

Further, as we observed in *Schademann v. Casey*, 194 Neb. 149, 154-55, 231 N.W.2d 116, 121 (1975):

> "Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved. * * * In determining whether a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard." . . . "The term 'arising out of the employment' in the Workmen's Compensation Act covers all risks of accident from causative acts done or occurring within the scope or sphere of the employment. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment."

Deyle was not at the cabin at the time of the accident for personal reasons or to engage in personal recreational activity. Quite to the contrary, he was there for the purpose of clearing the area of debris caused by a storm. Obviously, the company had one of two choices—it could either use its own employees or hire others. We believe we would be hard pressed to deny coverage to Deyle had he been sent to the site by his employer with instructions to clear the area. Therefore, the real question is, Does the fact that Deyle is the president of the company thereby preclude him from recovering under the workers' compensation laws of Nebraska when engaging in work which results in injury?

In 1984 the Legislature clearly indicated its intent when it enacted Neb. Rev. Stat. § 48-115(3) (Reissue 1984), which provides in part: "Every executive officer of a corporation elected or appointed under the provisions or authority of the charter, articles of incorporation, or bylaws of such corporation shall be an employee of such corporation under the provisions of Chapter 48, article 1 . . . ."

We are unable to envision how the Legislature could have made it any clearer that it intended to bring officers of a corporation within the ambit of the Nebraska workers' compensation law and within the definition of "employee" for purposes of the Nebraska workers' compensation law. The issue here is not whether an individual engaged in business, not incorporated, may bring himself or herself within the definition of "employee" within the meaning of the Nebraska workers' compensation laws, see *Williams v. Williams Janitorial Service*, 207 Neb. 344, 299 N.W.2d 160 (1980), but, rather, whether an executive officer of a business, incorporated under the laws of Nebraska, is within the definition of "employee."

As we observed in a not too dissimilar situation in the case of *McGee v. Panhandle Technical Sys.*, 223 Neb. 56, 61, 387 N.W.2d 709, 713 (1986): " ' "A corporation is a complete entity separate and distinguishable from its stockholders and officers and if it sees fit to have one of the latter serve it in the capacity of an ordinary employee we see nothing to prevent it from so doing." ' " We believe that by reason of both the provisions of § 48-115(3) and the laws of Nebraska which recognize that a corporation is a separate legal entity, we must conclude that under the facts in this case Deyle was an employee of the construction company and sustained an injury as a result of an accident arising out of and in the course of his employment. We therefore conclude that the Workers' Compensation Court was correct in determining that Deyle was an employee and sustained an injury as a result of an accident arising out of and in the course of his employment.

We have greater difficulty with the panel's conclusion that the evidence was sufficient to establish that Deyle had an average weekly wage of $958.91. We reach that conclusion because we do not believe, as a matter of law, that the evidence supports the claim that Deyle was in fact receiving any compensation for performing his duties as executive officer of the company. The fact that he had an arrangement with the company whereby he was permitted to buy from the company properties at the company's cost and to resell or lease them at whatever price he might obtain does not, in our view, sustain the employee's burden to establish the wages which the

employee received. This position is further bolstered by the fact that no agreement was reached in advance as to the value of the "wages" received by this arrangement, nor did Deyle or the company think it appropriate to report such sums as either an expense of the company by way of salary upon which social security would be paid or as income to Deyle upon which income tax would be paid. It was obviously a convenient arrangement made between Deyle and the company over which he had full control. Every such arrangement, however, does not constitute wages within the meaning of the Nebraska Workers' Compensation Act.

Neb. Rev. Stat. § 48-126 (Reissue 1984) defines wages for purposes of the Workers' Compensation Act, providing:

> Wherever in this act 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. It shall not include gratuities received from the employer or others, nor shall it include board, lodging, or similar advantages received from the employer, unless the money value of such advantages shall have been fixed by the parties at the time of hiring . . . .

(Emphasis supplied.)

While we recognize that it may be possible for the company to provide an officer/employee with benefits equal to cash and constitute wages, see *Loeffelholz v. Allied Mut. Ins. Co.*, 183 Neb. 112, 158 N.W.2d 219 (1968), we do not believe that the evidence in this case is sufficient to establish that the employer and employee had any understanding as to what the value of those "wages" were or recognized them as being wages.

Having therefore determined that no wages were paid, it necessarily follows from the language of the Nebraska Workers' Compensation Act in effect at the time of the accident that Deyle is not entitled to receive any compensation other than the payment of his medical bills.

Neb. Rev. Stat. § 48-121(1) (Reissue 1984), applicable at the time of the injury, provided in part: "[I]f at the time of injury the employee receives wages of less than forty-nine dollars per week, then he or she shall receive the full amount of such wages

per week as compensation." This was amended in 1985, but such amendment has no application in the instant case. See Neb. Rev. Stat. § 48-121.01 (Cum. Supp. 1986). See, also, *Osteen v. A. C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981); *Chadd v. Western Cas. & Sur. Co.*, 166 Neb. 483, 89 N.W.2d 586 (1958).

If, as we have determined, the Workers' Compensation Court was correct in determining that Deyle was an employee but was not receiving any wages, then we must conclude that he is not entitled to receive more than his weekly wages, or, in this case, nothing.

To the extent that the Workers' Compensation Court granted Deyle the maximum benefits rather than nothing, the judgment is in error and must be reversed.

That leaves us then with only the last question, whether the evidence was sufficient for the Workers' Compensation Court to determine that Deyle was temporarily disabled. In view of the fact that we have determined that Deyle was not entitled to receive any weekly benefits because he had received no wages before his injury, we need not address that issue.

The judgment of the three-judge panel of the Workers' Compensation Court is affirmed except as modified herein.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. TROY A. HESS, APPELLANT.
402 N.W.2d 866

Filed March 27, 1987. No. 86-539.

1. **Trial: Witnesses: Testimony.** A sequestration order alone does not automatically put the witnesses on notice that they are not to discuss their testimony with other witnesses.
2. _____: _____: _____. If a party desires to extend a sequestration order to prohibit discussion of proposed testimony between or among the various witnesses, such a request must specifically be made.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Victor Gutman, for appellant.

Robert M. Spire, Attorney General, and Mark D. Starr, for appellee.

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

HASTINGS, J.

Defendant was convicted in a jury trial of an October 19, 1985, second degree murder. On appeal he assigns as error the action of the district court in overruling his motion for a mistrial because of a violation of the court's ordered sequestration of the witnesses.

At the commencement of the trial defense counsel stated to the court: "Before we start may I make a motion to sequester all witnesses, please?" to which the court replied, "Motion sustained."

The record discloses that during the first recess, which interrupted the testimony of Bo Bonn, the State's initial witness, Bonn visited with the prosecuting attorney in the latter's office in the presence of Tony Hutchinson and Todd Tillman. Those two men testified immediately following the testimony of Bonn. Nothing is disclosed as to any conversation had except that the witness Bonn said the prosecuting attorney asked him to draw a diagram positioning certain people. The testimony of neither Hutchinson nor Tillman indicated the nature of the conversation in the prosecutor's office nor whether in fact one had occurred. In other words, the defendant has made no showing of prejudice, which is necessary to constitute reversible error due to a violation of a sequestration order. *State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982).

Beyond the question of prejudice there was no evidence of a violation of the court's order of sequestration. Generally speaking, a request for sequestration of witnesses is a request that they be excluded from the courtroom until called to testify. *Swartz v. State*, 121 Neb. 696, 238 N.W. 312 (1931); *Maynard v. State*, 81 Neb. 301, 116 N.W. 53 (1908). A sequestration order

alone does not automatically put the witnesses on notice that they are not to discuss their testimony with other witnesses. *People v Davis*, 133 Mich. App. 707, 350 N.W.2d 796 (1984). If a party desires to extend a sequestration order to prohibit discussion of proposed testimony between or among the various witnesses, such a request must specifically be made. *People v Davis, supra*. Cf. *State v. Bautista*, 193 Neb. 476, 227 N.W.2d 835 (1975).

There was no prejudicial error committed in the trial of this cause, and the judgment of the district court is affirmed.

AFFIRMED.

KATHLEEN SUE SMITH, APPELLANT AND CROSS-APPELLEE, V. GAYLORD NEAL SMITH, APPELLEE AND CROSS-APPELLANT.
402 N.W.2d 688

Filed March 27, 1987. No. 86-566.

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

Michael J. Elsken, for appellant.

David L. Kimble, for appellee.

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

PER CURIAM.

A divorce decree was rendered in this case on April 18, 1986. On April 28, 1986, respondent-appellee filed a motion for new trial. On May 5, 1986, respondent filed a withdrawal of motion for new trial in which it is stated that respondent "voluntarily withdraws his Motion For New Trial filed in this matter."

On May 5, 1986, petitioner-appellant filed a motion for new trial. On June 9, 1986, a court order was entered as follows: "Petitioner's motion for new trial submitted and overruled." On July 7, 1986, petitioner filed her notice of appeal.

Respondent has cross-appealed.

In *Sederstrom v. Wrehe*, 215 Neb. 429, 339 N.W.2d 74 (1983), in applying the provisions of Neb. Rev. Stat. § 25-1143 (Reissue 1985) and Neb. Rev. Stat. § 25-1912 (Reissue 1979), we held that a motion for new trial must be filed within 10 days after a judgment is rendered and that, in the absence of a timely motion for new trial, a notice of appeal to the Supreme Court must be filed within 1 month after the decree or final order.

Appellant's motion for new trial was filed 17 days after the rendition of the divorce decree, and her notice of appeal was filed more than 2 months after the decree was rendered. This court has no jurisdiction, and the appeal and the cross-appeal are dismissed.

We note that the procedures for appeals to the Supreme Court have been amended by 1986 Neb. Laws, L.B. 529, effective January 1, 1987, and L.B. 530, effective July 17, 1986. See § 25-1912 (Cum. Supp. 1986). Those changes do not affect the result of this case.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. LARRY HODGE, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. THERESA JANE CARPENTER, APPELLANT.
402 N.W.2d 867

Filed March 27, 1987. Nos. 86-611, 86-646.

1. **Search Warrants: Probable Cause: Appeal and Error.** The duty of the Supreme Court in determining whether probable cause to issue a search warrant exists is only to ensure that the magistrate had a substantial basis for concluding that such existed.
2. **Search Warrants: Probable Cause: Words and Phrases.** Probable cause is a reasonable suspicion founded on articulable facts.
3. **Search Warrants: Probable Cause.** In evaluating the showing of probable cause necessary to support the issuance of a search warrant, only the probability, and not a prima facie showing, of criminal activity is required.

4. _____: _____. A search warrant may be issued for a location where it is probable that the property described would be found.
5. **Search Warrants: Appeal and Error.** In determining the validity of a search warrant, the reviewing court may consider only information brought to the attention of the issuing magistrate.
6. **Search Warrants: Probable Cause: Appeal and Error.** A magistrate's determination of probable cause should be paid great deference by reviewing courts, and warrants should not be invalidated by interpreting the supporting affidavit in a hypertechnical, rather than a commonsense, manner.
7. **Search Warrants: Probable Cause: Affidavits.** To invalidate a warrant on grounds that the supporting affidavit was false, the defendant bears the burden of showing that the affiant made a deliberate falsehood or acted with reckless disregard for the truth and that the challenged information was material or necessary to a finding of probable cause.
8. **Search Warrants: Probable Cause: Proof.** The proof of probable cause which must be made before a search warrant may be issued must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof satisfies this test is determined by the circumstances in each case.
9. **Constitutional Law: Search and Seizure.** A person's capacity to claim the protection of article I, § 7, of the Nebraska Constitution as to unreasonable searches and seizures, like its counterpart, the fourth amendment to the U.S. Constitution, depends upon whether the person who claims such protection has a legitimate expectation of privacy in the invaded place.
10. _____: _____. An unreasonable search within the meaning of the fourth amendment occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.
11. _____: _____. Generally, a person who has relinquished control and vacated the premises has no reasonable expectation of privacy in the premises.
12. _____: _____. 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.

Appeal from the District Court for Pierce County: MERRITT C. WARREN, Judge. Affirmed.

Hal W. Anderson of Berry, Anderson, Creager & Wittstruck, and Michael T. Brogan of Brogan & Stafford, P.C., for appellants.

Robert M. Spire, Attorney General, and Linda L. Willard, for appellee.

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

BOSLAUGH, J.

The defendants, Larry Hodge and Theresa Jane Carpenter, were charged in separate informations with possession of marijuana with intent to manufacture, distribute, deliver, or dispense. After a consolidated trial on stipulated facts, they were found guilty. The defendant Hodge was sentenced to 3 to 5 years' imprisonment, with credit for 2 days served. Carpenter was sentenced to 1 to 3 years' imprisonment, also with credit for 2 days served.

On appeal, the defendants attack the constitutionality of a search made on September 29, 1985, claiming that the trial court erred in finding there was probable cause to issue the search warrant and in failing to find the evidence was seized in violation of the defendants' rights under both the U.S. and Nebraska Constitutions. Hodge also claims his sentence was excessive.

On September 28, 1985, Ronald Hilliges, an investigator with the Nebraska State Patrol, obtained a search warrant for the defendants' leased residence, a farmhouse, in Pierce County, Nebraska.

The warrant was issued on the basis of an affidavit by Hilliges, which provided as follows:

> Ronald J. Hilliges, being duly sworn, upon oath deposes and says that he is an investigator with the Nebraska State Patrol office in Norfolk, Nebraska.
>
> Affiant states that he had received information from a confidential informant that Larry Hodge had sold marijuana in pound or larger quantities during 1982. Affiant was at that time uncertain as to the reliability and truthfulness of the informant so he began to monitor the activity of Larry Hodge.
>
> In November of 1984 affiant, together with other law enforcement officials, observec [sic] approximately 600 cultivated marijuana plants that had been grown and harvested near the Stanton County residence that was then occupied by Larry Hodge. Also observed and found by affiant were hand tillage tools, fertilizer, fertilizer containers and remnants of the cultivated plants at the marijuana patch.

Affiant was informed that Larry Hodge and Jane Carpenter, who resided in the Stanton County farmshouse [sic] with Larry Hodge, moved out of that residence sometime during June 1985. Despite that fact that Larry Hodge moved from the residence, he continued to pay rent on the residence until approximately September 1, 1985.

Affiant further states that after the lease was terminated on or about September 1, 1985, he personally viewed the Stanton County residence that had been occupied by Larry Hodge. The house contained a stairway door that was padlocked which led to the attic. The attic contained leaves and pieces of marijuana, wire was strung in the attic for drying, nylon screening was used for drying, and a plastic bag containing approximately one quarter ounce of marijuana was found.

Affiant further states that the acreage and area surrounding the Stanton County farmhouse then occupied by Larry Hodge had been monitored again since late spring in 1985. Affiant observed marijuana being grown and cultivated near the farmhouse occupied by Larry Hodge. The marijuana plants were weeded and the male plants were removed from the patch during the summer. Affiant further states that the marijuana plants were still growing in the aforementioned patch when observed on Wednesday morning, September 25, 1985. However, when affiant observed the patch on Friday afternoon, September 27, 1985, the plants had been harvested.

Affiant further states that a well defined path from the house, that was formerly occupied by Larry Hodge, to the marijuana patch was observed. Also an alternate path that appeared to be more secluded but which crossed a marshy wet area of property from the house to the marijuana patch was observed by affiant.

Affiant further states that Larry Hodge and Jane Carpenter moved from the Stanton County residence to a Pierce County farmstead residence that is now leased by Larry Hodge and that is located on the real estate

described as the Southeast Quarter of the Southeast Quarter(SE¼SE¼) of Section Eleven (11), Township Twenty-five (25) North, Range Two (2) West of the 6th P.M., Pierce County, Nebraska.

Affiant, therefore, believes that the following items will be found within the farmstead residence leased by Larry Hodge that is located on the real estate described as the SE¼SE¼ 11-25-2 Pierce County, Nebraska: or the out-buildings or surrounding area of the farmstead residence of Larry Hodge heretofore described; or any motor vehicle owned by Larry Hodge; or any motor vehicle owned by Jane Carpenter:

1. Evidence of marijuana harvesting tools
2. Plastic bags for storing marijuana similar to that found in the vacated Stanton County residence
3. Literature on the cultivation of marijuana
4. Tools used in the cultivation of marijuana
5. Records or documents relating to transactions dealing with the sale of marijuana including telephone numbers of possible buyers
6. Marijuana seeds
7. Drying racks used for drying marijuana
8. Marijuana plants and marijuana leaves
9. Processed marijuana
10. Nylon screening similar to that found in the vacated Stanton County residence.

Affiant further believes that since the heretofore described items of property are easily movable or easily destroyed, said items of property may be moved or hidden in a different location, or destroyed, if not seized without further delay, and, therefore, request that a Search Warrant be issued and be authorized to be served at any time.

The warrant was served on the defendants at their Pierce County residence on September 29, 1985. A large quantity of marijuana was seized from the home and surrounding outbuildings. As a result, the defendants were charged with possession of a controlled substance with intent to manufacture, distribute, deliver, or dispense.

Both defendants filed motions to suppress the evidence

seized as a result of the search. After a consolidated hearing on February 10, 1986, the motions to suppress were overruled. At trial the issues raised in the motions to suppress were preserved by timely objections to the offered evidence.

The defendants maintain the articles seized were improperly admitted in evidence because the affidavit in support of the warrant was wholly defective, lacked sufficient foundation for issuance of the warrant, and appeared to contain information obtained as the result of an earlier illegal search.

Although it contained certain inaccuracies, the defendants have not attacked the veracity of the statements contained in the affidavit.

According to the defendants, the major problem with the affidavit is that most, if not all, of the allegations of fact concern activity at a location other than the location for which the search warrant was obtained.

Having previously adopted the *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), "totality of the circumstances" analysis, the duty of this court in reviewing probable cause determinations as to search warrants "is only to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *State v. Abraham*, 218 Neb. 475, 478, 356 N.W.2d 877, 879 (1984). Probable cause is defined as a reasonable suspicion founded on articulable facts and does not require a prima facie showing of criminal activity. *State v. Abraham, supra*. Instead, it is the probability of such activity that must be shown. *State v. Abraham, supra*.

Further, in determining the validity of the search warrant, the reviewing court may consider only information brought to the attention of the issuing magistrate. *State v. Holloway*, 187 Neb. 1, 187 N.W.2d 85 (1971). A magistrate's determination of probable cause is to be paid great deference by reviewing courts, and warrants should not be invalidated by interpreting the supporting affidavit in a hypertechnical, rather than a commonsense, manner. *Illinois v. Gates, supra*.

This court has previously held that a search warrant may be issued for a location where it is probable that the property described would be found. *State v. Abraham, supra*. The affidavit in the present case contained evidence sufficient to

indicate that it was probable that the items listed would be found at the defendants' Pierce County residence.

As the affidavit makes clear, at the time of the warrant the defendants were no longer residing at the Stanton County residence. Also according to the affidavit, the defendants had moved to the Pierce County residence in June of 1985, yet had continued to pay rent on the Stanton County residence through approximately September 1, 1985. This information gave the issuing magistrate facts which connected the defendants with the Stanton County residence for the relevant time periods.

The affidavit also indicates that marijuana was observed to be cultivated in a patch connected by two paths with the Stanton County residence during the spring and summer of 1985. The marijuana was ultimately harvested sometime between September 25 and 27, 1985. From this information the magistrate had facts sufficient to raise a reasonable suspicion that a crime had been committed near the Stanton County residence by someone connected with the house.

Further, the affidavit reflects that a search of the Stanton County residence following the termination of the defendants' lease revealed leaves and pieces of marijuana, materials used in drying marijuana, and a bag containing a quarter ounce of the substance. This information suggested that the defendants had processed marijuana in that residence, and since they no longer had access to the Stanton County house when the 1985 marijuana crop was harvested, it further suggested use of their new home for similar purposes. See *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984). Thus, from a review of the totality of the circumstances, we conclude that the issuing court had a substantial basis for concluding that probable cause existed to issue a search warrant for the Pierce County residence.

As previously mentioned, the defendants do not challenge the warrant on grounds of inaccuracies contained in the affidavit. We comment on those inaccuracies only to note that they would not have required invalidation of the warrant had their truthfulness been challenged.

To invalidate a warrant on grounds that the supporting affidavit was false, the defendant bears the burden of showing that the affiant made a deliberate falsehood or acted with

reckless disregard for the truth and that the challenged information was material or necessary to a finding of probable cause. *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); *State v. LeBron, supra.*

The inaccuracies in this case relate to the fact of when the defendants actually moved from Stanton County to Pierce County. At the time of the affidavit the affiant, Hilliges, stated that the defendants had lived in the Stanton County residence until June of 1985 and had continued to pay rent on the house until September 1, 1985. At the suppression hearing, Hilliges testified that in fact, from November of 1984 through August of 1985, Jay Brummond, and not the defendants, had lived in and paid rent on the Stanton County residence. Nevertheless, Hilliges' testimony also indicated that he had reasons for his mistaken beliefs when the affidavit was made. Both defendants had been frequently observed at the Stanton County residence after November of 1984. After at least three occasions when the defendants were observed there, changes in the nearby marijuana patch, such as thinning, trimming, and weeding, were also observed. The affiant believed that the defendants continued to pay rent on the residence despite the fact that they had moved out because they still had property remaining at the location during 1985. As such, the affiant did have a reasonable basis upon which to base his beliefs, and the defendants could not be said to have met their burden of showing the affiant deliberately misled or acted with reckless disregard for the truth regarding the defendants' property interest in the Stanton County residence.

Next, the defendants contend the information in the affidavit regarding observations from 1982 through 1984 was stale as to a probable cause determination made in 1985. Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time. *State v. Kallos*, 193 Neb. 113, 225 N.W.2d 553 (1975). Whether the proof satisfies this test is determined by the circumstances in each case. *State v. Kallos, supra.*

Viewed separately, the observations contained in the affidavit regarding the defendants' activities between 1982 and

1984 were perhaps too distant to warrant a probable cause determination in September of 1985. Such a conclusion ignores the fact that the affidavit also contained information from up to a day prior to the issuance of the warrant which clearly supported the probable cause determination. The observations from 1982 merely served to indicate how and why the defendants became subjects of police surveillance. The observations from 1984 tended to establish a pattern of marijuana cultivation at the Stanton County property and, in conjunction with the 1985 observations, suggested that the defendants were probably responsible for that practice. Thus, viewed as a whole, the information contained in the affidavit was not too stale to establish probable cause for issuance of the warrant in September of 1985.

The defendants also argue that the affidavit contained information obtained by means of an illegal search. Specifically, they complain that the evidence obtained from the Stanton County residence after the defendants' lease had clearly ended was illegally obtained because the door to the attic where the evidence was discovered was padlocked prior to the search.

> [A] person's capacity to claim the protection of article I, § 7, of the Nebraska Constitution as to unreasonable searches and seizures, like its counterpart, the fourth amendment to the U.S. Constitution, depends upon whether the person who claims such a protection has a legitimate expectation of privacy in the invaded place.

State v. Havlat, 222 Neb. 554, 560, 385 N.W.2d 436, 440 (1986).

Evidence presented at the suppression hearing indicated that the defendants had not lived in the Stanton County house since November of 1984. At the time of the affidavit, the affiant believed that the defendants had moved in June of 1985 but had continued to pay rent on the house until September 1, 1985. Nevertheless, when the search of the Stanton County residence was conducted sometime on or after September 1, 1985, it was apparent that the house had been vacated by the defendants and the alleged subsequent tenant, who the defendants claim leased the house from November of 1984 through August of 1985.

The articles seized from the attic included letters, cards, and

books belonging to the defendants which were located with the seized marijuana and drying materials.

In *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984), the Court stated that an unreasonable search within the meaning of the fourth amendment occurs "when an expectation of privacy that society is prepared to consider reasonable is infringed."

Recently, in *State v. Kenny*, 224 Neb. 638, 399 N.W.2d 821 (1987), this court held that the defendant had no reasonable expectation of privacy in a letter he posted in a public mailbox and sent through the mail to another. In that instance, the court concluded that while the defendant may have hoped for privacy, he had no fourth amendment expectation of privacy because he had relinquished physical control over both the letter and the recipient.

In the present case, although the defendants may have left a padlock on the attic door, they effectively relinquished control of the Stanton County residence when their lease ended and they vacated the premises. See *Abel v. United States*, 362 U.S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960) (hotel had exclusive right to possession of hotel room after petitioner vacated room, and seizure of property he had abandoned in the room was lawful as search was made with the free consent of the hotel management).

Absent a reasonable expectation of privacy in the searched premises, the defendants are without standing to claim a fourth amendment violation in regard to the search of the vacated Stanton County residence. The seized evidence was thus properly relied upon in the affidavit for the search warrant and was properly received in evidence at trial. See *State v. Kenny, supra*.

Finally, Hodge contends that his sentence of 3 to 5 years' imprisonment is excessive and constitutes an abuse of discretion by the sentencing court. Hodge was convicted of knowingly or intentionally possessing with intent to manufacture, distribute, deliver, or dispense marijuana in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1985). That crime is a Class III felony which is punishable by up to 20 years' imprisonment, a $25,000 fine, or both, with a minimum sentence of 1 year's

imprisonment. Neb. Rev. Stat. §§ 28-105 and 28-416(2)(b) (Reissue 1985).

Ordinarily, a sentence imposed within statutory limits will not be overturned on appeal, absent an abuse of discretion by the sentencing court. *State v. Gonzales,* 224 Neb. 659, 399 N.W.2d 832 (1987).

The record in the present case shows that 42 pounds of marijuana and a variety of processing materials were seized from the defendants' residence. At the sentencing hearing, the 34-year-old Hodge acknowledged full responsibility for the operation. The trial court committed no abuse of discretion in sentencing Hodge.

The judgments are affirmed.

AFFIRMED

ELAINE D. BLASER, APPELLANT, V. KENNETH M. BLASER, APPELLEE.

402 N.W.2d 875

Filed April 3, 1987. No. 85-371.

1. **Deeds: Parol Evidence.** Parol evidence must be clear, unequivocal, and convincing to overcome recorded legal title and the recitals in the deed that purport to convey title to both of the parties.
2. **Divorce: Property Division.** Property divisions are not subject to a rigid mathematical formula. The division must, most of all, be reasonable.
3. **Alimony: Appeal and Error.** Decisions regarding alimony are entrusted to the sound discretion of the trial judge and, absent an abuse of discretion, will be upheld on appeal.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed as modified.

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

James G. Egley of Moyer, Moyer, Egley & Fullner, for appellee.

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

WHITE, J.

Elaine D. Blaser appeals from the decree of the district court for Platte County, Nebraska, dissolving her marriage to Kenneth M. Blaser. Elaine alleges four separate errors were made by the lower court: First, the court erred in failing to find 120 acres was a gift to both parties, and therefore inequitably divided the marital estate; second, the alimony awarded her was inadequate; third, the court erred when it failed to make findings of fact regarding the value of real and personal property; and last, the court erred by not awarding her half of the amount of money removed by Kenneth from joint accounts after a restraining order was issued limiting use of the accounts. We affirm.

At trial, testimony revealed that the parties had been married for nearly 29 years and had one daughter, who had already reached the age of majority. Kenneth is a farmer. Elaine has not been gainfully employed since they were married and has no special job training. She is a high school graduate. While it is undisputed that she was responsible for childrearing and housekeeping, her representations regarding her contribution to the operation of the farm were sharply contradicted by Kenneth, his father, and Virgil Norris, a neighbor of the Blasers' who worked daily with Kenneth, helping with each other's farm chores.

At the time of trial Kenneth was 53 years old. He testified that he has a bad back and a bad knee, but is otherwise in good health. Elaine testified that she has "fibroids" and sees a female pelvic specialist regularly. The condition is not disabling.

Elaine inherited a one-half interest in 160 acres of pastureland and a one-fourth interest in 6 acres on the Loup River. Neither parcel was included as an asset in the marital estate by the trial court.

In 1965 the parties acquired an 80-acre parcel of land for $36,000. The couple used $10,000 that Elaine inherited and borrowed $10,000 from Elaine's father to finance this purchase. The loan was never repaid, and the debt was forgiven

upon Elaine's father's death.

In 1973 and 1974 Kenneth's parents conveyed two parcels of land, totaling 120 acres, to Elaine and Kenneth as joint tenants. The property had a farmhouse on it, in which the parties lived until 4 years prior to trial. The structure was removed from the property and sold, and a new house erected. Kenneth was awarded 120 acres and the new house. Elaine was awarded the proceeds of the sale of the old house, which were held in escrow.

In the decree the 120 acres conveyed by Kenneth's parents is categorized as a gift to Kenneth. The debt forgiven the parties upon Elaine's father's death is categorized as a gift to Elaine, although at trial she contended the debt was forgiven both of them. The decree does not set out whether these were ultimately considered part of the marital estate.

Elaine's first assignment of error alleges that the property was inequitably divided because the court wrongfully excluded the gifts from Kenneth's parents from the marital estate. While it is unclear as to whether the lower court included or excluded the land and old house from the marital estate, we find that the 120 acres and the house were a gift to both parties and, therefore, part of the marital estate.

The deeds unambiguously convey the land to Elaine and Kenneth as joint tenants. Although Kenneth's father, Milton Blaser, testified that he intended the property to remain in the family, that he did not like Elaine, and that he meant the land to be a gift to Kenneth, he also admitted that he knew at the time the conveyance created a joint tenancy, and understood what that meant since he and his wife hold their property as joint tenants. This was the only evidence offered in support of finding the land to be a gift to Kenneth alone. This parol evidence is not of the clear, unequivocal, and convincing type required in cases such as *Salmon v. Salmon*, 219 Neb. 899, 367 N.W.2d 142 (1985), and *Anstine v. Anstine*, 214 Neb. 808, 336 N.W.2d 552 (1983), to overcome recorded legal title and the recitals in the deed that purport to convey title to both of the parties.

Having decided that the farmhouse and the 120 acres were given to both Kenneth and Elaine and are part of the marital estate, we must now determine if the division of property was

inequitable. On appeal we consider the issues de novo on the record and affirm the trial judge's decision where we observe no abuse of discretion. *Busekist v. Busekist*, 224 Neb. 510, 398 N.W.2d 722 (1987). As a general rule, one-third to one-half the property is an appropriate division. However, property divisions are not subject to a rigid mathematical formula. The division must, most of all, be reasonable. *Sullivan v. Sullivan*, 223 Neb. 273, 388 N.W.2d 516 (1986).

In calculating what property is subject to division and to whom it went, we exclude from the estate the land Elaine inherited and owns part interest in, and several pieces of farm equipment still owned by Kenneth that were given to him by his father. Property not specifically handled in the decree, such as a wooden building, with eight windows, that is able to be sold, is considered to be evenly divided between the parties, as provided for by the decree. As a result of our review of the record, we find that Elaine received over one-third of the marital estate.

The bulk of the marital assets are in the form of the new house, the real estate, and farm equipment. Kenneth testified that he wanted Elaine to have the house, and she testified she did not want it. They both agree there is not a good market for the home due to its location. Elaine received 40 percent of the land and the means to irrigate it. She never indicated to the court she wanted any of the machinery, and Kenneth received all of it. Elaine received almost all of the parties' cash and personal property; Kenneth was given responsibility for all the marital debts. Although the decree awards Elaine less property than Kenneth, it divides the property between the parties in a reasonable manner in light of Elaine's wishes not to be awarded the house and to move off the land. We find no abuse of discretion by the trial judge with respect to the division of property.

There is, however, one change that must be made in the decree. At trial the appellant requested that she be awarded the "Mueller" 80-acre tract and the equipment used to irrigate it, since her family contributed a large part of the money used to purchase the tract. The appellee did not contest her request. In its findings, the court found that the "Blaser 80" was a gift to Kenneth. The appellant never requested to be awarded this

80-acre parcel, although she felt it should be included in the marital estate. In the order the court awarded Elaine an 80-acre tract and irrigation pipe, and Kenneth an 80-acre tract with the house, yet the legal descriptions of the two 80-acre tracts were interchanged. To the extent that the order does not reflect the obvious intention of the trial court and the consonant wishes of the parties, it is modified. Elaine is awarded the land described as the east half of the southwest quarter of Section 32, Township 17 North, Range 1 West of the 6th P.M., in Platte County, Nebraska. Kenneth is awarded the land described as the south half of the southeast quarter of Section 32, Township 17 North, Range 1 West of the 6th P.M., in Platte County, Nebraska.

Elaine was awarded alimony in the amount of $400 per month for 3 years and $250 per month for 7 years thereafter, and appeals because she feels it to be inadequate. Decisions regarding alimony are entrusted to the sound discretion of the trial judge and, absent an abuse of discretion, will be upheld on appeal. *Busekist v. Busekist, supra.*

Kenneth farms for a living. Elaine was awarded 40 percent of the farmland the two of them owned. She also owns a one-half interest in 160 acres and a one-fourth interest in 6 acres. Kenneth testified that the profits from the 120 acres he was awarded have been and will be greatly reduced due to seepage of underground water onto part of the land, drowning the crops. Elaine received most of the parties' cash. She is not unable to work. In light of the resources she has at her disposal, we cannot say that the trial court abused its discretion by awarding her alimony in the amounts described above. We uphold the decision of the trial court.

Elaine's third assignment of error concerns the trial court's failure to make findings of fact with respect to the values of the property contained in the marital estate. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986) provides that "consideration of the case will be limited to errors assigned and discussed." This assignment of error was not briefed and, therefore, shall not be considered. *In re Interest of J.S., S.C., and L.S.*, 224 Neb. 234, 397 N.W.2d 621 (1986).

In her fourth assignment of error, Elaine complains that the

court erred when it failed to award her one-half the amount of money Kenneth removed from a joint account after a restraining order was served upon him. The order at issue restrained Kenneth from disposing of the property described in the order, except in the usual course of business. Elaine argues in her brief that since he did not account for "where specifically it went" at trial, she should recover half of the money. Brief for Appellant at 24. Neb. Rev. Stat. § 42-357 (Reissue 1984), which provides for the issuance of restraining orders such as the one at issue here, provides in part: "[T]he party against whom such order is directed shall *upon order of the court* account for all unusual expenditures made after such order is served upon him or her . . . ." (Emphasis supplied.) The record before us does not demonstrate that Elaine requested the court for an order requiring Kenneth to account for these expenses or that Kenneth was ever ordered to account for these expenses. There is no evidence suggesting the expenditures were unusual or that Kenneth misused the funds or secreted them away. Since Kenneth was not ordered to account for these expenditures, we cannot find that his failure to do so entitles Elaine to any more property than has been awarded her in the decree dividing the property between the parties. We find no merit in this final assignment of error and uphold the decree of the trial court as modified.

AFFIRMED AS MODIFIED.

McMULLIN TRANSFER, INC., APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLEES.

402 N.W.2d 878

Filed April 3, 1987. No. 85-528.

1. **Tort Claims Act: Appeal and Error.** The findings of fact of the trial court in a proceeding under the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981), have the effect of jury findings and will not be disturbed on appeal unless they are clearly wrong.
2. **Negligence: Words and Phrases.** Contributory negligence is conduct for which

the plaintiff is responsible, amounting to a breach of the duty imposed upon persons to protect themselves from injury and which, concurring with actionable negligence on the part of the defendant, is a proximate cause of injury.

Appeal from the District Court for Polk County: WILLIAM H. NORTON, Judge. Affirmed.

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

Robert M. Spire, Attorney General, and John R. Thompson, for appellee State of Nebraska.

Jerry W. Katskee of Katskee & Henatsch, for appellee Village of Shelby.

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

PER CURIAM.

Plaintiff-appellant, McMullin Transfer, Inc. (hereinafter McMullin), brought this action against defendants-appellees, State of Nebraska and Village of Shelby, for property damages, loss of use, and related damages resulting from the collision of a trailer, leased by the plaintiff and being pulled by plaintiff's truck tractor, with a tree limb extending over the highway. The lessor of the trailer had assigned its claim for damages to plaintiff. In the petition, the plaintiff alleged the State and village were negligent in not keeping the highway free of obstructions and in a reasonably safe condition. The defendant State of Nebraska answered, generally denying any liability and pleading that the sole proximate cause of the accident was plaintiff's driver's negligence, which was imputed to plaintiff, and that the contributory negligence of plaintiff's driver was more than slight and, therefore, sufficient to bar recovery. Defendant State alleged that plaintiff's contributory negligence included its negligence in failing to maintain a proper lookout and in failing to "stop, swerve or divert the course of said vehicle to avoid the collision." Defendant State also alleged that plaintiff had assumed the risk of the accident in operating a vehicle exceeding 12 feet 6 inches in height, as set out in Neb.

Rev. Stat. § 39-6,178 (Reissue 1984).

The district court for Polk County found that a duty existed to protect the public from injury arising from the lawful use of a highway, including damage from overhanging trees. The court also found the State had gratuitously assumed the duty of maintaining the highway within Shelby and had thus relieved the Village of Shelby from liability. The court further concluded that the defense of assumption of the risk asserted pursuant to § 39-6,178(2) was not available to defendant State. The court held that the State was negligent in maintaining the highway but that, under the circumstances present, the contributory negligence of the operator of the vehicle was more than slight and, when imputed to the plaintiff, was sufficient to bar recovery.

The plaintiff timely appealed to this court. In its appeal, the plaintiff alleged the trial court erred in determining plaintiff's driver was guilty of contributory negligence in a degree sufficient to bar recovery. The plaintiff alleged the trial court erred in entering judgment for defendant State against the plaintiff, but did not assign as error the trial court's order dismissing the village. The State did not cross-appeal and seek to have the order dismissing the village reversed, and we therefore consider the case on appeal as one involving only plaintiff as appellant and the State as appellee. For the reasons hereinafter stated, the judgment of the trial court is affirmed.

The record discloses the following. Lester Clure was employed as a truckdriver by the plaintiff. On the evening of May 11, 1982, at approximately 9 p.m., Clure, while acting within the scope of his employment with plaintiff, was operating plaintiff's truck east on Highway 92 within the limits of the Village of Shelby. At that point, the highway was straight. Within Shelby the highway was 42 feet wide, with a marked centerline but no marked travel lanes. Plaintiff's driver was operating the rig in the southernmost portion of the eastbound lane, approximately 2 feet north of the south curb. As he drove through Shelby, the trailer of the rig collided with the tree limb extending across the road. Damage to the trailer included buckling in the center and a tear in the top right corner, causing damage to the trailer and resulting in the load of wheat's

partially spilling onto the road.

The driver testified that at the time of the collision the road was wet as a result of an earlier rain and that the sky was overcast and it was dark. The trial court found that plaintiff's driver had driven along this stretch of road on many occasions prior to the night of May 11, 1982, the last of which was about 1 month before the collision, and that the driver was familiar with the area both at night and in the daylight. The driver was aware of the trees that lined the road. He testified that on the night of the accident he saw the particular tree prior to the collision at a distance sufficient to allow him to come to a stop safely. While the tree was seen at a safe distance, the limb extending over the road could not be seen clearly as it was above the illumination provided by the truck's headlamps, which were on low beam at the time of the collision. There was no evidence presented to establish the extending limb would have been visible had the truck been operated with the lights on high beam.

It was established that the tree limb which was involved in the collision was approximately 12 feet 6 inches above the surface of the highway. The trailer was approximately 12 feet 11 inches in height. The evidence showed that if the rig had been driven closer to the centerline, the collision would not have occurred, since the tree limb was closer to the pavement along the southern part of the highway.

On appeal the plaintiff alleges the trial court erred in finding that plaintiff's driver was contributorily negligent to a degree sufficient to bar recovery. The trial court based its finding on the driver's familiarity with the road; the driver's knowledge of location of the trees; the fact that the driver had seen the tree in time to safely come to a stop; the driver's failure to have the driving lights "completely illuminate the area"; and in the driver's operation of the vehicle on the extreme right-hand side of the road. We hold the trial court did not err in finding that plaintiff's driver was contributorily negligent to a degree more than slight and sufficient to bar plaintiff's recovery.

Since plaintiff's action was one against the State of Nebraska and the Village of Shelby, a political subdivision of the State, the case was tried to the court sitting without a jury after plaintiff's duly filed claims had been denied by each of the

defendants. Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981); Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983). The findings of fact of the trial court in a proceeding under the State Tort Claims Act have the effect of jury findings and will not be disturbed on appeal unless they are clearly wrong. *Oldenburg v. State*, 221 Neb. 1, 374 N.W.2d 341 (1985); *Wakenight v. State*, 212 Neb. 798, 326 N.W.2d 52 (1982).

The trial court found that a duty existed to protect the traveling public from "damage arising from the lawful normal use of the highway, including damage from the overhanging trees" and that this duty fell upon the State only, because the State had assumed that duty gratuitously. The State in its brief, on the issue of negligence, does not contend that there was not a duty to maintain the highway safely even as to overhanging tree limbs, nor that there was not a violation of that duty, but only that the duty rested solely on the village and not on the State, since the accident occurred in the southernmost part of the eastbound driving surface and the duty of maintaining that portion of the road rested on the village. While the State generally denied it was negligent, the issue that the village was solely responsible for maintenance of the highway at the point of the collision was not presented in the State's answer to plaintiff's petition and will not be considered for the first time on appeal. See *Leseberg v. Meints*, 224 Neb. 533, 399 N.W.2d 784 (1987). The evidence before the trial court fully supports the court's conclusion that the State was negligent.

Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty imposed upon persons to protect themselves from injury and which, concurring with actionable negligence on the part of the defendant, is a proximate cause of injury. *Steinauer v. Sarpy County*, 217 Neb. 830, 353 N.W.2d 715 (1984); *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984).

As stated in *Circo v. Transit Auth. of City of Omaha*, 217 Neb. 497, 501, 348 N.W.2d 908, 910 (1984), quoting from *Murray v. Pearson Appliance Store*, 155 Neb. 860, 54 N.W.2d 250 (1952):

> "The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though

> he is rightfully on the highway and has the right-of-way or is driving on the side of the highway where he has a lawful right to be. He must keep a lookout ahead or in the direction of travel . . . and is bound to take notice of the road, to observe conditions along the way, and to know what is in front of him for a reasonable distance."

Plaintiff emphasizes that its driver was operating plaintiff's vehicle on a dark, rainy night, but this court has held that conditions facing a driver impose a duty to exercise a degree of care commensurate with the circumstances. In *Central Constr. Co. v. Republican City School Dist. No. 1*, 206 Neb. 615, 294 N.W.2d 347 (1980), the condition was dust obstructing the driver's view, and the driver's turning his vehicle into the defendant's vehicle when he could not see was held to be contributory negligence sufficient to defeat plaintiff's claim. We stated in *Willey v. Parriott*, 179 Neb. 828, 833, 140 N.W.2d 652, 655-56 (1966), that the driver of a motor vehicle

> must keep a lookout ahead . . . and to know what is in front of him for a reasonable distance. Snow, mist, fog, or other conditions which affect visibility are not intervening causes but are conditions which require a driver to exercise a degree of care commensurate with the circumstances.

What determines the exercise of reasonable care, or the breach of that duty of care, must be determined by the circumstances of each case. In this case, the trial court, as finder of fact, determined that plaintiff's driver was guilty of contributory negligence.

The finding was based on the driver's prior knowledge of the highway through Shelby and of the trees lining the highway. There was no need for plaintiff's driver to proceed as close as he did to the south edge of the eastbound highway, and thus to the adjoining trees. The driver could see the tree whose limb the vehicle struck at a sufficient distance to safely stop or swerve the vehicle to the north, and while plaintiff's driver testified he could not see the overhanging limb, he knew, as stated by the trial court, that "trees had limbs." Under the circumstances of this case, to proceed along the southernmost edge of the highway, close to known trees, when there was sufficient room to proceed in the main portion of the highway constituted

contributory negligence. We determine that the trial court's finding that plaintiff's driver was guilty of contributory negligence in a degree sufficient to defeat plaintiff's recovery is supported by the evidence and is not clearly wrong. The judgment of the trial court in favor of defendant State is affirmed.

AFFIRMED.

GRANT, J., dissenting.

I disagree with the court's holding that the evidence supports the trial court's finding that plaintiff's driver was guilty of contributory negligence to a degree sufficient to defeat plaintiff's recovery. Plaintiff's vehicle was of a height of 12 feet 11 inches. The statutory height limit for trucks is 14 feet 6 inches, as provided in Neb. Rev. Stat. § 39-6,178(1) (Reissue 1984). While § 39-6,178(2) provides that existing structures need not be changed to permit the passage of vehicles exceeding 12 feet 6 inches in height and that owners of vehicles exceeding 12 feet 6 inches assume the risk of damages resulting from an existing "overhead obstruction," the trial court properly found a tree limb is not an overhead obstruction as defined in the statute. Employees of the State were aware of the tree limb before the accident and that the limb was a "hazard to traffic." I believe that, under the facts in this case, a person driving a vehicle of legal height at a place on the highway where he is legally entitled to be is not guilty of contributory negligence in assuming that the roadway provided for passage is free of obstructions (except for the statutory obstructions defined in § 39-6,178(2)) which would cause damage from above to passing vehicles.

WHITE, J., joins in this dissent.

BETTY LOU SEEMANN, APPELLANT AND CROSS-APPELLEE, V. LEE DUNN SEEMANN, JR., APPELLEE AND CROSS-APPELLANT.

402 N.W.2d 883

Filed April 3, 1987. No. 85-545.

1. **Property Division: Appeal and Error.** The division of the marital estate is initially left to the sound discretion of the trial court and will be reviewed de novo on the record and affirmed absent an abuse of discretion.
2. **Alimony: Appeal and Error.** An award of alimony, if reasonable in light of the facts and circumstances of the case, will be upheld on appeal absent an abuse of discretion.
3. **Interest: Appeal and Error.** It is within the discretionary power of the district court to award the payment of interest, and such awards will be upheld on appeal absent an abuse of discretion.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

David L. Herzog, P.C., for appellant.

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

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

WHITE, J.

This is an appeal from the district court for Douglas County. A decree of divorce was entered in this case on June 14, 1985. The Seemanns' marital estate is extensive, and a detailed recitation of the division of the assets will be useful in the disposition of this case.

The appellant, Betty Lou Seemann, was awarded as marital assets all household goods, furnishings, clothing, and jewelry in her possession; the couple's 1957 Mercedes; all shares of R.J. Reynolds stock; and $145,000, as part of the property settlement, payable over the next 6 years at 10 percent interest per annum. The appellant was also awarded costs and $9,000 in attorney fees.

The appellee was awarded care and custody of their minor son and $150 per month child support from the appellant. As nonmarital assets, Mr. Seemann was awarded his interest in Seemann Properties Ltd. and all shares of Berkshire Hathaway stock and New America Fund stock, gifts to him by his family.

As a share of the marital assets, Mr. Seemann was awarded the couple's home in Elkhorn, Nebraska, as well as all personal belongings and household goods and furnishings in his possession. He was also awarded real properties at Leshara, Nebraska, and at Okoboji, Iowa; his interest in the family truck and trailer business, Seemann Truck and Trailer, Inc.; his interest in Seemann Truck and Trailer profit-sharing plan; and his interest in Seemann Enterprises, Inc., a real estate holding company.

After a motion for new trial by the appellant, the district court granted the appellant alimony of $1,500 per month for 18 months, a total of $27,000, and temporary support of $2,000 per month pending appeal, for which the appellee was granted a credit against the property settlement. Finally, in an order nunc pro tunc, the district court ordered that in event of an appeal, the appellee was ordered to pay all fees and costs previously awarded. This appeal follows.

On appeal Mrs. Seemann assigns as error that her share of the marital estate was inadequate, that the alimony awarded was insufficient, that the court erred in granting the appellee a credit of sums paid as temporary support, and that the district court erred in ordering the appellant to pay child support. On cross-appeal Mr. Seemann alleges that the property settlement awarded the appellant was excessive, that it was error to award alimony, that the court erred in awarding the appellant interest on the $145,000 awarded in the settlement, that the attorney fees awarded were excessive, and that the court erred in ordering that the fees and costs awarded were payable pending appeal. We affirm.

Appellant's first assignment of error revolves around the division of the marital estate. Appellant argues that the district court incorrectly excluded certain assets from the marital estate, erred in its valuation of the assets, and unfairly divided the marital estate. The division of the marital estate is initially left to the sound discretion of the trial court and will be reviewed de novo on the record and affirmed absent an abuse of discretion. *Busekist v. Busekist*, 224 Neb. 510, 398 N.W.2d 722 (1987); *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986). The issue will ultimately turn upon the question of the

reasonableness of the division in light of the circumstances and facts of the case. *Busekist, supra.* Neb. Rev. Stat. § 42-365 (Reissue 1984) sets out a series of factors to be taken into consideration in the division of the marital estate, including the duration of the marriage, the circumstances of the parties, and the history of contributions to the marriage made by each party. For the following reasons, we find this assignment of error to be without merit.

Appellant argues that certain assets were incorrectly excluded from the marital estate, thereby unfairly reducing her share of the estate. At trial each side presented evidence relevant to the issue of whether the assets in question should be included in the marital estate. When there is conflicting evidence, this court traditionally has given weight to the fact that the trial judge heard and saw the evidence and chose one version of the facts over another. *Bryan v. Bryan*, 222 Neb. 180, 382 N.W.2d 603 (1986). We find no abuse of discretion in the trial court's delineation of the marital estate. We also note that at trial the appellant agreed that one of the assets at issue was not properly included in the marital estate.

Mrs. Seemann also argues that the court incorrectly accepted the valuation of the couple's marital assets presented by the appellee's accountant as opposed to the valuation prepared by her accountant. Although the record does not reveal exactly which valuation the court accepted, again the trial judge heard and saw all of the evidence, and, in accordance with our earlier statement, we give weight to his decision. We can find no abuse of discretion. From a careful review of the record we cannot say that the division or delineation of the marital estate was unreasonable, and find this assignment of error to be without merit.

Appellant's next three assignments of error are argued together, and we have unraveled the arguments as best we can. Mrs. Seemann assigns as error that the alimony awarded was insufficient. As stated above, Mrs. Seemann was awarded $1,500 per month for a period of 18 months, a total of $27,000. Considering the facts and circumstances of this case, we note that Mrs. Seemann is trained as a radio and television broadcaster as well as having extensive experience as a manager

of a women's retail clothing store, although she is still unemployed. The property settlement is generous; the appellant will be receiving installments of the $145,000 for 6 years at 10 percent interest per annum. Although the appellant has been ordered to pay $150 per month in child support and she will have substantial fees from the proceedings, for which she has been given a significant sum, we are aware of no other indebtedness. We can find no abuse of discretion in this award of alimony, and find the award of alimony reasonable in light of the facts and circumstances of this case. *Gale v. Gale*, 224 Neb. 803, 401 N.W.2d 501 (1987).

Appellant next assigns as error that the trial court erred in granting Mr. Seemann a credit against the property settlement for sums paid as support pending appeal. Appellant argues that the credit unfairly reduces the property settlement. We disagree. Unless the lower court credited the appellee for the sums paid to Mrs. Seemann as temporary support, she would receive a windfall—the entire property settlement as well as the sums paid as temporary support. Credits for temporary allowances have been upheld by this court on prior occasions. *Berigan v. Berigan*, 194 Neb. 185, 231 N.W.2d 131 (1975); *Badberg v. Badberg*, 193 Neb. 844, 229 N.W.2d 552 (1975). We find no abuse of discretion in the actions of the lower court.

Mrs. Seemann's final assignment of error contends that the court abused its discretion in ordering her to pay $150 per month in child support. As stated above, the appellee was granted custody of the couple's minor son. In view of the facts and circumstances of this case and the costs of raising a child, $150 per month is a minimal amount for the appellant to contribute to the support of her child. We do not agree that the trial judge abused his discretion in ordering the payment of an unreasonably high amount of child support. *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986); *Lainson v. Lainson*, 219 Neb. 170, 362 N.W.2d 53 (1985).

On cross-appeal the appellee contends that the award of property to the appellant was excessive and that no alimony should have been awarded. Mr. Seemann argues that certain assets were incorrectly included in the marital estate. As we have already stated, we can find no abuse of discretion in the

trial court's delineation of the marital estate, the division of assets, nor in its award of alimony. We need not further discuss these assignments of error.

Appellee's third assignment of error on cross-appeal contends that the district court erred in ordering that interest be payable upon the installments of the $145,000 awarded the appellant as part of the division of the marital assets. Awards of interest due upon the property settlements ordered by the courts of this State have been upheld previously upon appellate review. We note that it is within the discretionary powers of the district court to award the payment of interest, and we do not see an abuse of discretion in this instance. *Kullbom v. Kullbom*, 215 Neb. 148, 337 N.W.2d 731 (1983). As we have already upheld the division of property in this case, we need not further address this issue.

Mr. Seemann's fourth assignment of error on cross-appeal contends that the district court awarded an unreasonably high amount of attorney fees and costs to the appellant. The costs of these proceedings have been substantial and are well documented in the record. While the award is ample, it does not completely cover the costs of the appellant, who will be left with not insignificant expenses when these proceedings are concluded. We find no abuse of discretion after a careful review of the record. *Rinderknecht v. Rinderknecht*, 204 Neb. 648, 284 N.W.2d 569 (1979).

The appellee's fifth and final assignment of error on cross-appeal alleges that the lower court abused its discretion by requiring that the fees and costs awarded the appellant be paid immediately. We have already stated that the award of attorney fees and costs was not an abuse of discretion, and therefore we need not discuss this fifth and final assignment of error.

AFFIRMED.

GERALDINE LYNN, APPELLANT, V. METROPOLITAN UTILITIES DISTRICT, A NEBRASKA CORPORATION, APPELLEE.

403 N.W.2d 335

Filed April 3, 1987. No. 85-575.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), will not be set aside unless such findings are clearly incorrect.
2. **Trial: Evidence: Witnesses.** In a bench trial of a law action, the court, as the "trier of fact," is the sole judge of the credibility of witnesses and the weight to be given their testimony. Among the factors entering into the trial court's resolution of any conflicts of evidence are such items as the respective interests of the parties in the litigation; the demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by witnesses; the extent to which testimony of various witnesses is corroborated; and the reasonableness or unreasonableness of testimony from the witnesses.
3. **Judgments: Appeal and Error.** In reviewing a judgment awarded in a bench trial, the Supreme Court does not reweigh evidence but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
4. **Negligence: Proof.** In the face of the defense of contributory negligence and to recover on a claim of negligence, a plaintiff must prove the defendant's negligence and must be free from contributory negligence more than slight in comparison with the defendant's negligence.
5. _____: _____. Contributory negligence is an affirmative defense which must be proved by the party asserting such defense.
6. **Negligence: Pedestrians.** A pedestrian on a public thoroughfare must exercise the degree of care that an ordinarily prudent person would exercise under similar circumstances.
7. **Negligence.** To determine whether conduct constitutes negligence, the invariable standard is reasonable care, although reasonable care is directly proportional to the danger inherent in conduct and may vary depending on the circumstances.
8. _____. Entering a darkened area requires one to exercise caution greater than that ordinarily required in an illuminated area.
9. _____. One who is capable of understanding and discretion but fails to exercise ordinary care and prudence to avoid obvious dangers is negligent or contributorily negligent.
10. **Negligence: Pedestrians: Highways.** A pedestrian on a street or highway must use reasonable care to discover and avoid obvious defects or obstructions involving such street or highway. A pedestrian's failure to exercise reasonable care to discover and avoid an obvious defect or obstruction in the path or course traveled is, ordinarily, contributory negligence.
11. **Negligence.** Generally, one is contributorily negligent if (1) he breaches the duty imposed upon him by the law to protect himself from injury; (2) his actions

concur and cooperate with actionable negligence of the defendant; and (3) his actions contribute to his injuries as a proximate cause.

12. **Negligence: Pedestrians: Highways.** Whether a pedestrian who walks on a street and falls as the result of the street's condition is contributorily negligent is, ordinarily, a question of fact.

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

Michael Lehan and William Latka III, for appellant.

Thomas A. Wurtz and Daniel G. Crouchley, for appellee.

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

SHANAHAN, J.

Geraldine Lynn appeals the judgment for Metropolitan Utilities District (M.U.D.) in a negligence action, which she brought pursuant to the provisions of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983). We affirm.

In Omaha, at approximately 5:25 a.m. on January 28, 1980, Geraldine Lynn parked her car, as she had done "for four years," on the west side of 22d Street and began walking to work at Northwestern Bell Telephone Company, which was located four blocks away at 19th and Douglas Streets. Lynn regularly followed the same pedestrian course from her parking place on 22d Street to the Bell building.

Running north and south, 22d Street intersected with the north side of Dodge Street but did not cross Dodge, a one-way thoroughfare with four lanes for traffic and a parking lane adjacent to the south curb. Although there was a sidewalk on each side of Dodge, there was no crosswalk at the intersection of 22d and Dodge Streets. Two blocks east, at the intersection of 20th and Dodge Streets, there was a crosswalk.

There were no other pedestrians or traffic regarding Dodge Street when Lynn reached the 22d Street intersection. It was dark that morning, a light snow was falling, and the temperature was near 17°. The condition of illumination from street lights on Dodge Street is undisclosed.

Leaving the corner of 22d and Dodge Streets, Lynn

commenced walking diagonally in a southeasterly direction across Dodge. As she was approaching the curb on the south side of Dodge Street, Lynn stepped into a hole in the street and fell. Lynn fell "suddenly . . . just fell straight down" and "jammed" her leg into a hole.

The hole, located 3 to 4 feet from the south curb of Dodge Street, was a gas valve box, owned by M.U.D. and encasing a low-pressure valve utilized to regulate the flow of gas. The valve in the box was located 6 feet below the surface of Dodge Street. Ordinarily, a cast-iron cover lay over the 8-inch-wide valve box, but was missing the morning when Lynn fell. The edge of the valve box was "flush" with the concrete surface of Dodge Street. Before Lynn's accident, M.U.D. had no actual notice that the cover was missing from the valve box, installed in 1948 but never inspected after 1958.

Lynn testified that it was "very dark" at the site of the hole and that she had "walked over" the gas valve box before the morning of the accident, but denied prior knowledge that the valve box was at the site of her fall. According to Lynn, the "hole was never there all the times that I had walked that path," and "I had no idea what I had stepped into."

As the result of her fall into the valve box, Lynn sustained a severe laceration of her lower left leg, was hospitalized, and eventually retired from employment at Bell because persistent pain from the leg injury prevented her working.

In her petition, Lynn made specific allegations concerning M.U.D.'s negligence, namely, M.U.D.'s failure to (1) maintain the valve box, which was located in a "public way," in a safe condition; (2) inspect and discover the dangerous condition regarding the uncovered valve box; (3) barricade the hole; (4) warn Lynn; and (5) comply with Omaha Mun. Code ch. 49, art. XIV, § 49-536 (1980), pertaining to installation, inspection, and maintenance of a utility outlet. Additionally, Lynn alleged M.U.D.'s negligence in utilizing a "covering on a utility hole in the public way which was not properly designed to remain attached under the circumstances." In its answer, M.U.D. denied any negligence and alleged the affirmative defenses of contributory negligence and assumption of risk.

After a bench trial, the district court for Douglas County

entered judgment for M.U.D., stating: "In consideration of the facts and law, the Court finds that the Plaintiff should not recover on her Petition against the Defendant. IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT a verdict for the Defendant is rendered on the Plaintiff's Petition."

Geraldine Lynn claims that the district court committed error in (1) not finding M.U.D. negligent by its failure to inspect and properly maintain the valve box, as well as warn the public about the dangerous condition regarding the valve box; (2) requiring Lynn to prove that M.U.D. had actual notice of the valve box's defective condition, when evidence established that M.U.D. had no maintenance or inspection program for its system; and (3) finding Lynn contributorily negligent in a degree preventing recovery.

Lynn asserts that the district court committed reversible error in specific conclusions of law or findings of fact, such as failing to find M.U.D. negligent and requiring Lynn's proof of actual notice to M.U.D. concerning the condition at the valve box. The record does not reflect such specificity by the district court as asserted by Lynn. Rather, in the words of the district court, a general "verdict for the Defendant is rendered on the Plaintiff's Petition." Neb. Rev. Stat. § 25-1127 (Reissue 1985) does provide a procedure in a law action whereby a party may request, and the court must specify, certain conclusions:

> Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law.

"The purpose of § 25-1127, requiring a trial court's separate statements regarding its findings of fact and conclusions of law, is to enable the parties to question the 'rulings of the court upon legal questions involved.' " *Fee v. Fee*, 223 Neb. 128, 132, 388 N.W.2d 122, 125 (1986). The procedure for specific findings of fact and conclusions of law, authorized in § 25-1127, is

available in actions brought under the Political Subdivisions Tort Claims Act. See *Lindgren v. City of Gering*, 206 Neb. 360, 292 N.W.2d 921 (1980). However, Lynn did not use the procedure authorized in § 25-1127, although such procedure was available in cases such as Lynn's action against M.U.D. Lynn's expressions about specificity in the district court's findings are only surmise.

A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly incorrect. *McGinn v. City of Omaha*, 217 Neb. 579, 352 N.W.2d 545 (1984). See, also, *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984).

In a bench trial of a law action, the court, as the "trier of fact," is the sole judge of the credibility of witnesses and the weight to be given their testimony. Among the factors entering into the trial court's resolution of any conflicts of evidence are such items as the respective interests of the parties in the litigation; the demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by witnesses; the extent to which testimony of various witnesses is corroborated; and the reasonableness or unreasonableness of testimony from the witnesses. See *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985).

> In reviewing a judgment awarded in a bench trial, the Supreme Court does not reweigh evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. [Citations omitted.]

Alliance Nat. Bank v. State Surety Co., 223 Neb. 403, 404, 390 N.W.2d 487, 489 (1986).

In the face of the defense of contributory negligence and to recover on her claim against M.U.D., Lynn must prove M.U.D.'s negligence and must be free from contributory negligence more than slight in comparison to M.U.D.'s negligence. See Neb. Rev. Stat. § 25-21,185 (Reissue 1985) (contributory negligence; comparative negligence). See, also,

Teegerstrom v. H. J. Jeffries Truck Line, 216 Neb. 917, 346 N.W.2d 411 (1984).

To dispose of Lynn's appeal, we must determine whether, based on the issues presented, there is support for the district court's judgment. In that regard, we proceed on the hypothesis that Lynn had established all facts necessary to prove M.U.D.'s negligence as specifically alleged in her petition. When Lynn proved M.U.D.'s negligent conduct, the burden shifted to M.U.D. to prove one of its alleged defenses, either Lynn's contributory negligence or assumption of risk on the part of Lynn. Contributory negligence is an affirmative defense which must be proved by the party asserting such defense. See *Foland v. Malander*, 222 Neb. 1, 381 N.W.2d 914 (1986).

In *Mercer v. Omaha & C. B. Street R. Co.*, 108 Neb. 532, 535, 188 N.W. 296, 297 (1922), this court stated: "It is the settled law of this state that the general public has the right to the use of a public street and every part thereof . . . ."

A pedestrian's right to ambulation on a public street, however, is not absolute. A pedestrian on a public thoroughfare must exercise the degree of care that an ordinarily prudent person would exercise under similar circumstances. See, *Seitter v. City of St. Joseph*, 358 S.W.2d 263 (Mo. App. 1962); *Thomas v. City of Devils Lake*, 143 N.W.2d 718 (N.D. 1966); *Engman v. City of Des Moines*, 255 Iowa 1039, 125 N.W.2d 235 (1963).

To determine whether conduct constitutes negligence, the invariable standard is reasonable care, although reasonable care is directly proportional to the danger inherent in conduct and may vary depending on the circumstances. See, *McDaniel v. McNeil Laboratories, Inc.*, 196 Neb. 190, 241 N.W.2d 822 (1976); Restatement (Second) of Torts § 298 (1965). Cf. *Martinez v. Hoveling*, 184 Neb. 560, 169 N.W.2d 428 (1969) (gunshot wound during hunting accident). Cf., also, *Whittington v. Nebraska Nat. Gas Co.*, 177 Neb. 264, 128 N.W.2d 795 (1964) (explosion from escape of natural gas).

Entering a darkened area requires one to exercise caution greater than that ordinarily required in an illuminated area. *Leary v. Martin K. Eby Constr. Co., Inc.*, 191 Neb. 575, 216 N.W.2d 750 (1974); *Johnson v. Goodier*, 182 Neb. 172, 153 N.W.2d 445 (1967).

One who is capable of understanding and discretion but fails to exercise ordinary care and prudence to avoid obvious dangers is negligent or contributorily negligent. *Utsumi v. City of Grand Island*, 221 Neb. 783, 381 N.W.2d 102 (1986); *Suarez v. Omaha P.P. Dist.*, 218 Neb. 4, 352 N.W.2d 157 (1984).

In *Gaver v. City of Columbus*, 141 Neb. 832, 4 N.W.2d 924 (1942), a pedestrian sought damages from the city as a result of the pedestrian's collision with boughs hanging across a sidewalk. While factually dissimilar to Lynn's case, we find this court's language in *Gaver* is appropriate:

> "A person using or traveling on a street or public way is required reasonably to exercise his faculties to discover and avoid dangerous defects and obstructions, the care required being commensurate with the danger or appearances thereof; and he is guilty of contributory negligence if by reason of his failure to exercise such care he fails to discover and avoid a defect or obstruction which is visible and obvious . . . ." . . .
>
> A traveler along a street or highway is under a duty to keep a general lookout to observe dangers directly in his path.

Id. at 835, 4 N.W.2d at 926. To paraphrase the rule expressed in *Gaver*, a pedestrian on a street or highway must use reasonable care to discover and avoid obvious defects or obstructions involving such street or highway. A pedestrian's failure to exercise reasonable care to discover and avoid an obvious defect or obstruction in the path or course traveled is, ordinarily, contributory negligence.

"Generally, one is contributorily negligent if (1) he breaches the duty imposed upon him by the law to protect himself from injury; (2) his actions concur and cooperate with actionable negligence of the defendant; and (3) his actions contribute to [his] injuries as a proximate cause." *Steinauer v. Sarpy County*, 217 Neb. 830, 836, 353 N.W.2d 715, 721 (1984). See, also, *Stephen v. City of Lincoln*, 209 Neb. 792, 311 N.W.2d 889 (1981).

Whether a pedestrian who walks on a street and falls as the result of the street's condition is contributorily negligent is, ordinarily, a question of fact. *Seitter v. City of St. Joseph,*

supra; Faw v. North Wilkesboro, 253 N.C. 406, 117 S.E.2d 14 (1960); *City of Miami v. Lawson*, 104 So. 2d 600 (Fla. App. 1958); *Mullis v. City of Miami*, 60 So. 2d 174 (Fla. 1952).

M.U.D.'s valve box was located in the curb lane of Dodge Street, in an area which Lynn admits was "very dark." According to her testimony, Lynn was walking on her usual course from her parking place to the Bell building, a route or path which she had previously taken and "walked over" the valve box in question. Lynn followed her usual course in crossing Dodge Street and took no steps for diversion from danger in the darkness on Dodge, where she encountered a hole which, as Lynn described, "was never there all the times that I had walked that path." The district court undoubtedly sought some explanation for Lynn's failure to observe the uncovered valve box and apparently concluded that Lynn's failure to see the hole was attributable to either a lack of light (the scene of the accident was "very dark") or Lynn's inattention while walking along a route she had traveled "for four years." Evidence supports either of the foregoing conclusions and supports a finding that Lynn failed to use reasonable or ordinary care for her own safety and, therefore, was contributorily negligent to a degree more than slight in comparison with M.U.D.'s negligence (which we have assumed, for the purpose of this appeal, but have not determined).

Under the circumstances, the district court's findings are not clearly incorrect. Therefore, we affirm the judgment of the district court.

AFFIRMED.

McGOWAN GRAIN, INC., A NEBRASKA CORPORATION, APPELLANT, V. RONALD D. SANBURG AND DARRELL STRICKLER, APPELLEES.

403 N.W.2d 340

Filed April 3, 1987. No. 85-597.

1. **Due Process: Jurisdiction.** In order to subject a defendant to a judgment in personam, if the defendant is not within the territory of the forum, due process requires that such defendant have certain minimum contacts with the forum state so that maintenance of the suit does not offend traditional notions of fair play and substantial justice.
2. _____: _____. Within the concept of minimum contacts, due process protects against inconvenient litigation which imposes an unreasonable or unfair burden on a defendant.
3. **Due Process: Jurisdiction: States.** Fair warning that activity in a forum state may result in personal jurisdiction is satisfied if a defendant purposefully directs activities at the forum state and its residents and injury is caused by the defendant's activity within the forum state.
4. _____: _____: _____. Where a nonresident individual purposefully derives benefit from interstate activities, fairness requires such individual to account for the consequences arising proximately from the individual's activities in the forum state.
5. **Jurisdiction: Principal and Agent: Due Process: Corporations.** The "fiduciary shield" doctrine is not a constitutional principle precluding personal jurisdiction over a nonresident officer, agent, or employee of a corporation. If a nonresident, as a corporate officer, agent, or employee, has contacts which satisfy standards imposed by a forum state's long-arm statute and the requirements of due process, personal jurisdiction over such nonresident may be obtained in the forum state.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded for further proceedings.

Robert C. McGowan, Jr., for appellant.

James T. Blazek and Martin Cahill, for appellees.

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

SHANAHAN, J.

McGowan Grain, Inc., sued Ronald D. Sanburg (Ron Sanburg) and Darrell Strickler in a contract action brought in the district court for Douglas County. After sustaining special appearances by Ron Sanburg and Strickler, the district court

dismissed McGowan's action. We reverse and remand these proceedings.

At the hearing on the special appearances, affidavits provided the background and factual basis on which the court determined there was no personal jurisdiction over Ron Sanburg and Strickler.

In 1981, the Nebraska Grain & Feed Dealers Association published a "grain & feed directory & buyers guide." At page 105 of that publication there appeared the advertisement of Sanburg Co., Inc., "Truck Grain Merchants of the Midwest," informing readers that Sanburg Co. had a toll-free line for customers in states bordering Kansas. The advertisement also stated that Sanburg Co. had an office at McCool Junction, Nebraska. Among the names appearing in the advertisement was "Ron Sanburg." In 1982, substantially the same advertisement appeared in the directory, with the exception of the addition of Darrell Strickler's name and information that Sanburg Co. had a "National WATS" line in addition to a "Kansas WATS" and a toll-free number for "bordering states." That advertisement again appeared in the grain directory in 1983 and 1984. It appears that Sanburg Co. is a Kansas corporation and had its office at Overland Park and, later, Lenexa, in the State of Kansas. McGowan, a Nebraska corporation, was a member of the Nebraska Grain & Feed Dealers Association and operated a commercial grain elevator in Louisville, Nebraska.

Sometimes McGowan's representatives placed telephone calls to Sanburg Co. about prospects of a grain sale. On other occasions, Sanburg Co. telephoned McGowan and inquired whether McGowan was interested in selling grain. Regardless of the source of telephone calls about grain sales, if McGowan had available grain Sanburg Co. mailed duplicate original contracts to McGowan. Pursuant to the established practice between Sanburg Co. and McGowan, one of the mailed duplicate contracts, which had been signed by Sanburg Co., was retained by McGowan, while the other duplicate, which was unsigned by Sanburg Co., was signed by McGowan and mailed to Sanburg Co.'s office in Kansas. Every delivery of contracted grain took place at McGowan's elevator, where the

grain was loaded on Sanburg Co.'s trucks.

Between July 18, 1983, and May 21, 1984, McGowan had 29 separate written contracts for sale of grain to Sanburg Co. Of these 29 contracts, Ron Sanburg, a Kansas resident for approximately 14 years before the McGowan contracts, negotiated and signed 9 contracts on behalf of Sanburg Co. for purchase of 57,582 bushels of McGowan's grain, including 3 contracts during February and March 1984. In September 1983, and during March, April, and May of 1984, Darrell Strickler, who was a Kansas resident employed by Sanburg Co. as a "merchandiser," negotiated and signed four contracts regarding Sanburg Co.'s purchase of 54,000 bushels of grain from McGowan. The last contract obtained by Sanburg Co. through Strickler was dated May 21, 1984, and involved 20,000 bushels of McGowan corn at a price of $3.40 per bushel. All contracted grain was delivered to Sanburg Co.

Throughout Sanburg Co.'s transactions with McGowan, Sanburg Co. did not have a Nebraska grain dealer's license, and neither Ron Sanburg nor Strickler, as employees of Sanburg Co., was licensed by the State of Nebraska as required by Neb. Rev. Stat. § 88-518 (Supp. 1983), which in part provided:

> Any person, firm, cooperative, or corporation, . . . who shall purchase grain from the owner thereof for the purpose of resale, or who shall purchase and transport grain or who shall transport grain in or out of this state for resale, or who shall act as employee or agent of a seller or purchaser of grain, . . . shall first procure a license therefor from the Public Service Commission before transacting such business . . . . Any person violating the provisions of this section shall be guilty of a Class II misdemeanor, and in addition shall be liable for any damages suffered by any person as a result of such violation.

Cf. Neb. Rev. Stat. §§ 75-901 to 75-909 (Reissue 1986) ("Grain Buyer Act").

The records of the Nebraska Public Service Commission, which issues licenses to grain buyers and agents or employees of grain buyers, contained verified documents reflecting that Ronald D. Sanburg (Ron Sanburg) is the president of Sanburg

Co. (In his affidavit, Ron Sanburg acknowledged his presidency of Sanburg Co. from September 1980 to September 13, 1984.) The Public Service Commission records also reflect that the only other officer for Sanburg Co. is Nancy Sanburg, secretary of the corporation. According to the return of summons by the Kansas sheriff, Nancy Sanburg is the wife of Ron Sanburg.

In September 1984, Sanburg Co. was "put into bankruptcy . . . in the United States Bankruptcy Court for the District of Kansas." Because Sanburg Co. failed to pay for the McGowan corn purchased and delivered on May 21, 1984, McGowan, on November 30, 1984, filed suit against Ronald D. Sanburg and Strickler in the district court for Douglas County, alleging the May 21 contract with Sanburg Co.; agency or employment of Ron Sanburg and Strickler in relation to Sanburg Co.; nonpayment for the purchased and delivered corn; nonexistence of a license for Sanburg Co., Ron Sanburg, and Strickler; and liability of Ron Sanburg and Strickler on account of § 88-518.

Nebraska's "long-arm statute," Neb. Rev. Stat. § 25-536 (Reissue 1985), states:

> A court may exercise personal jurisdiction over a person:
>
> (1) Who acts directly or by an agent, as to a cause of action arising from the person:
>
> (a) Transacting any business in this state;
>
> (b) Contracting to supply services or things in this state;
>
> (c) Causing tortious injury by an act or omission in this state;
>
> (d) Causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;
>
> (e) Having an interest in, using, or possessing real property in this state; or
>
> (f) Contracting to insure any person, property, or risk located within this state at the time of contracting; or
>
> (2) Who has any other contact with or maintains any

> other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.

A summons issued from the Nebraska court was served on Ron Sanburg and on Strickler in Kansas. Ron Sanburg and Strickler, neither of whom had ever been present in Nebraska regarding any McGowan contract, each filed separate special appearances, alleging: "Defendant has had no contact with [Nebraska] and does not maintain any relation with this State sufficient to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States."

After a hearing on the special appearances, the court concluded there was

> no jurisdiction over the persons of the individual defendants for the reason that the contacts of the corporate employer with the State of Nebraska may not be charged or imputed to the employees of that corporation who were acting in behalf of that corporation, unless the employees in their individual capacities were transacting business on their own accounts and not on behalf of the corporation. The evidence in this case indicates that the individual employees had no contacts with the State of Nebraska other than within the scope of their employment when they were acting in behalf of the employer. In the Court's view, the statute imposing a derivative liability on the unlicensed and unbonded employees of the corporation does not create a threshhold [sic] for long-arm jurisdiction of this Court.

Thereafter, the district court dismissed McGowan's action. The only question is whether a Nebraska court has acquired personal jurisdiction concerning Ron Sanburg and Strickler.

As the U.S. Supreme Court expressed in *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945):

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and

substantial justice."

326 U.S. at 316.

> It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. [Citations omitted.] Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations. [Citations omitted.]

326 U.S. at 319.

Consequently, our inquiry is whether Ron Sanburg and Strickler had sufficient "minimum contacts" with the State of Nebraska to subject those nonresidents to the jurisdiction of a Nebraska court consistent with the U.S. Constitution. See *York v. York*, 219 Neb. 883, 367 N.W.2d 133 (1985).

Ron Sanburg and Strickler suggest that the "fiduciary shield doctrine" is applicable in the present case and prevents personal jurisdiction over them in Nebraska. The fiduciary shield doctrine may be stated: Personal jurisdiction over a corporate agent or employee cannot be based on jurisdiction over the corporation for which the fiduciary acts, when the individual's activity in the state of the forum is conducted solely as the agent or employee of the corporation. See *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899 (2d Cir. 1981). See, also, *Columbia Briargate Co. v. First Nat. Bank*, 713 F.2d 1052 (4th Cir. 1983), *cert. denied* 465 U.S. 1007, 104 S. Ct. 1001, 79 L. Ed. 2d 233 (1984). Although we have not expressly adopted the fiduciary shield doctrine, this court has recognized the general rule that an agent, acting for a disclosed principal, is not ordinarily liable for the principal's contract. See, *State Securities Co. v. Svoboda*, 172 Neb. 526, 110 N.W.2d 109 (1961); *Bury v. Action*

Enterprises, Inc., 197 Neb. 38, 246 N.W.2d 724 (1976); *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981). For reasons expressed later in this opinion, we find that the fiduciary shield doctrine is irrelevant to the question concerning personal jurisdiction over Ron Sanburg and Strickler. We do not have before us and, therefore, make no determination regarding the issue of substantive law, whether one may be held liable in damages as the result of § 88-518.

In *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957), the U.S. Supreme Court examined a situation where a Texas insurance company had mailed a reinsurance certificate to its insured, a California resident, who paid all premiums by mail. The insurance company did not have an office or agent in California and had "never solicited or done any insurance business in California apart from the policy involved here." 355 U.S. at 222. The insurance company was not served with process in California, but was served by registered mail at its principal place of business in Texas. In holding that personal jurisdiction over the insurance company did not amount to a denial of due process, the Court stated:

> [A] trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.
>
> Turning to this case we think it apparent that the Due Process Clause did not preclude the California court from entering a judgment binding on respondent. It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State.

> [Citations omitted.] The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable.

355 U.S. at 222-23.

More recently, in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980), service under the Oklahoma long-arm statute raised a question of due process in a products liability case, where a New York resident, who had purchased an Audi in New York, was en route to Arizona in that automobile, when the Audi was struck from the rear and ignited, causing severe burns to one of the plaintiffs. Suit was filed in Oklahoma and included as defendants the Audi's retailer and wholesaler, both of which were New York corporations and neither of which did any business in Oklahoma. In ruling that there were insufficient "contacts, ties, or relations" to sustain personal jurisdiction in Oklahoma concerning the retailer and wholesaler, the U.S. Supreme Court expressed:

> The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.
>
> The protection against inconvenient litigation is typically described in terms of "reasonableness" or "fairness." . . . The relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there." [Citing and quoting from *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).] Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while

> always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute . . . ; the plaintiff's interest in obtaining convenient and effective relief, . . . at least when that interest is not adequately protected by the plaintiff's power to choose the forum . . .; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies [citation omitted].

444 U.S. at 291-92.

> Petitioners carry on no activity whatsoever in Oklahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the State. Nor does the record show that they regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market. In short, respondents seek to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma.

444 U.S. at 295.

> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," *Hanson v. Denckla*, 357 U.S., at 253, it has clear notice that it is subject to suit there . . . .

444 U.S. at 297. Later, as expressed by the U.S. Supreme Court in *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 703 n.10, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982):

> The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and

the Clause itself makes no mention of federalism concerns.

Due process and personal jurisdiction pursuant to a long-arm statute were examined in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-74, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985), where the U.S. Supreme Court stated:

> The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful "contacts, ties, or relations." . . . By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," . . . the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," . . . .
>
> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984), and the litigation results from alleged injuries that "arise out of or relate to" those activities, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). . . . And with respect to interstate contractual obligations, we have emphasized that parties who "reach out beyond one state and create continuing relationships and obligations with citizens of another state" are subject to regulation and sanctions in the other State for the consequences of their activities. [Citations omitted.]
>
> We have noted several reasons why a forum legitimately may exercise personal jurisdiction over a nonresident who "purposefully directs" his activities toward forum residents. A State generally has a "manifest interest" in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors. [Citation omitted]; see also *Keeton v. Hustler Magazine,*

> *Inc., supra*, at 776. Moreover, where individuals "purposefully derive benefit" from their interstate activities, *Kulko v. California Superior Court*, 436 U.S. 84, 96 (1978), it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed. And because "modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity," it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity. *McGee v. International Life Insurance Co., supra*, at 223.

Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984), mentioned in *Burger King Corp. v. Rudzewicz, supra*, involved an action for libel. Jones, who lived and worked in California, brought suit in a California court, claiming that an article written by South, Calder's codefendant, and edited by Calder, was libelous. Calder and South, Florida residents, were employees of the National Enquirer, Inc., a Florida corporation. South traveled frequently to California on business but, in writing the questioned article, relied on telephonic information from California sources. Aside from his frequent trips and phone calls, South had no relevant contacts with California. Calder had been to California only twice—once on a pleasure trip, before publication of the subject article, and once after publication to testify in a matter unrelated to the questioned article. Calder had no other relevant contacts with California. As president and editor of the Enquirer, Calder oversaw " 'about every function of the Enquirer.' " 465 U.S. at 786. Recognizing that the California court had personal jurisdiction over Calder and South, the U.S. Supreme Court observed and stated:

> Petitioners argue that they are not responsible for the circulation of the article in California. A reporter and an editor, they claim, have no direct economic stake in their employer's sales in a distant State. Nor are ordinary

employees able to control their employer's marketing activity. The mere fact that they can "foresee" that the article will be circulated and have an effect in California is not sufficient for an assertion of jurisdiction. [Citations omitted.] They do not "in effect appoint the [article their] agent for service of process." [Citation omitted.] Petitioners liken themselves to a welder employed in Florida who works on a boiler which subsequently explodes in California. Cases which hold that jurisdiction will be proper over the manufacturer [citations omitted], should not be applied to the welder who has no control over and derives no direct benefit from his employer's sales in that distant State.

Petitioners' analogy does not wash. Whatever the status of their hypothetical welder, petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article. [Citations omitted.] An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.

Petitioners are correct that their contacts with California are not to be judged according to their employer's activities there. On the other hand, their status as employees does not somehow insulate them from jurisdiction. Each defendant's contacts with the forum State must be assessed individually. [Citation omitted.] In this case, petitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that

basis.

465 U.S. at 789-90. Cf. *Asahi Metal Ind. v. Super. Ct. of Cal., Solano Cty.*, ____ U.S. ____, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987), where the U.S. Supreme Court considered a Taiwanese tire manufacturer's claim for indemnification from a Japanese corporation whose tire valve assembly was incorporated into a motorcycle tire which exploded, causing injury to the motorcycle's operator and death to a passenger on the motorcycle. The product liability claim was settled, leaving the issue of indemnification sought by the Taiwanese corporation. In finding that the Japanese corporation's contacts were insufficient to sustain a California court's personal jurisdiction over that corporation, the Supreme Court noted in *Asahi* at 107 S. Ct. at 1034-35:

> The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.
>
> . . . In the present case, however, the interests of the plaintiff and the forum in California's assertion of jurisdiction over Asahi are slight. All that remains is a claim for indemnification asserted by Cheng Shin, a Taiwanese corporation, against Asahi. The transaction on which the indemnification claim is based took place in Taiwan; Asahi's components were shipped from Japan to Taiwan; Cheng Shin has not demonstrated that it is more convenient for it to litigate its indemnification claim against Asahi in California rather than in Taiwan or Japan.
>
> Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished. . . .
>
> . . . .
>
> Considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair.

Applying the principles enunciated by the U.S. Supreme

Court regarding due process and personal jurisdiction over a nonresident, we find that both Ron Sanburg and Strickler have sufficient contacts, ties, or relations with the State of Nebraska which are adequate bases for personal jurisdiction exercised by a Nebraska court.

No one disputes that Sanburg Co. has carried on protracted business in Nebraska by substantial and numerous purchases of grain from a Nebraska resident, McGowan. The State of Nebraska clearly considers grain transactions within its borders to be matters of public interest and concern. See, Grain Buyer Act, §§ 75-901 to 75-909; Nebraska Public Grain Warehouse Act, Neb. Rev. Stat. §§ 88-502 to 88-517 (Cum. Supp. 1986). As a more fundamental interest, the State of Nebraska has seen fit to enact a specific code pertaining to sales of personal property within this state, see Neb. U.C.C. §§ 2-101 to 2-725 (Reissue 1980), especially statutory provisions for the passage of title from seller to buyer. See § 2-401. It is inescapable that sales of grain within Nebraska's borders are a matter of substantive policy of this state and, in the event of a dispute concerning any such sale, a matter for efficient judicial resolution in a Nebraska court. Thus, Nebraska "has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

Sanburg Co., in advertising in a Nebraska publication, sought to serve the Nebraska market and very pointedly solicited business from Nebraska residents. Both Ron Sanburg and Strickler signed contracts which Sanburg Co. mailed to McGowan in Nebraska. Pursuant to those contracts, Sanburg Co.'s trucks were obviously dispatched into Nebraska, with the McGowan elevator as their destination, to obtain delivery of McGowan's grain. At the elevator, as the grain was loaded into Sanburg Co.'s trucks, truckload after truckload, title for the contracted corn passed from McGowan to Sanburg Co. See, § 2-401; *Huskinson v. Vanderheiden*, 197 Neb. 739, 251 N.W.2d 144 (1977) (in the absence of a contractual provision, title of goods sold passed on seller's delivery to buyer). Such deliveries of McGowan were products of commercial

transactions having substantial business effects in Nebraska and were consequences of intentional acts directed at Nebraska residents.

Generally, and in the absence of restriction by statute, articles of incorporation, or corporate bylaws, the president of a corporation, by the very nature of that office, is the head of the corporation, its general agent, chief executive officer, and general manager of corporate affairs. See, *Roe v. Bank of Versailles*, 167 Mo. 406, 67 S.W. 303 (1902); *Burlington Industries v. Foil*, 284 N.C. 740, 202 S.E.2d 591 (1974); *Axelrod v. Premier Photo Service*, 154 W. Va. 137, 173 S.E.2d 383 (1970).

Ron Sanburg, as president of Sanburg Co., and, therefore, that corporation's general manager, controlled the day-to-day activities of Sanburg Co. and ostensibly guided corporate activities into Nebraska, such as the advertisements in the grain dealers' directory and dispatch of trucks to haul McGowan's grain delivered pursuant to contracts with Sanburg Co. Both Ron Sanburg and Strickler negotiated and signed several contracts for Sanburg Co.'s acquisition of McGowan's grain in Nebraska over an appreciable period. The intentional actions of Ron Sanburg and Strickler were expressly aimed at Nebraska, that is, contracts with a Nebraska resident. If personal jurisdiction has been upheld concerning nonresident primary participants whose intentional actions allegedly took the good name of a resident of the forum state, see *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984), then nonresident primary participants, whose intentional and directed actions allegedly caused a resident of the forum state to part with ownership of tangible property, are subject to personal jurisdiction in the forum of the resident's state, which is precisely the case before us. Both Ron Sanburg and Strickler controlled some marketing activity of Sanburg Co. when they obtained contracts from a Nebraska resident. Thus, both Ron Sanburg and Strickler had direct, deliberate, and purposeful contact with Nebraska.

Moreover, unless we succumb to naivete and accept the very unlikely premise that Ron Sanburg and Strickler gratuitously rendered services for Sanburg Co., both Ron Sanburg and

Strickler received a benefit from their employment and the McGowan contracts, namely, their compensation, whether a salary, commission, or wages, paid by Sanburg Co. In the realities of this case, both Ron Sanburg and Strickler acted in their own interests by carrying out their employment activities aimed into Nebraska at McGowan. At least in part, the compensation paid to Ron Sanburg and Strickler was derived from their conduct of Sanburg Co.'s business in Nebraska. See *Chancellor v. Lawrence*, 501 F. Supp. 997, 1005 (N.D. Ill. 1980) ("sheer fiction" to assume that nonresident employees of nonresident corporation derived no benefit from their activities in the forum state, when such employees received a salary from their corporate employer). Both Ron Sanburg and Strickler "purposefully" availed themselves of the privilege of conducting business activities within Nebraska. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980).

Also, we find it is not so burdensome for Ron Sanburg and Strickler, Kansas residents, to defend an action in Nebraska, where business activity took place. Evidence bearing upon delivery of the contracted corn and other evidence concerning McGowan's claim against Ron Sanburg and Strickler undoubtedly is readily and efficiently available from sources in Nebraska. McGowan would suffer a costly and unnecessary disadvantage, if required to secure such evidence in Nebraska for presentation in Kansas. It is, therefore, reasonable and fair to require Ron Sanburg and Strickler to defend the action in Nebraska, which has an available forum for the litigation. See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957).

In disposing of the contention that the fiduciary shield doctrine precludes personal jurisdiction, we believe that, while such doctrine may have a bearing on substantive liability in some jurisdictions, we must agree with the statement: "Ignoring any notion that acting in a corporate capacity somehow provides the defendant with a jurisdictional shield eliminates unfairness to the plaintiff and permits a systematic application of jurisdictional principles as they are applied in other contexts." Sponsler, *Jurisdiction Over the Corporate*

Agent: The Fiduciary Shield, 35 Wash. & Lee L. Rev. 349, 365 (1978). We neither state nor imply that an employee of a corporation may be subjected to personal jurisdiction in any state where the corporate employer does business. However, if a defendant's contacts satisfy the standards imposed by the forum state's long-arm statute and the requirements of due process, the fiduciary shield doctrine does not prevent personal jurisdiction. Rather than misplaced emphasis on the fiduciary shield doctrine as a bar to personal jurisdiction, "the primary focus should be on the defendant's activities without regard to the role in which these activities were entered into. If such activities satisfy minimum contacts analysis, personal jurisdiction should be obtained." Note, *The Fiduciary Shield Doctrine: A Rule of Statutory Construction or a Constitutional Principle?*, 9 J. of Corp. L. 901, 925 (1984). See, also, *Columbia Briargate Co. v. First Nat. Bank*, 713 F.2d 1052 (4th Cir. 1983), *cert. denied* 465 U.S. 1007, 104 S. Ct. 1001, 79 L. Ed. 2d 233 (1984).

Any thought that the fiduciary shield doctrine is a principle pertinent to personal jurisdiction received a constitutional coup de grace administered by the U.S. Supreme Court in *Calder v. Jones*, 465 U.S. 783, 790, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984), when the Court stated: "Petitioners are correct that their contacts with California are not to be judged according to their employer's activities there. On the other hand, their status as employees does not somehow insulate them from jurisdiction. Each defendant's contacts with the forum State must be assessed individually." A defendant's conduct or activities in relation to the forum state and its residents, not the defendant's role in or relationship with a corporate employer during occurrence of such conduct or activities, supply the bases for determining whether minimum contacts exist in reference to the forum state. The "fiduciary shield" doctrine is not a constitutional principle precluding personal jurisdiction over a nonresident officer, agent, or employee of a corporation. If a nonresident, as a corporate officer, agent, or employee, has contacts which satisfy standards imposed by a forum state's long-arm statute and the requirements of due process, personal jurisdiction over such nonresident may be obtained in the

forum state.

Consequently, we hold that Ron Sanburg and Strickler have sufficient contacts with the State of Nebraska to justify personal jurisdiction over them in a Nebraska court. We, therefore, reverse the judgment of the district court and remand this matter to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. VERDON SCOTT, APPELLANT.
403 N.W.2d 351

Filed April 3, 1987. No. 85-797.

1. **Theft.** Theft is a single offense.
2. **Preliminary Hearings: Theft.** A preliminary hearing on theft in one form is sufficient to bind a defendant over to the district court for trial on theft performed in a different manner.
3. **Constitutional Law: Theft.** Neb. Rev. Stat. § 28-512(2) (Reissue 1985) is constitutional.
4. **Venue: Proof.** Venue may be proved as any other fact.
5. **Theft: Value of Goods: Proof.** In a theft charge, the value of the thing involved is an element of the charge against defendant and must be proved by the State beyond a reasonable doubt.
6. **Theft: Value of Goods: Juries.** The value of the thing involved in a theft case must be established by the jury.

Appeal from the District Court for Hitchcock County: JACK H. HENDRIX, Judge. Reversed and remanded for a new trial.

Frank Shoemaker, for appellant.

Robert M. Spire, Attorney General, and Dale D. Brodkey, for appellee.

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

GRANT, J.

Defendant-appellant, VerDon Scott, was charged by information in Hitchcock County, Nebraska, and convicted of two counts of theft in violation of Neb. Rev. Stat. § 28-512(2) (Reissue 1985). The violations alleged in the amended information were that defendant

> on or about the 18th day of July, 1981 [November 15, 1981, in the second count], . . . did . . . obtain property of Rickel, Inc., a Kansas Corporation, by deception, to-wit: $1,236.70 [$1,141.88, in the second count], by intentionally preventing the said Rickel, Inc., from acquiring information regarding the transfer of grain in which Rickel, Inc., shared a pecuniary interest, thereby affecting its judgment of a transaction involving the performance of an agreement for the purchase and sale of a certain leasehold estate and grain facilities . . . .

After jury trial, defendant was convicted of each count and sentenced to 3 years' probation with certain conditions, including 90 days' confinement in the Hitchcock County jail and "restitution of the fruits of his [defendant's] crime, which shall include thirty-seven and one-half percent (37½%) of the fair market value of the grain involved in the two counts herein . . . ." Defendant timely appealed to this court.

Defendant's assignments of error may be consolidated for the purpose of this opinion into four: (1) That the trial court erred in failing to hold that Neb. Rev. Stat. §§ 28-510 and 28-512 (Reissue 1985) are unconstitutionally vague; (2) That the court erred in failing to provide defendant a preliminary hearing on the amended charges on which he was tried (theft by deception), although affording defendant a preliminary hearing on the original charges against him (theft by taking); (3) That the trial court erred in failing to dismiss the case against defendant because the State failed to prove the venue of the crime; and (4) That the court erred in failing to properly instruct the jury. We reverse and remand for a new trial because of the court's instructions.

Defendant first contends that §§ 28-510 and 28-512 are unconstitutionally vague and that, therefore, defendant's conviction cannot stand. In *State v. Sailors*, 217 Neb. 693, 352

N.W.2d 860 (1984), we held § 28-512(1) to be constitutional, and much of the reasoning of that case can be applied to the consideration of the constitutionality of § 28-512(2). Section 28-510 states:

> 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. An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under sections 28-509 to 28-518, notwithstanding the specification of a different manner in the indictment or information, subject only to the power of the court to insure fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

Section 28-512 states in pertinent part:

> A person commits theft if he obtains property of another by deception. A person deceives if he intentionally:
>
> . . . .
>
> (2) Prevents another from acquiring information which would affect his judgment of a transaction . . . .

Defendant specifically contends that §§ 28-510 and 28-512 are unconstitutionally vague and deprive the defendant of due process of law in violation of Neb. Const. art. I, § 3, which provides: "No person shall be deprived of life, liberty, or property, without due process of law."

Regarding § 28-510, defendant argues that the statute allows the county court to assume prosecutorial functions by allowing the court to determine at the preliminary hearing which of the five crimes consolidated in § 28-510 were committed by the defendant. Such a result, defendant argues, prevents the defendant from examining the State's witnesses as to essential elements of the crime for which he is charged because the defendant has no knowledge of the crime he is charged with until after the preliminary hearing.

The defendant's argument that § 28-510 is unconstitutional

appears to be that he was not put on notice of which type of theft he was being charged with until after the preliminary hearing, that he was therefore deprived of the opportunity to cross-examine witnesses concerning the essential elements of the crime defendant was ultimately charged with, and that he was unable to prepare his defense. Defendant's attack is based on his allegation that in the criminal procedure used in his case he was not able to cross-examine the witnesses as to the specific charges against him. The alleged constitutional issue is based on lack of notice. With regard to § 28-510, that statute is the consolidation statute only. It does not set out the elements of any specific crime, but only groups conduct of a certain type in a single offense to be known as "theft."

Defendant's challenge to § 28-510 is directed to the conduct of the proceedings against him at the preliminary hearing level—not at the level of the proceedings in the district court. Section 28-510 provides that accusation of theft may be supported by evidence supporting any manner of theft, as described in Neb. Rev. Stat. §§ 28-509 to 28-518 (Reissue 1985), even though a different manner was specified *in the indictment or information*. We are not faced with the question of the effect of § 28-510 as it applies to proceedings in the district court, but only as to the sufficiency of the preliminary hearing afforded defendant in this case.

Neb. Rev. Stat. § 29-1607 (Reissue 1985) provides in part that "[n]o information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, unless such person shall waive his or her right to such examination . . . ." In the case at bar, defendant contends he was afforded a preliminary hearing on the charges of theft by taking in violation of § 28-511, but not on the charges of theft by deception in violation of § 28-512(2).

The State's answer to this allegation is that under our criminal statutes in effect at the time of this incident "theft" is a single offense and that a preliminary hearing on theft in one form is sufficient to bind a defendant over to the district court for trial on theft performed in a different manner. We agree.

The function of a preliminary hearing is to determine if it

appears a crime has been committed and that "there is probable cause to believe that the person charged has committed the offense." Neb. Rev. Stat. § 29-506 (Reissue 1985). The preliminary hearing is in no sense a trial as to the guilt or innocence of the person charged. *Delay v. Brainard*, 182 Neb. 509, 156 N.W.2d 14 (1968).

In the case before us, defendant argues only the lack of notice to him. Defendant was bound over for trial on theft by deception on September 12, 1984. Defendant's trial began on June 10, 1985. Defendant had notice of the specific charges on which he was tried. Section 28-510 is not unconstitutional as applied to defendant in this case.

The defendant argues that § 28-512 is unconstitutionally vague because it failed to give the defendant fair notice that his conduct was forbidden by the statute. Defendant claims that the statute failed to inform defendant that his conduct concerning the failure to record the two loads of grain sold for cash would be forbidden by the statute.

With regard to defendant's attack on the constitutionality of § 28-512(2), defendant contends that the statute is so vague that "it failed to give him fair notice that his contemplated conduct was forbidden by the Statute . . . ." Brief for Appellant at 17-18.

We held in *State v. Copple,* 224 Neb. 672, 684, 401 N.W.2d 141, 151 (1987), quoting from *State v. Neal,* 187 Neb. 413, 191 N.W.2d 458 (1971):

> "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."

We further stated in *Copple*, quoting from *State v. Sailors*, 217 Neb. 693, 352 N.W.2d 860 (1984):

> 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.

State v. Copple, supra at 684, 401 N.W.2d at 151.

Section 28-512(2) provides that a person commits theft by deception if he obtains property of another by deception and intentionally "[p]revents another from acquiring information which would affect his judgment of a transaction." As was the case with § 28-511(1), *State v. Copple, supra*, the statute in question in this case uses words in common usage, capable of being understood by persons of ordinary intelligence. Defendant knew that Rickel was entitled to receive a portion of defendant's net profit before taxes. Necessarily, defendant knew that Rickel had to have truthful information in order for Rickel to accurately determine what amount of money was due. By reading § 28-512(2) defendant was informed that it was theft, and unlawful, to prevent Rickel from acquiring truthful information. Defendant did not place the amount representing two sales on his daily position records, and it is clear that a reading of the statute forbids such conduct. It is from the daily position records that the amount of the bond guarantee expense due Rickel under the contract was determined. The defendant knew that his failure to record the cash transactions would prevent Rickel from knowing the full extent of defendant's earnings and would therefore affect Rickel's judgment concerning what defendant owed Rickel in bond guarantee expense. If the defendant intended to prevent Rickel from acquiring information about the two grain sales for cash, then § 28-512(2) provided adequate and clear notice that the

defendant's conduct was forbidden as a criminal act. The question whether the defendant had the required criminal intent is a fact question for the jury. *State v. Copple, supra.* Section 28-512(2) is not vague and is constitutional.

Defendant also assigns as error the failure of the trial court to dismiss the case against him because the State failed to establish venue, a jurisdictional element of the State's proof. Defendant relies on *State v. Liberator*, 197 Neb. 857, 858, 251 N.W.2d 709, 710 (1977), in which this court held:

> " 'The venue of an offense may be proven like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient.' . . ."

See *State v. Laflin*, 201 Neb. 824, 272 N.W.2d 376 (1978).

Defendant asserts that the town of Beverly (where the alleged theft by deception occurred) is "unincorporated, . . . appears on no maps, cannot be sued, has no boundaries, and its location cannot be inferred without evidence." Brief for Appellant at 11. The defendant argues that the State did not produce any evidence which would establish that the theft by deception was committed in Hitchcock County, Nebraska.

A review of the record shows that while the State did fail to directly prove this fact, the State did provide evidence that the crimes occurred in Hitchcock County. It was clearly established that the two purchases of grain by LeRoy Peterson in 1981 took place at the Beverly grain elevator. It was also established that the defendant purchased the grain elevator from Rickel and that the terms of the purchase were set out in a contract of sale. Exhibit 5, the contract of sale between Rickel and the defendant, was admitted into evidence at trial. The contract includes the following language:

> THIS CONTRACT made and entered into this 6th day of June, 1977, by and between Rickel, Inc., a Kansas corporation, herein referred to as "Seller", and VerDon Scott, herein referred to as "Buyer,"
>
> WITNESSETH:
>
> 1. That for the consideration hereinafter specified,

> Seller hereby sells and agrees to assign and convey to Buyer, the following described properties in the County of Hitchcock, City of Beverly, State of Nebraska, to-wit:

The contract of sale modification agreements, attached to exhibit 5, also refer to the grain facilities "located in the County of Hitchcock, City of Beverly, State of Nebraska."

Exhibit 6, the United Pacific Insurance Company grain warehouse bond, admitted into evidence, states on page 2: "Grain Warehouse Bond-Beverly Elevator-Beverly (P.O.Culbertson), Hitchcock, Nebraska."

Indirect evidence of venue may also be inferred from the testimony of William Cemer, who identified himself as the "Hitchcock County Sheriff" and testified that he went to the Beverly elevator to speak to the defendant.

We note also that defendant's accountant, to whom defendant failed to furnish accurate information, lived in Hitchcock County. Based on the evidence which was before the jury, the proof was sufficient to show that the crime was committed in Hitchcock County. The district court correctly overruled the defendant's motion for a directed verdict because of failure of the State to establish venue.

Defendant also assigns as error that "[t]he Court erred in failing to properly instruct the jury." Such a general assignment would ordinarily not be considered as setting forth a contention that must be reviewed by this court. The error argued under the general assignment, in any event, is that the trial court failed to give an instruction submitted by defendant. Examination of the proposed instruction shows that the general idea set out in the instruction was submitted in an instruction given by the court. The trial court may refuse to give a requested instruction where the substance of the request is covered in instructions given to the jury. *State v. Thielen*, 216 Neb. 119, 342 N.W.2d 186 (1983).

We do note, however, an error not assigned in the giving of instructions. Under Neb. Ct. R. of Prac. 9D(1)d (rev. 1986), we, at our option, may note a plain error not assigned. *Tautfest v. Tautfest*, 215 Neb. 233, 338 N.W.2d 49 (1983).

By § 28-510, "[c]onduct denominated theft in sections 28-509 to 28-518 constitutes a single offense . . . ." Section 28-518 provides in part:

(1) Theft constitutes a Class III felony when the value of the thing involved is over one thousand dollars.

(2) Theft constitutes a Class IV felony when the value of the thing involved is three hundred dollars or more, but not over one thousand dollars.

(3) Theft constitutes a Class I misdemeanor when the value of the thing involved is more than one hundred dollars, but less than three hundred dollars.

(4) Theft constitutes a Class II misdemeanor when the value of the thing involved is one hundred dollars or less.

It is obvious that "the value of the thing involved" determines whether a defendant's conduct in a particular case is a felony of some degree or a misdemeanor. The value of the thing involved is an element of the charge against a defendant that must be proved beyond a reasonable doubt by the State, and the jury must make a factfinding as to that issue or the case has not been proven. The value of the thing involved in a theft case must be established by the jury.

Such an approach only reflects the concept of Neb. Rev. Stat. § 29-2026.01 (Reissue 1985), which remained operative after the enactment of §§ 28-510 et seq., and which requires that when an information charges an offense against the property of another by "larceny, embezzlement or obtaining under false pretenses, the jury, on conviction, shall ascertain and declare in its verdict the value of the property stolen, embezzled, or falsely obtained."

Without any unnecessary discussion of whether theft by deception by preventing another from acquiring information constitutes one of the crimes set out in § 29-2026.01, it is obvious that a jury must determine the amount involved when conduct is graded by the amount involved. To hold otherwise would deprive defendants of the right to jury trial on an element of the crime charged.

In *State v. Clancy*, 224 Neb. 492, 495, 398 N.W.2d 710, 713 (1987), in discussing the proof necessary under § 28-517, we stated, quoting from *State v. Hayes*, 187 Neb. 325, 190 N.W.2d 621 (1971): " 'The value of the goods in question is an essential element of the crime and like all other elements thereof the evidence must be sufficient to support a finding of the

necessary value beyond a reasonable doubt. . . .' " See, also, *State v. Redding*, 213 Neb. 887, 331 N.W.2d 811 (1983).

In the case at bar, there was evidence adduced by the State which proved, albeit indirectly, that by not placing the two cash sales in question on the daily position records, defendant had prevented Rickel from obtaining information as to transactions from which Rickel could determine it had been cheated out of 37 1/2 percent of the pretax profit of each of those sales.

There was also evidence adduced, however, by the same witness that if a proper amount of shrinkage in the grain had been calculated, the net profit figure could have been lowered to the point where Rickel was overpaid by defendant. Other accounting calculations showed that if defendant had reported the two cash sales, defendant would have owed an additional amount of between $100 and $150 on the bond expense due Rickel. If such evidence were believed by the jury, defendant would have been guilty of a misdemeanor. The determination of the "value of the thing involved" is absolutely essential to proving the charge against defendant, and that determination is for the jury.

We further note that defendant owed Rickel 37 1/2 percent of the pretax net profit to be determined, as provided by part 4 of the contract between defendant and Rickel, "by calendar quarters within sixty (60) days after the end of such quarter." Each of the sales which are the basis of the charges against defendant occurred in a different calendar quarter. No evidence was adduced as to the pretax net profits during any quarter. It is true that the contract may have been amended, for civil purposes, by the conduct of the parties to the contract, but no evidence was submitted, or instructions given to the jury, on any amendment to the contract. The effect of this change in the manner of calculating the pretax profit is not presented to us, and we do not discuss it further.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. RONALD E. ROBINSON, APPELLANT.
402 N.W.2d 886

Filed April 3, 1987. No. 86-377.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Victor Gutman, for appellant.

Robert M. Spire, Attorney General, and Elaine A. Catlin, for appellee.

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

PER CURIAM.

Defendant was charged with the felony crime of attempted robbery. He was found not responsible by reason of insanity. Pursuant to Neb. Rev. Stat. § 29-3701 (Reissue 1985), a hearing was held to determine if defendant was dangerous to himself or others, and defendant was ordered to be committed for a mental evaluation. The evaluation was made and submitted to the court, and an evidentiary hearing was later held pursuant to the requirements of Neb. Rev. Stat. § 29-3702 (Reissue 1985). The trial court ordered the defendant "committed to the Department of Public Institutions, Regional Center at Lincoln."

Defendant has appealed from this order of commitment. An examination of the evidence shows that the trial court's findings that defendant was mentally ill and dangerous to himself or others are fully supported by the evidence, and the court's order is affirmed.

AFFIRMED.

IN RE INTEREST OF R.A. AND V.A., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. R.A., JR., APPELLANT.

403 N.W.2d 357

Filed April 3, 1987. No. 86-475.

1. **Juvenile Courts: Appeal and Error.** The standard of review applicable to a juvenile proceeding under Neb. Rev. Stat. § 43-247 (Cum. Supp. 1986) is de novo on the record.
2. _____: _____. The findings of fact made by the juvenile court are accorded great weight because the court observed the parties and witnesses and could better judge their credibility.
3. **Trial: Evidence: Hearsay: Appeal and Error.** The determination as to the admissibility of an excited utterance generally rests within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.
4. **Trial: Evidence: Hearsay.** Spontaneity is the key factor in determining whether a statement falls within the excited utterance exception. To qualify as an excited utterance, generally, a statement must meet the following criteria: (1) There must have been a startling event; (2) the statement must relate to the event; and (3) the statement must have been made by the declarant while under the stress of the event.
5. **Trial: Evidence: Hearsay: Minors.** Generally, the common-law res gestae requirements that the statement be contemporaneous and spontaneous are relaxed where the statement is one made by a young victim of sexual abuse.
6. **Juvenile Courts: Final Orders.** Generally, a dispositional order made by a juvenile court is a final order.
7. **Minors: Statutes: Juvenile Courts.** The Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1984 & Cum. Supp. 1986), must be liberally construed to accomplish its purpose of serving the best interests of the juveniles who fall within it.
8. **Juvenile Courts.** A juvenile court has broad discretion as to the disposition of those who fall within its jurisdiction.
9. _____. Juvenile courts have broad discretion to accomplish the purpose of serving the best interests of the children involved.
10. **Juvenile Courts: Child Custody: Visitation.** Psychiatric testing or psychological evaluations of a parent may be required to determine the best interests of children when issues of custody and visitation are presented.
11. **Juvenile Courts.** A juvenile court may, within its discretion, require parents to make reasonable efforts to rehabilitate themselves.

Appeal from the Separate Juvenile Court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Affirmed.

Randal B. Brown, for appellant.

Laurie J. Campbell, Deputy Lancaster County Attorney, for appellee.

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

BOSLAUGH, J.

R.A., Jr., appeals from the orders of the separate juvenile court of Lancaster County, Nebraska, which found his children to be neglected, limited his visitation, and required him to submit to a psychological evaluation.

The original petition in this proceeding was filed April 3, 1986, and alleged that V.A., a daughter born November 22, 1982, lacked proper parental care by reason of the faults and habits of the appellant. The petition further alleged that on or between September 1, 1985, and February 28, 1986, the appellant engaged in inappropriate sexual contact with his daughter. An amended petition filed April 17, 1986, contained the same allegations as to the daughter and further alleged that R.A., a son born January 1, 1980, was at risk due to the actions of his father.

At a hearing on April 17, 1986, the appellant denied the allegations of the amended petition. At the adjudication hearing on May 5, 1986, the son, who was 6 years old, testified that he saw his father "put his finger up in my sister's bottom." The child testified that the appellant inserted the fourth finger on his hand and that the incident occurred while the appellant was bathing the children. He further testified that his sister did not cry or scream when the incident occurred. He also testified that his father had never touched his private places, made him feel uncomfortable, or "hurt" him while bathing him. He further testified this incident was the only time he had seen his father touch the daughter in that manner.

The daughter, who was 3 years old at the time of the hearing, did not testify. Her mother was allowed to testify, over objection, as to the following statements made by the daughter approximately 5 minutes after the child had returned from a weekend visit with the appellant and was being bathed. While the child was standing up in the bathtub, she "stated that she had been hurt." The mother then asked, "In what way were you

hurt?" and the daughter replied "her daddy had put his finger in there." The mother replied, "Well, [V.A.], you sure he just wasn't washing you and, you know, it might have been rubbed a little hard or something?" The girl replied, "No, it went up there." When the child was removed from the bathtub she indicated to her mother that the appellant had put his fingers in her vagina. The child was then taken to a physician, and Child Protective Services was informed.

The parents are separated and the children are in the custody of their mother. The mother testified the children had spent every other weekend with the appellant for approximately 2 years prior to this incident. The visitations were discontinued in December of 1985. The mother also testified that her daughter had suffered from frequent vaginal infections and that the appellant had been instructed as to appropriate bathing techniques, which included washing the vaginal area. She further testified that her daughter had never reported that anyone else had touched her in an inappropriate manner and neither child had ever indicated an unwillingness to be near the father.

The appellant objected to the admission of the child's statements, as reported by the mother, on the ground the statements were inadmissible hearsay. The trial court concluded the statements were admissible under the excited utterance exception to the hearsay rule contained in Neb. Rev. Stat. § 27-803(1) (Reissue 1985). The trial court stated:

> [I]n looking at the matter of the excited utterance, the excited utterance must be gaged in relationship to what the incident was. Even as testified to here, there wasn't any physical harm done to the child. There was no tearing or that type thing as there was in State vs. Redfeather. You're talking about a three year old child. It's a matter here, a three year old child who comes home and within a short period of time is given a bath and who then relates the incident. As to what is the excited utterance so far as a three year old child is different than it would be for someone older. The circumstances are such that the matter would be considered an excited utterance for a child of that age in that circumstance.

Tim Domgard, a Lincoln police officer, testified that he spoke with the appellant on February 1, 1986, concerning the alleged sexual contact. The officer asked the appellant if he believed his daughter was telling the truth about the incident, and the father replied, "Yes." The officer stated that he was referring only to the alleged incident and had asked the appellant whether he had touched the child as she had alleged. The appellant's response was "something like: I don't know if I have. I guess what scares me is that I may have and it's too awful for me to remember and that I might have blocked it out, but then I would have to be crazy to do that. And I'm not crazy." The officer also testified that at one point the appellant stated, "I feel I did it," after stating that something must have happened because so many people had told him he had done it. The officer further testified the appellant stated he would not admit to inappropriate sexual contact with his daughter because that would be the most terrible thing he could do for his child. In addition, the officer stated the appellant reported one other incident in which he had had sexual thoughts or feelings about his daughter.

The appellant then presented his mother and counselor as witnesses. The appellant's mother testified she had often seen him interact with the children and thought he had a good relationship with them. The counselor testified that he had met with the appellant on approximately six occasions and that the appellant seemed anxious and depressed during that time. He further testified the appellant seemed confused "as to the reality of whether or not the incident alleged between himself and his daughter ever actually occurred."

After hearing the evidence summarized above, the trial court found the allegations in the amended petition to be true and determined the children lacked proper parental care due to the faults of the appellant, as defined by Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1986). The court based its findings on the direct evidence provided by the son's eyewitness testimony and the corroboration provided by the daughter's statements to her mother, the appellant's failure to deny the allegations, and his statement that he believed his daughter was telling the truth about the incident. The trial court commented

that the children apparently loved their father and enjoyed their visits, making it unlikely their testimony was false.

Final disposition was continued pending the completion of a predispositional report by the Department of Social Services. In the interim, the court ordered that visitation between the appellant and the children be under supervision.

The disposition hearing was held May 28, 1986. The State presented a predispositional report, prepared by Child Protective Services, which contained the following recommendations: (1) that custody of the children remain with their mother; (2) that the father's visitation be supervised by Child Protective Services; (3) that the children participate in an educational program on sexual abuse; (4) that the children participate in any counseling recommended by Child Protective Services and the Child Guidance Center; (5) that the father participate in and complete a psychological evaluation and counseling at the Child Guidance Center; (6) that the father have no unsupervised contact with the children until he presents evidence to the court that he no longer presents a risk to the children; and (7) that the children not be removed from the state without permission.

The appellant objected to the requirement that he participate in and complete a psychological evaluation and counseling, testified that he did not believe he posed a risk to his children, and denied having engaged in any inappropriate sexual contact with his daughter.

Michael Utley, project director of the incest and sexual abuse project at the Child Guidance Center, testified it was its policy to require perpetrators to admit their actions before accepting them for treatment. This was required because, in his experience, persons who did not admit involvement would rarely change that position and would not benefit from the program.

The trial court adopted the recommendations, with two changes: The appellant's mother was approved to supervise visitation; and the appellant was required to submit to a psychological evaluation, but not to participate in counseling. The decision not to require counseling was based on Utley's testimony that it would serve no purpose to direct such

participation in view of the appellant's objection to it. The trial court stated the evaluation was ordered so that the appellant would have the benefit of the results obtained from it, opening the door to treatment and the resumption of a normal relationship with his children. The trial court further stated this was the final order in the case. This appeal followed.

The appellant has made four assignments of error. He contends the trial court erred in admitting the daughter's statements, in finding the state presented sufficient evidence that the children lacked proper parental care, in overruling his motion for a new trial, and in ordering him to submit to a psychological evaluation.

The State contends the trial court's finding that the children lacked proper parental care was supported by sufficient evidence, the child's out-of-court statements qualified under the excited utterance exception, the order requiring the father to submit to a psychological evaluation was not a final order, and, alternatively, the court had authority to order the father to make reasonable efforts to rehabilitate himself by undergoing a psychological evaluation.

The appellant first contends that his daughter's statements to her mother did not rise to the level of an excited utterance because the child was not visibly excited when she made the statements. The State contends the statements fall within the exception because they were spontaneously made immediately upon the child's return to her mother.

The determination as to the admissibility of an excited utterance generally rests within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Lee*, 216 Neb. 63, 341 N.W.2d 600 (1983).

The excited utterance exception is based on the common-law res gestae exception. 4 J. Weinstein & M. Berger, Weinstein's Evidence 803-33 (1985); 6 J. Wigmore, Evidence in Trials at Common Law § 1745 (J. Chadbourn rev. 1976). The underlying theory of the exception is that "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." 4 J. Weinstein & M. Berger, *supra*. Spontaneity is the key factor in determining whether a statement falls within

the exception. *Id.* See, also, *Roh v. Opocensky*, 126 Neb. 518, 253 N.W. 680 (1934) (spontaneous exclamations uttered impulsively, and so closely connected with the event as to exclude the idea the statements were made with deliberation and purpose, are admissible as res gestae). The standard of measurement for the time interval between the event and the statement is the duration of the state of excitement. 4 J. Weinstein & M. Berger, *supra*.

This court has stated that to qualify as an excited utterance, generally, a statement must meet the following criteria: (1) There must have been a startling event; (2) the statement must relate to the event; and (3) the statement must have been made by the declarant while under the stress of the event. *State v. Reed*, 201 Neb. 800, 272 N.W.2d 759 (1978).

It is not disputed that the daughter's statements were made after the occurrence of a startling event, and related to that event. The sole question is whether the statements were made while the child was under the stress of the event. The appellant contends the child was not under the stress of the incident because she manifested no outward signs of excitement. That argument is unpersuasive.

The courts of many jurisdictions have recognized that special circumstances exist with regard to the motives behind the statements of very small children. See Note, *A Tender Years Doctrine for the Juvenile Courts: An Effective Way to Protect the Sexually Abused Child*, 61 U. Det. J. Urb. L. 249 (1984). The statements are admitted for the reason that it is unlikely a small child will have reason to fabricate stories of sexual abuse. *Id.* See, also, *People v. Bitler*, 146 Ill. App. 3d 477, 497 N.E.2d 137 (1986). As a result, numerous jurisdictions have relaxed the common-law res gestae requirements that a statement be contemporaneous and spontaneous when made by a young victim of sexual abuse. 61 U. Det. J. Urb. L., *supra*.

The contemporaneous requirement, in the res gestae context, traditionally meant the statement was made while the exciting event was still in progress. The spontaneity requirement meant the statement was made while the declarant was still under the influence of the exciting event and the statement was an unreflected statement concerning the event.

This court relaxed the contemporaneous requirement in cases involving small children in *State v. Red Feather*, 205 Neb. 734, 289 N.W.2d 768 (1980). There, we stated the time lapse between the assault and the statements was not dispositive; rather, the crucial consideration was whether there had been time for conscious reflection. The admission of statements concerning sexual assault made by a 7-year-old girl approximately 1 hour after the incident was upheld. Similarly, in *State v. Roy*, 214 Neb. 204, 333 N.W.2d 398 (1983), we upheld the admission of a child's statements concerning a sexual assault made after an unknown period of time had elapsed since the assault. These decisions are in accord with decisions rendered in numerous other jurisdictions. See, e.g., *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980), *cert. denied* 450 U.S. 1001, 101 S. Ct. 1709, 68 L. Ed. 2d 203 (1981) (statements made approximately 1 hour after the assault); *United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979) (statements made after an unknown period of time had elapsed since the assault); *People v. Bitler, supra* (time lapse of 24 hours did not control admissibility of statements); *In the Matter of Meeboer*, 134 Mich. App. 294, 350 N.W.2d 868 (1984) (admitted statements made the morning after an assault); *State v. Padilla*, 110 Wis. 2d 414, 329 N.W.2d 263 (1982) (admitted statements made 3 days after the assault).

Many courts have also relaxed the requirement of spontaneity when the declarant made the statement at the earliest opportunity to do so, during continued intimidation, or while fearful of another attack. 61 U. Det. J. Urb. L., *supra* at 257-58. The Wisconsin Court of Appeals has relaxed the spontaneity requirement by fashioning a judicial presumption that stress is present in children for some time after a triggering event occurs. *State v. Padilla, supra*. This decision was based upon several observations: that a child is likely to repress such an incident; that a child is likely to report such an incident only to the mother; and that the characteristics of young children work to produce declarations " 'free of conscious fabrication' " for a longer time after the incident than adults. *Id.* at 419, 329 N.W.2d at 266. The court also noted that a young child is not likely to review such an incident and calculate the

effect of such a statement. *Id.* (citing *United States v. Nick, supra*).

In a subsequent opinion, *State v. Gollon*, 115 Wis. 2d 592, 340 N.W.2d 912 (1983), that court stated that the fact that a child did not appear to be emotionally upset when making statements concerning an assault was only one factor to be considered, although it may weigh against admitting the statements. In view of the facts of *Gollon* and the applicable law, the court concluded the trial court had not abused its discretion in admitting the statements even though the child had no outward signs of excitement.

In *People v. Bitler*, 146 Ill. App. 3d 477, 497 N.E.2d 137 (1986), the Illinois Appellate Court affirmed its adoption of the *Padilla* court's analysis. The court rejected the defendant's argument that the statements were inadmissible because the victims did not appear to be under the stress of excitement when the statements were made. The defendant argued there was no evidence the victims displayed any anxiety that day; rather, the evidence showed they had appeared calm. The court concluded the stress caused by the incident "would have lingered long after the acts themselves were committed," and upheld the admission. *Id.* at 483, 497 N.E.2d at 140.

Similarly, in *United States v. Iron Shell, supra*, there was some evidence the child was calm and unexcited when making the statements. There was also evidence to the contrary. The court concluded that in view of the circumstances of the assault, its shocking nature, and the age of the declarant, it was not an abuse of discretion for the trial court to find the child was still under the stress of the attack when the statements were made. The court commented that it was not unreasonable for the trial court to have found the child was in a continuous state of excitement from the time the assault occurred.

Some jurisdictions continue to require a showing that the child-declarant manifested outward signs of excitement as a foundational requirement for the excited utterance exception. See, e.g., *State in Interest of C.A.*, 201 N.J. Super. 28, 492 A.2d 683 (1985) (statements inadmissible because there was no evidence of the existence of any excitement by the children); *State v. Brown*, 341 N.W.2d 10 (Iowa 1983) (victim must be

upset or in an excited state).

The approach taken by the *Padilla* court and those courts which have followed it appears sound to us in view of the nature of the excited utterance exception and its application in cases of the sexual abuse of children. In the case of small children, generally, the stress of a sexual assault is present for some time after the assault occurred. The key requirement remains spontaneity, which, in our view, requires a showing the statements were made without time for conscious reflection.

The record in this case shows the trial court correctly determined the statements were admissible. The trial court considered the child's age, the circumstances of the assault, and the facts that the statements were made to the child's mother and were made soon after the child had returned to the mother's care. The trial court ascertained that several indicia of reliability were present. The statements were voluntarily made to a trusted authority figure as soon as the child was able to report the incident out of the defendant's presence, and the prior parent-child relationship revealed no motive for fabrication. This was sufficient evidence to support the trial court's admission of the statements. The father's first assignment of error is therefore overruled.

The next assignment of error is that insufficient evidence was presented at the adjudication hearing to support a finding that the children lacked proper parental care due to the appellant's actions. That contention is not supported by the facts.

The standard of review applicable to a juvenile proceeding under § 43-247 is de novo on the record. *In re Interest of J.M.*, 223 Neb. 609, 391 N.W.2d 146 (1986). The findings of fact made by the juvenile court are accorded great weight because the court observed the parties and witnesses and could better judge their credibility.

At the adjudication hearing there was direct evidence of the assault through the testimony of the victim's brother. His testimony was corroborated by the daughter's statements to her mother concerning the incident. Further, testimony by the investigating officer revealed that the appellant believed his daughter was telling the truth about the incident. This was sufficient evidence from which the juvenile court could find the

allegations true and properly take jurisdiction over the children.

The appellant next contends his motion for a new trial should have been granted. This contention was not separately argued in his brief and will not be considered. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986). See, also, *In re Interest of J.S., S.C., and L.S.*, 224 Neb. 234, 397 N.W.2d 621 (1986).

The final assignment of error concerns the portion of the juvenile court's order which requires the appellant to submit to a psychological evaluation. The appellant contends the juvenile court did not have authority to order him to participate in and complete a psychological evaluation as part of a plan to correct the conditions of neglect the court had found to exist.

The State responds that the appellant cannot appeal from that order because it is not a final order, and, alternatively, if it is an appealable order, the juvenile court had the authority to order the father to make reasonable efforts to rehabilitate himself.

The order which required the appellant to submit to a psychological evaluation was a part of the dispositional order and, as such, was a final order from which an appeal may be taken. See *In re Interest of V.T. and L.T.*, 220 Neb. 256, 369 N.W.2d 94 (1985).

In support of his contention, the appellant points out that Neb. Rev. Stat. § 43-210.04 (Reissue 1978) was the predecessor of Neb. Rev. Stat. § 43-288 (Reissue 1984). The legislative history of § 43-210.04 reveals that the Legislature considered adding a provision to that section which would have permitted juvenile courts to order parents to undergo medical, psychiatric, and psychological diagnosis and treatment. Floor Debate, L.B. 290, Judiciary Committee, 84th Leg., 1st Sess. 812-19 (Feb. 19, 1975). That provision was deleted after several legislators opposed it on the grounds it would pose a danger of overreaching by enabling a court to order an entire family to seek treatment because one of its members became involved with the juvenile court for any reason. The appellant argues that the juvenile court had no authority to order him to submit to a psychological evaluation, since the Legislature specifically excluded such a provision from the statute. That argument is

unpersuasive in this case.

As we stated in *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986), the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1984 & Cum. Supp. 1986), must be liberally construed to accomplish its purpose of serving the best interests of the juveniles who fall within it. The juvenile court has broad discretion as to the disposition of those who fall within its jurisdiction. See *In re Interest of V.T. and L.T., supra.*

The basis for such power is the power of the State. The State's jurisdiction

> arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine the status and custody that will best meet its needs and wants . . . .
>
> . . . .
>
> The juvenile court is a product of the solicitude of the law for the welfare of infants. Its powers and duties are described more or less in detail in our statutes, and because of their humanitarian and beneficient [sic] purpose, they should be liberally construed to the end that their manifest purpose may be effectuated to the fullest extent compatible with their terms.

Stewart v. McCauley, 178 Neb. 412, 415, 418, 133 N.W.2d 921, 924-25 (1965).

It is the law in this jurisdiction that juvenile courts have broad discretion to accomplish the purpose of serving the best interests of the children involved. *State v. Vogt*, 190 Neb. 205, 206 N.W.2d 849 (1973). Juvenile courts have long recognized that psychiatric testing or psychological evaluations of a parent may be required to determine the best interests of children when issues of custody and visitation are presented. See, e.g., *In re Interest of J.S., S.C., and L.S.*, 224 Neb. 234, 397 N.W.2d 621 (1986); *In re Interest of S.P., N.P., and L.P.*, 221 Neb. 165, 375 N.W.2d 616 (1985); *In re Interest of Wood and Linden*, 209 Neb. 18, 306 N.W.2d 151 (1981).

Further, this court has often stated that a juvenile court may, within its discretion, require parents to make reasonable efforts to rehabilitate themselves. See, e.g., *In re Interest of W.*, 217 Neb. 325, 384 N.W.2d 861 (1984); *In re Interest of Wood and*

Linden, supra.

In this case the juvenile court found that the appellant had engaged in inappropriate sexual contact with his daughter and therefore posed a risk to both children. The trial court ordered the father to submit to a psychological evaluation to provide him with a means of rehabilitating himself and reestablishing a normal relationship with his children. The order was an attempt by the court to serve the children's best interests, was within the jurisdiction of the court, and, under the circumstances of this case, was not an abuse of discretion.

The judgment is affirmed.

AFFIRMED.

GORDMAN PROPERTIES COMPANY, FORMERLY KNOWN AS GORDMAN PARTNERSHIP, A PARTNERSHIP, ET AL., APPELLANTS, V. BOARD OF EQUALIZATION OF HALL COUNTY, NEBRASKA, ET AL., APPELLEES.

403 N.W.2d 366

Filed April 10, 1987. No. 85-268.

1. **Constitutional Law: Taxation: Valuation.** Taxes shall be levied by valuation uniformly and proportionately upon all tangible property. Neb. Const. art. VIII, § 1.
2. **Taxation: Valuation: Appeal and Error.** The district court shall hear appeals and cross-appeals, taken from action of a board of equalization, as an equity case and without a jury, and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof. Neb. Rev. Stat. § 77-1511 (Reissue 1986).
3. _____: _____: _____. Neb. Rev. Stat. § 77-1511 (Reissue 1986) restricts a taxpayer's appeal to a consideration of questions raised before the board of equalization, and the court is without power to adjudicate any other factual question or issue in the taxpayer's appeal.
4. **Appeal and Error.** A correct result will not be reversed merely because a trial court reached that correct result for an incorrect reason.
5. **Taxation: Valuation.** Equalization of assessments has for its general purpose to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. The object of the law of uniformity is accomplished if all of the

property within the taxing jurisdiction is assessed at a uniform standard of value.

6. _____: _____. In a proceeding before a county board of equalization, a taxpayer may raise questions concerning the assessed value (actual value) of the taxpayer's real estate, the lack of proportionate and uniform valuation regarding the taxpayer's property, or both such aspects of valuation for tax purposes.
7. **Motions to Dismiss: Appeal and Error.** When a trial court sustains a motion to dismiss at the close of a plaintiff's case in chief, the Supreme Court must treat as admitted the truth of all relevant evidence favorable to the plaintiff and must give the plaintiff the benefit of all permissible inferences deducible from the properly admitted evidence to determine whether a prima facie case has been established.
8. **Taxation: Valuation: Appeal and Error.** An appeal from action by a county board of equalization is an equity action tried de novo in the district court.
9. _____: _____: _____. On appeal to the Supreme Court, an equity case involving action by a county board of equalization is a trial of factual questions de novo on the record, requiring the Supreme Court to reach a conclusion independent of the findings of the trial court.
10. **Taxation: Valuation: Proof: Appeal and Error.** In a taxpayer's appeal from action of a county board of equalization, the burden is on the taxpayer to prove the contention that the value of the taxpayer's property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed in part, and in part reversed and remanded with direction.

James A. Beltzer of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellants.

Michael P. Norris and Jerom E. Janulewicz, Deputy Hall County Attorneys, for appellees.

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

SHANAHAN, J.

Gordman Properties Company appeals dismissal of its petitions in the district court for Hall County after Gordman had presented evidence and rested its case in appeals from actions of the board of equalization of Hall County, which had approved an increase in the tax valuation of Gordman's real estate.

For purposes of taxation, on January 1, 1983, Gordman's real estate had an aggregate value of $1,762,500—$388,120 for land valuation and $1,374,380 for improvements. On April 20, 1983, Gordman filed its protest with the county board of equalization and alleged: "Current valuation of $1,762,500 is above actual Market. $1,200,000 represents the Fair Market Value of this property based on current appraisals." The board of equalization rejected Gordman's protest, and Gordman appealed to the district court. See Neb. Rev. Stat. § 77-1510 (Reissue 1981). In its "Petition on Appeal," Gordman claimed: "The value of [Gordman's] property has not been fairly and proportionally equalized with all of the property resulting in a discriminatory, unjust and unfair assessment," and "The assessment of said real estate is grossly excessive and is a result of arbitrary and unlawful action."

On January 1, 1984, the tax valuation of Gordman's real estate was the same as the 1983 valuation. This court, on January 27, 1984, issued *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984), which contained the following syllabus item: "A taxpayer is entitled to have its property in a county assessed uniformly and proportionately with other property in the county even though the result may be that it is assessed at less than actual value." (Syllabus of the court.) Gordman filed its protest on April 27, 1984, concerning the same real estate involved in the 1983 protest and, among several allegations, claimed:

> 1. The protested valuation, as determined by the County Assessor, is in excess of "actual value" of the real estate and improvements, as defined by R.R.S. 77-112.
>
> . . . .
>
> 5. The protested valuation was determined by the County Assessor in a manner and amount which is unjust, disproportionate and unequal when compared with the actual value of other property within the county.
>
> . . . .
>
> 8. The fair market value of irrigated and dryland agricultural crop land for the year 1984 was uniformly under valued by the Hall County Assessor resulting in irrigated and dryland agricultural farmland being

uniformly valued at substantially less of its actual value - fair market value.

9. The application of different methods for determining the values of agricultural land and all building improvements resulted in an assessment which was not uniform and proportionate.

When the county board of equalization rejected the 1984 protest, Gordman appealed to the district court and alleged that the 1984 tax valuation was in excess of the actual value of Gordman's real estate and was unjust, disproportionate, and unequal when compared with the actual value of other property within the county, resulting "in an assessment which was not uniform and proportionate."

At the pretrial conference for the combined appeals by Gordman, the district judge determined the following:

> Ultimate facts in dispute: 1. Whether value of agricultural land for '83 & '84 in Hall County was uniformely [sic] undervalued.
>
> 2. Whether plaintiff Richard-Gordman [sic] was valued in excess of its actual value. 1983 equalization not presented to board.
>
> Points of law to be passed upon by the Court: 1. Whether Kearney convention case ruling applies in this case.

As its witness, Gordman called Larrilyn Crow, an employee of the Hall County assessor's office, who testified that the Gordman property had been valued at $1,762,500 for 1983 and 1984 in accordance with the Marshall-Swift method, as reflected in the manual bearing the same name. Crow also testified that Hall County used the 1980 Nebraska Agricultural Land Valuation Manual for valuation of agricultural real estate within Hall County.

Gordman called another witness, Donald McDannel, who is a real estate appraiser, consultant, a member of the American Institute of Real Estate Appraisers—a professional real estate appraisers' organization, and a member of the Counselors of Real Estate, an "invitation only" group of real estate consultants with a minimum of 5 years' experience. For 19 years McDannel had taught real estate appraisal courses for the

American Institute of Real Estate Appraisers, had coauthored a book on the appraisal of rural properties, and had done appraisal work since 1958, some in Hall County. Gordman retained McDannel to search the records of the Hall County register of deeds' office for arm's-length sales of agricultural land in Hall County and thereby determine a ratio between the assessed value of real estate and the sale price for such land. McDannel used the county's assessed value and considered the sale price of the property to be its actual value on the date of sale. For the 1983 sales-assessment ratio, McDannel utilized sales occurring in 1982 and sales in 1983 for the 1984 ratio to be determined. McDannel excluded several transfers for various reasons, including the appearance of acreage sales, interfamily transactions, less than fee interest transfers, old contracts for deeds, and sales for uses other than farming.

To arrive at a 1983 sales-assessment ratio, McDannel located 153 transfers of rural property, as reflected in the office of the register of deeds and, after analyzing those transfers, determined that 25 were arm's-length transfers which indicated actual value of the property. Concerning the 1983 tax valuation, McDannel testified that the assessed value of agricultural land ranged from 37.3 percent to 51.6 percent of its actual value. Based upon his research, McDannel expressed his opinion that, on January 1, 1983, agricultural real estate in Hall County was valued for tax purposes at 42.15 percent of its actual value. Regarding a 1984 ratio, McDannel considered 189 real estate transfers and determined that 33 were arm's-length transactions indicative of the actual value of the land sold. The sales-assessment ratio ranged from 46 percent to 56 percent, and in McDannel's opinion, for 1984, agricultural real estate in Hall County was valued for tax purposes at 49 percent of its actual value.

When Gordman had concluded presentation of evidence in its case in chief and rested, the board of equalization moved for dismissal, asserting that Gordman had failed to sustain the burden of proof placed upon a taxpayer in an appeal from action by a board of equalization. The court found that Gordman failed to present the issue of equalization as a part of its 1983 protest, but such absence of that issue before the board

of equalization did not preclude the district court's deciding the equalization issue in Gordman's appeal from the board's action regarding the 1983 assessment. The court then dismissed Gordman's petitions, finding that Gordman had failed to establish that its real estate "was not uniformly and proportionately valued with agricultural property in Hall County for the assessment years 1983 and 1984."

In its appeal to this court, Gordman does not question any determination of actual value. Rather, Gordman contends only that the district court erred in dismissing Gordman's petitions, since Gordman had presented a prima facie case that Hall County's tax valuations for farmland in 1983 and 1984 were not uniform and proportionate in relation to the tax valuation for Gordman's real estate in those years. The board of equalization counters that not only did Gordman fail to prove a prima facie case, as determined by the district court, but Gordman had failed to raise the issue of equalization in its 1983 protest and, therefore, the court was without power to resolve such question about equalization.

Neb. Const. art. VIII, § 1, states: "Taxes shall be levied by valuation uniformly and proportionately upon all tangible property . . . ."

Neb. Rev. Stat. § 77-1511 (Reissue 1986) states in part: "The district court shall hear appeals and cross appeals taken under section 77-1510 as in equity and without a jury, and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof."

Referring to a statutory predecessor substantially the same as the current § 77-1511, this court observed in *Reimers v. Merrick County*, 82 Neb 639, 640, 118 N.W. 113, 114 (1908): "The legislature, in the section of the revenue law referred to, has seen fit to restrict the district court on such appeal to a consideration of the questions raised before said board, and the court is without power to adjudicate any other issue in that proceeding." See, also, *State Bank v. Seward County*, 95 Neb. 665, 146 N.W. 1046 (1914); *Brown v. Douglas County*, 98 Neb. 299, 152 N.W. 545 (1915).

This court has advanced two explanations or reasons for the

restriction on issues or questions which can be tried in the district court in a taxpayer's appeal from action of a county board of equalization.

In *Reichenbach Land & Loan Co. v. Butler County*, 105 Neb. 209, 211, 179 N.W. 1015, 1016 (1920), this court noted:

> The local board had ample power in the first instance to correct any error in the official action of the assessor, and the question for review should have been pointed out in some form. In considering the interests of the taxpayers of an entire county and of the public at large, in examining numerous items and in determining the value of property in different forms for the purpose of taxation, the county board of equalization is entitled to a specific complaint, and should have an opportunity to pass on the question for ultimate decision before the public revenues become involved in protracted or vexatious litigation. On appeal to the district court the questions for review are limited to the questions presented to the county board of equalization. This is the public policy of the state. [Citations omitted.]

The district court's restricted scope of inquiry in a taxpayer's appeal from action by a board of equalization was also discussed in *Nebraska Telephone Co. v. Hall County*, 75 Neb. 405, 407, 106 N.W. 471 (1906), where this court stated:

> [T]he reason for the limitation is obvious. If a taxpayer could present a question to the board which was without merit, and, after a determination of that question against him, could appeal to the district court and there present another and different question, a meritorious one, which required a different ruling, he could always overturn the assessment, and thus escape taxation of his property altogether.

Although Gordman, by its petition in district court, claimed there was a lack of uniform and proportionate valuation for 1983, such question about absence of uniformity and proportionality was never placed before the board of equalization by Gordman's 1983 protest. Without the issue of uniformity and proportionality of valuation presented to the board of equalization, the district court was without power to

adjudicate such question, in view of the provisions of § 77-1511. See, *Reimers v. Merrick County, supra; State Bank v. Seward County, supra; Brown v. Douglas County, supra.* While the district court, in its pretrial order, with acquiescence of Gordman and the board of equalization, designated uniformity and proportionality of a valuation as an issue, the district court did not acquire, and the parties were unable to supply, the judicial capacity or power to litigate a factual question or issue not presented to the board of equalization. Regarding the assessed valuation for 1983, the district court dismissed Gordman's petition on the ground that a prima facie case had not been established. However, dismissal of Gordman's petition was correct because, under the circumstances present in this case, the district court did not have the power to entertain any question about uniformity and proportionality of valuation for the 1983 assessment, and not because a prima facie case had not been established. As we expressed in *Travelers Indemnity Co. v. Heim*, 223 Neb. 75, 80, 388 N.W.2d 106, 110 (1986): "A correct result will not be reversed merely because a trial court reached that correct result for an incorrect reason." See *Gall v. Great Western Sugar Co.*, 219 Neb. 354, 363 N.W.2d 373 (1985).

In *Hastings Building Co. v. Board of Equalization*, 212 Neb. 847, 850-51, 326 N.W.2d 670, 672 (1982), this court stated:

> [T]he taxpayer has the burden of proving that the value of his property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value, *or* that its value has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment.

" 'Equalization of assessments has for its general purpose to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax. . . .' " *Hacker v. Howe*, 72 Neb. 385, 393, 101 N.W. 255, 258 (1904).

Consequently, in a proceeding before a county board of equalization, a taxpayer may raise questions concerning the assessed value (actual value) of the taxpayer's real estate, the

lack of proportionate and uniform valuation regarding the taxpayer's property, or both such aspects of valuation for tax purposes.

As this court expressed in *Carpenter v. State Board of Equalization & Assessment*, 178 Neb. 611, 619, 134 N.W.2d 272, 278 (1965): "[T]he object of the law of uniformity is accomplished if all of the property within the taxing jurisdiction is assessed at a uniform standard of value." (Emphasis omitted.)

"The rule of uniformity applies to both the rate of taxation and the valuation of property for tax-raising purposes." *Grainger Brothers Co. v. Board of Equalization*, 180 Neb. 571, 574, 144 N.W.2d 161, 164 (1966).

Concerning the 1984 assessment, the district court found, as a matter of law at the conclusion of Gordman's case in chief, that Gordman had failed to establish that its property was not uniformly and proportionately valued with agricultural land in Hall County. When a trial court sustains a motion to dismiss at the close of a plaintiff's case in chief, the Supreme Court must treat as admitted the truth of all relevant evidence favorable to the plaintiff and must give the plaintiff the benefit of all permissible inferences deducible from the properly admitted evidence to determine whether a prima facie case has been established. See *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983).

An appeal from action by a county board of equalization is an equity action tried de novo in the district court. See § 77-1511. See, also, *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984); *Grainger Brothers Co. v. Board of Equalization, supra*. On appeal to the Supreme Court, an equity case involving action by a county board of equalization is a trial of factual questions de novo on the record, requiring the Supreme Court to reach a conclusion independent of the findings of the trial court. See, *Kearney Convention Center v. Board of Equal., supra; Grainger Brothers Co. v. Board of Equalization, supra; Beynon Farm Products v. Bd. of Equalization*, 213 Neb. 815, 331 N.W.2d 531 (1983).

In a taxpayer's appeal from action of a county board of

equalization, the burden is on the taxpayer to prove the contention that the value of the taxpayer's property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. *Hastings Building Co. v. Board of Equalization*, 190 Neb. 63, 206 N.W.2d 338 (1973); *Lincoln Tel. & Tel. Co. v. County Board of Equalization*, 209 Neb. 465, 308 N.W.2d 515 (1981).

In *Hastings Building Co. v. Board of Equalization*, 212 Neb. 847, 851, 326 N.W.2d 670, 672 (1982), we stated:

> There is a *presumption* that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Such presumption disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon the evidence, with the burden of showing such valuation to be unreasonable resting upon the appellant on appeal from the action of the board.

(Emphasis supplied.) See, also, *Kearney Convention Center v. Board of Equal., supra; Richman Gordman v. Board of Equalization*, 214 Neb. 470, 334 N.W.2d 447 (1983).

As expressed in McCormick on Evidence § 343 at 969 (E. Cleary 3d ed. 1984):

> Most presumptions have come into existence primarily because the judges have believed that proof of fact B renders the inference of the existence of fact A so probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it.
>
> Obviously, most presumptions . . . have been created for a combination of reasons. Usually, for example, a presumption is based not only upon the judicial estimate of the probabilities but also upon the difficulties inherent in proving that the more probable event in fact occurred. Moreover, as is the case with initial allocations of the burdens, the reasons for creation of presumptions are

> often tied closely to the pertinent substantive law. This is particularly true with regard to those presumptions which are created, at least in part, to further some social policy.

McCormick then indicates several "presumptions" and the reasons underlying their creation, such as: "Official actions by public officers, including judicial proceedings, are presumed to have been regularly and legally performed. Reason: probability and the difficulty of proving that the officer conducted himself in a manner that was in all ways regular and legal." *Id.*

While we have used the word *presumption* in reference to propriety of action by a board of equalization, what we have characterized as a presumption is, perhaps, more appropriately classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. Cf. *McGowan v. McGowan*, 197 Neb. 596, 250 N.W.2d 234 (1977) (various presumptions and their nature). Cf., also, *Anderson v. Claussen*, 200 Neb. 74, 262 N.W.2d 438 (1978) (presumption and the risk of nonpersuasion). See Fenner, *About Presumptions in Civil Actions*, 17 Creighton L. Rev. 307 (1984).

In *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984), we addressed the same issue with which we are faced in this case. There, the taxpayer contended that Buffalo County's use of two dissimilar methods of appraisal, the Nebraska Agricultural Land Valuation Manual and the Marshall-Swift manual, resulted in " 'blatant disparity in actual value between urban and agricultural real estate . . . .' " *Id.* at 293, 344 N.W.2d at 621. As in this case, the taxpayer in *Kearney Convention Center* introduced testimony of an expert witness that agricultural land was uniformly undervalued, at 44 percent of its actual value in that case. We stated in *Kearney Convention Center* that

> dry cropland, irrigated cropland, and all real estate, whether improved or not, are all tangible property of the same class for taxation purposes, as defined in our Constitution; and while such properties may be

> appropriately classified into logical subclassifications and different appropriate methods of determining values of such subclassifications may be utilized, the answers obtained as to the values of the various subclassifications of property must be correlated so that *all* tangible property shall be assessed uniformly and proportionately.
>
> The evidence in this case shows that that result has not been reached.

Id. at 303, 344 N.W.2d at 625-26. In *Kearney Convention Center*, we then held that the assessment of the taxpayer's property should be reduced to 44 percent of its actual value to equalize the value of the taxpayer's property with other property in Buffalo County.

Gordman offered the testimony of Donald McDannel, an expert witness, who expressed his opinion that, for the year 1984, Hall County had used a tax valuation for agricultural land at 49 percent of the agricultural land's actual value. However, although not required to do so by the Nebraska Evidence Rules, McDannel testified about the facts and factors entering into his opinion. See Neb. Evid. R. 705: "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." Neb. Rev. Stat. § 27-705 (Reissue 1985). Through McDannel's testimony about the tax valuation of agricultural land, Gordman established a prima facie case that the valuations for agricultural land and Gordman's real estate were not uniform and proportionate in 1984, as required by Neb. Const. art. VIII, § 1.

Therefore, we affirm the district court's judgment concerning the 1983 assessment of Gordman's real estate, but we reverse the district court's judgment regarding Gordman's appeal from the 1984 assessment and remand this matter to the district court for a new trial.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

IN RE GUARDIANSHIP AND CONSERVATORSHIP OF MAUDE CLEVENGER SIM.
MAUDE CLEVENGER SIM, APPELLANT, V. EDITH WRIGHT AND OPAL C. COMISKEY, APPELLEES.
IN RE ESTATE OF MAUDE CLEVENGER SIM.
MAUDE CLEVENGER SIM, APPELLEE, V. EDITH WRIGHT AND OPAL C. COMISKEY, APPELLEES, ALAN M. WOOD, GUARDIAN AND CONSERVATOR, APPELLANT.

403 N.W.2d 721

Filed April 10, 1987. Nos. 85-422, 85-922.

1. **Guardians and Conservators: Appeal and Error.** The district court's and Nebraska Supreme Court's scope of review of proceedings to appoint a guardian or a conservator is for error appearing on the record made in the county court.
2. **Constitutional Law: Legislature: Presumptions.** Attached to every constitutional challenge is the presumption that acts of the Nebraska Unicameral are constitutional, with all reasonable doubts resolved in favor of constitutionality.
3. _____: _____: _____. The presumption of constitutionality continues until the statute under review clearly appears to contravene some constitutional provision.
4. _____: _____: _____. Because statutes are presumed to be constitutional, the burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
5. **Guardians and Conservators.** One may not have his or her property taken away and placed in the hands of a conservator merely because potential heirs believe there will be more left for them if the owner is not free to deal with the property as he or she chooses.
6. _____. A conservator may be appointed for one who, because of advanced age, is unable to manage and will therefore waste or dissipate his or her property unless proper management is provided.
7. _____. Each case seeking the appointment of a guardian or conservator must be determined upon its particular facts, the question being whether the record is such as to establish that the statutory grounds for appointment of a guardian or conservator exist.
8. **Actions: Pleadings.** The fact a party may be entitled to require a more definite statement from a petitioner does not necessarily mean that the statement as originally made was not sufficient to state a cause of action.
9. _____: _____. The failure to make a timely demand for a more definite statement from a petitioner waives the right to such a statement.
10. **Constitutional Law: Guardians and Conservators: Mental Health.** The subject of a proceeding to determine the need for a guardian or conservator has no fifth amendment right to remain silent during the course of a psychiatric examination.

11. **Trusts: Accounting.** No trust instrument can relieve a trustee from a duty to account to interested persons.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Judgment in No. 85-422 affirmed as modified. Appeal in No. 85-922 dismissed.

Harvey A. Neumeister, Kent J. Neumeister, and J. Patrick Green, for appellant Sim.

Richard H. Hoch of Hoch & Steinheider, for appellees Wright and Comiskey.

Alan M. Wood, guardian and conservator.

Robert M. Spire, Attorney General, and Ruth Anne Evans, for amicus curiae State.

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

CAPORALE, J.

I. INTRODUCTION

These cases, which were consolidated for argument on the court's own motion, arise from a petition by Edith R. Wright and Opal C. Comiskey to have a guardian and conservator appointed for their 87-year-old half sister, Maude Clevenger Sim, with whom they share a common father. The cases constitute the third and fourth appearances of this matter in this court. In the first appearance, *Sim v. Comiskey*, 216 Neb. 83, 341 N.W.2d 611 (1983), we affirmed the district court's dismissal of the effort by Sim's attorneys to enjoin the county court proceeding which ultimately led to the designation of Alan M. Wood, a member of the bar of this state, as Sim's guardian and conservator with limited powers, a designation the district court later affirmed but modified by eliminating the limitations, and now appears before us the third time as case No. 85-422, *In re Guardianship and Conservatorship of Maude Clevenger Sim*. In the second appearance, *In re Guardianship and Conservatorship of Sim v. Comiskey*, 216 Neb. xxvi (case No. 83-873, Jan. 23, 1984), we dismissed as premature (that is, for lack of jurisdiction) the appeal taken by Sim's attorneys from an order of the county court which appointed physicians

to examine Sim. In the remaining, or fourth, appearance, case No. 85-922, entitled *In re Estate of Maude Clevenger Sim*, the designated guardian and conservator appeals the district court's refusal to issue letters of appointment. For the reasons hereinafter discussed, we affirm as modified the judgment of the district court in case No. 85-422 and dismiss as moot the appeal in case No. 85-922.

II. FACTS

In the summer of 1981, Wright began to see Sim lose her train of thought, and in May of 1982 saw Sim's mental capacities diminish further. For example, when Wright and Sim were watching a television evangelist, Sim arose from the davenport and, referring to the television program, announced, "He's going to kill me. He's going to kill me. Help, they're going to put me up as a sacrifice." As another example, Sim would light the electric stove, forget to turn it off, and burn up whatever had been placed thereon. By July of 1982, Sim could hardly recognize where she was going. She would get lost very easily, including in the grocery store. Sim would tell Wright that she was going to a certain place, but would head in the other direction. Sim would say, "I'm going to the bathroom" and then get lost behind the French door in the living room.

Robert S. Comiskey is married to Joan Comiskey and is the son of Opal Comiskey, notwithstanding the fact he testified that Sim was "the only mother I've ever had." Robert and his wife had apparently lived with "Aunt Maude" since 1975. Robert performed simple maintenance around the house, mowed the lawn, and painted; Joan cooked, drove, and occasionally did Sim's laundry. Sometime in June of 1982, Wright suggested that she and her husband, Vance, move in and take over the job of caring for Sim.

Sim fell and injured her hip and elbow on June 25, 1982. She was taken to St. Mary's Hospital in Nebraska City and, in addition to the injuries, was provisionally diagnosed as having organic brain syndrome. The medical reports show that she had been deteriorating mentally. Family members reported that Sim had been having hallucinations but that her prescribed medication, Haldol, had been helping. Sim was finally diagnosed as having parkinsonism, among other things.

Parkinsonism is the condition characteristic of Parkinson's disease, a neurological disorder usually due to arteriosclerotic changes in the basal ganglia of the brain, and marked by muscular tremors, droopy posture, rigidity, and a masklike facial expression. 3 J.E. Schmidt, Attorneys' Dictionary of Medicine and Word Finder P-51 (1987). Sim's discharge summary of July 6, 1982, also reports that she "was confused off and on" and that "[s]ometimes she didn't even remember her sister's name when she was in the room or the doctor's name." Sim was transferred to Clarkson Hospital in Omaha to see a neurologist. The July 6, 1982, discharge summary also shows that "[t]his was requested partly by the family and partly by Mr. [Harvey] Neumeister, a lawyer friend of hers." A computerized axial tomography (CAT) scan revealed the presence of Alzheimer's disease, a form of mental deterioration marked by a wasting of the cortex of the brain and the development of argyrophil plaques. 1 J.E. Schmidt, *supra* at A-159. The discharge summary further states that Sim's "prognosis is poor as far as the Alzheimer's with gradual deterioration. She has organic brain syndrome and needs somebody to keep an eye on her." On July 2, 1982, one of Sim's half sisters discussed with Sim's doctor the possibility of applying for appropriate guardianship. The doctor's notes from July 2, 1982, indicate that the doctor thought that was very reasonable.

When Sim left the hospital and returned home, Opal Comiskey stayed with Sim to care for her needs. Opal Comiskey had the locks changed on or about August 5, 1982, "to keep Joan [Comiskey] from running in and out whenever she chose." According to Opal Comiskey, Harvey A. Neumeister "had charge of" Sim's money already, at this time, and Opal Comiskey would sometimes have to use her own money to buy groceries for Sim.

A few days after Opal Comiskey was no longer able to care for Sim, another friend, Helen Gladys Parks Beccard, who was herself then 89 years old, came to care for her.

Sim was taken to Duff's Nursing Home in Nebraska City on August 10, 1982, by Joan Comiskey, Gladys Beccard, and perhaps Margaret Kreifels. The nursing home was told to send

the bills to Harvey Neumeister. Harvey Neumeister regularly called upon Sim at the nursing home and conferred with the nursing home about the care Sim was receiving and the care she might need. Opal Comiskey was not informed that Sim had been taken to a nursing home and did not know Sim's whereabouts for 2 weeks, when she read about Sim in the nursing home news. In fact, Opal Comiskey was kept from visiting Sim until more than 1 month after she and Wright, on September 3, 1982, petitioned for the appointment of a guardian and conservator for Sim on the basis that because of physical disability and advanced age, Sim could not take care of herself or her assets. Following that filing, on application of the half sisters, the court issued an order certifying that there were no restrictions on visiting Sim.

The county court set a hearing on the petition for September 24, 1982, appointed a provisional guardian ad litem for Sim, and appointed a physician to examine Sim and submit a report to the court. Before the hearing could be held, however, Harvey A. Neumeister and his son, Kent J. Neumeister, appeared as Sim's attorneys and initiated a number of steps which prevented the orderly progress of the proceeding. These steps included the writing of letters, bearing only Harvey Neumeister's signature, advising the guardian ad litem and physician that Sim did not recognize their authority and would not cooperate with them; the bringing of simultaneous actions in both the county and district courts to enjoin the proceeding on the ground the relevant statutes are unconstitutional; and suing the half sisters, judges, sheriffs, attorney for the half sisters, the court-appointed guardian ad litem, and the court-appointed physician.

At no time, however, was an answer filed alleging that Sim was competent, nor did Sim ever appear and testify that there was no need for a guardian or conservator.

The guardian ad litem met with Sim at the nursing home on September 21, 1982. Sim indicated

> that she didn't feel that she was incompetent and that she didn't need or want the two sisters or either of them appointed for her as guardian and conservator, and that Mr. [Harvey] Neumeister had been taking care of her

> things for her and that she felt that he could continue to do that for her.

The guardian ad litem nonetheless was of the opinion that the interview showed the need for a guardian or a conservator to care for Sim's affairs.

On October 7, 1982, Sim signed a joint tenancy warranty deed which conveyed her home in Nebraska City to Robert and Joan Comiskey in consideration of $1 and love and affection. The $25.85 transfer tax stamp affixed November 5, 1982, suggests, however, that the actual value of the property involved in the transaction was $23,500. The deed also recites that "[t]his deed by gift voids in my Will dated May 13, 1980, Paragraph SECOND #10 . . . ."

Sim executed a second warranty deed on October 7, 1982, which conveyed four pieces of realty in Nebraska City to "Harvey A. Neumeister, Trustee," with additional language, neither typed nor in Sim's handwriting, which states, "if necessary, Kent J. Neumeister as alternate trustee or successor trustee."

Alba B. Neumeister, Harvey Neumeister's wife of over 50 years and stenographer for more than 40 years, testified in response to questioning by her son, Kent Neumeister, using notes he had typed, that she has known Sim for over 40 years and that on October 7, 1982, she picked up Sim from the home, drove her to Lincoln, ate lunch with her before the documents and deeds were executed, and took her shopping after the documents and deeds were executed. Mrs. Neumeister's testimony concerning the signing of the documents shows that the only people present were herself; her husband; William Walker, an attorney now deceased; Sim; and the notary public, Don G. Renner. Mrs. Neumeister also testified that her husband asked Sim whether she understood what she was signing, but did not give any testimony as to Sim's response to that question. Mrs. Neumeister did state that Sim "followed those documents that she signed, that trust agreement and those deeds that she signed — or one deed that she signed, and also the transfer of the car. She could read those. She had her mentality at that time."

Harvey Neumeister later testified that his wife forgot about

the second deed to himself as trustee of three (sic) pieces of property.

Harvey Neumeister testified that he is Sim's lawyer and also acts as her trustee. He drafted the trust instrument which named himself as trustee, and further drafted two instruments which purportedly gave himself power of attorney for Sim. His testimony is that his power of attorney "couldn't be any broader" and that the trust instrument contained no duty for the trustee to account to anyone. These documents were also purportedly executed by Sim on October 7, 1982.

Don G. Renner attested that when he notarized Sim's signatures on the various documents on October 7, 1982, he "did not have any discussion with Mrs. Sim regarding the instruments being executed, did not inquire about them, and cannot testify or affirm whether or not Maude C. Sim knew anything about the documents or was competent to understand them and realize what she was signing . . . ."

Sim remained at the nursing home until August of 1983. On August 29, 1983, Otoe County Judge Eugene Atkinson appointed two Bellevue physicians to examine Sim. Two days after the order was entered, Robert Comiskey removed Sim from the nursing home, and she never returned there. Harvey Neumeister admitted he knew the court entered the order which appointed the two doctors to examine his client. Kent Neumeister, however, took the position that the order was written on August 29, 1983, but not filed until August 31, 1983, and that it was addressed to the doctors but neither to Sim's attorneys nor to Robert and Joan Comiskey. Kent Neumeister thus concluded "that if Judge Atkinson doesn't know how to make out an order, that's not our fault." On October 26, 1983, Harvey Neumeister called Duff's Nursing Home and said that "they were dismissing Maude effective 10-31 and would pick up all of her belongings." Harvey Neumeister later testified that Sim's removal from the nursing home was a decision made by her lawyers that she was not going to be examined by the doctors. His basis for violating the court order was that "this has been an unconstitutional thing."

Sim moved in with Robert Comiskey on August 31, 1983, and fell and broke her hip sometime prior to October 2, 1983,

when she was taken to a hospital in Lincoln, where she remained until around January 8, 1984.

Samuel Hofer, the pastor at the Presbyterian church where Sim had been worshiping for 27 years, visited Sim at Duff's Nursing Home in July or August of 1983. He tried to visit her again at Christmas to present a gift but was told that she had left the nursing home. The clergyman unsuccessfully attempted to locate her at other nursing homes in town. He called Joan Comiskey and was told that he would have to learn Sim's whereabouts from "Mr. Neumeister." The clergyman made 15 or 20 unsuccessful attempts to contact one of the Messrs. Neumeister.

Harvey and Kent Neumeister continued to hide Sim for more than half a year, refusing to disclose her whereabouts to Sim's half sisters, to her pastor, or to the court. On March 22, 1984, Harvey Neumeister finally answered the court's inquiry and revealed that he had moved Sim to Milder Manor in Lincoln.

The court then, through Judge Robert C. McGowan, appointed Dr. Emmett Kenney to examine Sim, and instructed counsel not to interfere with the psychiatric evaluation. The court further stated that "[i]f somebody wants a reporter there to record it, it's all right with me. I don't care. But there are not going to be any attorneys participating in this thing. It's a medical question at this point . . . ."

Dr. Kenney examined Sim for about an hour on April 28, 1984, to see if a mental illness was present that would interfere with Sim's capacity to act in her own best interests. The doctor identified himself to Sim as a court-appointed physician and psychiatrist, and explained to her that this was a special examination and that the result of it would not be confidential because there would be a report to the court. No court reporter was present during the interview.

The doctor testified that he made specific inquiries and that Sim made some specific answers. When asked three times when her birthday was, Sim responded that it's true, that she was going, and "with the girls." When asked where she lived, Sim responded that she lived mainly on the Lincoln trail, and answered that the building she was in was "plastic and ring way." She gave the current date to be April 3, 1886. She evaded a

question as to the cost of a loaf of bread but finally answered 25 cents. She priced a quart of milk at 20 cents. When asked if she had any relatives, Sim responded that she had "half of an umbrella." When asked with whom she was living, she responded, "Rolled oats high cut."

The doctor's opinion was that Sim had an organic brain syndrome which adversely affected her judgment, orientation, memory, affect, and cognition. The doctor stated that while Alzheimer's would cause an organic brain disease, he doubted that the previous diagnosis of Alzheimer's was correct. His own opinion was that Sim suffered from an organic brain disease that affected her judgment, memory, and cognition, and that her mental condition left her "vulnerable to exploitation."

Robert Comiskey, called on Sim's behalf, was asked at the June 14, 1984, hearing, "I want to know if you feel [Sim] can handle her affairs today." His answer was, "Today? Right now, at this moment, quite honestly, no." Even Harvey Neumeister, at the same hearing, when asked, "Do you think today, Mr. Neumeister, that Maude can handle her own affairs?" answered, "I think she needs help."

III. JUDGMENTS APPEALED

1. Case No. 85-422

The county court found it was necessary to appoint a guardian and conservator for Sim and designated Wood as such, directing that, until further order, his authority as guardian be limited to monitoring Sim's condition at Milder Manor in Lincoln, reporting Sim's condition quarterly to the court, setting aside any restrictions on rights of visitation with her, and waiving on Sim's behalf any statutory or other privileges as to confidential communications. Wood's authority as conservator was, pending further order, limited to obtaining a copy of the power of attorney and trust agreement, and procuring an accounting, pursuant to Neb. Rev. Stat. ch. 30, art. 28 (Reissue 1985), of all assets Harvey Neumeister claims to hold as trustee for Sim and of all receipts and expenditures as trustee.

Sim's attorneys promptly appealed the county court's order to the district court, which affirmed but modified the county court judgment by removing all limitations on the authority of

the guardian and conservator. Sim's attorneys have appealed the district court's judgment to this court.

2. Case No. 85-922

Since Sim's attorneys had appealed the county court's judgment in case No. 85-422 to the district court before the county court had the opportunity to issue letters of appointment to Wood, the county court, concluding it had lost jurisdiction, denied Wood's application for such letters. Wood then, in the district court appeal taken by Sim's attorneys and which constitutes the subject matter of case No. 85-422, applied for such letters from the district court. The district court denied the application on the ground that since Wood had not appealed from the county court's refusal to issue the letters, the district court lacked jurisdiction. Wood has appealed that district court judgment to this court.

IV. ANALYSIS OF CASE NO. 85-422

We concern ourselves first with case No. 85-422, in connection with which Sim's attorneys assign 12 errors. We begin by noting that, like the district court, our scope of review is for error appearing on the record made in the county court. *In re Estate of Oltmer*, 214 Neb. 830, 336 N.W.2d 560 (1983); Neb. Rev. Stat. § 24-541.06 (Reissue 1985). See, also, *In re Estate of Michels*, 223 Neb. 286, 389 N.W.2d 285 (1986); *In re Estate of Wagner*, 222 Neb. 699, 386 N.W.2d 448 (1986); *In re Estate of Wagner*, 220 Neb. 32, 367 N.W.2d 736 (1985).

1. Need for Guardianship and Conservatorship

The first assignment claims that the courts below erred in failing to hold that "the guardianship law is unconstitutional as applied to the constitutionally protected conduct of Mrs. Sim because she has already fulfilled the only permissible purpose for guardianship by moving into a nursing home and establishing a durable power of attorney and an irrevocable trust with herself as the lifetime beneficiary."

In this connection Sim's attorneys argue in general terms that Sim is a person who has a right to liberty, property, association, travel, privacy, a good reputation, and to due process and the equal protection of the laws. The question, however, is not whether Sim possesses those rights but whether the State of Nebraska has a legitimate interest in protecting Sim's person

and property and whether it has asserted that interest in a constitutionally permissible manner.

In beginning the analysis of this assignment, it is appropriate to recall that attached to every constitutional challenge is the presumption that acts of the Nebraska Unicameral are constitutional, with all reasonable doubts resolved in favor of constitutionality. *State ex rel. Wright v. Pepperl*, 221 Neb. 664, 380 N.W.2d 259 (1986); *State v. Mayhew Products Corp.*, 211 Neb. 300, 318 N.W.2d 280 (1982). This presumption continues until the statute under review clearly appears to contravene some constitutional provision. *Lenstrom v. Thone*, 209 Neb. 783, 311 N.W.2d 884 (1981); *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977). Because statutes are presumed to be constitutional, the burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *State v. Mayhew Products Corp., supra.*

The relevant statutes embody separate systems of guardianship to protect persons of minors and mental incompetents, and also include provisions for a type of power of attorney that does not terminate on disability of the principal, which adults may use when approaching senility or incompetence to obviate the need for other kinds of protective regimes. Neb. Rev. Stat. ch. 30, art. 26 general comment (Reissue 1985).

In presenting their position Sim's attorneys place heavy reliance on *Matter of Forward*, 86 A.D.2d 850, 447 N.Y.S.2d 286 (1982), a proceeding to appoint a conservator under the New York mental hygiene law. Therein, the proposed conservatee, an 88-year-old woman who resided with her family, had "recently executed an irrevocable trust" with a bank and trust company as trustee and herself as the lifetime beneficiary, to provide for her medical and living expenses. *Id.* at 851, 447 N.Y.S.2d at 287. The court noted that even if the woman's ability to care for her property were found to be substantially impaired, as the distributees had alleged, the trust would continue in force and the care of her property would be assured for the duration of her life. The court concluded that under the circumstances of that case there was no need to appoint a conservator, and there were no triable issues of fact

which would alter the result. There are, however, a number of features which distinguish the present case from *Forward*. First, since the *Forward* court was able to describe the trust provisions, we must conclude that the court had the trust before it. In the present case we have before us only the drafter's representations concerning the existence of certain selected terms of the trust. Second, the absence of other triable issues of fact signals that there were in *Forward* no concerns that the settlor lacked capacity or made her own decisions. Third, as the county court in the present case noted, "The trustee in Forward was a trust company and the very brief opinion does not touch upon the subject of accounting. Apparently accounting was not a problem in Forward." Fourth, the *Forward* decision does not disclose whether the trust was executed before or after the conservatorship proceedings had been commenced.

Sim's attorneys also cite *Matter of Waxman*, 96 A.D.2d 906, 466 N.Y.S.2d 85 (1983), wherein an application to appoint a conservator was dismissed because, among other things, the appellant had "recently executed an irrevocable trust," with his attorney as trustee and himself as lifetime beneficiary for the purpose of providing for his lifetime medical and living expenses. *Id.* at 907, 466 N.Y.S.2d at 87. The *Waxman* court, however, remanded the proposed conservatee's counterclaim, which included issues of fraud, duress, and the unlawful withholding of property by his wife and her attorneys. Sim's attorneys failed to call our attention to the result on appeal after remand of that case. In *Matter of Waxman*, 110 A.D.2d 644, 487 N.Y.S.2d 381 (1985), the same court noted that the previous decision did not reach the validity of the inter vivos trust, and again remanded the case for hearing because of conflicting evidence as to Waxman's state of mind at the time of the trust's execution and as to whether Waxman had received a proper explanation of the trust, including a clause which waived the settlor's statutory rights to revoke the trust.

Sim's attorneys do not relate the dispersive constitutional attack they make under this assignment of error to any particular statutory provision employed in this proceeding; rather, they seem to assault the application of the entire guardianship and conservatorship statutory schemes to Sim on

vaguely articulated grounds that the schemes violate portions of the federal Bill of Rights. Nothing has been called to our attention, nor do we find anything, which supports such an attack to the application of the pertinent portions of the statutory schemes to Sim. Accordingly, this assignment of error fails.

2. Certainty and Breadth of Standards

The second assignment of error declares the courts below erred in failing to declare that the various standards contained in "the guardianship law are overbroad and vague and fail to incorporate the least restrictive alternative as applied to the constitutionally protected conduct of Mrs. Sim."

To the extent pertinent to our inquiry, § 30-2619 provides:

> (a) The allegedly incapacitated person or any person interested in his or her welfare may petition for a finding of incapacity and appointment of a guardian. The petition shall be verified and shall contain allegations with regard to any of the areas as provided under section 30-2619.01 in which the petitioner claims that the allegedly incapacitated person lacks sufficient understanding to make or communicate responsible decisions concerning his or her own person.

The "areas" contained in § 30-2619.01, to which § 30-2619 refers, concern the

> allegedly incapacitated person's ability to make, communicate, or carry out responsible decisions concerning his or her person with regard to:
>
> (1) Selecting his or her place of abode within or without this state;
>
> (2) Arranging for his or her medical care;
>
> (3) Protecting his or her personal effects;
>
> (4) Giving necessary consents, approvals, or releases;
>
> (5) Arranging for training, education, or other habilitating services appropriate to him or her;
>
> (6) Applying for private or governmental benefits to which he or she may be entitled;
>
> (7) Instituting proceedings to compel any person liable for the support of the proposed ward to support him or her if no conservator has been appointed for the proposed

ward;

(8) Entering into contractual agreements if no conservator has been appointed for the proposed ward;

(9) Receiving money and tangible property deliverable to him or her and applying such money and property to his or her expenses for room and board, medical care, personal effects, training, education, and habilitative services; and

(10) Any other area of inquiry which the court may direct.

The relevant portions of § 30-2630 provide:

Upon petition and after notice and hearing in accordance with the provisions of this part, the court may appoint a conservator or make other protective order for cause as follows:

. . . .

(2) Appointment of a conservator or other protective order may be made in relation to the estate and property affairs of a person if the court determines that (i) the person is unable to manage his or her property and property affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, . . . or disappearance; and (ii) the person has property which will be wasted or dissipated unless proper management is provided . . . .

While we have held that one may not have his or her property taken away and placed in the hands of a conservator merely because potential heirs believe there will be more left for them if the owner is not free to deal with the property as he or she chooses, *In re Estate of Wagner*, 220 Neb. 32, 367 N.W.2d 736 (1985), it is clear that a conservator may be appointed for one who, because of advanced age, is unable to manage and will therefore waste or dissipate his or her property unless proper management is provided. *In re Estate of Oltmer*, 214 Neb. 830, 336 N.W.2d 560 (1983).

In reliance upon *O'Connor v. Donaldson*, 422 U.S. 563, 576, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975), Sim's attorneys first argue that a state "cannot constitutionally confine without more a nondangerous individual who is capable of surviving

safely in freedom by himself or with the help of willing and responsible family members or friends." The present case does not, however, deal with the commitment with which *O'Connor* concerned itself and which the U.S. Supreme Court termed a "massive curtailment of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972).

Sim's attorneys have presented no legal authority which requires the use of a "least restrictive alternative" in a guardianship and conservatorship proceeding such as is at issue in the present case. Indeed, the U.S. Supreme Court imposed no such requirement even when dealing with the substantive rights of involuntarily committed mentally retarded individuals under the 14th amendment to the U.S. Constitution. In *Youngberg v. Romeo*, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982), the U.S. Supreme Court concluded that an involuntarily committed mentally retarded person's liberty interests required only that, in addition to food, shelter, clothing, and medical care, the state provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint, and recognized that in determining what is "reasonable," the courts "must show deference to the judgment exercised by a qualified professional." *Id.* at 322. An application of the *Youngberg* principles is found in *Mental Health Ass'n v. Deukmejian*, 186 Cal. App. 3d 1531, 233 Cal. Rptr. 130 (1986), *modified* 187 Cal. App. 3d 212A, 233 Cal. Rptr. 130, *review denied and ordered not to be officially published* (Cal. Mar. 5, 1987).

Sim's attorneys further contend that the conservatorship statute is vague and overly broad. In arguing that the "necessary or desirable" standard of § 30-2630(2)(ii) and the phrase "the person is unable to manage his or her property and property affairs effectively" in § 30-2630(2)(i) are overbroad, they rely on *In re Boyer*, 636 P.2d 1085 (Utah 1981). In doing so, they characterize *Boyer* as a case where the Supreme Court of Utah "reviewed the constituionality [sic] of the Utah guardianship law which contains standards identical to the guardianship law in Nebraska." Brief for Appellant Sim at 31. What Sim's attorneys fail to state is that in its constitutional review, the *Boyer* court (1) found that while the phrase

"responsible decisions" admitted of a broad interpretation, it was *not unconstitutionally vague* because it was limited to situations wherein the putative ward's decisionmaking process was so impaired that he or she would be unable to care for his or her personal safety or unable to attend to and provide for such necessities as food, shelter, clothing, and necessary medical care; (2) there was no "least restrictive alternative" requirement in a guardianship proceeding; (3) the guardianship statute *was not unconstitutionally overbroad*; (4) the flexibility available to a judge in tailoring a specific remedy to a specific individual lessens the potential for an overly broad deprivation of personal decisionmaking power; and (5) evidence of incompetency must be established by clear and convincing evidence. While it is true the *Boyer* court reversed the appointment of a guardian, it did so not because of a constitutional infirmity but because there was no clear and convincing evidence of incompetency.

There is no merit to this assignment of error.

3. Prepetition Decisions

The third assignment of error asserts that the lower courts erred in failing to interpret "the guardianship law in a way that is consistent with the only constitutional purpose for guardianship so that Mrs. Sim is not 'incapacitated' when she has already made 'responsible decisions' concerning her own person and property."

The key flaw in this assignment is the word "already," because although the record shows that Sim had entered a nursing home before the petition was filed, there had been no decisions "already made" concerning her property. Moreover, the record does not disclose that Sim herself made the decision to enter a nursing home. Another flaw is found in the use of the word "responsible," which refers not only to the method used in the decisionmaking process but to the quality of those decisions as well. The conveyances, trust, and powers of attorney were signed after the subject proceeding was initiated, under circumstances which leave us in doubt as to Sim's level of understanding of the nature and finality of her acts.

The constitutional arguments Sim's attorneys make in connection with this assignment of error have been addressed in the analysis of the first two assignments. As with those

preceding assignments, this third claim is also without merit.

4. Sufficiency of the Evidence

In their fourth assignment Sim's attorneys state the lower courts erred in failing "to hold that, given a proper interpretation of the guardianship law, the determination that imposed guardianship and conservatorship on Mrs. Sim is contrary to the evidence in the case."

This court has long recognized that each case of this type must be determined upon its particular facts. *Hyde v. Crocker*, 185 Neb. 428, 176 N.W.2d 234 (1970); *Cass v. Pense*, 155 Neb. 792, 54 N.W.2d 68 (1952). In each case the question is whether the record is such as to establish that the statutory grounds exist to appoint a guardian or conservator.

The record outlined in part II of this opinion clearly and convincingly shows that at the relevant time, that is, at the time of the appointment of the guardian and conservator, *Hyde v. Crocker, supra*, Sim was, because of advanced age, suffering from a mental deficiency such as to render her unable to care for herself or to manage her assets. She is therefore an "incapacitated person" within the contemplation of § 30-2619. The record also clearly and convincingly establishes that Sim is incapable of demanding an accounting and is unable to understand any accounting her trustee might provide her. She is therefore, as more fully discussed in section 12 hereinafter, a person having property and property affairs which she cannot manage, thereby rendering her property vulnerable to waste and dissipation. Sim is therefore also within the contemplation of § 30-2630. Accordingly, there is no merit to this assignment of error.

5. Evidentiary Rulings

Sim's attorneys in the next, and fifth, assignment pronounce that the courts below erred in "overruling Mrs. Sim's defense against guardianship because they erroneously held that her properly admitted evidence had not been admitted into evidence."

We understand the argument in this connection to be that the county court erred in refusing to consider as having received in evidence certain of Harvey Neumeister's affidavits. It is true that in its judgment the county court observed that affidavits

filed with the clerk but not received in evidence were not evidence. However, the county court judgment does not state that any particular affidavits had not been received. The record in fact reveals that a number of Harvey Neumeister's affidavits offered by the half sisters were received in evidence without objection and that those affidavits include Harvey Neumeister's representations that Sim had made the conveyances, had created the trust, and had granted him the powers of attorney as discussed earlier, in part II of this opinion. Those representations constitute the gravamen of the attorneys' defense to the appointment of a guardian and conservator. Thus, there is no substance to the claim that the "defense against guardianship" was prejudiced by the county court's holding that Sim's "properly admitted evidence had not been admitted into evidence." The attorneys' real complaint seems to be that the county court did not decide the case as they wanted it decided. That is a matter for this court to review and resolve, but there is no merit to this particular assignment.

6. Adequacy of Petition

In the sixth assignment of error Sim's attorneys contend that the courts below "erred in failing to hold that the guardianship law is unconstitutional because it allows orders to be issued against Mrs. Sim on the basis of a constitutionally defective petition for guardianship."

To the extent the argument in connection with this assignment differs from that presented in the next one, it is that a petition which is phrased in statutory terms is somehow constitutionally defective. Sim's attorneys cite no relevant authority in support of that position, and we find none. We note, however, that even in criminal cases, a complaint charging a crime in the words of the relevant statute is deemed sufficient. *State v. Wehrle*, 223 Neb. 928, 395 N.W.2d 142 (1986). Surely, then, a petition such as involved in this case, which is in the words of the relevant statute, is adequate in the absence of a motion for a more definite statement. The fact a party may be entitled to require a more definite statement from a petitioner does not necessarily mean that the statement as originally made was not sufficient to state a cause of action. See *Willis v. Rose*, 223 Neb. 49, 388 N.W.2d 101 (1986). The record in this case

contains no motion for a more definite statement; under such circumstances, any right Sim's attorneys may have had for such was waived. *Lease Northwest v. Davis*, 224 Neb. 617, 400 N.W.2d 220 (1987). This assignment has no merit.

7. No Probable Cause Hearing

In their seventh assignment Sim's attorneys proclaim that there was error "in failing to hold that the guardianship law is unconstitutional because Mrs. Sim was denied the right to have a probable cause hearing after being served with the petition for guardianship."

The essence of the argument in this connection is that the guardianship and conservatorship statutes are flawed, in that they make no provision for a preliminary determination that the allegations of the petition are probably true before permitting an order for medical and psychiatric examinations. In the context of this case, however, the assignment presents a nonissue because Sim's attorneys prevented any examination for many months, and the examination, when finally conducted, established that the allegations of the petition as related to Sim's condition were correct. Under the circumstances, no further discussion is required to demonstrate that the subject assignment is without merit.

8. Conduct of Psychiatric Examination

In the eighth assignment Sim's attorneys aver that Sim was erroneously "deprived of her constitutional right to have the assistance of legal counsel before, during, and after her interrogation by the psychiatrist."

It is to be noted in the first instance that, as reflected in part II of this opinion, the county court only required that the attorneys not interfere with the psychiatric examination; no order prevented the attorneys from consulting with Sim either before or after the examination.

In essence, Sim's attorneys claim that her sixth amendment right to counsel was violated by their inability to be present during the course of the examination.

The difficulty with that position is that it is not supported by either legal authority or sound reasoning. It is true that the cases cited by Sim's attorneys, *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980); *Doe v. Gallinot*, 657 F.2d

1017 (9th Cir. 1981); *Luna v. Van Zandt*, 554 F. Supp. 68 (S.D. Tex. 1982); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974), *reversed* 651 F.2d 387 (5th Cir. 1981); and *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *judgment vacated* 414 U.S. 473, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974), *again vacated* 421 U.S. 957, 95 S. Ct. 1943, 44 L. Ed. 2d 445 (1975), hold that the subject of an involuntary civil commitment proceeding for mental illness, or one being transferred from prison to a mental hospital, is entitled to a due process hearing. None of those cases hold, however, that there exists a right to the presence of counsel during the course of a psychiatric examination. Indeed, *Lynch v. Baxley, supra*, requires only that the names of witnesses, including any examining physicians, be made available to counsel prior to any hearing and that counsel be permitted to inspect any documents or records pertaining to the case. In an analogous matter, the termination of parental rights, this court approved the receipt of evidence which was developed through interviewing the parents outside counsel's presence. *In re Interest of Spradlin*, 214 Neb. 834, 336 N.W.2d 563 (1983), *cert. denied* 464 U.S. 1011, 104 S. Ct. 533, 78 L. Ed. 2d 714.

For the reasons above stated we conclude there is no merit to this assignment of error.

9. Nonrecording of Psychiatric Examination

In this assignment Sim's attorneys urge that Sim was erroneously deprived of her right "to have an official transcript of her interrogation by the psychiatrist after the county court had declared her right, she was denied legal counsel, and she volunteered to pay for the transcript."

It must first be observed that in asserting the county court declared Sim had a right to a transcript of the court-ordered psychiatric examination, Sim's attorneys misrepresent the record. The county court did not declare any "right" to have the examination recorded or that he, the judge, wanted it recorded. The county court gratuitously offered Sim's attorneys an opportunity to have a reporter present if they wished. They told the court they would think it over for a while. Sim's attorneys later sent a letter to the judge to accept the offer. The court then wrote a letter to Dr. Kenney, which stated:

"Please let me know when you plan to go [conduct your examination] and I will call the reporting service and make arrangements for the reporter to meet you at the nursing home."

Dr. Kenney testified that he has performed over 300 of these examinations for the courts and for the Veterans Administration, and never before had there been a court reporter present. Although the court contacted Dr. Kenney before he conducted the examination, he failed to have a reporter present.

Sim's attorneys argue that the absence of a verbatim transcript prejudices Sim's rights in a way that could not be remedied at trial. The fact of the matter, however, is that Sim's attorneys did not even try to refute Dr. Kenney's evidence. They could have arranged their own examination to dispute Sim's mental condition, or simply brought Sim into court to testify that she did not need a guardian or conservator. Sim's attorneys are unable to point to any prejudice that could not be remedied at trial. They had an opportunity to thoroughly cross-examine Dr. Kenney as to all of the events which occurred at his examination and about all of Sim's responses. The results of the examination are uncontroverted. Because of these factors, and because among the more than 45 pounds of paper comprising the record there is not a single answer denying Sim's incompetency, the failure to record the psychiatric evaluation must be viewed as harmless. Error without prejudice is not a ground for reversal. *Hennis v. O'Connor*, 223 Neb. 112, 388 N.W.2d 470 (1986); *Emery v. Mangiameli*, 218 Neb. 740, 359 N.W.2d 83 (1984).

10. Nature of Psychiatric Examination

In their 10th assignment Sim's attorneys allege that the courts below erred "in failing to hold that Mrs. Sim was deprived of her right to be warned that the confidential relationship she has with her regular doctor no longer applies when she is being examined by a court-appointed doctor, and that her statements can be used against her."

This assignment can be resolved quickly, for the characterization of the record by Sim's attorneys is not entirely accurate. While it is true that Dr. Kenney did not say to Sim in so

many words that the statements she made could be used "against her," he did tell Sim, as stated earlier, in part II, that the examination was not confidential because there would be a report to the court. To suggest that such advice is not enough to inform one mentally capable of understanding that no confidential relationship exists and that what she said would be used in the proceeding is ludicrous.

11. No Right to Remain Silent

In this 11th assignment Sim's attorneys postulate there was error "in failing to hold that Mrs. Sim was deprived of her right to remain silent during the interrogation by the psychiatrist so that she is not compelled to be a witness against herself."

The argument made in support of this proposition rests principally upon *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), wherein the U.S. Supreme Court held that a court-ordered psychiatric examination to determine a criminal defendant's competency to stand trial, at which he was not warned he had a right to remain silent, could not be used in determining what penalty should be imposed. The *Estelle* Court ruled that the use of the examination, under the circumstances of that case, violated both the defendant's fifth amendment privilege against self-incrimination and his sixth amendment right to counsel, and thus overturned the imposition of the death penalty. The obvious and fundamental distinction between *Estelle* and the matter before us is that the present case is not a criminal one. In *Kraemer v. Mental Health Board of the State of Nebraska*, 199 Neb. 784, 261 N.W.2d 626 (1978), *cert. denied* 441 U.S. 960, 99 S. Ct. 2403, 60 L. Ed. 2d 1064 (1979), this court examined Neb. Rev. Stat. § 83-1059 (Reissue 1976), which prescribes the rules of evidence applicable to proceedings under the Nebraska Mental Health Commitment Act. In holding that *Miranda* warnings need not be given, the court stated: "In this case Kraemer was not charged with a crime, or even suspected of a crime. He was not being interrogated by a law enforcement officer, but by a doctor and the purpose was to determine, by medical diagnosis, his mental status." 199 Neb. at 795, 261 N.W.2d at 632. We have further held that where medical testing is required by law, there is no requirement in Nebraska that *Miranda* warnings be given.

There is therefore no merit to the effort of Sim's attorneys to impose the requirement that *Miranda* warnings be given prior to a psychiatric examination in guardianship and conservatorship cases. We have held that the *Miranda* rule applies to custodial interrogations by law enforcement officers of persons suspected of or charged with crime. See *State v. Bishop*, 224 Neb. 522, 399 N.W.2d 271 (1987), which holds that there is no requirement that *Miranda* warnings be given prior to requesting a driver to submit to a chemical test of blood, breath, or urine. We have also held that absent questions which would subject a parent to criminal sanctions, a proceeding to terminate parental rights does not trigger the protection afforded by the fifth amendment against self-incrimination. *In re Interest of M.S.*, 218 Neb. 889, 360 N.W.2d 478 (1984), *cert. denied* 471 U.S. 1138, 105 S. Ct. 2680, 86 L. Ed. 2d 698 (1985).

12. Scope of Duties of Guardian and Conservator

In this 12th, and last, assignment, Sim's attorneys conclude that the "district court erred in granting the guardian and conservator unlimited power over Mrs. Sim and her property in violation of the requirement of the least restrictive alternative."

The question is not whether the district court violated any nonexistent "least restrictive alternative" requirement but whether there was any "error appearing on the record made in the county court" which the district court was authorized to correct.

When all is said and done, the overriding issue in this case is whether the record supports the county court's conclusion that a guardian is needed to oversee the care given Sim and to see to it that she is not denied access to visitors, and that a conservator is required to determine what has happened to her assets.

Prior to the designation of a guardian, Sim's attorneys secreted her and restricted her access to visitors. Since the purpose to be served by the guardianship is to see to it that Sim continues to receive appropriate care and is not hidden from her family, the restrictions imposed upon the designated guardian are appropriate.

In essence, the question in connection with the conservatorship is whether the trustee can be made to account. Harvey Neumeister, in his dual role as one of Sim's attorneys

and as her trustee, argues he cannot be so required because the trust instrument provides that he need not account to anyone, presumably not even to Sim as the settlor. Such a position is untenable. Any notion of a trust without accountability is a contradiction in terms. If the trustee cannot be called upon to account, the settlor cannot force the trustee to any particular line of conduct with regard to the trust property, or sue for breach of trust. No trust instrument can relieve a trustee from a duty to account to interested persons. *In re Estate of Wallich*, 18 Utah 2d 240, 420 P.2d 40 (1966); *Wood et al. v. Honeyman et al.*, 178 Or. 484, 169 P.2d 131 (1946). See, also, *Fleener v. Omaha Nat. Co.*, 131 Neb. 253, 267 N.W. 462 (1936); Annot., 171 A.L.R. 631 (1947). Since Sim is in no position to demand or understand an accounting, it is legally right and proper that a conservator make that demand for her. For the present, then, it is appropriate that the conservator's authority be limited as the county court directed. What further authority the conservator may need, if any, will depend upon the outcome of the accounting.

Thus, while our perspective with respect to this assignment is different than that of Sim's attorneys, we nonetheless agree that there was no error on the record made in the county court; accordingly, the district court erred in modifying the county court's judgment.

V. DISPOSITION OF CASE NO. 85-422

For the reasons hereinabove stated, we affirm but modify the district court's judgment by directing that court to affirm the county court's judgment and to remand the cause to the county court with the direction that the county court issue Wood letters of appointment consistent with its judgment.

VI. RESOLUTION OF CASE NO. 85-922

The foregoing disposition of case No. 85-422 renders case No. 85-922 moot. Accordingly, case No. 85-922 is dismissed.

VII. MOTION RE DISQUALIFICATION OF CERTAIN ATTORNEYS

There remains for disposition the motion filed by the Attorney General, who entered the case under the provisions of Neb. Ct. R. of Prac. 16A (rev. 1986) because of the constitutional questions raised, to disqualify both Harvey

Neumeister and Kent Neumeister as attorneys for Sim. The half sisters and Wood joined in the motion, which is grounded on the claim that Canon 5, DR 5-101 and 5-102, of the Code of Professional Responsibility, prohibits members of our bar from at one and the same time acting as attorneys and testifying about substantive matters. While we do not wish to be understood as condoning any violation of our Code of Professional Responsibility, because the record supports the appointment of a guardian and conservator with or without the Neumeisters' participation as witnesses, we overrule the motion without prejudice to such disciplinary sanctions as may prove to be appropriate, if any, because of this and other questionable conduct in which each of Sim's attorneys may have participated.

JUDGMENT IN NO. 85-422 AFFIRMED AS MODIFIED.
APPEAL IN NO. 85-922 DISMISSED.

NEBRASKA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE, V. DENNIS R. MUNDERLOH ET AL., APPELLANTS.
LEON BRUNS AND RONALD BRUNS, DOING BUSINESS AS BRUNS BROTHERS, A PARTNERSHIP, ET AL., APPELLANTS, V. NEBRASKA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.
403 N.W.2d 374

Filed April 10, 1987. No. 85-503.

Easements: Right-of-Way. A segment of a continuous right-of-way, once acquired for a stated purpose, continues to be used for that purpose during the period of time that the holder of the right continues in good faith its efforts to complete the acquisition of the entire right-of-way.

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

David A. Domina and Douglas J. Stratton of Domina & Gerrard, P.C., for appellants.

Noyes W. Rogers of Leininger, Grant, Rogers & Maul, and John C. McClure, for appellee.

Richard M. Duxbury and Mary C. Wickenkamp of Erickson & Sederstrom, P.C., for amici curiae Chambers et al.

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

HASTINGS, J.

This appeal involves 10 consolidated cases relating to construction of easements for an electric power transmission line held by Nebraska Public Power District (NPPD) over various properties located in Thurston County. The cases in which NPPD is the plaintiff are suits seeking injunctions against the landowners to prevent their interference with the use of the easements; the remaining actions are suits for declaratory judgments filed by the landowners seeking adjudications that the easements have expired. The trial court held generally in favor of NPPD in all cases, and the landowners have appealed. The assignments of error simply relate generally to the claimed error of the trial court in not declaring the expiration or termination of the easements. We affirm.

In the early 1970s, NPPD undertook planning studies to construct a 345,000-volt transmission line in northeast Nebraska to interconnect with an Iowa Public Service substation near Raun, Iowa. The line was proposed to run across Stanton, Wayne, Thurston, and Dakota Counties. During late 1978 and early 1979 numerous easements were obtained along the selected route, and construction of the transmission line began.

The documents creating the right-of-way easements now in dispute all contain the following language:

> The District agrees that should said right of way not be used for the purposes herein stated, or should any transmission line constructed hereunder be removed and not replaced by another transmission line, for a period of five years, the right of way and easement hereby secured shall then cease and terminate, and this instrument shall be of no further force and effect.

This language apparently was based on that contained in Neb. Rev. Stat. § 70-303 (Reissue 1986), which reads as follows: "If any pole line or underground line constructed under section 70-301 be abandoned for a period of five years, the right-of-way or easement acquired for its construction shall revert to the owner of the property affected." NPPD argues that the added language in the easement documents relating to "used for the purposes herein stated" was for the purpose of limiting the use of the right-of-way for an electric transmission line only.

It is the landowners' contention that although all of the towers for the electric transmission line have long ago been constructed throughout Stanton, Wayne, and Dakota Counties, no construction has been commenced on nor any known use made of the disputed easements in Thurston County for more than 5 years after the granting of the easements. Therefore, they argue, by the very terms of the documents creating the easements, all rights of NPPD have expired because of nonuse for the stated purpose.

However, NPPD points out that the easements are only about 200 feet in width, and because it has no other access rights to the easements, i.e., no public access, it is necessary for the contractor to move the heavy construction equipment along the easement in a sequential manner.

NPPD was then presented with a problem in Thurston County in which the Winnebago Indian Reservation is located. The route selected by NPPD for the transmission line, which in part crossed the lands which are the subject of this litigation, also crossed 27 tracts of Indian land. Although having been assured by the Bureau of Indian Affairs that there would be no problem acquiring easements of the Indian tracts, the tribal council of the Winnebago Indians passed a resolution objecting to the construction of the transmission line through Indian lands. The western boundaries of the reservation and of Thurston County are conterminous.

According to NPPD, it then became apparent that it would be necessary to commence condemnation proceedings to acquire the remaining easements to complete the transmission line. Recognizing the delays which would be occasioned by

protracted litigation, NPPD obtained an amendment to its construction contract to provide for building of the transmission line from the western terminal at the Hoskins substation in an easterly direction, rather than proceeding from the east to the west.

The record reflects that on April 30, 1979, the Winnebago Tribe filed a lawsuit in the U.S. District Court for the District of Nebraska to prevent construction of the line, which court at first granted a temporary restraining order in favor of the plaintiff, but shortly thereafter ruled in favor of NPPD. A condemnation action was filed on August 14, 1979, to acquire the necessary right-of-way over Indian lands. However, in an order filed October 17, 1979, the U.S. Court of Appeals for the Eighth Circuit issued an order staying the condemnation action and any construction east of the western boundary of the Winnebago Indian Reservation, which order was in force until April 11, 1980, when it was lifted.

The condemnation case in the U.S. District Court finally went to trial in December of 1980, and on June 4, 1982, the court ruled that NPPD did not have the power to condemn easements over the Indian-allotted land. This action was appealed to the U.S. Court of Appeals, which in October of 1983 reversed that portion of the district court's decision and held that NPPD did have the power to condemn such lands. Following this ruling clarifying the various rights of the parties regarding the acquisition of easements over Indian properties, NPPD obtained all of the necessary easements to give NPPD an uninterrupted right-of-way for the completion of the transmission line. It was at this point that certain of the appellants gave notice to NPPD that the easements of 1978 and 1979 would not be honored. The present litigation resulted.

Richard Green, construction manager of NPPD, gave testimony which explained the impossibility of utilizing the easements NPPD had in Thurston County until a continuous right-of-way could be obtained over the Indian lands, as follows:

> Q All right. Why didn't you go and construct on those easements at that time?
>
> A While N.P.P.D. had acquired easements, there were

> also areas within Thurston County — scattered through and along down that right-of-way — that N.P.P.D. had not acquired, in particular the Winnebago Indian land. *And, the absence of that right-of-way or the gap left in those easements made it impossible to construct.* We had no access to go up and down the right-of-way of the transmission line. There were tower sites that we couldn't get to. The contractor had no means at all of which to string wire or to get in and haul materials. There were certain spots that he could get to, but he could not complete the construction.

(Emphasis supplied.)

Although the facts in this case are complex and the record voluminous, we believe the resolution of the dispute is fairly simple. Much of the appellants' legal argument relates to the sanctity of the easements as expressed by their written terms; i.e., an easement specific in its terms is decisive of its limits; if an easement is to continue until terminated in a certain manner, it will continue until so terminated; and if the language of an easement is clear and unambiguous, it may not be varied by parol evidence. With these principles of law we have no quarrel.

However, it seems quite apparent that there was no occasion when the right-of-way, taken as a whole, was not being used for the purposes stated therein. Spot easements acquired, but separated from each other by parcels over which no right-of-way had yet been obtained, had to of necessity simply be "banked" until an unbroken chain of right-of-way was available. As such, those easements were being used.

Although we have been cited to no case directly on point, nor have we been able to find one by our independent research, the case of *Vandewater v. Railway Co.*, 170 Iowa 687, 153 N.W. 190 (1915), may well be applied to the facts of this case by analogy.

In *Vandewater*, the Rock Island proposed to build a line of railway between Greenfield and Winterset, Iowa. Through its exercise of the right of eminent domain, an easement was obtained over the farm of the plaintiff, which lay between the two towns. The Rock Island commenced construction of the line in 1903, building the roadway from Winterset to about 2 miles from plaintiff's land, and from Greenfield to a point

approximately 1 mile from the farm. In the fall of 1903, the Rock Island quit the construction of the road from Greenfield to Winterset, gathered up its materials and equipment, and never returned to recommence construction. Although it does not appear in the reported opinion, it is assumed that it was more than 8 years after 1903 that this action was brought by the plaintiff. He sought to quiet title in himself because of a termination as a matter of law of all rights to the easement once held by the railway company.

The basis of the plaintiff's lawsuit was an Iowa statute, Iowa Code § 2015 (1897), which provided in part as follows:

> If the railway or any part thereof shall not be used or operated for a period of eight years, or if, its construction having been commenced, work on the same has ceased and has not been in good faith resumed for eight years, the right of way, including the road-bed, shall revert to the owner of the land from which said right of way was taken.

Following trial to the court, a decree was entered for the plaintiff, quieting title as prayed.

The Rock Island defended on the theory that the 8-year statute of limitations did not commence to run until construction had been actually commenced and work then abandoned, whereas construction had never been started on the plaintiff's land.

In rejecting this argument, the Supreme Court of Iowa stated as follows:

> To construct this railway, it was necessary to commence somewhere. They did commence at Winterset, and, as we take it, at Greenfield, and constructed a roadbed a large portion of the way between Winterset and the land in controversy, and a large portion of the roadbed between Greenfield and this land. To say that they had not commenced the construction would be to say that the construction was not commenced until the whole roadbed had been built. To say that the words "the construction" of a railway (to start the limitation against any particular landowner) required that the building of some portion of the road had been commenced on his land would be an unreasonable limitation on the words, "its construction

having been commenced." Its construction means the construction of the contemplated railway.

170 Iowa at 694, 153 N.W. at 193.

Adopting the reasoning of the Iowa court, we hold that a segment of a continuous right-of-way, once acquired for a stated purpose, continues to be used for that purpose during the period of time that the holder of the right continues in good faith its efforts to complete the acquisition of the entire right-of-way.

The judgment of the district court is affirmed.

AFFIRMED.

JOHN FREDERICKS, APPELLANT, V. WESTERN LIVESTOCK AUCTION COMPANY, APPELLEE, THE TRUST COMPANY FOR FINANCIAL PLANNING COMMON TRUST FUND FOR QUALIFIED EMPLOYEE BENEFIT PLANS ET AL., INTERVENORS-APPELLEES.

403 N.W.2d 377

Filed April 10, 1987. No. 85-555.

1. **Courts: Judgments.** A district court has the inherent power to vacate its own judgment anytime during the term in which it is rendered.
2. **Default Judgments: Proof.** The vacation of a default judgment rests in the discretion of the district court. The burden rests on the person adversely affected by the court's order to affirmatively establish an abuse of discretion.
3. **Default Judgments: Motions to Vacate.** In considering a request to set aside a default judgment, a court may consider promptness of the motion to vacate, negligence or want of diligence of the party moving to vacate, and avoidance of unnecessary delays and frivolous proceedings in the administration of justice.
4. **Trial: Appeal and Error.** A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or rulings of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through a judicial system.
5. **Default Judgments: Motions to Vacate: Proof: Appeal and Error.** Regarding a refusal to set aside a default judgment, an abuse of discretion may exist where the defaulted party tenders an answer or other proof disclosing a meritorious defense to the action which is the subject of the default.
6. **Actions: Words and Phrases.** A meritorious or substantial defense or cause means one which is worthy of judicial inquiry because it raises a question of law

deserving some investigation and discussion or a real controversy as to the essential facts.

7. **Default Judgments: Motions to Vacate.** A default judgment will not ordinarily be set aside on the application of a party who, by his own fault, negligence, or want of diligence, has failed to protect his own interest. Such a party will not be permitted to ignore the process of the court and thereby impede the termination of litigation.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Larry R. Baumann and Frankie J. Dawson of Kelley, Scritsmier, Moore & Byrne, P.C., for appellant.

Donald E. Rowlands II of Baskins & Rowlands, and Donald W. Pederson of Murphy, Pederson, Piccolo & Pederson, for appellee and intervenor-appellee Trust Fund.

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

SHANAHAN, J.

John Fredericks appeals the order of the district court for Lincoln County refusing to vacate a default judgment against Fredericks. We affirm.

In November 1984, Fredericks filed a "Petition in Replevin" against Western Livestock Auction Company. Fredericks alleged that he was the owner of 189 head of Brangus cattle purchased from another individual not involved in the proceedings and further alleged that Western acquired and retained possession of the cattle as agent for a Texas trust company (Trust Fund). Fredericks requested return of the cattle or an amount equivalent to their value.

Western answered and filed a cross-petition, alleging that Western had been employed by Trust Fund to feed and maintain the cattle pending disposition of claims concerning those cattle and asserting a first lien for veterinary services and maintenance of the cattle, pursuant to Neb. Rev. Stat. §§ 52-601.01, 52-604, and 52-605 (Reissue 1984) (lien for services on personal property). Trust Fund filed a "Petition in Intervention," acknowledging Western's employment concerning the cattle and further alleging that Fredericks was

indebted to Trust Fund as reflected by Fredericks' promissory note. Trust Fund alleged that Fredericks was in default on that promissory note secured by Fredericks' security agreement given to Trust Fund.

The district court permitted Trust Fund's intervention on November 29, 1984, and ordered the parties to plead to Trust Fund's petition within 14 days. Fredericks' demurrer to Trust Fund's petition was overruled, but Fredericks never filed an answer. In its pleading, Western reasserted its lien for the cattle. Both Western and Trust Fund requested that the cattle be sold and proceeds be applied to satisfy the claims of Western and Trust Fund.

On Western's application, the court appointed a receiver with direction to sell the livestock immediately at a public sale, which took place in February and was judicially confirmed on March 12, but distribution of sale proceeds was deferred until completion of trial.

On March 25, 1985, the court held a "preliminary conference" attended by Fredericks' attorney and ordered Fredericks to file an answer within 10 days concerning Western's cross-petition and Trust Fund's petition in intervention. Additionally, the court ordered completion of discovery and a pretrial conference for April 23. On March 26, Fredericks' attorney filed a motion to withdraw from representation of Fredericks and mailed a copy of that motion, as well as notice of hearing on the motion, to Fredericks. After a hearing on April 1, the court allowed Fredericks' attorney to withdraw.

Pursuant to the previous order of March 25, the court held a pretrial conference on April 23. Neither Fredericks nor his attorney appeared at that pretrial conference, where both Western and Trust Fund moved for default judgment against Fredericks. The court entered a default judgment against Fredericks and also dismissed Fredericks' replevin action. At the April 23 pretrial conference, the court received evidence concerning the amounts claimed by Western and Trust Fund and then entered judgment for Western and Trust Fund. The court ordered the receiver to distribute the proceeds from the sale of cattle to Western and Trust Fund according to their

respective claims and the judgment entered. After those payments, any balance of sale proceeds was required to be paid into the registry of the court.

Fredericks wrote to the district court on April 26 and requested "a 30 day stay on the default motion while [he] secure[d] another Nebraska attorney to represent [Fredericks]," which request the district court denied on April 30. Through a successor attorney, Fredericks, on May 23, filed a "Motion to Vacate Default Judgment" and submitted his affidavit alleging he was "unable to secure additional legal representation or file an answer to the Petitions in Intervention and the Crossclaim of [Western] by the deadline for filing said answers on April 4, 1985." In his affidavit Fredericks further alleged that his cattle were wrongfully retained by the Lincoln County sheriff and were not covered by the security agreements and financing statements given to Trust Fund and, further, the receiver did not obtain a commercially reasonable price in the sale of Fredericks' cattle.

On June 24, 1985, the court held an evidential hearing on Fredericks' motion to vacate the default judgment, and Fredericks testified:

> Q [Fredericks' attorney] And you were aware that [your attorney] had withdrawn as being your counsel?
>
> A [Fredericks] Yes.
>
> Q You received notice of that, correct?
>
> A Yes.
>
> Q Were you ever advised that a pre-trial hearing or pre-trial conference was scheduled for the latter part of April of 1985?
>
> A At the time [my attorney] pulled out, he had advised me of a pre-trial conference.

According to the affidavit of Fredericks' former attorney, which was received as evidence, Fredericks was informed on April 22 that the attorney would contact the district court and request additional time for Fredericks to obtain counsel. Fredericks' former attorney did talk to the court on the morning of April 23, before the pretrial conference, and informed the court that Fredericks required additional time to obtain another attorney, but the court denied such additional

time. In a letter dated March 26, 1985, Fredericks' former attorney wrote to Fredericks:

> [E]nclosed is a copy of the Court Order allowing ten days for you to file an answer to the Defendant's Petition and Cross-Petition. You should be aware that if you fail to do this, you will probably be in default, the trust company will receive the money they are asking for and the auction company will receive the funds that they are requesting for their services. . . . I strongly suggest to you that you retain an attorney to see that a proper answer is filed to prevent this from happening.

Fredericks testified he received the foregoing letter sometime after April 1, 1985, but was uncertain of receipt before the pretrial conference on April 23. The district court declined to vacate the default judgment against Fredericks. We make no comment about the procedural propriety of joining the actions pled by the parties. Fredericks has appealed no aspect of the replevin action. Rather, Fredericks' only assignment of error relates to the court's refusal to vacate such default judgment.

A district court has the inherent power to vacate its own judgment anytime during the term in which it is rendered. *Beren Corp. v. Spader*, 198 Neb. 677, 255 N.W.2d 247 (1977). See, also, *Urwin v. Dickerson*, 185 Neb. 86, 173 N.W.2d 874 (1970).

> The vacation of a default judgment rests in the discretion of the district court. The burden rests on the person adversely affected by the court's order to affirmatively establish an abuse of discretion. . . . "Whether a default shall be opened, is a question addressed to the discretion of the court. The Supreme Court will not interfere with its exercise, unless it is oppressive."

(Citation omitted.) *Commercial Sav. & Loan Assn. v. Holly Development, Inc.*, 182 Neb. 335, 339, 154 N.W.2d 510, 513 (1967).

The district court's discretion must be exercised reasonably, not arbitrarily. See *Steinberg v. Stahlnecker*, 200 Neb. 466, 263 N.W.2d 861 (1978). The facts and circumstances in each case determine whether the district court's discretion has been exercised reasonably. See *Michaelis v. Michaelis*, 187 Neb. 350,

190 N.W.2d 783 (1971). In considering a request to set aside a default judgment, a court may consider promptness of the motion to vacate, negligence or want of diligence of the party moving to vacate, and avoidance of unnecessary delays and frivolous proceedings in the administration of justice. *Michaelis v. Michaelis, supra.*

> "A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or rulings of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through a judicial system."

Newton v. Brown, 222 Neb. 605, 617-18, 386 N.W.2d 424, 432 (1986). See, also, *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986).

Regarding a refusal to set aside a default judgment, an abuse of discretion may exist where the defaulted party tenders an answer or other proof disclosing a meritorious defense to the action which is the subject of the default. *Lincoln Welding Supply v. Inhalation Plastics*, 213 Neb. 862, 331 N.W.2d 804 (1983); *Steinberg v. Stahlnecker, supra.* " 'A meritorious or substantial defense or cause means one which is worthy of judicial inquiry because it raises a question of law deserving some investigation and discussion or a real controversy as to the essential facts.' " *Steinberg v. Stahlnecker, supra* at 468, 263 N.W.2d at 862-63.

In seeking to set aside the default judgment against him, Fredericks raised some question about the propriety of actions by the sheriff and receiver and the correctness of his security agreements and financing statements given to Trust Fund. The record does not disclose that Fredericks has challenged the order entered March 12, 1985, confirming the sale of Fredericks' cattle. Questions raised by Fredericks relate to the replevin action, a matter which is not before this court. Fredericks has never questioned the claim of Western or existence of the debt owed to Trust Fund. Without Fredericks' allegation of a meritorious defense concerning the claims of Western and Trust Fund, we cannot begin to evaluate whether there has been an abuse of discretion by the trial court.

The evidence clearly shows that Fredericks knew that his attorney had withdrawn before the pretrial conference, which had been scheduled for April 23, 1985, and that Fredericks had been informed about the consequences of failure to file an answer and, therefore, become in default in the proceedings. Fredericks has offered no valid excuse for his failure to appear personally or by counsel at the pretrial conference. While Fredericks may have appeared personally, if unable to obtain representation for the pretrial conference, he instead chose to ignore the obligation for his appearance before the court on a matter scheduled and called to Fredericks' attention. As we stated in *Commercial Sav. & Loan Assn. v. Holly Development, Inc., supra* at 341-42, 154 N.W.2d at 514:

> A default judgment will not ordinarily be set aside on the application of a party who, by his own fault, negligence, or want of diligence, has failed to protect his own interests. Such a party will not be permitted to ignore the process of the court and thereby impede the termination of litigation.

Moreover, a motion for continuance was not filed. In the circumstances of this case, the oral request for a continuance does not comply with Neb. Rev. Stat. § 25-1148 (Reissue 1985), which provides in part:

> Whenever application for continuance or adjournment is made by a party or parties to any cause or proceeding pending in the district court of any county, such application shall be by written motion entitled in said cause or proceeding and setting forth the grounds upon which said application is made, which motion shall be supported by the affidavit or affidavits of person or persons competent to testify as witnesses under the laws of this state, in proof of and setting forth the facts upon which such continuance or adjournment is asked.

The district court did not abuse its discretion in declining to set aside the default judgment entered against Fredericks. The judgment of the district court is affirmed.

AFFIRMED.

UNITED STATES FIRE INSURANCE COMPANY, APPELLEE, V. AFFILIATED FM INSURANCE COMPANY, APPELLEE, VANN REALTY COMPANY, A NEBRASKA CORPORATION, APPELLANT.

403 N.W.2d 383

Filed April 10, 1987. No. 85-644.

1. **Pleadings: Motions to Dismiss.** A pretrial motion to dismiss another's action is not a permissible pleading.
2. _____: _____. Under certain circumstances, and where by stipulation of the parties or court rule it is allowed, a pretrial motion to dismiss may be treated as a demurrer.
3. **Dismissal and Nonsuit.** A plaintiff has the right to dismiss the action it has brought at any time prior to final submission.
4. **Pleadings: Motions to Dismiss.** A pretrial motion to dismiss made by a plaintiff may be treated as a voluntary dismissal of the plaintiff's petition at plaintiff's costs.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded for further proceedings.

Warren S. Zweiback and Maria R. Leslie of Zweiback, Flaherty, Betterman & Lamberty, P.C., for appellant.

Melvin C. Hansen of Hansen, Engles & Locher, P.C., for appellee United States Fire Insurance.

Thomas J. Walsh, Sr., of Walsh, Fullenkamp, Doyle & Rau, for appellee Affiliated FM Insurance.

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

PER CURIAM.

Appellee United States Fire Insurance Company, which had issued a policy of insurance to appellant, Vann Realty Company, a Nebraska corporation, brought a declaratory judgment action against Vann Realty and appellee Affiliated FM Insurance Company, which had also issued a policy, seeking an adjudication that an Affiliated policy provided Vann Realty with certain coverages. Vann Realty in turn counterclaimed against United States Fire and cross-claimed against Affiliated, alleging that the policy each of them issued provided Vann Realty with the coverages in question. By an irregular

procedure which is more fully described hereinafter, the district court dismissed all pending actions without prejudice at United States Fire's cost, and denied Vann Realty's application for fees and costs. We reverse and remand for further proceedings.

Vann Realty managed the Fox Run apartment complex in Omaha. United States Fire had issued a policy which required it to pay all sums Vann Realty, as the named insured, should become legally obligated to pay for property damage arising out of Vann Realty's "ownership, maintenance or use of" the Fox Run complex and "all operations necessary or incidental to [Vann Realty's business] conducted at or from" that complex, and to defend any suit seeking recovery from Vann Realty as a consequence of such damage. The policy, however, excluded from coverage "property damage to property in the care, custody or control" of Vann Realty or as to which Vann Realty was "for any purpose exercising physical control."

Affiliated had issued a policy to Howard D. and Judith M. Vann, which included as additional insureds the corporation owning the Fox Run complex and "any person (other than an employee of the named insured) or organization while acting as real estate manager for the named insured." The pertinent insuring and exclusionary language of the Affiliated policy is identical to that of the United States Fire policy.

The events underlying the present dispute started when the pipes at one of the Fox Run complex buildings began to freeze. Because the regular maintenance man had been called to another location, Ruth Smith, the resident manager of the Fox Run complex, telephoned Susan Blum, an employee of Vann Realty, and asked permission to rent a propane heater to use in thawing the pipes. Mrs. Smith's husband, Robert Smith, then attempted to heat the pipes. In the process the heater caused an explosion and fire which destroyed the subject building. Both of the above-described policies were in full force and effect at the time of the fire.

Affiliated paid the corporation owning the Fox Run complex for its damages. That corporation thereafter, presumably on behalf of Affiliated, filed suit against a number of defendants, alleging that their negligence resulted in the propane heater's causing an explosion and thereby became the proximate cause

of the fire. Those defendants in turn filed a third-party complaint against Vann Realty, alleging that it was the negligence of Vann Realty's employee, Robert Smith, which proximately caused the fire. It appears that United States Fire defended Vann Realty under a reservation of rights, the terms of which are not included in the record. It further appears that this underlying litigation was settled and the third-party complaint against Vann Realty dismissed without prejudice.

In the meantime, United States Fire had filed the declaratory judgment action which is the subject of this appeal, alleging that its policy would not provide coverage to Vann Realty for the underlying litigation and, as indicated previously, seeking an adjudication that the Affiliated policy did provide such coverage. The issues raised and discussed by the parties to this appeal focus on who employed the Smiths and whether, in any event, the "care, custody or control" exclusions apply, these determinations being treated as pivotal to the question of whether Vann Realty is entitled to coverage under the policies and to thereby recover certain attorney fees and costs from the two insurers.

However, because of the procedural posture in which this case comes to us, we do not reach those issues. United States Fire filed a "Motion to Dismiss" without prejudice "all claims pending" in its declaratory judgment action. Affiliated also filed a "Motion to Dismiss" United States Fire's declaratory judgment action and a "Motion to Dismiss Counterclaim of Vann Realty Company." The district court's order recites that the matter came on for hearing "on the motion[s] to dismiss filed by the plaintiff, United States Fire Insurance Company, and by the defendant, The Affiliated F. M. Insurance Company, and on the application for allowance of attorneys fees and costs filed by the defendant The Vann Realty Company." The district court dismissed all pending actions without prejudice on the ground that settlement of the underlying litigation rendered the actions involved in the present case moot, and denied Vann Realty fees because no favorable declaratory relief had been granted to it.

The difficulty is that the case was resolved through a procedure not recognized in our law. The district court

undertook to dispose of the actions on the basis of evidence presented in conjunction with pretrial motions to dismiss. In rejecting that procedure in *Voyles v. DeBrown Leasing, Inc.*, 222 Neb. 250, 383 N.W.2d 36 (1986), we again observed that a pretrial motion to dismiss another's action is not a permissible pleading. Accord, *Smick v. Langvardt*, 216 Neb. 778, 345 N.W.2d 830 (1984); *Nelson v. Sioux City Boat Club*, 216 Neb. 484, 344 N.W.2d 634 (1984); *Blitzkie v. State*, 216 Neb. 105, 342 N.W.2d 5 (1983).

It is true that under certain circumstances, and where by stipulation of the parties or court rule it is allowed, such an irregular motion may be treated as a demurrer. *Voyles v. DeBrown Leasing, Inc., supra; Smick v. Langvardt, supra; Nelson v. Sioux City Boat Club, supra; Blitzkie v. State, supra.* Such circumstances do not, however, exist in the present case; not only does the record not show a stipulation or court rule permitting such treatment, but the matter cannot be resolved solely on the basis of the allegations of United States Fire's petition or of Vann Realty's counterclaim and cross-petition.

Accordingly, Affiliated's motions are nullities. However, a plaintiff has the right to dismiss the action it has brought at any time prior to final submission. *Schroeder v. Schroeder*, 223 Neb. 684, 392 N.W.2d 787 (1986); Neb. Rev. Stat. § 25-601 (Reissue 1985). United States Fire's motion is therefore a valid dismissal of its petition against Affiliated and Vann Realty without prejudice, at United States Fire's costs. The matter thus pends on Vann Realty's counterclaim against United States Fire and cross-claim against Affiliated on which the evidence taken constitutes but a partial trial.

The question therefore becomes whether the district court could correctly conclude on the basis of that partial trial that the actions presented by Vann Realty's counterclaim against United States Fire and cross-petition against Affiliated were moot. The filing of the present action required Vann Realty to litigate its rights under the policies. That being so, Vann Realty's counterclaim against United States Fire presents a viable justiciable issue under Neb. Rev. Stat. § 44-359 (Reissue 1984), which provides that when one entitled thereto brings an action on an insurance policy, the court, "upon rendering judgment

against" the insurer, shall allow the plaintiff a reasonable attorney fee. In order to determine whether Vann Realty is entitled to any attorney fee on its counterclaim in the present action, it is necessary that the district court determine whether the United States Fire policy obligated it to defend the allegations made against Vann Realty in the underlying litigation. That cannot be done on the basis of the partial trial had.

Vann Realty's cross-petition against Affiliated is another matter. Affiliated did not institute this action, and whether it was correct or incorrect in deciding not to defend or make any payment on behalf of Vann Realty is, on the basis of the record developed to date, immaterial to Vann Realty because United States Fire defended and settled the underlying litigation. The posture of the case is such, however, that the district court was not yet entitled to rule on Vann Realty's cross-petition against Affiliated.

Thus, the order of the district court is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

LOIS HAVLICEK, APPELLEE, V. YOGESH DESAI, APPELLANT, DESAI CORPORATION ET AL., APPELLEES.

403 N.W.2d 386

Filed April 10, 1987. No. 85-718.

1. **Directed Verdict.** On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can be deduced therefrom.
2. **Verdicts: Appeal and Error.** A jury verdict will not be disturbed on appeal unless it is clearly wrong.
3. **Negligence.** Where the negligence charged furnishes only a condition by which the injury is made possible, and a subsequent independent act of a third party causes the injury, the two acts are not concurrent, and the existence of the condition is not the proximate cause of the injury.

4. **Invitor-Invitee: Negligence.** A failure to provide a business invitee with adequate lighting on a stairway may support an action for negligence.
5. _____: _____. The proprietor of a business establishment generally has a legal duty to exercise ordinary care to keep his or her premises reasonably safe for use by a business invitee.
6. **Invitor-Invitee: Liability: Negligence: Proof.** In cases when liability for injuries suffered on business premises is being predicated on the owner's or operator's failure to remove or remedy a hazardous condition, unless the evidence shows that the alleged hazardous condition existed and was known to exist by the defendant, the party injured must prove either that the condition was created by the defendant or that it had existed a long enough time prior to the accident to charge the defendant or the defendant's servants with notice to afford them a reasonable opportunity to remedy such condition. However, when a business proprietor is under an affirmative obligation to provide proper lighting to reveal a hazardous condition, such proprietor has in effect created the condition and it is not necessary to prove that he or she had actual or constructive knowledge of the situation.
7. **Invitor-Invitee: Negligence: Proof.** Where a business proprietor has an affirmative duty to provide adequate lighting, and there is some reasonable explanation why such was not accomplished, it is incumbent upon that proprietor to produce that evidence as part of his or her defense.
8. **Verdicts: Damages: New Trial.** A jury verdict which is wholly inadequate as to amount of damages, and therefore is not supported by the evidence, must be set aside and a new trial granted.

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

Thomas C. Sattler of Knudsen, Berkheimer, Richardson & Endacott, for appellant.

Hal Bauer of Bauer, Galter & O'Brien, for appellee Havlicek.

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

HASTINGS, J.

This is an appeal from the district court for Lancaster County in which the plaintiff received a jury verdict for "$0" in her personal injury case. The plaintiff brought a motion for a new trial on the basis that the court had accepted a verdict for "$0," which motion the court sustained. The defendant brought a motion for judgment notwithstanding the verdict, which was overruled. The defendant Yogesh Desai appeals.

Although the defendant's first assignment of error is general,

his arguments make it clear he contends the court erred in overruling his motion for judgment notwithstanding the verdict because the court failed to find that (1) plaintiff was contributorily negligent as a matter of law; (2) inadequate lighting is a mere condition and not a proximate cause; and (3) the plaintiff failed to present evidence of the defendant's constructive notice of any inadequate lighting. The defendant also insists that the court erred in sustaining plaintiff's motion for a new trial because a verdict for "$0" is a valid verdict in this case. We find the district court did not err.

The evening of March 4, 1983, the plaintiff and her husband, son, and granddaughter went to the Congress Inn located at 2001 West O Street in Lincoln, Nebraska, to eat dinner. Plaintiff and her granddaughter were dropped off at the north entrance of the restaurant. Plaintiff's husband then drove the car around to the south parking lot and he and the son joined plaintiff and her granddaughter in the restaurant. When the family finished eating, everyone but the plaintiff walked to the car while she finished filling two foam containers, which were used as doggie bags.

When plaintiff left the restaurant through the south exit, it was past sundown, overcast, and sprinkling or raining. She testified on direct examination that she walked out the door, stopped, and looked because she did not know where her husband was parked. She was impeached on cross-examination with a prior deposition in which she stated that she did not pause or hesitate at all. In any event, by the time she got outside, her husband had turned on the car lights so she could see where the car was. On direct examination she testified that the car was to the west and she started heading toward it. With foam containers in her hands and a purse slung over her shoulder, she went west down the sidewalk close to the building, which was protected from the rain by an overhang. On cross-examination she testified that she was not walking particularly faster than usual, but in her prior deposition she agreed she probably was walking a little faster than usual.

On cross-examination plaintiff further testified that she could see outlines of things, but in her deposition she stated that she did not believe she could see the ground in front of her, that

it was very dark. There were recessed light fixtures in the soffit of the overhang, but they were not lit at the time. There was a neon sign, over the exit door, which was on and emanating light. That neon sign illuminated a short sidewalk which went directly south into the parking lot. As she moved west, she was moving away from that light. On cross-examination she testified it was not necessary to take the sidewalk to the west, and in her deposition she agreed she was taking a shortcut by going to the west. As she walked down the sidewalk, she suddenly stepped off into "nothingness." She had fallen down an unlighted stairway.

After she fell, plaintiff's husband and son carried her to their pickup and took her to Lincoln General Hospital. The x-ray report indicated a hairline fracture in the midbody of the sacrum, with no displacement. Dr. Sposato, the neurologist to whom the plaintiff was referred by her primary physician, diagnosed the plaintiff's injury as a fractured sacrum with injury to nerves in that area, which was consistent with a fall like the one the plaintiff took. For a while after the accident, the plaintiff lost control of both bladder and bowel. She was also numb in the rectal and vaginal areas. She could not go to work for 6 weeks because of the pain. At the time of the accident she earned $228 per week. Also, she still lacked the sensation of having to go to the bathroom.

The defendant first assigns as error the overruling of his motion for judgment notwithstanding the verdict. On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can be deduced therefrom. *Farm Bureau Life Ins. Co. v. Luebbe*, 218 Neb. 694, 358 N.W.2d 754 (1984). A jury verdict will not be disturbed unless it is clearly wrong. *Id.*

Our review of the facts shows that the trial court was correct in overruling the defendant's motion for judgment notwithstanding the verdict. The jury's verdict as to liability was not clearly wrong.

To support his first assignment of error the defendant argues

that the plaintiff was contributorily negligent as a matter of law. With this argument we cannot agree. The facts were disputed as to how dark it was outside, how quickly the plaintiff was walking, and whether she paused or hesitated as she left the restaurant. Whether it was unreasonable for the plaintiff to have taken the sidewalk to the west instead of the one to the south was a question of fact for the jury. In the former case, the plaintiff could walk along a paved sidewalk protected from the rain, while in the latter case, she could walk for a short distance to the south on the pavement which was illuminated by the neon sign, but then would have to walk in the rain away from the light again to get to her vehicle. The failure to take alternative courses of action suggested by defendant's counsel—using a lighter or matches to light her way, calling out to her family for help, stopping, and going back into the restaurant for assistance—all bear directly on the reasonableness of the plaintiff's actions, but do not rise to the level of contributory negligence as a matter of law.

The defendant next argues that his motion for judgment notwithstanding the verdict should have been granted because inadequate lighting is a mere condition and cannot be the proximate cause of plaintiff's injuries. In support of this argument the defendant cites *Childers v. LCW Apartments*, 214 Neb. 291, 333 N.W.2d 677 (1983), a case in which plaintiff was brutally attacked, in the parking lot of the apartment complex where she lived, by two men intent upon stealing her car. The plaintiff asserted that "the alleged inadequate lighting was active and therefore a concurrent cause which, operating with the tortious conduct of the two robbers, proximately caused her injuries and consequent damages." *Id.* at 294, 333 N.W.2d at 679. We held that in such a situation inadequate lighting was a condition, not active negligence, and the plaintiff was not entitled to an instruction on concurring cause identical to that found in NJI 3.42.

In *Childers* and other cases in which we have made a distinction between condition and cause, see, e.g., *Bringewatt v. Mueller*, 201 Neb. 736, 272 N.W.2d 37 (1978), *Connolley v. Omaha Public Power Dist.*, 185 Neb. 501, 177 N.W.2d 492 (1970), and *Bruno v. Gunnison Contractors, Inc.*, 176 Neb.

462, 126 N.W.2d 477 (1964), there were two alleged negligent parties. The rule in such a case is: "[W]here the negligence charged furnishes only a condition by which the injury is made possible, and a subsequent independent act of a third party causes the injury, the two acts are not concurrent, and the existence of the condition is not the proximate cause of the injury . . . ." *Connolley, supra* at 508, 177 N.W.2d at 496.

The defendant's reliance on this rule is misplaced. The distinction between condition and cause has no application where, as here, there is no subsequent independent act of a third party which causes the injury. Additionally, we have stated that failure to provide a business invitee with adequate lighting on a stairway may support an action for negligence. *Broadston v. Beddeo Clothing Co.*, 104 Neb. 604, 178 N.W. 190 (1920).

In support of his first assignment of error, the defendant lastly argues that the plaintiff failed to present evidence of the defendant's actual or constructive notice of any inadequate lighting. The defendant acknowledges that the plaintiff is an invitee on the defendant's place of business and that he therefore had a legal duty to exercise ordinary care to keep his premises reasonably safe for her use. *Lund v. Mangelson*, 183 Neb. 99, 158 N.W.2d 223 (1968).

The defendant next cites this court to cases in which persons slipped and fell because of various substances on the floors of the businesses. See, e.g., *Jeffries v. Safeway Stores, Inc.*, 176 Neb. 347, 125 N.W.2d 914 (1964); *Taylor v. J. M. McDonald Co.*, 156 Neb. 437, 56 N.W.2d 610 (1953); *Broadston v. Beddeo Clothing Co., supra*. In cases such as those, when liability is being predicated on the defendant's failure to remove or remedy the hazardous condition, unless the evidence shows that the alleged hazardous condition existed and was known to exist by the defendant, the plaintiff must prove either that the condition was created by the defendant or that it had existed a long enough time prior to the accident to charge the defendant's servants with notice to afford them a reasonable opportunity to remedy it. The defendant in this case argues that the hazardous condition was not created by the defendant, and therefore the plaintiff was required to show actual or constructive notice of the hazardous condition. That is not the case.

The defendant in this case was under an affirmative obligation to light his business premises in such a manner as to make the stairway visible to the plaintiff. *Broadston v. Beddeo Clothing Co., supra.* The evidence was undisputed that no light illuminated the stairway and that the stairway would be unsafe at night with no lights on. Thus, when the defendant failed to provide adequate lighting, he created the hazardous condition that proximately caused the plaintiff's injuries. Because the defendant created the hazardous condition, the plaintiff did not have to bring forth evidence as to the defendant's actual or constructive knowledge of the hazardous condition. If there were some reasonable explanation as to why there were no lights on that night, it was incumbent upon the defendant to produce that evidence as part of his defense.

The defendant also assigns as error the district court's sustaining of the plaintiff's motion for a new trial. The jury reached a verdict for the plaintiff but assessed her damages as "$0," which the district court accepted. The plaintiff then made a motion for a new trial for various reasons, one being that the court erred in accepting the verdict of the jury when it held for the plaintiff in the sum of zero dollars. The court sustained the plaintiff's motion for a new trial for that reason alone. The defendant believes that under the circumstances of this case it was appropriate for the court to accept the verdict for zero dollars. In support of this argument the defendant asks this court to overrule *Bushey v. French*, 171 Neb. 809, 108 N.W.2d 237 (1961). We decline to so do.

In *Bushey v. French, supra*, the jury returned a verdict for the plaintiff and assessed the amount of his recovery against the defendant in the sum of "$ No Money." This court then cited the rule in other jurisdictions that such a verdict confers no authority to enter a judgment upon it. *Id.* We then indicated that this rule should be adopted in Nebraska, especially in light of the fact that it was undisputed the plaintiff sustained pain and suffering and some disability for which he was entitled to be compensated if liability was established. We therefore held that the trial court erred in receiving the verdict, in rendering judgment for the defendant thereon, and in not sustaining the plaintiff's motion for a new trial.

In the present case it was equally obvious that the plaintiff suffered some damages as a result of her injuries. Even if the jury disbelieved the extent of her pain and suffering, at the very least the plaintiff proved that she had lost 6 weeks of work, at $228 per week, due to her fall. Dr. Sposato, although not relating with any specificity the type of her disability other than the numbness in the areas affected, concluded that her condition amounted to a permanent disability. In such a case the jury's verdict of "$0" was wholly inadequate and unsupported by the evidence, and the trial court was correct in sustaining plaintiff's motion for a new trial. *O'Neil v. Behrendt*, 212 Neb. 372, 322 N.W.2d 790 (1982).

The judgment of the district court is affirmed.

AFFIRMED.

VICTOR LAMBELET ET AL., APPELLANTS, V. HARRY NOVAK ET AL., APPELLEES.

404 N.W.2d 28

Filed April 17, 1987. No. 85-401.

1. **Directed Verdict.** A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence.
2. _____. The parties against whom the verdict is directed are entitled to have every controverted fact resolved in their favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the parties against whom the motion is made, the case may not be decided as a matter of law.
3. **Fraud.** In order to maintain a cause of action for false representation, the plaintiff must allege and prove by a preponderance of the evidence (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 the plaintiff suffered damages as a result.

Appeal from the District Court for Nemaha County: ROBERT T. FINN, Judge. Affirmed.

Joseph Ginsburg of Erickson & Sederstrom, P.C., for appellants.

Otto H. Wellensiek of Wellensiek, Rehmeier & Kelch, for appellees.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

Plaintiffs-appellants, Victor and Juanita Lambelet, husband and wife, and their daughter, Sylvia Lambelet Driskell, filed their petition in the district court for Nemaha County, Nebraska, seeking damages against defendants-appellees, Harry and Norma Novak, in connection with the purchase of a house located on 1.06 acres in Nemaha County. Plaintiffs set out three "causes of action," seeking damages. The first cause of action pled the alleged fraud of defendants in advising plaintiffs that the existing water system to the residence was in good operating condition for domestic purposes and would supply potable water, when, in fact, the water was contaminated and unfit for human use. The first cause sought damages for the fair and reasonable cost of replacing the water system to furnish potable water. The second cause of action sought damages for "physical detriment and injury" from drinking the contaminated water. The third cause alleged that defendants knew, or should have known, that the use of "sprays, chemicals and herbicides . . . would further contaminate water from the well," but that defendants caused the area of the well, which was located on land retained by defendants, to be sprayed, and thus caused the well to be unusable. Plaintiffs sought damages of $25,000 on the first and third causes of action, and general damages on the second.

Defendants generally denied all the allegations of the petition and, with regard to the first cause of action, alleged that the house had been sold "as is," that no representation had been made, and that plaintiffs had full knowledge of the condition of the premises at the time the purchase contract was executed.

The case was tried to a jury. After the plaintiffs rested, defendants moved for a directed verdict on all three causes of

action. The trial court sustained the motion. Plaintiffs timely appealed to this court, assigning as error the actions of the trial court in directing a verdict in favor of defendants and in sustaining objections to some of plaintiffs' exhibits. We affirm.

Our review of an appeal from an order dismissing plaintiffs' case at the conclusion of the plaintiffs' evidence is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence. *Vice v. Darm Corp.*, 224 Neb. 1, 395 N.W.2d 524 (1986); *Greening v. School Dist. of Millard*, 223 Neb. 729, 393 N.W.2d 51 (1986). Further, the parties against whom the verdict is directed are entitled to have every controverted fact resolved in their favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the parties against whom the motion is made, the case may not be decided as a matter of law. *Kahrhoff v. Kohl*, 219 Neb. 742, 366 N.W.2d 128 (1985); *Whitaker v. Burlington Northern, Inc.*, 218 Neb. 90, 352 N.W.2d 589 (1984).

Plaintiffs' evidence, when viewed in the light most favorable to plaintiffs, shows the following. Plaintiffs, together with two other children of Victor and Juanita Lambelet and the husband and child of Sylvia Lambelet Driskell, were looking for a residence for the group. Plaintiffs had lived together in Johnson County, Nebraska, for 16 years before selling that acreage in 1977 and moving to Texas. The group returned to Nebraska in May of 1983 in trailers and were staying at a state park in Beatrice, Nebraska.

In driving in the area sometime in May 1983, plaintiffs saw a two-story house in Nemaha County, located on a farm which they found out was owned by defendants. On the next day plaintiffs called defendants, who lived in Nebraska City. Plaintiffs then saw Dale Cullen, an attorney in Auburn, Nebraska, who also called defendants, at plaintiffs' request. In the evening of the same day, plaintiffs met defendants at their home in Nebraska City. All matters between plaintiffs and defendants were handled solely by defendant Harry Novak, and "defendant," as used herein, refers to him. The parties discussed the possible purchase of the residence and 2 acres of

the farm, and defendant told plaintiffs he would be willing to sell. The parties agreed to meet on the premises the following morning.

At that meeting, plaintiffs examined the house and the parties discussed the purchase of the property. Plaintiffs saw that the house needed a "lot of repairs" and that the pump motors in the basement were unhooked. Defendant stated he would get the motors in good working order before the contract was executed. Plaintiffs then discussed the expense of driving back and forth from Beatrice to do the house repairs themselves, and defendant suggested, "If you have trailers, why, you can just pull them here beside the house. No one's using it." There is nothing in the record indicating any representation made as to the condition of the water at this time.

Plaintiffs moved their trailers to the defendants' property that day, and continued to live in the trailers there until November of 1983. During this period of time defendant would come to the property to meet with the plaintiffs. On his second visit, the defendant was asked about the water. He replied, "There's plenty of water. It's good water; it's good spring water. . . . You have nothing to worry about."

A contract for the sale was to be drawn by Cullen, who was the attorney selected by, and acting on behalf of, the plaintiffs. The parties agreed that defendant would pay for Cullen's services. At a date not shown in the record, a proposed draft of the contract was given to the plaintiffs. Subsequently, the plaintiffs executed the contract in final form for the purchase of the property on October 3, 1983. A provision stating plaintiffs were "purchasing said real property, and any improvements thereon 'as is' " remained in the contract when it was signed by the plaintiffs. Plaintiffs testified they had reviewed the contract and suggested changes in it, but testified the changes were not all made by the attorney.

Approximately 2 days before signing the contract, the plaintiffs again asked defendant about the water supply. The plaintiffs testified they expressed their concern about the need for pure water. Sylvia Driskell testified that when asked whether or not he would guarantee the water to be good, the

defendant responded that he would. Juanita Lambelet testified at trial that the defendant said at this time, "I will guarantee the water. I cannot guarantee the machinery but I will guarantee the water to be pure and drinkable." Mrs. Lambelet and Mrs. Driskell testified that the defendant then took a drink of the water.

The plaintiffs moved into the house sometime in November of 1983. The pumps had been repaired, and this was the first time that any water was consumed from the tap. Shortly after the family began using the water they became nauseated, had headaches, and began vomiting. Plaintiffs continued to use the water between November of 1983 and March of 1984, when they stopped using the well water.

In their first cause, plaintiffs rely on the theory of false representation, and not on fraudulent concealment. This court has held that in order to maintain a cause of action for false representation the plaintiff must allege and prove by a preponderance of the evidence (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 the plaintiff suffered damages as a result. *Nelson v. Cheney*, 224 Neb. 756, 401 N.W.2d 472 (1987).

Considering these elements, the record of the case at bar shows that plaintiffs have failed to maintain their first cause of action. Plaintiffs adduced evidence which, if believed, showed that defendant did make representations and that the representations were made with the intention that plaintiffs should rely on them.

Plaintiffs did not prove that the representations were false when made, however. With regard to the falsity of the statements, plaintiffs testified the defendant made those statements on two occasions: at the second time the property was viewed by plaintiffs in May of 1983, and again approximately 2 days before plaintiffs signed the contract on October 3, 1983. Plaintiffs did not use the water until sometime in November of 1983, and the water was not tested until

November 29, 1984. That test showed a high level of nitrates, but there was further testimony from plaintiffs' witness that the nitrate level in November of 1984 was not indicative of the levels of nitrates at the time the representations were made. The witness testified on cross-examination that levels of nitrates could fluctuate on a monthly basis. No evidence was adduced as to the quality of the water at the times the representations were made, although plaintiffs resided in close proximity to the well in question for more than 4 months before signing the contract. The trial court did not err in directing a verdict for defendants on plaintiffs' first cause of action.

Plaintiffs' second cause of action made the same allegations as those set out in their first cause, adding only that the water caused "plaintiffs and various members under their control" to become ill as a result of imbibing the "contaminated water." In addition to the problems of plaintiffs' proof as set out above, evidence was lacking as to the proximate causation of plaintiffs' illness, and the trial court properly directed the verdict, on this cause of action, for defendants.

Plaintiffs' third cause of action was based upon defendant's negligent use of sprays containing "highly dangerous and poisonous combinations of herbicides, weed killers and the like," resulting in rendering the well used by plaintiffs unusable. In a case in negligence, to establish a prima facie case the plaintiff must establish evidence of causation. *Hilt Truck Line v. Pullman, Inc.*, 222 Neb. 65, 382 N.W.2d 310 (1986); *Greening v. School Dist. of Millard*, 223 Neb. 729, 393 N.W.2d 51 (1986). In the case at bar plaintiffs did not establish any causal link between any farming operations of the defendant and the tainting of plaintiffs' well. Sylvia Driskell testified that she saw defendant's agents spraying his field, but there is nothing in the record showing what was being sprayed, when the spraying took place, or whether the spray contained any type of "poisonous combinations of herbicides, weed killers and the like." In the absence of any evidence as to what the defendant was spraying, and the effect of that spraying, the trial court properly dismissed plaintiffs' third cause of action.

Finally, plaintiffs argue the court erred in excluding plaintiffs' exhibits 1, 2, 3, 6, 7, and 8. The bill of exceptions

shows exhibits 3 and 8 were received in evidence. Exhibits 1 and 2 were state microbiology reports on water samples which showed on their face were taken on May 25 and 30 and June 4, 1984, by Victor Lambelet, one of the plaintiffs. Mr. Lambelet did not testify at the trial, and plaintiffs' witness, an employee of the state Department of Health, testified he did not know if the exhibits pertained to the well in question. Defendants' objections to exhibits 1 and 2 were properly sustained.

Exhibit 6 contained the state's "Rules and Regulations Governing a Private Water Well," and exhibit 7 was the state's "Rules and Regulations for the Design, Operations and Maintenance of Septic Tank Systems in Nebraska." Plaintiffs' petition contained no allegations concerning the failure of the well to conform to any regulations and no reference to any sewer system. The trial court properly sustained defendants' objection to these exhibits.

The action of the trial court in sustaining defendants' motion for a directed verdict on plaintiffs' petition was correct.

AFFIRMED.

KRIVOSHA, C.J., not participating.

HENRY M. WILLIAMS, APPELLANT, V. KINGERY CONSTRUCTION COMPANY, A CORPORATION, ET AL., APPELLEES.

404 N.W.2d 32

Filed April 17, 1987. No. 85-624.

1. **Constitutional Law: Limitations of Actions.** Neb. Rev. Stat. § 25-222 (Reissue 1985) is constitutional.
2. _____: _____. Neb. Rev. Stat. § 25-223 (Reissue 1985) is constitutional.
3. **Limitations of Actions: Words and Phrases: Construction Contracts.** Architects and engineers are professionals for purposes of Neb. Rev. Stat. § 25-222 (Reissue 1985), and the period of repose applicable to an architect who has a duty to inspect throughout construction under the provisions of § 25-222 begins to run when the construction is completed.
4. **Statutes.** A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning.

5. **Words and Phrases: Actions: Torts: Construction Contracts.** The phrase "[a]ny action to recover damages" in Neb. Rev. Stat. § 25-223 (Reissue 1985) includes an action in tort for damages caused by the negligent construction of a building.

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

James R. Harris, for appellant.

Robert T. Grimit and Lynn A. Melson of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Davis, Fenton, Stange & Darling.

P. Shawn McCann and Joseph S. Daly of Sodoro, Daly & Sodoro, for appellee Kingery Construction.

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

PER CURIAM.

This was an action for personal injury sustained by the appellant, Henry M. Williams, when he fell through a 4-foot stretch of uncompleted wall in a pipe chase at East High School in Lincoln, Nebraska. Williams fell backward a distance of approximately 30 feet and sustained a compression fracture of the spinal column, leaving him a paraplegic.

The district court for Lancaster County, Nebraska, sustained motions for summary judgment filed by the appellees Kingery Construction Company (Kingery) and Davis, Fenton, Stange & Darling (Davis, Fenton) on the basis that Williams' cause of action against both Kingery and Davis, Fenton was barred by the 10-year statutes of repose set forth in Neb. Rev. Stat. §§ 25-222 and 25-223 (Reissue 1985). Williams now appeals to this court, maintaining that the district court erred (1) in finding that § 25-223 was constitutional and applicable to the particular facts of this case, thereby entitling Kingery to a judgment as a matter of law, and (2) in finding that § 25-222 was constitutional and applicable to the facts in this case, thereby entitling Davis, Fenton to judgment as a matter of law. We affirm.

The undisputed evidence submitted by the parties for purposes of summary judgment discloses that on November 17,

1982, Henry Williams was working as a custodian on the south side of the second floor of East High School in Lincoln, Nebraska. While working in the women's restroom, he noticed that there was a leaky toilet in one of the stalls. The valve which controlled the flow of water to the toilet was located in a long, narrow pipe chase behind the row of toilets. Williams entered this pipe chase with the intention of turning off the flow of water to the toilet. He proceeded toward the valve and was forced to move sideways, with his backside touching the wall, because of the narrowness of the room and the presence of pipes in the east portion of the room. When Williams had moved approximately 12 feet into the room, he, suddenly and without warning, fell backward, falling some 30 feet. He was eventually found, by members of the Lincoln Fire Department, lying literally "inside" the walls of the East High building.

It was determined that the reason Williams fell is that a section of concrete wall was completely missing from the floor to the ceiling of the pipe chase. Apparently, the last 4 feet of the west wall had simply never been built.

For purposes of the summary judgment, we must assume, as the affidavits contend, that the area remained unchanged since the building was initially constructed. The architectural drawings did call for a wall to be built in this room, though, apparently, it never was.

The appellee Kingery was the general contractor in charge of building the high school. The appellee Davis, Fenton was the architectural firm which had prepared the plans and which was retained to supervise the construction.

Under the provisions of the Nebraska summary judgment statutes, Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 1985), a court should sustain a motion for summary judgment if, upon hearing, the pleadings, depositions, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See, *R.A.S., Inc. v. Crowley*, 217 Neb. 811, 351 N.W.2d 414 (1984); *Borg-Warner v. Watton*, 215 Neb. 318, 338 N.W.2d 612 (1983).

If, in fact, the statutes of repose created by §§ 25-222 and 25-223 apply to both Kingery and Davis, Fenton, thereby

barring Williams' action, then, regardless of what other issues of fact may exist, both Kingery and Davis, Fenton would be entitled to have their motions for summary judgment sustained because Williams would be barred from bringing the action and therefore both Kingery and Davis, Fenton would be entitled to judgment as a matter of law. Therefore, the only issues we need concern ourselves with at this point are whether §§ 25-222 and 25-223 are constitutional and, if they are, whether they apply to the parties under the facts as developed for purposes of summary judgment. As we have indicated, we believe that the statutes are constitutional and are applicable.

While Williams raises a number of issues as to why neither § 25-222 nor § 25-223 should be declared constitutional, we note that we have already recently passed upon that question and the issues raised in that regard. In the cases of *Smith v. Dewey*, 214 Neb. 605, 335 N.W.2d 530 (1983), and *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982), we held that the provisions of § 25-222 were constitutional. Little purpose would be served by our once again repeating in extenso the basis for our holding. Suffice it to say, for purposes here, we have not changed our mind since our decisions in *Smith v. Dewey, supra*, and *Colton v. Dewey, supra*, and therefore once again declare that § 25-222 is constitutional.

While we have not specifically addressed § 25-223, all of the arguments which have been raised with regard to the constitutionality of § 25-222 and our handling of those arguments are likewise applicable with regard to § 25-223. Therefore, for reasons more particularly set out in *Smith v. Dewey, supra*, and *Colton v. Dewey, supra*, in sustaining the 10-year statute of repose under § 25-222, we likewise hold that § 25-223 is constitutional.

That leaves us, then, simply with the question of whether the facts in this case apply to the provisions of §§ 25-222 and 25-223. With regard to the former, Williams argues that even if § 25-222 is constitutional, it has no application in this case because § 25-222 only applies to professional acts and Davis, Fenton's failure to detect the absence of the wall was not a professional act because anyone could have detected the absence of the wall. In this regard, Williams misconceives the

provisions of the act.

We have recently determined that architects and engineers are professionals for purposes of § 25-222, and the period of repose applicable to an architect who has a duty to inspect throughout construction under the provisions of § 25-222 begins to run when the construction is completed. See *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985). In this case, then, the period of time began to run on March 28, 1968, some 14 1/2 years before suit was filed.

Davis, Fenton had a professional responsibility to supervise the construction and see to it that all walls called for by the plans and specifications were in fact constructed. It was not the failure to find the wall missing which constitutes the act of negligence but, rather, the failure to properly supervise and see that the required wall was constructed which gives rise to the cause of action. That is clearly a professional act contemplated by § 25-222 and applicable to Davis, Fenton. Williams' argument that this was not an action to recover damages based upon alleged professional negligence simply misses the point.

Williams' argument with regard to § 25-223, as it applies to Kingery, is that the statute of repose has no application to causes of action for personal injury and only applies to causes of action for damage to property. In support of the argument Williams cites to us a host of rules with regard to statutory construction, including the requirement that we should seek to determine the intent of the Legislature. Williams, however, overlooks the first rule of statutory construction, which gives rise to all of the others. That rule is:

> "A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute."

County of Douglas v. Board of Regents, 210 Neb. 573, 577-78,

316 N.W.2d 62, 65 (1982). See, also, *Spilinek v. Spilinek*, 215 Neb. 35, 337 N.W.2d 122 (1983); *Hill v. City of Lincoln*, 213 Neb. 517, 330 N.W.2d 471 (1983).

It appears to us that the language of § 25-223 is plain, direct, and unambiguous, requiring no interpretation. It reads:

> *Any action to recover damages* based on any alleged breach of warranty on improvements to real property or *based on any alleged deficiency in the* design, planning, supervision, or observation of construction, or *construction* of an improvement to real property shall be . . . . *In no event may any action be commenced to recover damages* for an alleged breach of warranty on improvements to real property or *deficiency in the* design, planning, supervision, or observation of construction, or *construction* of an improvement to real property *more than ten years beyond the time of the act* giving rise to the cause of action.

(Emphasis supplied.)

We find nothing in the act to exclude an action in tort such as that brought by Williams in the instant case. While it may be true that the Legislature did not intend to be so all-encompassing, nevertheless, courts are bound, in the first instance, by what the Legislature says and not by what individual members may mean. We simply have no authority to proceed to interpret a statute requiring no interpretation. The phrase "[a]ny action to recover damages" in § 25-223 must mean any action, including an action in tort for damages caused by the negligent construction of a building. The mere fact that the parties may disagree as to how they believe the language of the statute should be read does not, by itself, create an ambiguity requiring judicial interpretation or construction. We believe that a plain reading of § 25-223 requires us to hold that the statute, including the 10-year statute of repose, applies to actions for personal injury caused by one who constructs improvements on real estate. The statute, therefore, did apply to Kingery and, being constitutional, entitled Kingery to judgment as a matter of law.

For these reasons, therefore, the judgment of the district court sustaining the motions for summary judgment as to both

Kingery and Davis, Fenton must be affirmed.

AFFIRMED.

KRIVOSHA, C.J., did not participate in the decision of this case.

PRESTON L. WHITE, APPELLEE, V. LINDA MERTENS, APPELLANT.
404 N.W.2d 410

Filed April 17, 1987. No. 85-627.

1. **Constitutional Law: Paternity.** The relationship between a parent and child is a constitutionally protected one, and although the father of a child born out of wedlock need not be treated in all respects as is the father of a child born in wedlock, the relationship between an unwed father and his child is not devoid of constitutional protection.
2. **Declaratory Judgments: Paternity: Parental Rights.** In the absence of any other statutory remedy, an unwed father has recourse to the declaratory judgment statutes to establish his paternal rights.
3. **Trial: Stipulations.** Parties are bound by stipulations voluntarily made and are granted relief therefrom only under exceptional circumstances.
4. **Parental Rights.** One may forfeit his or her parental rights by conduct.
5. **Paternity: Time.** The 5-day claim provision of Neb. Rev. Stat. § 43-104.02 (Reissue 1984) does not apply to a dispute between the biological father and mother of a child born out of wedlock.
6. **Paternity: Visitation.** Visitation of a child born out of wedlock is to be decided on the basis of what is in the best interests of the child and depends upon the existence of a familial relationship with the child.
7. **Pleadings: Trial: Appeal and Error.** This court ordinarily will not consider issues not properly raised in the pleadings nor litigated at trial.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

John C. Hahn of Jeffrey, Hahn & Hemmerling, P.C., for appellant.

Stanley D. Cohen and Deborah K. Long, for appellee.

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

CAPORALE, J.

Plaintiff, Preston L. White, brought an action under the

Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985), seeking a declaration that he is the father of a daughter born out of wedlock in late 1981 to the defendant mother, Linda Mertens, and, as such, has a right to visit his daughter. The court declared that plaintiff was the father of the child in question; awarded the care, custody, and control of the child to the mother; established a visitation schedule for the father; and ordered the father to make future support payments. While during the course of the proceedings the mother stipulated that plaintiff is the father of the child in question, she nonetheless appeals, claiming that the district court erred in (1) finding it had subject matter jurisdiction, (2) finding the father had not abandoned the child, (3) finding she was not entitled to reimbursement for past expenses, and (4) finding she was not entitled to an attorney fee. She also claims that she was entitled to a jury trial on the question of whether the father abandoned the child and therefore forfeited his parental rights. The record establishes, however, that she waived a jury, if any right to such existed, a matter we do not decide; therefore, nothing remains to be said about that matter. The other claims also being without merit, we affirm.

The mother and father met in 1979 and began dating. After a period somewhat in excess of a year, the mother moved in with the father. Thereafter, the couple lived together as husband and wife and planned to marry, but did not do so, at least in part because of strong objections from the mother's family.

When the mother was approximately 7 months' pregnant, she left the father's home under circumstances which are in dispute. The father testified she moved out without telling him and for reasons which were still not clear to him at the time of trial, although the mother had said she was under pressure from her family to leave. The mother, on the other hand, testified that the father told her to leave and said if she did not move her things, he would move them for her.

There is also a dispute as to when the father learned of the child's birth. There is testimony that he was told when the mother began to deliver the child; he, however, said he did not learn of the child's birth until 2 weeks after the event.

In January of 1983 the father wanted blood tests performed

to establish his claim of paternity, but the mother refused because she "didn't think tests were necessary." Nonetheless, after the father commenced this action on February 25, 1983, the mother initially denied that he was the father until after blood tests confirmed his paternity.

The approximately 12 visits which took place between the father and child prior to suit were arranged as the result of telephone calls between the father and mother. They took place at the father's home, notwithstanding the mother's reluctance to go there because of the frequent presence of the father's then girlfriend, whom he later married. Visits could not take place at the mother's home because of the hostility of the mother's family, with whom she lived, toward the father. Indeed, it was the father's threat to visit his child at the mother's home which persuaded the mother to take the child to the father. The father spent approximately $1,000 on clothes and gifts for his daughter prior to the filing of this suit.

The first claim of error rests on the fact that the paternity statutes in effect at the times this action was brought and tried, Neb. Rev. Stat. §§ 13-106 and 13-113 (Reissue 1983), did not empower the father of a child born out of wedlock to maintain a suit to establish his paternity. She argues that, therefore, an unwed man cannot determine his status as the father of a child born out of wedlock in an action for declaratory judgment, and, thus, the district court lacked jurisdiction over the subject matter of the present action, as a consequence of which her stipulation concerning paternity is of no force or effect. (The present statute, Neb. Rev. Stat. § 43-1411 (Cum. Supp. 1986), now authorizes one claiming to be the father of a child born out of wedlock to bring suit to determine his paternity.)

The mother is quite correct in asserting that this court has said a number of times and in a variety of contexts that an action for the purpose of determining the paternity of a child born out of wedlock depends upon statutory authority for its maintenance and must be brought in strict accordance with such statutes. *County of Hall ex rel. Wisely v. McDermott*, 204 Neb. 589, 284 N.W.2d 287 (1979) (reversed judgment obtained by county on behalf of mother against alleged father of child born out of wedlock because he had not been told of his right to

a jury trial); *Riederer v. Siciunas*, 193 Neb. 580, 228 N.W.2d 283 (1975) (held court had authority to increase award for child support entered in earlier paternity action); *Boersen v. Huffman*, 189 Neb. 469, 203 N.W.2d 489 (1973) (states determination of paternity not a proper issue in an annulment action); *Paltani v. Creel*, 169 Neb. 591, 100 N.W.2d 736 (1960) (held that action in equity could not be maintained to establish paternal rights to children born out of wedlock); *Timmerman v. Timmerman*, 163 Neb. 704, 81 N.W.2d 135 (1957) (modified and affirmed a child support order against father of child born out of wedlock in cause of action which began as one for divorce but which found marriage to be invalid).

However, the mother's premise that an unwed man cannot determine his status as the father of a child born out of wedlock by an action for declaratory judgment is incorrect, notwithstanding the dicta and holdings of the foregoing cases. In *Carlson v. Bartels*, 143 Neb. 680, 10 N.W.2d 671 (1943), the next friend of children born out of wedlock brought a declaratory judgment action to determine that the decedent was their father and that his estate was liable for their care, support, and maintenance. While the *Carlson* court concluded that the matter was one in probate within the exclusive jurisdiction of the county court while pending on contingent claims, and thus reversed a judgment in favor of the next friend, it nonetheless stated that paternity could be determined by an action for declaratory judgment. It is true that *Carlson* differs from the present case in that the next friend was empowered to sue by the paternity statutes. Nonetheless, the *Carlson* dictum recognizes that paternity is a "right," "status," or "legal relation" within the ambit of a declaratory judgment action.

This comports with the fact that the relationship between a parent and child is a constitutionally protected one and that although the father of a child born out of wedlock need not be treated in all respects as is the father of a child born in wedlock, the relationship between an unwed father and his child is not devoid of constitutional protection. See, *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978); *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). The *Carlson* dictum is also in keeping with the determinations

of other states that, if no other method exists, equal protection principles require that fathers of children born out of wedlock be permitted to file declaratory judgment actions to determine their status and rights. *Anonymous v. Anonymous*, 472 So. 2d 640 (Ala. Civ. App. 1984), *writ quashed* 472 So. 2d 643 (Ala. 1985); *Thornsberry v. Superior Court, Mohave County*, 146 Ariz. 517, 707 P.2d 315 (1985); *R.McG. v. J.W.*, 200 Colo. 345, 615 P.2d 666 (1980); *Kendrick v. Everheart*, 390 So. 2d 53 (Fla. 1980); *Willmott v. Decker*, 56 Haw. 462, 541 P.2d 13 (1975); *In re Petition of Sullivan*, 134 Ill. App. 3d 455, 480 N.E.2d 1283 (1985); *Pritz v. Chesnul*, 106 Ill. App. 3d 969, 436 N.E.2d 631 (1982); *A.—B.— v. C.—D.—*, 150 Ind. App. 535, 277 N.E.2d 599 (1971); *Johannesen v. Pfeiffer*, 387 A.2d 1113 (Me. 1978); *K.D.R. v. D.E.S.*, 637 S.W.2d 691 (Mo. 1982); *L.M.K. v. D.E.K.*, 685 S.W.2d 614 (Mo. App. 1985); *Brauch v. Shaw*, 121 N.H. 562, 432 A.2d 1 (1981); *Boatwright v. Otero*, 91 Misc. 2d 653, 398 N.Y.S.2d 391 (1977); *Crane v. Battle*, 62 Misc. 2d 137, 307 N.Y.S.2d 355 (1970); *In re Mengel*, 287 Pa. Super. 186, 429 A.2d 1162 (1981); *Slawek v. Stroh*, 62 Wis. 2d 295, 215 N.W.2d 9 (1974). Thus, the district court had jurisdiction to determine the matter of paternity.

Parties are bound by stipulations voluntarily made and are granted relief therefrom only under exceptional circumstances. *State v. Wells*, 197 Neb. 584, 249 N.W.2d 904 (1977). See, also, *State v. Davis*, 224 Neb. 205, 397 N.W.2d 41 (1986). The record reveals no exceptional circumstances which would entitle the mother to relief from her stipulation on the issue of paternity; thus, the first claim of error fails.

The mother nonetheless correctly observes in connection with the second claim of error that one may forfeit his or her parental rights by conduct. See *Stratman v. Hagen*, 221 Neb. 157, 376 N.W.2d 3 (1985). She contends that by asking her to leave, by not marrying her, by not being with her when the child was born, by refusing to "sign the birth certificate," by failing to support the child, and by seeing the child only infrequently, the father abandoned his daughter and is thereby now estopped from asserting his parental right to visit with her.

We cannot agree. Much of what the mother complains about, even assuming the fault rested solely with the father,

concerns the father's conduct toward her, not toward his daughter. While the mother asserts the father did not sign the birth certificate, the record reflects that she told him she had shown him as the father on the certificate. The hostility of the mother's family toward the father excuses the father's failure to visit his daughter with greater frequency, as well as his failure to provide more support and maintenance. See *In re Guardianship of Sain*, 217 Neb. 96, 348 N.W.2d 435 (1984), *aff'g after remand* 211 Neb. 508, 319 N.W.2d 100 (1982).

The mother also calls to our attention the fact that under the provisions of Neb. Rev. Stat. § 43-104.02 (Reissue 1984), unless the father of a child born out of wedlock files a notice of intent to claim paternity within 5 days of the child's birth, neither his relinquishment for nor consent to adoption is required. That statute, however, by its very terms has no application in a dispute between the biological father and mother of a child born out of wedlock. See *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986).

Cox v. Hendricks, 208 Neb. 23, 302 N.W.2d 35 (1981), establishes that visitation of a child born out of wedlock is to be decided on the basis of what is in the best interests of the child and depends upon the existence of a familial relationship with the child. The record satisfies us that the father established as much of a familial relationship with his daughter as the circumstances permitted and that it would be in the best interests of the child to continue and to nurture that relationship.

In the third claim of error the mother complains that the district court did not order the father to pay for past child support. We observe, however, that the matter of past child support was not raised by the pleadings in the district court. Since this court ordinarily will not consider issues not properly raised in the pleadings nor litigated at trial, *Hewson v. Stevenson, post* p. 254, 404 N.W.2d 35 (1987), and *Norris v. Iowa Beef Processors*, 224 Neb. 867, 402 N.W.2d 658 (1987), that is all that need be said about the matter.

The fourth claim of error, that she was not awarded an attorney fee, is equally spurious. Attorney fees have not been allowed in paternity actions. *State ex rel. Toledo v. Bockmann*,

218 Neb. 428, 355 N.W.2d 521 (1984). Moreover, one of the factors to be considered in awarding such a fee is the result obtained; the mother being unsuccessful, she is for that additional reason not entitled to an attorney fee. See *Meyers v. Meyers*, 222 Neb. 370, 383 N.W.2d 784 (1986).

AFFIRMED.

ALBERT ROCEK, APPELLANT, V. DEPARTMENT OF PUBLIC INSTITUTIONS, STATE OF NEBRASKA, ET AL., APPELLEES.
404 N.W.2d 414

Filed April 17, 1987. No. 85-804.

1. **Rules of Evidence: Appeal and Error.** Error predicated on a ruling admitting evidence must be shown to affect a substantial right of a party and a timely objection stating a specific ground must have been made. Neb. Rev. Stat. § 27-103 (Reissue 1985).
2. **Evidence: Appeal and Error.** A party is barred from asserting a different ground for his objection to the admission of evidence on appeal than was offered before the trier of fact.
3. **Administrative Law: Appeal and Error.** When reviewing decisions of the State Personnel Board, the Supreme Court conducts its review of the findings de novo on the record. Neb. Rev. Stat. § 84-918 (Reissue 1981).

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

Robert Wm. Chapin, Jr., of Mowbray, Chapin & Walker, P.C., for appellant.

Robert M. Spire, Attorney General, and Charles E. Lowe, for appellees.

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

WHITE, J.

Albert Rocek appeals from a judgment of the district court, which affirmed a decision of the Nebraska State Personnel Board upholding the Department of Public Institution's discharge of Rocek from his job at the Lincoln Regional Center.

Rocek's assignments of error raise six issues to be addressed by this court: first, that the Department of Public Institutions followed incorrect procedure when it extended its suspension of Rocek; second, that Rocek's due process rights were violated because one person investigated him, testified against him, and decided to terminate him; third, that a police report was erroneously admitted into evidence; fourth, that the State Personnel Board considered records and documents that were not part of the record; fifth, that Rocek was denied his right to cross-examine witnesses against him; and sixth, that the decision to terminate the appellant was not supported by the evidence. We affirm the district court's judgment upholding the termination.

At the time when the disciplinary action at issue here arose, Rocek was employed as a Psychological Services Assistant II at the Lincoln Regional Center. His duties included treatment development, group and individual counseling, and testing of patients. His work required extensive unsupervised contact with patients. His duties involved him in all programs of the security unit at the center, including the mentally disordered sex offender program.

On September 21, 1983, a plainclothes officer, Gregory Sims, walked into a restroom at a public park and observed Rocek stroking his penis in an open stall. The officer engaged Rocek in conversation, and Rocek continued masturbating. Upon leaving the public facility, Rocek was arrested and charged with disturbing the peace. His name appeared in the newspaper on October 6, 1983, in connection with the incident, and, as a result of this publication, Rocek's supervisor, Dr. Suzanne Bohn, became aware of his arrest. She limited Rocek's contact with the patients and, on October 13, 1983, suspended him for 10 workdays.

On October 18, 1983, Rocek entered the Lancaster County pretrial diversion program, and the disorderly conduct charge was dismissed. On October 28, 1983, Rocek was notified his suspension was extended an additional 10 workdays. Rocek filed a grievance based on this extension, which was denied.

On November 2, 1983, Rocek and his attorney met with persons from the regional center and Department of Public

Institutions to discuss the incident and investigation. Rocek was terminated on November 10, 1983.

Rocek filed a grievance contesting his termination, which was denied after a hearing. Later, he was afforded a full evidentiary hearing before the State Personnel Board, which upheld his termination. After an unsuccessful appeal from that tribunal to the district court for Lancaster County, Rocek brings this present appeal.

PROCEDURAL ISSUES

Rocek argues in his first assignment of error that the act of extending his suspension after he had entered the pretrial diversion program was improper and unauthorized by rule 13.14.5 of the Nebraska Personnel System Rules and Regulations, which provides:

> Suspension for Legal Charges or Investigation. Employees who are under investigation for or charged with criminal activity may . . . be indefinitely suspended pending outcome of a trial or investigation. Employees who are found guilty shall not be compensated for the suspension and may be dismissed. If they are not found guilty or if no judicial action is taken, they may be restored to their position and granted full pay and service credit for the period of their suspension, if circumstances justify such restoration.

Rocek argues that since the extension occurred after he entered the pretrial diversion program, the extension violated his due process rights because no trial or investigation was pending. He contends that the "investigation" referred to in rule 13.14.5 is a legal investigation. The Department of Public Institutions argues that the pending agency investigation authorizes the continuance of the suspension. We need not decide whether the word "investigation" in the rule refers to the legal investigation or the agency investigation, since, under either view, the record shows that both the legal and agency investigations had not ended.

We note that although the first notice indicated a suspension of 10 workdays, the rule authorizes suspensions for an indefinite amount of time. The record shows both that the agency was conducting an investigation during the second 10

days of the suspension and that Rocek's relief from prosecution on his disturbing the peace arrest was contingent upon his abiding by the terms set out in the pretrial diversion program agreement for 6 full months; hence, the legal trial or legal investigation did not reach its "outcome" before the extension just because Rocek entered the pretrial diversion program. The program had to run its course before he could be considered free from legal prosecution for his actions in the past and lay the matter to rest. Under either interpretation, the extension of the suspension is authorized by rule 13.14.5, and Rocek's contentions of impropriety in this regard are unfounded.

Rocek's second assignment of error asserts that his supervisor, Dr. Bohn, was the investigator, chief witness, and final decision maker with respect to his termination and that because of the three-way role she played, he was denied due process of law. In his brief, Rocek states, "[D]ue process requires a fair, honest, and objective hearing which cannot be achieved if the person making the decision . . . is also the chief witness and the person instigating the investigation." Brief for Appellant at 19. He cites an unpublished federal district court opinion, which found that where review is limited to the record provided by the agency head who acted in this three-way capacity, there is no guarantee of the agency record's integrity. *Lembrich v. Dunning*, No. CV83-L-210 (D. Neb. Apr. 15, 1983). The record has no such limitation here.

First, it is clear Dr. Bohn investigated Rocek on her own volition and decided he should be terminated. She then went to Superintendent Klaus Hartmann of the Lincoln Regional Center and presented him with her findings and conclusions. He was not personally involved in the investigation, and reviewed and approved the decision to terminate Rocek. This same procedure was found to afford an employee due process in *Buhrmann v. Sellentin*, 218 Neb. 288, 352 N.W.2d 907 (1984), absent a showing that the person reviewing the investigation was incapable of making an objective judgment. There is no such showing here.

Second, the review of the termination is not limited to a review of the record compiled by Dr. Bohn. Rocek did receive a "fair, honest, and objective hearing" before the State Personnel

Board, where evidence was adduced by many witnesses, and his termination was reviewed and upheld by decision makers independent of Dr. Bohn. Rocek does not challenge the integrity of the record of the State Personnel Board. We find Rocek was not denied his right to review by an impartial decision maker and that he received due process in this respect.

Rocek next contests the admission into evidence of the police report concerning his arrest. At the personnel board hearing Rocek's attorney objected to the admission of an exhibit on the grounds of relevancy and the "best evidence" rule. In his brief before this court he asserts that the exhibit was erroneously admitted because the report was never used to refresh the officer's memory, was overly prejudicial, and was irrelevant. Because it was necessary to prove Rocek was under criminal investigation to justify his suspension, the report is clearly relevant. Neb. Rev. Stat. § 27-103 (Reissue 1985) states that error cannot be predicated upon a ruling admitting evidence unless a substantial right of a party is affected and a timely objection or motion to strike stating the specific ground for the objection is made. The ruling admitting the police report meets neither of the criteria necessary to find it erroneous.

Rocek cannot assert a different ground for his objection on appeal than was offered in the lower tribunal. Since he failed to specify the grounds now asserted, except for relevancy, in a timely manner before the personnel board, he is barred from asserting them on appeal. *Langenheim v. City of Seward*, 200 Neb. 740, 265 N.W.2d 446 (1978). Rocek fails to demonstrate how the admission of the police report substantially affects his rights. The officer who filled out the report testified at length about the incident described in the report. The report is repetitive and cumulative; Rocek suffered no prejudice from its admission into evidence. See *State v. Tweedy*, 224 Neb. 715, 400 N.W.2d 865 (1987).

Rocek's fourth assignment of error alleges that the personnel board considered facts not in evidence in contravention of Neb. Rev. Stat. § 84-914(3) (Reissue 1981), which requires that factual information considered in the determination of a case must be offered into evidence. What appears to offend Rocek is the similarity in the language of the conclusions of the

personnel board and the conclusions of the hearing officer appointed to resolve the grievance Rocek filed. The hearing officer's recommendations were contained in the transcript of documents properly before the State Personnel Board, but not offered into evidence.

Assuming for the sake of argument that language used by the State Personnel Board in its written conclusions was influenced by the language used by the hearing officer, the recommendations of the hearing officer do not constitute evidence. The findings of fact made by the State Personnel Board are supported by the evidence before it. The language pointed to by Rocek does not indicate that the State Personnel Board failed to make an independent determination based on the evidence actually offered; only that, at best, it may have borrowed appropriate language from the hearing officer's recommendations in the transcript once it made its own determination of the case. This assignment of error is meritless.

In his fifth assignment of error, Rocek claims he was denied his right to cross-examine witnesses who testified against him. At the hearing before the State Personnel Board, Dr. Bohn stated that she consulted with several of her coworkers and fellow professionals, Dr. Anderson, Dr. Zeisset, Wilma Wenninger, Dr. Leggiadro, and Dr. Woytassek, before deciding to limit Rocek's contact with patients. She did not repeat any of their statements or mention what their advice was, only that she had consulted with them. These peers did not testify at the State Personnel Board hearing.

Rocek claims he had no opportunity to rebut whatever statements these people may have made and that, as a result, he was denied his fundamental right to cross-examine persons testifying against him. This argument is wholly frivolous. The people mentioned in Rocek's brief never testified and therefore could not be cross-examined.

FACTUAL ISSUES

In Rocek's final assignment of error he attacks the sufficiency of the evidence used to support the State Personnel Board's decision to uphold the termination. We review the findings of the State Personnel Board de novo on the record in accord with Neb. Rev. Stat. § 84-918 (Reissue 1981), and

Haeffner v. State, 220 Neb. 560, 371 N.W.2d 658 (1985), and find that the personnel board's decision is correct.

The notification Rocek received informing him of his termination listed as reasons for the action that his arrest at the park "has an adverse impact on your ability to fulfill your job responsibilities in accordance with Lincoln Regional Center's goals and objectives for the effective patient care of the mentally ill and brings discredit upon the State." Nebraska Personnel System rule 13.12 lists reasons for imposing disciplinary actions such as dismissal, and includes rule 13.12.3, "Inefficiency, incompetence, or negligence in the performance of duties," and rule 13.12.14, "Other acts, based on competent evidence, which bring discredit upon the state," which correspond with the reasons given in the notification of termination.

Rocek argues that there is no evidence of diminished abilities or of complaints, or that patients or the public was aware of his acts, since the newspaper articles discussing his charges did not mention he was a State employee. These contentions are the basis of his claim that the decision is not supported by the evidence.

At the personnel board hearing both Drs. Bohn and Hartmann testified that Rocek was no longer competent to perform his required duties because he would require supervision that they were unable to provide and that as a result of the incident his credibility with the patients was seriously impaired. They also testified that allowing someone arrested for sexual misbehavior to counsel patients would discredit the program. The contention that Rocek required supervision is supported by the evidence and justified the termination. We need not reach the other ground for termination.

Rocek's position required him to be involved in all the center's security unit's programs. Approximately one-third of the patients were sex offenders who had a problem with, and were in programs to learn to develop, responsible sexual behavior. Both Drs. Bohn and Hartmann were of the opinion that a person with Rocek's history of sexual misconduct would have to have his contact with patients closely monitored and that he should not be alone with patients. It is uncontroverted

that they were unable to provide such supervision.

The testimony of Officer Sims provides a basis in evidence for concluding that Rocek engaged in irresponsible and inappropriate sexual behavior. The conclusion of both Drs. Hartmann and Bohn that such misbehavior demonstrates that Rocek should not work with patients without constant supervision is not arbitrary; it is a rational response justified and supported by substantial evidence. We find de novo on the record that the evidence demonstrates that Rocek has a serious lack of judgment and responsibility, as proven by his inappropriate sexual behavior in a public park; that his actions showed a need for monitoring when dealing with patients; and that the center could not provide such supervision. As a consequence, Rocek could no longer function in the independent manner that the job required. The evidence therefore supported termination under rule 13.12.3.

AFFIRMED.

EVERETT HEWSON, APPELLEE, V. RICHARD STEVENSON, DOING BUSINESS AS 9TH & R CONOCO, AND UNION INSURANCE COMPANY, APPELLANTS.

404 N.W.2d 35

Filed April 17, 1987. No. 86-062.

1. **Workers' Compensation: Appeal and Error.** In a review of a workers' compensation case, the 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 and will not be set aside unless clearly wrong.
2. **Workers' Compensation.** The right of an injured worker to vocational rehabilitation depends on the inability to perform work for which the worker has previous training and experience.
3. _____. Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the compensation court.
4. **Appeal and Error.** In the absence of plain error, where a specific issue is raised for the first time on appeal such issue will ordinarily not be determined.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

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

A. James McArthur, for appellee.

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

GRANT, J.

This action was brought by the appellee, Everett Hewson, to recover workers' compensation benefits from the appellants, Richard Stevenson, doing business as 9th & R Conoco, and Union Insurance Company. Hewson was injured while working for Stevenson on August 12, 1980. Appellants paid Hewson temporary total disability payments following the accident, but informed Hewson that further payments would not be made after June 1, 1985, for the reason that appellants did not consider Hewson to be totally permanently disabled. Hewson filed a petition in the Nebraska Workers' Compensation Court on April 15, 1985, praying "that the rights and liabilities of the parties be determined . . . ." An award was entered in Hewson's favor on July 9, 1985. Appellants then sought rehearing. In the award on rehearing, filed December 18, 1985, the three-judge panel, with one judge dissenting, affirmed and modified the award. The panel determined that Hewson had been injured in the course of his employment with Stevenson and that

> [a]s a result of said accident and injury the plaintiff . . . suffered temporary partial disability through November 3, 1980 . . . and thereafter was temporarily totally disabled from November 4, 1980 to the date of this rehearing on October 22, 1985, is still temporarily totally disabled and will remain temporarily totally disabled for an indefinite future period of time.
>
> . . . .
>
> As a result of said accident and injury, the plaintiff is unable to perform work for which he has previous training or experience. . . . The evidence shows that the plaintiff does not have transferable skills and his age is a negative factor. The Court finds that the plaintiff is no longer a suitable candidate for vocational rehabilitation

services and that said services are no longer feasible.

Appellants timely appealed and assign the following errors: (1) The court erred in finding that the appellee is still temporarily and totally disabled; (2) The court erred in failing to find that the appellee should be receiving permanent partial disability payments; (3) The court erred in finding that the appellee is not subject to further vocational rehabilitation efforts; and (4) The court erred as a matter of law in failing to recognize that voluntary retirement on the part of the appellee was cause for ceasing temporary total disability payments. We affirm.

The following facts were adduced before the panel on rehearing. On August 12, 1980, Hewson, a 61-year-old auto mechanic, was injured in the course and scope of his employment at Stevenson's Conoco station. Hewson testified that on that date he was lying partially in and partially out of a small car, working under the dash. Hewson accidentally bumped the gear stick, causing the car to roll back, causing a severe twisting of his back. Hewson had been employed as a mechanic by Stevenson's Conoco for approximately 1 year. Prior to that time Hewson was employed as a general mechanic or auto mechanic for the majority of his working life.

As a result of the injury, Hewson experienced a sharp, burning pain in his back, for which he sought medical help the next day. Hewson attempted to return to work for approximately 2 months after the injury. During that time Hewson received temporary partial disability payments. Hewson testified that after October of 1980, he was unable to return to work because of his injury. He testified that he was "not supposed to lift over ten pounds," that "if I stand for any length of time, I start having nerve pains down my right leg; and then it goes into my back and causes spasms in my back," that he is unable to sit for any length of time because he starts having pains in his right leg again, and that his "back gets real sore" when he walks for any distance.

Hewson was treated by Dr. James Styner for his back injury beginning November 5, 1980. In a report of February 19, 1982, Dr. Styner stated that Hewson "still has acute disc syndrome." On April 3, 1981, Hewson was hospitalized for a "[d]e-

compression laminectomy, exploration of the disc space without removal." On November 17, 1982, Dr. Styner performed another operation described as "[l]aminectomy, (redo and exploration of disc space and diskectomy)."

James Kincaid, a vocational rehabilitation counselor for appellants, did a series of evaluations of Hewson from September 30, 1981, through February 26, 1982, to determine whether Hewson could be rehabilitated for new employment. Kincaid concluded that Hewson was not a suitable candidate for vocational rehabilitation at that time.

In July 1981, prior to the first meeting with Kincaid, Hewson reached the age of 62 and voluntarily began to draw social security retirement benefits.

Hewson testified that he made attempts to work on his own after the 1981-82 evaluations by Kincaid. In 1983 he attempted to start a small engine repair business in which neighbors in the area brought in mowers to be repaired. Hewson testified that because the motors were too heavy for him to lift, he could not continue. Later in 1983, Hewson tried to work as a security guard and had to quit after 1 hour because of the walking involved.

On June 10, 1983, Dr. Styner made a final disability rating of Hewson and stated:

> The patient has a rather severe coronary problem which is going to make it difficult to separate his Workman's Compensation problem from the rest, but I think as far as his back is concerned he has a disability rating of about 15-20% of the body as a whole.

On November 26, 1984, Dr. Styner determined that Hewson's disability regarding his back remained at 15 to 20 percent of the body as a whole, and on December 26, 1984, Dr. Styner reported that June 10, 1983, was the date that Hewson reached maximum recovery with regard to his back problem. Another doctor examined Hewson for appellants on March 15, 1985, and determined that Hewson had an "approximately 20% permanent partial disability of his body as a whole and by history this would date back to his 1980 injury."

On October 15, 1985, 1 week prior to the rehearing in the compensation court, Hewson was evaluated by Denise Wiemer,

a rehabilitation counselor employed by the State of Nebraska Department of Education, who determined that Hewson was not a suitable candidate for vocational rehabilitation.

In reviewing workers' compensation cases this court does not reweigh the facts. In a review of a workers' compensation case, the 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 and will not be set aside unless clearly wrong. *Bender v. Norfolk Iron & Metal Co.*, 224 Neb. 706, 400 N.W.2d 859 (1987).

Appellants first contend that, since the medical evidence shows that Hewson has a 15 to 20 percent permanent partial disability, and since Hewson "has decided not to work," Brief for Appellants at 12, Hewson should be paid permanent partial disability payments rather than temporary total disability payments. Appellants rely on Neb. Rev. Stat. § 48-121(3) (Reissue 1984), which states in pertinent part: "For disability resulting from permanent injury *of the following classes*, the compensation shall be in addition to the amount paid for temporary disability; *Provided*, the compensation for temporary disability shall cease as soon as the extent of the permanent disability is ascertainable . . . ." (Emphasis supplied.)

Appellants then contend that since the extent of Hewson's permanent disability as a result of the injury sustained on August 12, 1980, is now ascertainable, the issue is whether Hewson is in fact permanently partially disabled as a result of this injury.

The difficulties with appellants' position are two: (1) § 48-121(3) concerns specific member disabilities; and (2) this court has held that the determination of "total disability" does not depend solely on the determination of the degree of disability to the body as a whole.

We have held:

> For workmen's compensation purposes total disability does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind

> of work which a person of his mentality and attainments could do. *Franzen v. Blakley*, 155 Neb. 621, 52 N.W.2d 833 (1952). Total and permanent disability contemplates the inability of the workman to perform any work for which he has the experience or capacity to perform. *Shaw v. Gooch Feed Mill Corp.*, 210 Neb. 17, 312 N.W.2d 682 (1981).

Krijan v. Mainelli Constr. Co., 216 Neb. 186, 189, 342 N.W.2d 662, 664 (1984).

The evidence is that the appellee, 66 years of age at the time of the rehearing, has worked most of his adult life as a mechanic. He has no other training or skills. Hewson testified, and the panel apparently believed, that as a result of the injury in 1980, he is unable to lift more than 10 pounds, to walk for long distances, or to sit for more than a few minutes at a time. Although Hewson attempted to work, he was unsuccessful because of these physical limitations.

Both James Kincaid and Denise Wiemer concluded that Hewson was not a suitable candidate for rehabilitation given his age, work history, and medical condition.

After a reading of the record, we cannot say that the Workers' Compensation Court on rehearing was clearly wrong when it found that Hewson was and continues to be temporarily totally disabled. The first two of appellants' assignments of error are disposed of by this determination.

Appellants' third assignment of error states that the court was in error when it found that Hewson was not subject to further vocational rehabilitation efforts. This also depends on a finding of fact, and the evidence supports the panel's conclusion.

The opinions of two vocational rehabilitation specialists were before the court on rehearing. James Kincaid's evaluations of Hewson in 1982 concluded:

> It is not feasible to spend the time and money to train a person who is sixty-two years old and would have only a 10-15% chance of obtaining employment. No employer is going to hire a person of this age, who will work 2-3 years at best, then retire. . . .
>
> When looking at the client's age, medical condition,

> and work history, I do not feel it is feasible to continue any rehabilitation efforts on the client.

Just before the rehearing before the panel, a state rehabilitation worker reached the same general conclusion.

In *Smith v. Hastings Irr. Pipe Co.*, 222 Neb. 663, 386 N.W.2d 9 (1986), we held that the right of an injured worker to vocational rehabilitation depends upon the inability to perform work for which the worker has previous training and experience. Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the compensation court.

The evidence before the panel supports the panel's finding that Hewson "is no longer a suitable candidate for vocational rehabilitation services." This assignment is without merit.

The fourth and last error assigned by appellants asserts that the court erred as a matter of law in failing to recognize that voluntary retirement on the part of the appellee was cause for ceasing temporary total disability payments. Based on our examination of the record before this court, we determine that this issue does not appear to have been raised or specifically disposed of in the Nebraska Workers' Compensation Court. Neither the petition nor the appellants' answer raised this issue. No reference to the issue appears in the compensation court's "Award on Rehearing."

Appellants' reply brief states at 1:

> In his brief, Appellee asserts that the Workmen's Compensation Court made a factual determination that voluntary retirement does not equate with a voluntary removal from the work force. The Workmen's Compensation Court made no such finding. Indeed, there is no mention as to what effect the Appellee's voluntary retirement had upon his temporary total disability status. Appellant is contending that the Court should have considered the circumstances surrounding Appellee's voluntary retirement.

On the record before us, we cannot know what "circumstances" the Workers' Compensation Court considered on this issue. As stated above, we have determined that the evidence supports the court's finding that Hewson is entitled to

temporary total disability payments. In the absence of plain error, where a specific issue is raised for the first time on appeal, such issue will ordinarily not be determined. See *Norris v. Iowa Beef Processors*, 224 Neb. 867, 402 N.W.2d 658 (1987).

The judgment of the Workers' Compensation Court is affirmed. Appellee is awarded $1,000 for services of his attorney in this court.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JAMES P. MILLER, RESPONDENT.

404 N.W.2d 40

Filed April 17, 1987. No. 86-108.

1. **Disciplinary Proceedings.** A proceeding to discipline a lawyer is a trial de novo on the record.
2. _____. In a disciplinary proceeding against an attorney, the basic issues are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
3. _____. To determine whether and to what extent discipline should be imposed, it is necessary that the Supreme Court consider the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law.
4. _____. Mitigating circumstances shown in the record should be considered in determining an appropriate discipline.
5. _____. To determine what sanction is appropriate, each case justifying discipline of an attorney must be evaluated individually in the light of the particular facts and circumstances.
6. **Disciplinary Proceedings: Restitution: Conversion.** While an attorney's restitution of a client's converted funds prior to being faced with accountability may not exonerate such misconduct, restitution prior to complaint or prospective accountability is a significant mitigating factor to be considered in determining an appropriate sanction for an attorney's conversion of a client's funds.

Original action. Judgment of suspension.

Dennis G. Carlson, Counsel for Discipline, and Alison L. Larson, for relator.

John J. Reefe, Jr., for respondent.

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

PER CURIAM.

This is an original disciplinary proceeding against James P. Miller, an attorney admitted to practice in Nebraska. Pursuant to an application by the Committee on Inquiry of the Second Disciplinary District of the Nebraska State Bar Association, this court, on February 6, 1986, temporarily suspended Miller from practicing law in the State of Nebraska, see Neb. Ct. R. of Disc. 12 (rev. 1986), such suspension to continue until further order of this court. On April 16, 1986, the Committee on Inquiry held a hearing concerning the complaint against Miller and adopted formal charges against Miller, which charges were subsequently adopted by the Disciplinary Review Board. See Neb. Ct. R. of Disc. 9 (rev. 1986). The referee appointed by this court has filed a report containing findings and recommendations.

In 1970, Miller was admitted to practice in Nebraska and was elected Sarpy County public defender in 1980, an office which he held until his resignation on January 15, 1986, before this court's order of temporary suspension.

On July 14, 1982, Rosemary Mills accepted appointment as the personal representative of the estate of Stanley Mazur, deceased, and retained Miller to act as attorney for the personal representative. On October 22, 1982, Miller drew a check on the estate's account at Bell Federal Credit Union, in the amount of $19,486.38, payable to "Rosemary Mills, Administratrix of the estate of Stanley Mazur." Without Mills' permission, Miller endorsed the estate check "Rosemary Mills PR." Rather than depositing that check in a trust account, Miller deposited the check in his combined personal and business checking account and later wrote checks, reducing the balance of the account to $19.27 on December 1, 1982, but never paid the Stanley Mazur estate or any Mazur devisee anything from the proceeds realized by the estate check in question. Subsequently, without complaint concerning the deposit of the estate check in Miller's account, Miller borrowed funds and, by June of 1983, had paid

all Mazur devisees the amounts due them from the Stanley Mazur estate.

After a complaint by Miller's former associate, the Counsel for Discipline of the Nebraska State Bar Association commenced an investigation on November 16, 1985. Neither Mills, as personal representative of the Stanley Mazur estate, nor any Mazur devisee complained about Miller's conversion of estate funds.

At the hearing before the Committee on Inquiry, Miller admitted that he had endorsed the estate check with Rosemary Mills' name and deposited the estate check in his checking account for his own use. Miller did not contest the seriousness of his conduct. Throughout the time when Miller was acting as attorney for the personal representative, Miller extensively used alcohol and amphetamines, which affected his conduct as an attorney involved in the probate proceedings. The record does not disclose that the amphetamines were medically prescribed for any condition in Miller. At times Miller would suffer "blackouts" and would "become aware I was someplace and have no idea how I got there or what had happened in the intervening hour or two." However, as the result of his association with Alcoholics Anonymous, Miller stopped drinking alcohol and ceased using drugs in May 1983.

The formal charges alleged that Miller has violated his oath as an attorney, see Neb. Rev. Stat. § 7-104 (Reissue 1983), and certain provisions of the Code of Professional Responsibility, namely:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (3) Engage in illegal conduct involving moral turpitude.
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> (5) Engage in conduct that is prejudicial to the administration of justice.
>
> (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

And:

> DR 9-102 Preserving Identity of Funds and Property of a Client.
> (A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
> (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

The referee found that Miller had violated an attorney's oath of office and the aforementioned provisions of the Code of Professional Responsibility, as charged, but recommended that:

> Mr. Miller be suspended from the practice of law for a period of two years with credit given for the temporary suspension period. That prior to reinstatement of his license to practice, that [Miller]: 1) furnish independent third party proof of his continued active participation in Alcoholics Anonymous and abstinence from alcohol and drugs, 2) that he successfully complete courses at accredited educational institutions in Legal Ethics and basic accounting and at least one continuing education course in Law Office Management; and 3) that all costs of this action be taxed to [Miller].

Miller asserts that the 2-year suspension is an appropriate sanction and urges consideration of the following mitigating circumstances: (1) Restitution without any antecedent threat of action, discipline, or complaint against Miller; (2) absence of complaint from any client; (3) chemical dependence, now eliminated, at the time of the conduct in question; (4) cooperation with the Counsel for Discipline in disposing of the

charges, which are neither denied nor minimized by Miller; (5) a previously unblemished record as an attorney; (6) a good reputation among lawyers and nonlawyers, as evidenced by numerous letters; and (7) fidelity to this court's order of temporary suspension, entered in February 1986.

The Nebraska State Bar Association, as relator, has taken exception with the referee's report and contends that disbarment is the appropriate sanction for Miller's misconduct.

A proceeding to discipline a lawyer is a trial de novo on the record. *State ex rel. NSBA v. Kelly*, 221 Neb. 8, 374 N.W.2d 833 (1985); *State ex rel. NSBA v. Statmore*, 218 Neb. 138, 352 N.W.2d 875 (1984). In a disciplinary proceeding against an attorney, the basic issues are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. NSBA v. Kelly, supra; State ex rel. NSBA v. Statmore, supra.*

> To determine whether and to what extent discipline should be imposed, it is necessary that we consider the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law.

State ex rel. Nebraska State Bar Assn. v. McArthur, 212 Neb. 815, 819, 326 N.W.2d 173, 175-76 (1982).

While we have previously held that conversion of a client's funds requires disbarment, *State ex rel. Nebraska State Bar Assn. v. McConnell*, 210 Neb. 98, 313 N.W.2d 241 (1981); *State ex rel. Nebraska State Bar Assn. v. Bremers*, 200 Neb. 481, 264 N.W.2d 194 (1978); *State ex rel. Nebraska State Bar Assn. v. Ledwith*, 197 Neb. 572, 250 N.W.2d 230 (1977), we have also held that "disbarment is inappropriate in the absence of specifically delineated injuries" to a client as the result of an attorney's misconduct. *Kelly, supra* at 16, 374 N.W.2d at 838; *McArthur, supra.* In addition, we have held that mitigating circumstances shown in the record should be considered in determining an appropriate discipline. *State ex rel. NSBA v. Matt*, 213 Neb. 123, 327 N.W.2d 622 (1982); *State ex rel. Nebraska State Bar Assn. v. Leonard*, 212 Neb. 379, 322

N.W.2d 794 (1982).

To determine what sanction is appropriate, each case justifying discipline of an attorney must be evaluated individually in the light of the particular facts and circumstances. *In re Sawyer*, 98 Wash. 2d 584, 656 P.2d 503 (1983). See, also, *In re Kumbera*, 91 Wash. 2d 401, 588 P.2d 1167 (1979).

Miller admittedly commingled his clients' funds and converted them to his own use. Commingling of a client's funds is an area of grave concern. *Kelly, supra; Statmore, supra.* Ordinarily, commingling and conversion of a client's funds by an attorney may warrant disbarment. *Bremers, supra; Ledwith, supra.* However, we must examine Miller's claim of mitigating circumstances to determine whether disbarment is the appropriate sanction in the present case. See, *Matt, supra; Leonard, supra.*

Miller made restitution of the converted funds more than 2 years prior to a complaint filed against him and without any threat of disciplinary action. "A restitution of funds wrongfully converted by a lawyer, after he is faced with legal accountability, is not an exoneration of his professional misconduct." *Bremers, supra* at 484, 264 N.W.2d at 197. See, also, *Kelly, supra; Statmore, supra.* While an attorney's restitution of a client's converted funds *prior* to being faced with accountability may not exonerate such misconduct, restitution prior to complaint or prospective accountability is a significant mitigating factor to be considered in determining an appropriate sanction for an attorney's conversion of a client's funds. See Annot., 95 A.L.R.3d 724 (1979). Such view of restitution will encourage an attorney to correct a wrong before damage is sustained by a client.

In *State ex rel. NSBA v. Kelly*, 221 Neb. 8, 374 N.W.2d 833 (1985), the attorney admitted his securing a forged endorsement for his client's bond receipt and depositing the $1,500 bond proceeds in his office account rather than a trust account. The balance in Kelly's office account was allowed to drop below $1,500. Kelly refunded to his client, but only after the client had retained another attorney to assist in collecting the bond proceeds. We found that disbarment of Kelly was

inappropriate in the absence of specific injury to his client, and concluded that the appropriate sanction was suspension of Kelly's license to practice law for a period of 1 year. See, also, *State ex rel. NSBA v. Tomek*, 214 Neb. 220, 333 N.W.2d 409 (1983) (1 year suspension for withdrawing $25,651.70 from estate without notice or authority, which funds from estate were repaid). As in this case, many of the attorney's problems in *Kelly* were the result of alcoholism, and we noted that Kelly had "taken positive steps to deal with his alcohol dependence." *Kelly, supra* at 16, 374 N.W.2d at 837.

In *State ex rel. Nebraska State Bar Assn. v. Erickson*, 204 Neb. 692, 285 N.W.2d 105 (1979), Erickson claimed alcoholism was the primary reason for his disregard and mishandling of his clients' interests. Although part of Erickson's neglect of pending lawsuits occurred during the several months in which he was hospitalized for chemical dependency, we found that the alcoholism did not justify Erickson's misconduct and that he was not competent to continue to practice law unless that condition was controlled. We imposed a 1-year suspension on Erickson, with the right of reinstatement upon affirmative showing that, among other things, he had successfully controlled his problem of alcoholism.

In *State ex rel. NSBA v. Matt, supra*, Matt was charged with assisting in the illegal purchase of a controlled substance (cocaine) and was suspended from the practice of law for 1 year. We noted as a mitigating circumstance the fact that Matt was no longer involved with drugs.

Miller acknowledges that he was misusing drugs and excessively using alcohol when he represented the personal representative of the Mazur estate. Excessive use of alcohol and drug abuse contributed to the conduct involved in the charges filed against Miller. While abuse of a substance, such as some form of drugs or chemical dependence, in no way justifies or totally excuses misconduct, the fact remains that Miller voluntarily sought treatment for his condition and has not used alcohol or drugs since May 1983. Miller's terminated use of alcohol and drugs is a significant mitigating factor affecting the appropriate sanction to be administered in this case. See, *In re Sawyer*, 98 Wash. 2d 584, 656 P.2d 503 (1983); *In re Kumbera*,

91 Wash. 2d 401, 588 P.2d 1167 (1979); Annot., 26 A.L.R.4th 995 (1983).

We also take into account the numerous and supportive letters submitted regarding Miller's good reputation in the community and his competence as a lawyer. See *State ex rel. Nebraska State Bar Assn. v. Richards*, 165 Neb. 80, 84 N.W.2d 136 (1957). In addition to those letters, mitigating factors shown on the record include the following facts: Miller has cooperated fully with the Counsel for Discipline; the misconduct charged was a single, isolated incident; and no client has complained against Miller.

Miller's violation of his oath of office as an attorney and his violation of the ethical standards governing the conduct of attorneys are serious matters. Although there has been no specific damage to a client, a mere reprimand would be too lenient, and disbarment too harsh a sanction under the circumstances. However, we must impose a disciplinary sanction to deter others from misconduct similar to Miller's and to maintain the reputation of the bar as a whole. Since Miller's conduct in rectifying the wrong does indicate some retained professional responsibility, we find that suspension from the practice of law is the appropriate sanction to be applied under the circumstances. We agree with the recommendation of the referee regarding Miller's suspension and the requirements for Miller's reinstatement to the practice of law in the State of Nebraska.

Therefore, we conclude that the respondent, James P. Miller, shall be suspended from the practice of law for a period of 2 years; provided, however, respondent shall receive credit for the time he has been temporarily suspended from the practice of law, that is, from February 6, 1986. At the conclusion of respondent's suspension and before respondent may be reinstated to the practice of law in this state, respondent shall (1) furnish independent third-party proof that respondent has continued active participation in Alcoholics Anonymous and maintained abstinence from alcohol and drugs; (2) successfully complete a course in legal ethics and a course in basic accounting, such courses to be successfully completed at an accredited educational institution; (3) complete a course in

continuing legal education in law office management; and (4) pay all costs of this action, which are hereby taxed to the respondent.

JUDGMENT OF SUSPENSION.

STATE OF NEBRASKA, APPELLEE, V. STACIE L. MILLER, APPELLANT.
404 N.W.2d 45

Filed April 17, 1987. No. 86-972.

Criminal Law: Constitutional Law: Pleas. The proper way to conduct a group arraignment is to call each person being arraigned before the bench, identify the defendant, advise him or her that the remarks of the court apply to each person individually, and ascertain on the record that the defendant was present throughout the conduct of the arraignment, heard the remarks, and understood them.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Michael W. Baldwin, Deputy Buffalo County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder, for appellee.

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

CAPORALE, J.

Defendant-appellant, Stacie L. Miller, was adjudged guilty by the county court on a plea of no contest to a charge of disturbing the peace in violation of Neb. Rev. Stat. § 28-1322 (Reissue 1985). The conviction was affirmed by the district court, and Miller appeals to this court, asserting that the record shows error in that it fails to establish his plea was based on a knowing and intelligent waiver of his constitutional rights. We affirm.

Miller's sole assignment of error relates to the fact that the county judge conducted a group arraignment. We have held

that the proper way to conduct such an arraignment is to call each person being arraigned before the bench, identify the defendant, advise him or her that the remarks of the court apply to each person individually, and ascertain on the record that the defendant was present throughout the conduct of the arraignment, heard the remarks, and understood them. *State v. Martens*, 222 Neb. 870, 387 N.W.2d 701 (1986); *State v. Predmore*, 220 Neb. 336, 370 N.W.2d 99 (1985). The record shows that in the present case the county judge established on the record that Miller and five other defendants were present. The judge then instructed Miller and each of the other defendants to consider the comments he was about to make as if directed to each of them individually. He thereafter informed all the defendants of the rights, among others, to the assistance of counsel, to confront adverse witnesses, and to trial by jury, and of the privilege against self-incrimination. The county judge then individually advised Miller, who was represented by appointed counsel, of the charge against him and the range of the penalties which might be imposed. The county attorney then advised the judge that Miller had fired a blank from some type of firearm into a group of people.

Nonetheless, Miller argues his plea was defective because the record does not affirmatively show that, as required by *State v. Martens, supra*, he was present throughout the time the group arraignment was conducted. It is true that the better practice would have been to specifically ask Miller whether he had been present throughout the entire time the judge explained the rights possessed by a criminal defendant. The record does, however, reflect the following exchange between the county judge and Miller:

> [Judge]: Do you have any question as to any of the statutory or constitutional rights that I have just advised you of?
>
> MR. MILLER: Huh-uh.
>
> . . . .
>
> [Judge]: Do you understand the rights you would be waiving and giving up under a plea of no contest or under a plea of guilty?
>
> MR. MILLER: Yeah.

In the absence of an affirmative showing to the contrary, the foregoing colloquy adequately establishes that Miller was indeed present throughout the group arraignment. Thus, the county judge conducted a proper group arraignment and fulfilled the requirements for taking a valid no contest plea. *State v. Sianouthai, ante* p. 62, 402 N.W.2d 316 (1987); *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).

Accordingly, the district court was correct in concluding that there was no error appearing on the record made in the county court, and in affirming the judgment of the county court. The judgment of the district court is therefore hereby affirmed.

AFFIRMED.

CAMPUS LIGHT HOUSE MINISTRY, APPELLANT, V. BUFFALO COUNTY BOARD OF EQUALIZATION, BUFFALO COUNTY BOARD OF SUPERVISORS, APPELLEE.

404 N.W.2d 46

Filed April 17, 1987. No. 86-1052.

Taxation: Appeal and Error. A taxpayer who has first sought an exemption under Neb. Rev. Stat. § 77-202.01 (Reissue 1981), which was denied and from which no appeal pursuant to Neb. Rev. Stat. § 77-202.04 (Reissue 1986) was taken, may not thereafter pay the tax and seek a refund under the provisions of Neb. Rev. Stat. § 77-1736.10 (Reissue 1986).

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Kent D. Turnbull, for appellant.

Gerald R. Jorgensen, for appellee.

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

KRIVOSHA, C.J.

The specific question raised by this appeal is whether a taxpayer which claims that its property is exempt from taxation may first file a claim with the county board of equalization

seeking exemption from taxation, pursuant to the provisions of Neb. Rev. Stat. § 77-202.01 (Reissue 1981), and, after being denied the exemption and failing to appeal, pursuant to Neb. Rev. Stat. § 77-202.04 (Reissue 1986), may pay the tax and seek a refund under the provisions of Neb. Rev. Stat. § 77-1736.10 (Reissue 1986).

The district court for Buffalo County, Nebraska, found that the taxpayer could not, and sustained a demurrer filed by the appellee, Buffalo County Board of Equalization, to the petition in error filed by the appellant, Campus Light House Ministry. We agree with the district court, and affirm.

Because the matter comes to us on a demurrer, there are no issues of fact. We review the case, therefore, under the rule that the demurrer admits the truth of all facts well pleaded but not conclusions of fact drawn therefrom by the pleader. See *Thurston County v. Farley*, 128 Neb. 756, 260 N.W. 397 (1935).

The petition alleges that the appellant, Campus Light House Ministry, is a recognized nonprofit corporation and the owner of certain real estate in Buffalo County, Nebraska. The petition then alleges that the property involved in this action is used solely for religious reasons in that the building is primarily used as offices and meeting places for the campus ministry. The petition then alleges that applications for full tax-exempt status were submitted by Campus Light House Ministry for the years 1982 and 1983 and that on February 9, 1982, and February 15, 1983, the Buffalo County Board of Supervisors acting as the Buffalo County Board of Equalization denied the requests for full exemption for 1982 and 1983, setting the tax exemption rate at 50 percent of value.

Campus Light House Ministry then alleges that on December 26, 1985, the taxes for 1982 and 1983 were paid in full and a claim was filed with the county board of supervisors requesting a refund pursuant to § 77-1736.10. The petition then alleges that a hearing was thereafter held before the board of supervisors and the claim for refund denied. It is the refusal of this claim for refund from which Campus Light House Ministry sought to appeal to the district court for Buffalo County, Nebraska. The petition further alleges that the assessment of tax for the years 1982 and 1983 against the

property of Campus Light House Ministry is "a tax illegally assessed against protected property under the Nebraska Constitution, Article 8, Section 2, and Neb. Stat. 77-202(c) (Reissue 1981)." The petition further alleges that the board of equalization's actions in 1982 and 1983 were arbitrary and unreasonable. It is to this petition which the appellee filed a demurrer.

In support of its position, Campus Light House Ministry argues that it had a statutory right to seek a refund from Buffalo County of taxes which were illegally assessed pursuant to the provisions of § 77-1736.10. The difficulty with appellant's argument is that it seeks to create an issue of fact which has previously been resolved against Campus Light House Ministry and is therefore not properly a matter which can be attacked pursuant to the provisions of § 77-1736.10.

Neb. Rev. Stat. § 77-202(1) (Reissue 1981) provides in part that "[t]he following property shall be exempt from taxes: . . . (c) Property owned by educational, religious, charitable, or cemetery organizations and used exclusively for educational, religious, charitable, or cemetery purposes . . . ." Section 77-202.01 then provides, in part: "Any person, corporation, or organization seeking tax exempt status for any real property shall apply for exemption to the county assessor by January 1 of the year following adoption of sections 77-202.01 to 77-202.07, on forms prescribed by the Tax Commissioner."

Neb. Rev. Stat. § 77-202.02 (Reissue 1986) then provides for the procedure whereby the county board of equalization conducts a hearing and rules upon the request for exemption. Under § 77-202.02 the county board of equalization is required to either "grant or withhold tax exemption for the real property or tangible personal property except motor vehicles on the basis of law and of regulations promulgated by the Tax Commissioner."

In the event that the county board of equalization shall refuse to grant the exemption, § 77-202.04 provides the appropriate appeal procedure. It reads in part:

> Persons, corporations, or organizations denied exemption from taxation for real or tangible personal property, including motor vehicles, by a county board of

> equalization may appeal de novo to the district court of the county where such real or tangible personal property, including motor vehicles, is located in the same manner and under the same procedure as provided by sections 77-1510 and 77-1511, in the case of appeals from other actions of a county board of equalization, except that such appeal shall be taken within twenty days after the certification of the decision, determination, or order made by such board of equalization . . . .

We have had previous occasions to review these procedures. In *Bemis v. Board of Equalization of Douglas County*, 197 Neb. 175, 177, 247 N.W.2d 447, 449 (1976), we said:

> The provisions of sections 77-202.01 through 77-202.07, R.R.S. 1943, are clear and comprehensive. These provisions, adopted in 1963 as L.B. 386, constitute a complete and comprehensive act dealing with the matter of tax exemptions. They specifically provide who may appeal from the decision of the county board of equalization on a tax exemption determination.

Thereafter, in *United Way of the Midlands v. Douglas County Board of Equalization*, 199 Neb. 323, 326, 259 N.W.2d 270, 272 (1977), we said: "[I]n appeals under section 77-202.04, R.R.S. 1943, the giving of the notice of appeal and the furnishing of an appeal bond are the only jurisdictional requirements which must be completed within the 20-day period." It seems, therefore, clear beyond question that a full and complete procedure has been developed by the Legislature to handle situations where one first seeks exemption from the county board of equalization and, upon being denied the exemption, appeals to the district court.

Section 77-1736.10 involves a totally different situation, and not one within the allegations of appellant's petition. Section 77-1736.10 provides in part:

> Any person who has paid a tax upon property that he claims was illegally assessed for the reason that such property was exempt under section 77-202, shall file a claim with the county board, or the city governing board for tax paid directly to a city, as the case may be, for a refund of such tax within three years after the tax is paid . . . .

Presumably, if the claim is rejected, an appeal can then be taken to the district court of the appropriate county.

The problem with appellant's argument, however, is that it reads the phrase "that he claims was illegally assessed" to mean that if any person makes the claim, regardless of the legitimacy of that claim, that person may pay the tax and seek a refund. That is not at all what the language means. In the first instance, § 77-1736.10 was introduced and adopted by the Legislature to address those situations where individuals, believing their property no longer exempt, paid the tax. If it was later determined by court decision that, in fact, the state's action in declaring the property taxable was void, there was no procedure available for the taxpayer to recover back the tax moneys previously paid by the taxpayer and illegally collected by the state.

That is not the situation as pleaded by appellant herein. Appellant acknowledges that before paying the taxes it sought a determination from the Buffalo County Board of Equalization that the property was exempt. It is further acknowledged that when that request was denied, appellant did not appeal within 20 days, as required by § 77-202.04. The determination by the county board that the property was only 50 percent exempt was a final and binding determination, and, therefore, appellant was without basis to contend that the property was exempt under § 77-202, and therefore illegally assessed in 1982 and 1983. See *City of Lincoln v. Soukup*, 215 Neb. 732, 340 N.W.2d 420 (1983). By accepting the determination of the board of equalization and thereafter paying the tax, appellant waived any right to such claim. Were we to hold otherwise, individuals who sought exemption and who were denied their claim could choose to ignore the decision, pay the tax, and start all over again. Campus Light House Ministry was given a full and adequate procedure to both seek an exemption and, upon denial, seek redress in the courts. It chose not to do so. It is therefore not able to now start all over. The action of the district court sustaining the demurrer of the appellee, Buffalo County Board of Equalization, was correct. The judgment is affirmed.

AFFIRMED.

LEROY P. MALY AND SUE E. MALY, APPELLANTS, V. ARBOR MANOR, INC., A NEBRASKA CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, AND KINNING & REIL, INC., A NEBRASKA CORPORATION, AND RUMP'S, INC., A NEBRASKA CORPORATION, THIRD-PARTY DEFENDANTS, APPELLEES.

404 N.W.2d 419

Filed April 24, 1987. No. 85-687.

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. _____: _____. One relying upon the doctrine of res ipsa loquitur must establish that the instrumentality causing the damage was in the exclusive control and management of the party sought to be held liable.
3. **Negligence: Evidence: Proof.** 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. The doctrine is applicable only where the plaintiff is unable to allege or prove the particular *act of negligence* which caused the injury. However, the plaintiff may and must allege and prove the *physical cause* of the damage inflicted.
4. **Nuisances: Words and Phrases.** The use made by one of his or her property which works an irreparable injury to the property of his or her neighbor, the use made by one of his or her property whereby the unwritten but accepted law of decency is violated, the use made by one of his or her property whereby his or her neighbor is deprived of the reasonably comfortable use and enjoyment of his or her own property, and the use made by one of his or her property which will probably or likely endanger the health and the life of his or her neighbor are private nuisances.

Appeal from the District Court for Dodge County: DARVID D. QUIST, Judge. Reversed and remanded for further proceedings.

Sidner, Svoboda, Schilke, Wiseman, Thomsen & Holtorf, for appellants.

P. Shawn McCann and Joseph S. Daly of Sodoro, Daly & Sodoro, for appellee Arbor Manor.

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

HASTINGS, J.

Plaintiffs appeal the judgment of the district court for Dodge County, Nebraska, sustaining the defendant's motion for summary judgment in an action for damages to their property arising out of two sewer backups into their home.

In their amended petition the plaintiffs alleged the following facts: that the defendant owned certain property in Fremont, Nebraska, upon which it built a nursing home in 1966; that near the time the defendant constructed the nursing home it also constructed a manhole on that property, which tied the nursing home into the Country Acres sewer system which provides sanitary sewer services for both the plaintiffs and the defendant; that the manhole was defective in that there was a hole at the base of it which caused water from outside of the sanitary sewer system to infiltrate into the system, which caused the sewer system to back up and discharge raw sewage into the plaintiffs' home on August 1, 1981, and May 21, 1982; that these sewer backups caused damage to the plaintiffs; that the manhole was under the control and management of the defendant; that the sewer backups were such that in the ordinary course of things they would not have occurred if the defendant had used proper care; that these facts permit an inference of negligence under the doctrine of res ipsa loquitur; and that the maintenance of the manhole constituted a nuisance which impaired the comfort and health of the plaintiffs to their damage.

The defendant answered with a general denial and alleged that the damages suffered by the plaintiffs, if any, were proximately caused by the negligence of a third party.

The matter came before the district court on the defendant's motion for summary judgment, during which a third-party defendant's answers to interrogatories, LeRoy P. Maly's affidavit and supporting photographs, the third-party complaint, the answer to the third-party complaint, and an affidavit and report of a civil engineer were submitted for the court's consideration. The court sustained the defendant's motion for summary judgment, and the plaintiffs, after their motion for a new trial was overruled, appealed.

The plaintiffs contend the court erred in sustaining the

defendant's motion for summary judgment. In support of this argument, the plaintiffs assert that the doctrines of res ipsa loquitur and nuisance apply to the facts in this case. We agree, and therefore reverse the order of the district court.

The plaintiffs' first cause of action was based on the doctrine of res ipsa loquitur.

> 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, 224 Neb. 663, 665, 400 N.W.2d 850, 852 (1987). From this, the plaintiffs assert there were genuine issues of fact on the propositions (1) that the defendant was in exclusive control of the instrumentality which caused the sewer backups and (2) that the backups would not have occurred in the ordinary course of things if the defendant had used proper care.

Addressing this first contention, we note that in the plaintiffs' amended petition they alleged that the manhole was under the control and management of the defendant at all times relevant to the lawsuit. They did not, however, allege that the manhole was under the defendant's *exclusive* control and management. Although it would have been better had the plaintiffs alleged that the manhole was under the defendant's exclusive control and management, it was not fatal for them to have not included the word "exclusive." This is because we sometimes have used "exclusive" when describing the elements of a res ipsa loquitur case, sometimes have not, and sometimes have used "control and management" in one paragraph and "exclusive control and management" in another. For an example of the first, see *Beatty v. Davis, supra*; for the second, see *Fynbu v. Strain*, 190 Neb. 719, 211 N.W.2d 917 (1973); and for the third, see *Asher v. Coca Cola Bottling Co.*, 172 Neb. 855, 112 N.W.2d 252 (1961), a case in which we stated that the instrumentality causing the injury only had to be under the defendant's "control and management" but then went ahead

and discussed what "exclusive" control and management meant when applying the doctrine to a manufacturer of bottled goods sold to a retailer, which in turn sold them to a consumer. Despite these somewhat equivocal recitations of the elements of the res ipsa loquitur doctrine, whenever control and management were really at issue we have held that the plaintiff must prove that the instrumentality was in the defendant's "exclusive" control and management. See, e.g., *Asher v. Coca Cola Bottling Co., supra; McCall v. St. Joseph's Hospital*, 184 Neb. 1, 165 N.W.2d 85 (1969); *Weston v. Gold & Co.*, 167 Neb. 692, 94 N.W.2d 380 (1959). Thus, even though they left out the word "exclusive" in their petition, the plaintiffs in this case still must show there is a material issue of fact as to whether the defendant was in the "exclusive" control and management of the manhole.

The evidence presented at the hearing on the motion for summary judgment raised a question of fact as to the exclusiveness of the defendant's control and management of the manhole. The plaintiffs' petition alleged that the defendant built the manhole and has maintained it since. Supporting these allegations is information supplied by the third-party defendant Rump's, Inc., in its answer to the third-party complaint and in its answers to interrogatories. Rump's stated that it replaced, *at the defendant's request*, a 6-inch fiber pipe with a 6-inch clay tile pipe running easterly from the manhole. Rump's also stated that on September 1, 1982, the president of the defendant called Rump's to ask whether it would help make temporary repairs to the manhole. These statements directly support the allegation that the defendant was in exclusive control and management of the manhole. However, Rump's also stated that the defendant called it about the September 1982 repairs in order to get the Fremont Department of Utilities off the defendant's back. In that conversation, the president of the defendant made reference to three letters it had received from the utility. Also, Rump's stated that the department of utilities, "which was responsible for inspection of construction work attached to the city sewers, did not inspect the work on the construction of the manhole, according to Department of Utilities' records." This evidence suggests that the defendant

did not have exclusive control and management of the manhole. Thus, there is a genuine question of a material fact as to the defendant's *exclusive* control and management of the manhole, and summary judgment on the plaintiffs' first cause of action was improperly granted unless the plaintiffs did not present an issue of fact on the second element of a res ipsa loquitur case.

The second element of a res ipsa loquitur case is that the claimed injury would not have occurred in the ordinary course of things if the defendant had used proper care. It is obvious that sewers back up for a variety of reasons; some the result of negligence, others not. See, e.g., *Freitag v. Montello*, 36 Wis. 2d 409, 153 N.W.2d 505 (1967) (backup due to temporary obstruction in main sewerline). However, the plaintiffs did not make a general allegation that sewers do not back up in the absence of negligence. The plaintiffs have pinpointed the physical cause of the sewer backup as having resulted from a defective manhole on the defendant's property, which allowed excess infiltration into the sanitary sewer system. Thus, the plaintiffs have alleged that a manhole does not ordinarily allow excess water to enter the sanitary sewer system, thereby causing a backup of that system, if the entity controlling or managing that manhole has used proper care. This is a proper allegation.

In Nebraska, however, 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. *Beatty v. Davis*, 224 Neb. 663, 400 N.W.2d 850 (1987); *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); *Miratsky v. Beseda*, 139 Neb. 229, 297 N.W. 94 (1941). 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. v. Omaha Coca-Cola Bottling Co.*, 157 Neb. 923, 62 N.W.2d 127 (1954).

At first blush it appears that the plaintiffs have alleged the specific act of negligence which led to their injuries and that therefore the doctrine of res ipsa loquitur is not applicable. That is, however, not the case. The plaintiffs have, indeed, pinpointed the physical cause of the sewer backup. This they

needed to do in order to show both that the defendant was in exclusive control and management of the instrumentality that caused the harm and that the sewer would not have backed up in this manner in the absence of the defendant's negligence. They have not, however, alleged or proved what the legal cause of the sewer backup was. The legal cause of the sewer backup could have been negligent construction of the manhole, negligent inspection of the construction work, or negligent failure to inspect the manhole periodically, to name a few. For discussion of physical versus legal cause in this context, see 1 S. Speiser, The Negligence Case, Res Ipsa Loquitur § 5:21 (1972).

This case is very similar to *Nownes v. Hillside Lounge, Inc.*, 179 Neb. 157, 137 N.W.2d 361 (1965), a case in which plaintiff tipped over on the defendant's barstool and was injured. The plaintiff relied on the doctrine of res ipsa loquitur and recovered a verdict of $6,000. The defendant on appeal contended that the doctrine of res ipsa loquitur was inapplicable because the evidence established why, as well as how, the accident occurred. We stated:

> The evidence in this case shows that the accident occurred because the plate which was fastened to the floor became loose. There are many reasons why the plate may have become loose. . . .
>
> . . . We believe that the doctrine of res ipsa loquitur is applicable and in the absence of an explanation from the defendant, the facts permit an inference of negligence on the part of the defendant.

Id. at 159, 137 N.W.2d at 362-63. Similarly, the allegations and affidavits presented on the motion for summary judgment in this case permit an inference of negligence; therefore, the court was incorrect in sustaining the defendant's motion for summary judgment on plaintiffs' first cause of action.

The district court was also incorrect in sustaining the defendant's motion for summary judgment as to the plaintiffs' second cause of action, that of nuisance. The plaintiffs alleged that the defendant's maintenance of the manhole was a nuisance.

> [T]he use made by one of his property which works an irreparable injury to the property of his neighbor, the use

> made by one of his property whereby the unwritten but accepted law of decency is violated, the use made by one of his property whereby his neighbor is deprived of the reasonably comfortable use and enjoyment of his own property, the use made by one of his property which will probably or likely endanger the health and the life of his neighbor, are private nuisances . . . .

Lowe v. Prospect Hill Cemetery Ass'n, 58 Neb. 94, 107, 78 N.W. 488, 492 (1899).

The "use" the plaintiffs contend the defendant made of its property was maintenance of a defective manhole which allowed excess water to infiltrate into the sanitary sewer system, which in turn caused the sewer to back up twice into the plaintiffs' home. This is supported by the affidavit and attached report entitled "Sanitary Sewer Investigation, Country Acres Addition, Fremont, Nebraska," prepared by Stephen L. Hergert of Wells Engineers, Inc. The damages and expenses sustained by the plaintiffs as a result of the two sewer backups are detailed in LeRoy Maly's affidavit. Certainly this evidence creates an issue of fact as to whether the defendant's use of its property created a nuisance.

It bears noting that courts in other jurisdictions have recognized that plaintiffs can state a cause of action for nuisance under similar situations. In *Town of Rome City v. King*, 450 N.E.2d 72 (Ind. App. 1983), two residents of Rome City brought an action against the municipality, alleging negligence and nuisance arising out of the operation of a pumping station, which on several occasions caused raw sewage to flow onto one of the residents' lots. Similarly, in *Dempsey v. City of Souris*, 279 N.W.2d 418 (N.D. 1979), the plaintiffs brought a nuisance action in connection with the operation of a sewage lagoon, which at various times overflowed onto the plaintiffs' land. In both of those cases the courts affirmed the awards of damages to the plaintiffs caused by the nuisances.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BERNICE M. JOHANNES, APPELLANT, V. McNEIL REAL ESTATE FUND VIII, LTD., A LIMITED PARTNERSHIP, DOING BUSINESS AS TIMBER CREEK APARTMENTS, ET AL., APPELLEES.

404 N.W.2d 424

Filed April 24, 1987. No. 85-711.

1. **Expert Witnesses: Appeal and Error.** The admission or exclusion of expert testimony is left largely to the sound discretion of the trial court, which ruling will be upheld absent an abuse of that discretion.
2. _____: _____. While a trial court may admit, if it believes such may assist the jury, expert testimony in areas where laymen have competence, it is not error to exclude expert testimony relating to matters which are not complicated and embrace matters of common knowledge.
3. **Affidavits: Records: Appeal and Error.** The existence or contents of affidavits filed with the clerk of the trial court but not preserved in the bill of exceptions cannot be known by this court.
4. **Affidavits: Records: Trial: Appeal and Error.** Errors predicated on occurrences during the course of closing an argument cannot be shown by affidavit; the proper procedure, when the full arguments are not being reported, is to call in the official reporter and make a record of what occurred part of the bill of exceptions.
5. **Trial: Motions for Mistrial: Appeal and Error.** One may not take the chance of a favorable verdict and then complain of the result; thus, in order to assign error based on occurrences during the course of a closing argument, the complaining party must have objected to the occurrence and moved for a mistrial prior to submission of the cause.
6. **Negligence: Proof.** It is not necessary to prove that an owner or operator of premises who created a hazardous condition had actual or constructive knowledge of its existence; however, such proof, as well as proof that the owner or operator of the premises had a reasonable opportunity to correct the condition, is necessary where the hazard was created by a third person.
7. **Negligence.** In negligence actions there is but one standard of care, that of reasonable prudence under the circumstances.

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

Lawrence R. Brodkey and Scott Kirshenbaum, for appellant.

J. Joseph McQuillan and Susan Andersen Anderson of Walentine, O'Toole, McQuillan & Gordon, for appellees.

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

CAPORALE, J.

Plaintiff-appellant, Bernice M. Johannes, sustained injuries when she slipped and fell at a multibuilding apartment complex owned by defendant-appellee McNeil Real Estate Fund VIII, Ltd., a limited partnership, and operated by defendant-appellee Robert A. McNeil Corporation. The jury returned a verdict against her, and the trial court entered a judgment in favor of the defendants. The seven errors plaintiff assigns merge to claim that the trial court erred in (1) excluding certain evidence, (2) limiting her closing argument, (3) making a statement to the jury during the course of her closing argument, and (4) refusing to give certain requested instructions. We affirm.

Plaintiff and her husband had occupied a ground floor apartment in the complex, which is located in Omaha, for approximately 1 year prior to the occurrence in question. The building in which plaintiff's apartment is located is bordered by parking lots on its west and south sides. Plaintiff could enter or leave her apartment through a corridor which led to a doorway on the west side of the building. In addition, direct access to the apartment can be had through a patio door located on the east side of the building. There are paved sidewalks leading from the west parking lot to the west doors, but the patio door opened onto a grassy common area, or lawn. While tenants could park in any complex parking lot at which there was space, plaintiff found it closer and easier to park in the south lot and walk across the lawn to get to and from her apartment, and regularly did so.

On the morning of June 1, 1981, plaintiff left for work from the patio door and walked across the lawn. When she returned later that day, at noon, she parked her car in the south lot and started to cross the lawn to her apartment while carrying a sack of groceries and a box of laundry detergent. When she was approximately halfway between her car and her apartment, she slipped and fell. Plaintiff noticed that the area in which she fell was wetter than it had been in the morning and that she had slipped on a bare spot which was muddy and covered with weeds and grass. While there exists a dispute in the testimony, the evidence is such that the jury could find there was a

discernible pathway across the south lawn between the building containing plaintiff's apartment and the adjacent building. The evidence also establishes that refuse bins were kept in the south lot for the tenants' use.

Plaintiff established that the complex as designed contemplated a sidewalk from the south parking lot in the general vicinity of her fall. There also is evidence, however, that no ordinance of the city of Omaha required the installation of such a sidewalk and that a certificate of occupancy was issued by the city authorities for the complex as built.

Pursuant to the defendants' objections, the trial court rejected plaintiff's offer to prove that the architects preparing the original site plan anticipated the need for the unbuilt sidewalk, particularly in view of the fact that refuse bins were to be kept at the south lot. In their opinion such a sidewalk would constitute a safety measure, as sidewalks are safer to walk on than is grass.

The trial court did receive the testimony of a witness engaged in the business of managing apartments, to the effect that it was a custom and principle of the business to, upon observing such a pathway worn by tenants, fence the area, otherwise keep the tenants from walking across the area, or install a sidewalk.

The trial judge instructed the jury, in relevant part, that if defendants knew or should have known of a dangerous condition on their premises which presented an unreasonable risk of harm and had a reasonable time to correct such condition, they had a duty to use reasonable care to make the condition safe or to warn plaintiff of the condition and the risk involved. The judge defined negligence as the "doing of some act under the circumstances surrounding the accident involved which a man of ordinary prudence would not have done or the failure to do some act or to take some precaution which a man of ordinary prudence would have done or taken." Unreasonable risk of harm was defined to mean a risk that a reasonable person under all the circumstances would not allow to continue. The jury was further advised that a landlord has a duty to keep the common areas safe.

The first assignment urges that the trial court erred in excluding the proffered testimony of the architects.

The operative rule to recall is that the admission or exclusion of expert testimony is left largely to the sound discretion of the trial court, which ruling will be upheld absent an abuse of that discretion. *Aetna Cas. & Surety Co. v. Nielsen*, 222 Neb. 92, 382 N.W.2d 328 (1986); *Priest v. McConnell*, 219 Neb. 328, 363 N.W.2d 173 (1985).

Plaintiff argues that the architects' testimony concerning the anticipated need and original plan to install a sidewalk was relevant to her allegation that the defendants were negligent in not installing a sidewalk. Be that as it may, the fact that the sidewalk had been planned was a matter which had already been made known to the jury by other evidence. In addition, the architects' assessment that sidewalks are safer to walk on than grass is not the kind of determination which requires special skill, knowledge, or experience to make, as contemplated by Neb. Rev. Stat. § 27-702 (Reissue 1985). It is true that when the trial court concludes that such would assist the jury, expert testimony may be permitted even in areas where laymen have competence. *Hegarty v. Campbell Soup Co.*, 214 Neb. 716, 335 N.W.2d 758 (1983). That is not to say, however, that the exclusion of expert testimony relating to matters which are not complicated and which embrace matters of common knowledge is error. *Mathine v. Kansas-Nebraska Nat. Gas Co., Inc.*, 189 Neb. 247, 202 N.W.2d 191 (1972); *Moore v. Krejci*, 139 Neb. 562, 297 N.W. 913 (1941). Under the circumstances it cannot be said the trial court abused its discretion in excluding the architects' testimony.

The next two assignments of error, that the trial court erred in limiting plaintiff's closing argument and further erred in making a statement to the jury during the course thereof, are considered together.

For reasons the record does not reveal, the closing arguments were not reported. Plaintiff, however, attempts to raise these questions by calling our attention to certain affidavits contained in the transcript. The effort fails for a number of reasons.

Firstly, so far as the record reflects, these affidavits were not offered in evidence and, thus, are not a part of the bill of exceptions. The existence or contents of affidavits filed with the

clerk of the trial court but not preserved in the bill of exceptions cannot be known by this court. *Snyder v. Nelson*, 213 Neb. 605, 331 N.W.2d 252 (1983); *Bulger v. McCourt*, 179 Neb. 316, 138 N.W.2d 18 (1965).

Secondly, errors predicated on occurrences during the course of closing arguments cannot be shown by affidavit. In order that there may be an opportunity to make an accurate record, the proper procedure, when the full arguments are not being reported, is to call in the official reporter and make a record of what occurred part of the bill of exceptions. See *Sandomierski v. Fixemer*, 163 Neb. 716, 81 N.W.2d 142 (1957), *superseded in another respect, Kennedy v. Kennedy*, 221 Neb. 724, 380 N.W.2d 300 (1986). While it is in any event appropriate to make such a record at the close of the argument, see *Sandomierski v. Fixemer, supra*, the parties can avoid disputes about what occurred by exercising their right to have the entire arguments reported. See, Neb. Ct. R. of Official Ct. Rptrs. IV-B (rev. 1986); *Kennedy v. Kennedy, supra; Garska v. Harris*, 172 Neb. 339, 109 N.W.2d 529 (1961).

Thirdly, the record fails to show that plaintiff, prior to submission of the cause to the jury, objected to the judge's ruling and statement and moved for a mistrial on the bases thereof. These are indispensable steps which must be shown by the record, for one may not take the chance of a favorable verdict and then complain of the result. *Pitt v. Checker Cab Co.*, 217 Neb. 600, 350 N.W.2d 507 (1984).

In connection with her last assignment plaintiff claims the trial judge erred by failing to charge the jury, as she had requested, that it is not necessary to show that one who created a dangerous condition had knowledge of it, that a landlord must both give notice of and not knowingly expose tenants to "traps and hidden dangers," and that one who has superior skills, knowledge, or judgment is held to a higher standard of care than is the ordinary person.

It is true that it is not necessary to prove that an owner or operator of premises who created a hazardous condition had actual or constructive knowledge of its existence. However, such proof, as well as proof that the owner or operator of the premises had a reasonable opportunity to correct the condition,

is necessary where the hazard was created by a third person. See, *Havlicek v. Desai, ante* p. 222, 403 N.W.2d 386 (1987); *Brown v. Slack*, 159 Neb. 142, 65 N.W.2d 382 (1954). The evidence in the present case, however, is only that if the tenants had in fact worn a pathway across the lawn, a matter which is in dispute, then the custom and principle of the property management business was to either fence the area, otherwise keep tenants from walking across it, or install a sidewalk as had been planned originally. Plaintiff's position with respect to the lack of a need to establish the status of defendants' knowledge assumes that defendants created a hazardous condition by not installing a sidewalk. The evidence, however, only permits the jury to consider installation of a sidewalk as one of several means available to the defendants to keep tenants from walking across the lawn if, and only if, the jury first found that the tenants had in fact worn a pathway across the grass. Thus, the crucial condition is the existence of a worn pathway, not the lack of a sidewalk. There is no suggestion that defendants created the worn pathway; therefore, whether the pathway existed and, if so, whether defendants knew or should have known of its existence and had time to remedy the situation were questions for the jury to resolve.

The request for a trap or hidden danger instruction is equally without merit. There is no evidence that whatever conditions existed were in any way concealed or hidden and not apparent; whatever existed was there for anyone to observe. Thus, there existed no trap or hidden danger. *Gorman v. World Publishing Co.*, 178 Neb. 838, 135 N.W.2d 868 (1965).

Plaintiff next argues the jury should have been instructed that as a professional property manager, defendant Robert A. McNeil Corporation was to be held to an enhanced standard of care. The court in *LaVine v. Clear Creek Skiing Corp.*, 557 F.2d 730 (10th Cir. 1977), concluded the refusal to instruct that the defendant ski instructor's expertise was to be considered in assessing the quantum of care required did not constitute error, as there is in truth but one standard: that of reasonable prudence under the circumstances. We agree.

In the present case the jury was informed that the circumstances surrounding the accident bore on the questions

of whether negligence or an unreasonable risk of harm existed. One of those circumstances was the fact that Robert A. McNeil Corporation was a professional manager of property, a fact which was made known to the jury and presumably was argued as a significant circumstance to consider in evaluating whether the defendants had been negligent. For the foregoing reasons we must conclude that the trial court properly instructed the jury and did not commit error in rejecting plaintiff's requested instructions.

During her argument before this court, plaintiff called our attention to the fact that in *Weiss v. Autumn Hills Inv. Co.*, 223 Neb. 885, 395 N.W.2d 481 (1986), a tenant who fell while walking across a grassy common area in the dark was permitted to recover. Whatever the similarities between *Weiss* and the present case may be, there is a crucial distinction; in *Weiss* the jury resolved the factual issues in favor of the plaintiff therein and returned a verdict against the defendant therein; in the present case the jury resolved all factual issues in favor of the defendants and returned a verdict against the plaintiff. The differing results turn not on questions of law, but on questions of fact. Thus, the *Weiss* result does not control the result in this case.

The judgment of the district court is affirmed.

AFFIRMED.

TAMMY S. LEMBURG, THROUGH HER FATHER AND NEXT FRIEND, EUGENE C. LEMBURG, ET AL., APPELLANTS, V. ADAMS COUNTY, NEBRASKA, A POLITICAL SUBDIVISION, ET AL., APPELLEES.

404 N.W.2d 429

Filed April 24, 1987. Nos. 85-731, 85-732, 85-733, 85-734.

Judgments: Final Orders: Words and Phrases. A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist.

Appeal from the District Court for Adams County: WILLIAM G. CAMBRIDGE, Judge. Reversed and remanded for further proceedings.

Mark L. Eurek of The Law Office of Mark L. Eurek, P.C., and Allan J. Eurek of Pierson, Ackerman, Fitchett, Akin & Hunzeker, for appellants.

John R. Brownell of Lauritsen, Baker & Brownell, for appellee Adams County.

Douglas Pauley of Conway, Connolly and Pauley, P.C., for appellee Consbruck.

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

CAPORALE, J.

In this consolidated appeal each minor plaintiff-appellant, Tammy S. Lemburg, Sherry L. Lemburg, Susan K. Lemburg, and Laura J. Lemburg, through her father and next friend, sued defendant-appellee Adams County and the individual defendants Jerome G. Consbruck and Annette M. Hock for damages sustained when the automobile driven by Hock and in which each plaintiff was riding, along with her mother, was involved in a collision. The district court dismissed each action for want of prosecution and denied each plaintiff's motion for reinstatement. Each of the plaintiffs has appealed that denial on the ground that no valid judgment of dismissal was ever entered. We reverse the denials of reinstatement and remand each cause for further proceedings.

Each of the cases in question was filed on May 4, 1982. Although the record does not tell us when, a suit was also filed by the plaintiffs' father in his capacity as personal representative of the estate of the plaintiffs' mother, who was killed in the collision, against Adams County, Consbruck, and Hock. On July 26, 1984, a judgment was entered in favor of Adams County in the case brought for the estate of the plaintiffs' mother. The estate was successful in obtaining a judgment of $35,000 against Hock. It is not clear from the record when this judgment was obtained.

In any event, a pretrial conference in each plaintiff's case was held on December 15, 1983. Each plaintiff announced at that time that she was ready to proceed to trial. However, the court informed the parties that a jury would not be available until the

summer of 1984. The defendants then requested additional time within which to complete discovery. The court ordered that there be an additional pretrial conference, to be scheduled in the late spring nearer to trial, so that defendants could complete discovery and so that research could be conducted as to whether the actions against Adams County needed to be severed from those against the individual defendants. This second pretrial conference was held on May 2, 1984.

In the meantime, on March 7, 1984, the court entered an order, in each plaintiff's case, which reads as follows:

> On the Court's own motion, it is ordered that in the event the above captioned case has not been tried or otherwise disposed of by December 30, 1984, the case will thereupon, without further order of the Court, become automatically dismissed for lack of prosecution unless good cause is shown prior thereto that the same should not be dismissed.
>
> Good cause must be presented by written motion supported by Affidavit which will be heard after notice on such date, prior to the above stated date for dismissal as may be arranged with the Court.
>
> It is further ordered that the Court Clerk shall forthwith make service of this order upon each party to this action by mailing a copy of this order to such party's counsel of record, and if none, to such party.

In each plaintiff's case a docket entry dated March 7, 1984, reads, "Dismissal date ordered for December 30, 1984." No further docket entry was made with respect to the foregoing order.

On October 31, 1984, Adams County filed a motion for summary judgment in each plaintiff's case, which was then withdrawn on December 14, 1984. At some time not revealed by the record, each case file was stamped, by some undisclosed individual, "Dismissed for want of prosecution."

In its simplest form the principal argument each plaintiff makes is that the dismissal of her action is a nullity because it was not based upon a judgment directing such action.

A "judgment" is a court's final consideration and determination of the respective rights and obligations of the

parties to an action as those rights and obligations presently exist. *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986); *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986); *Allen v. IBP, Inc.*, 219 Neb. 424, 363 N.W.2d 520 (1985); Neb. Rev. Stat. § 25-1301 (Reissue 1985).

The court's March 7, 1984, order in each case was not, as of that date, a "final determination of the rights of the parties" as contemplated by § 25-1301, because the outcome of the dismissal or continuance, if not tried "or otherwise disposed of," depended upon the showing of good cause in a specified manner. In short, the order was conditional and, as such, not a judgment as defined in § 25-1301. *Fritch v. Fritch*, 191 Neb. 29, 213 N.W.2d 445 (1973). Accord, *Williams v. Bourne*, 248 Iowa 189, 79 N.W.2d 751 (1956); *Peterson v. Overson*, 52 Ariz. 203, 79 P.2d 958 (1938); *Wallace v. Hankins*, 541 S.W.2d 82 (Mo. App. 1976); *Pepe v. Tournage*, 128 So. 2d 56 (La. App. 1961).

The question thus becomes whether the conditional order matured into a judgment of dismissal when the conditions specified therein were not met by December 30, 1984. As stated at the beginning of this analysis, a judgment determines the rights and obligations which "presently exist." The March 7, 1984, order did not determine the then existing rights and obligations of the parties in each case but, rather, attempted to fix, without further court consideration, the future trial rights of the plaintiffs as forthcoming events, not all of which were in plaintiffs' control, might warrant. As expressed by *Wallace v. Hankins, supra* at 84, a conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be. *Williams v. Bourne, supra*, observed that, generally, final judgments must not be conditional, and unless there is an equitable phase of the action wherein it is necessary to protect the interests of defendants, a conditional judgment is wholly void. Thus, the conditional order could not and did not become a judgment.

Consequently, each plaintiff is correct in contending that the dismissal of her suit is a nullity. The district court's denial of the motions for reinstatement of the suits is accordingly reversed, and each cause is remanded for further proceedings.

We hasten, however, to commend the district court for being concerned about the need to assure that cases move to resolution in a timely fashion so that justice not be denied through undue delay. The fact the particular procedure employed in these cases has been found to be impermissible is not to suggest that a trial court can or should tolerate inactivity. It is entirely appropriate for a trial court to schedule the completion of pretrial tasks and, upon the failure of the parties to meet that schedule, to impose such sanctions as the facts may warrant, including the entering of a judgment of dismissal for want of prosecution.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. STEPHEN L. MECUM, APPELLANT.

404 N.W.2d 431

Filed April 24, 1987. No. 86-237.

1. **Trial: Witnesses: Indictments and Informations.** While as a general rule the practice of endorsing additional witnesses just before or during the course of a trial is to be avoided, the trial court may, in the exercise of its discretion, permit the names of witnesses to be endorsed upon an information before or after trial has begun when doing so does not prejudice the rights of the defendant.
2. **Motions for Continuance: Appeal and Error.** A motion for a continuance is addressed to the trial court's sound discretion, and its ruling thereon will not be disturbed on appeal absent a showing of an abuse of that discretion.
3. **Criminal Law: Circumstantial Evidence: Proof.** The identity of the perpetrator of a criminal offense may be proven by inference and circumstantial evidence.

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

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

Robert M. Spire, Attorney General, and Linda L. Willard, for appellee.

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

CAPORALE, J.

Following a jury trial, defendant-appellant, Stephen L. Mecum, was adjudged guilty of two counts of robbery in violation of Neb. Rev. Stat. § 28-324(1) (Reissue 1985) and of using a motor vehicle to flee arrest in violation of Neb. Rev. Stat. § 28-905(2) (Reissue 1985). In this appeal defendant assigns as errors the district court's rulings which (1) sustained the prosecutor's motion to endorse an additional witness during the course of the trial, (2) overruled defendant's motion for a continuance after the additional witness was endorsed, and (3) overruled defendant's objection to a portion of a jury instruction. We affirm.

Christine Klemas-Luna was a clerk at a Kwik Shop on 10th and Missouri Streets in Omaha on May 20, 1985. At approximately 12:20 a.m., a man went into the store, said "something about a knife," kept his right hand in his pocket, and announced he wanted all her money. The man grabbed the $1 and $5 bills Klemas-Luna had placed on the counter from the cash register drawer and put them in his left front pocket. He then grabbed some coins and started to leave, but returned, mumbled "something about a gun," and said he wanted the "twenties." The man then took some more coins and left. A total of approximately $64 was taken. Although the man used a shirt to cover his head, Klemas-Luna was nonetheless able to see his nose, eyes, and part of his red hair. Klemas-Luna called the police and gave them a description of the man, including the fact he had red hair and the clothes he was wearing. At about 12:30 a.m., Police Officer John Hill, Jr., after hearing of the robbery over his radio, saw a white Ford LTD automobile traveling at a high rate of speed approximately a mile from the Kwik Shop. Hill began following the accelerating automobile, and at one point got close enough to observe that the driver had red hair. Hill activated his patrol car's lights and siren, but the driver continued to travel at a high rate of speed, ignoring stop signs. When the speed reached 70 miles per hour, Hill slowed down, since it was raining and there was water on the streets.

Hill temporarily lost sight of the automobile, but a police roadblock eventually brought it to a stop. Crumpled paper money was found under the front seat of the automobile and in defendant's left front pocket.

Defendant was then taken back to the Kwik Shop so that Klemas-Luna could identify him. Klemas-Luna first observed defendant standing between two officers in the store's parking lot. Since it was raining and the parking lot was not very well lit, all she could identify at that time were the clothes defendant was wearing. She stated these clothes were the same as those worn by the robber. Defendant was then brought into the store, and Klemas-Luna identified him as the robber, as she did at the trial.

On June 17, 1985, John MacArthur III, an assistant manager of a Kwik Shop at 3440 South 50th Street in Omaha, was the only person in the store when, at approximately 2:30 a.m., a hostile-acting man entered, purchased a pack of cigarettes, and left. Shortly thereafter, the same man returned with his jacket draped over his head and ordered MacArthur to give him his money. Although MacArthur did not see a weapon, the robber kept his hands in his pockets. Being afraid, MacArthur handed over approximately $145.

MacArthur told the police he thought he could identify the man and was shown a group of five photographs. All five photographs were of men having rugged faces and unruly hair, and most had red hair. MacArthur immediately chose the second photograph as depicting the robber, but the officer asked him to look at all five. MacArthur did so, but remained certain that his first choice was a photograph of defendant, whom MacArthur later again identified at the trial.

After the first two trial witnesses, Klemas-Luna and MacArthur, had testified, the prosecutor told the judge and defense counsel that Judy Hoyt, a former girlfriend of and potential witness for defendant, had come to him and reported that she had been threatened by defendant to testify in his favor. She also said defendant had admitted to her that he had committed the first Kwik Shop robbery. The prosecutor then asked leave to endorse Hoyt as a State's witness, a request the court granted. Defense counsel thereupon asked for a continuance so that he could prepare for this testimony. The

trial court denied a continuance but gave defense counsel the opportunity to interview Hoyt or take her deposition before she testified. The record does not show whether defense counsel availed himself of these opportunities, but does show that defense counsel had previously had several conversations with Hoyt.

Hoyt later testified that she visited defendant in jail during July and August of 1985 and that, while defendant denied involvement in the second robbery, he confessed to the first Kwik Shop robbery. The jail visitation records established that Hoyt had not visited defendant in July but had visited him four times in August. Hoyt also testified on cross-examination that she had earlier filed assault charges against defendant and was afraid of him.

Hill testified that defendant was the person he had chased on May 20, 1985. A friend of defendant's testified that he drank beer with defendant around May 20, last talking with him sometime after 11 p.m.

Defendant testified on his own behalf and denied any involvement in either robbery and denied ever confessing to Hoyt. He explained that he had a lot of change in his possession on May 20 because he intended to play pool and had taken all the change out of a bowl he kept on his dresser. According to defendant, he left the bar where he had been drinking at 12:15 a.m. and was heading home when a police car began following him. He tried to outrun the police because he was drunk and possessed drugs. The pills taken from defendant's automobile were tested and shown to contain only caffeine. While defendant admitted being in MacArthur's Kwik Shop to buy cigarettes, he said that after buying the cigarettes he left Omaha and drove to Iowa to see Hoyt.

In connection with the first assignment defendant points out that this court has said the endorsement of additional witnesses just before trial is a practice to be avoided. *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979), *cert. denied* 446 U.S. 988, 100 S. Ct. 2974, 64 L. Ed. 2d 846 (1980). He in effect argues that endorsing an additional witness during trial is worse than doing so shortly before trial. We agree that as a general rule the State should not be permitted to endorse an additional witness during

the course of a trial. However, the trial court may, in the exercise of its discretion, permit the names of witnesses to be endorsed upon an information before or after trial has begun when doing so does not prejudice the rights of the defendant. *State v. Ellis*, 223 Neb. 779, 393 N.W.2d 719 (1986); *State v. Nielsen*, 203 Neb. 847, 280 N.W.2d 904 (1979); *Svehla v. State*, 168 Neb. 553, 96 N.W.2d 649 (1959). Neb. Rev. Stat. § 29-1602 (Reissue 1985) provides that the prosecuting attorney shall endorse upon the information the

> names of the witnesses known to him at the time of filing the same; and at such time thereafter, as the court or a judge thereof in vacation, in its or his discretion, may prescribe, he shall endorse thereon the names of such other witnesses as shall then be known to him.

Thus, the circumstances under which the additional name was added must be considered in determining whether the trial court erred by abusing its discretion. In the present case Hoyt was known to defendant, she had been interviewed by defense counsel, the prosecutor told defense counsel what he expected Hoyt to say, and the identification testimony of Klemas-Luna and Hill rendered cumulative Hoyt's testimony that defendant admitted to her that he had committed the first robbery. Under the circumstances, it cannot be said the district court abused its discretion in permitting the endorsement of Hoyt as an additional witness.

The claim made in the second assignment, that the district court erred in not granting a continuance, is equally without merit. While the record does not show whether defendant took advantage of the opportunity to again interview Hoyt and depose her, neither does the record tell us what a continuance would have accomplished. Defendant was able to show by the jail visitation records that Hoyt had not visited defendant in July as she claimed and was further able to imply that she was afraid of him as the result of having charged him with assault, thereby providing the jury with a basis for evaluating her desire to keep defendant in jail and to otherwise question her credibility. A motion for a continuance is addressed to the trial court's sound discretion, and its ruling thereon will not be disturbed on appeal absent a showing of an abuse of that

discretion. *State v. Donnelson, ante* p. 41, 402 N.W.2d 302 (1987); *State v. Sluyter*, 224 Neb. 768, 401 N.W.2d 480 (1987); *State v. Polyascko*, 224 Neb. 272, 397 N.W.2d 633 (1986); *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986). The foregoing factors, as well as those discussed in connection with the first assignment of error, established that the district court did not abuse its discretion in refusing to grant defendant a continuance.

This brings us to the third and last assignment, that the district court erred in overruling defendant's objection to the last paragraph of instruction No. 12. That instruction as given reads:

> The identity of the defendant as the perpetrator of the crimes charged is a material element of each and every offense herein. The State has the burden of proving identity beyond a reasonable doubt. Therefore, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant as the perpetrator of the offense before you can convict him.
>
> Identification testimony is an expression of belief or impression by a witness. In evaluating the identification testimony of a witness, you should consider, among other things, (1) the opportunity and capacity each witness had to observe the offender; (2) whether the identification made by the witness subsequent to the offense was the product of his own recollection of the offense; (3) whether a witness' identification testimony at trial is affected by a prior identification of the defendant, or prior failure to identify the defendant; (4) the length of time that elapsed between the occurrence of the crime and the first opportunity of the witness to see the defendant or his photograph; (5) the credibility of each witness pursuant to Instruction No. 17.
>
> The identity of the defendant as the perpetrator of the Crime charged need not be proved by eye witness testimony alone, but may also be proved by circumstantial evidence as explained to you in Instruction No. 13.

Defendant does not claim that instruction No. 13 fails to properly define and characterize the nature of circumstantial

evidence or that instruction No. 17 fails to properly advise the jury of the factors to consider when assessing a witness' credibility. Defendant's sole claim is that somehow the last paragraph of instruction No. 12

> enabled the jury to focus its attention on criteria not embraced by the courts. By allowing the jury to consider circumstantial evidence in determining whether the State proved beyond a reasonable doubt the identity of the Defendant, was incorrect. In other words, the District Court's instruction was too broad and could easily hâve lead [sic] the jury to consider irrelevant evidence in determining if the State had proved beyond a reasonable doubt the identity of the Defendant.

Brief for Appellant at 9.

Defendant does not, however, tell us how the questioned language led the jury to consider irrelevant matters in determining whether defendant was in fact the perpetrator of the crimes charged. Indeed, the identity of the perpetrator of a criminal offense may be proven by inference and circumstantial evidence, precisely as the last paragraph of instruction No. 12 states. *United States v. Royals*, 777 F.2d 1089 (5th Cir. 1985); *United States v. Lawrence*, 699 F.2d 697 (5th Cir. 1983), *cert. denied* 461 U.S. 935, 103 S. Ct. 2103, 77 L. Ed. 2d 309; *United States v. Quimby*, 636 F.2d 86 (5th Cir. 1981). The questioned language was appropriate because defendant was found in possession of a large number of coins and of crumpled paper money in his left front pocket, as well as in his automobile. These circumstances tied him to the first robbery and would support a finding he was the perpetrator of that offense even if the jury chose to reject Klemas-Luna's identification testimony.

The judgment of the district court is correct and is accordingly affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GREGORY KUHN, APPELLANT.
405 N.W.2d 9

Filed April 24, 1987. No. 86-844.

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

Gregory Kuhn, pro se.

Robert M. Spire, Attorney General, and William L. Howland, for appellee.

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

PER CURIAM.

Kuhn appeals from the district court's denial of his request for postconviction relief related to his entry of a plea of guilty to a charge of robbery. His brief before this court contains no assignments of error, and, as a result, the judgment will be affirmed in the absence of any plain error we may note. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986); *Reynolds v. Myers*, 224 Neb. 509, 398 N.W.2d 722 (1987).

We have reviewed the record and find that the process used by the court when accepting Kuhn's plea of guilty conforms with the requirements of *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). We note no plain error. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERNEST HARPER, APPELLANT.
404 N.W.2d 436

Filed April 24, 1987. No. 86-1105.

1. **Postconviction.** Once a motion for postconviction relief has been judicially determined, any subsequent motion 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.

2. _____. Postconviction relief may not be used to secure a review of issues which were capable of being raised in a direct appeal.

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

Ernest Harper, pro se.

Robert M. Spire, Attorney General, and Linda L. Willard, for appellee.

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

PER CURIAM.

Ernest Harper appeals from an order entered by the district court for Douglas County, Nebraska, denying Harper relief sought pursuant to the provisions of the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). We affirm.

This is the third appearance of this case before this court. Harper was charged by information with one count of robbery, one count of use of a firearm in the commission of a felony, and two counts of first degree sexual assault. Following trial to a jury, he was convicted of all of the counts and sentenced to the Nebraska Penal and Correctional Complex. Upon appeal to this court, we affirmed. See *State v. Harper*, 215 Neb. 686, 340 N.W.2d 391 (1983) (*Harper I*). Thereafter, Harper filed a petition in the district court for Douglas County, seeking postconviction relief, pursuant to the Nebraska Postconviction Act. Following a hearing, Harper was denied relief and appealed to this court. Upon careful review of the claim he raised, we affirmed. See *State v. Harper*, 218 Neb. 870, 359 N.W.2d 806 (1984) (*Harper II*).

Thereafter, in August of 1986, Harper, pro se, filed a second petition seeking relief pursuant to the provisions of the Nebraska Postconviction Act. All of the matters which he raised in his second petition seeking postconviction relief were matters that were available to be raised, whether raised or not, in his first direct appeal (*Harper I*) or in his subsequent postconviction action (*Harper II*).

The district court denied Harper an evidentiary hearing and

dismissed his second request seeking postconviction relief. It is from that order that he now appeals to this court. He raises no matters which were not either raised or could have been raised in *Harper I* or *Harper II*. This is simply an attempt to continue to rehash those matters which were or could have been previously presented to the court. That Harper may not do under the Postconviction Act.

As we observed in *State v. Rust*, 223 Neb. 150, 155, 388 N.W.2d 483, 489 (1986):

> In an effort to prevent justice from being appealed to extinction under the provisions of the Postconviction Act, we have held that once a motion for postconviction relief has been judicially determined, any subsequent motion 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. [Citations omitted.] Moreover, postconviction relief may not be used to secure a review of issues which were capable of being raised in a direct appeal. [Citation omitted.]

None of the matters presented to the district court in the first instance and to this court on appeal fall within the excepted categories, but, instead, fall within those areas for which subsequent postconviction relief may not be sought. The district court was correct in denying the petition. The judgment is affirmed.

AFFIRMED.

FREMONT PLAZA, INC., AND MARY RODAMAR, APPELLANTS, V. DODGE COUNTY BOARD OF EQUALIZATION, APPELLEE.

405 N.W.2d 555

Filed May 1, 1987. No. 85-583.

1. **Taxation: Appeal and Error.** An appeal from a judgment of the district court concerning action by a county board of equalization is heard as in equity and reviewed de novo.
2. **Taxation: Valuation.** A taxpayer may question the assessed value (actual value) of the taxpayer's real estate, the lack of proportionate and uniform valuation of the property, or both issues, in a proceeding before a board of equalization.
3. **Taxation: Valuation: Proof.** The taxpayer has the burden of proving that the value of the taxpayer's property has not been fairly and proportionately equalized with all other property.
4. **Taxation: Valuation: Presumptions.** There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment, which presumption remains until there is competent evidence to the contrary. Such presumption disappears when there is competent evidence on appeal to the contrary. From that point on the reasonableness of the valuation fixed by the board of equalization becomes an issue of fact based upon the evidence.
5. **Taxation: Valuation: Proof.** In proving disproportionate assessment, the key requirement is that the evidence establish an actual disparity in assessment which indicates the principle of uniformity has been violated, and not a mere difference of opinion as to valuation.
6. **Taxation: Valuation.** Authorities charged with the duty of valuing property for taxation purposes may classify different types of property reasonably, and may use appropriate differing methods of assessing actual value in the different classifications, but the results reached by such different methods and reasonable classifications must be correlated so that the valuations reached shall be uniform and proportionate and do not exceed the actual value of the property.
7. _____: _____. A taxpayer is entitled to have its property in a county assessed uniformly and proportionately with other property in the county even though the result may be that it is assessed at less than actual value.
8. **Taxation: Valuation: Costs: Appeal and Error.** Whenever any person shall appeal to the district court from the assessment of his property as fixed by the county board of equalization, and the appeal shall be sustained in whole or in part, the cost of such appeal, including costs of witnesses, if any, shall be paid by the county wherein such property is situated. Neb. Rev. Stat. § 77-1513 (Reissue 1986).

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded with directions.

Neil W. Schilke of Sidner, Svoboda, Schilke, Wiseman, Thomsen & Holtorf, for appellants.

Paul J. Vaughan, Deputy Dodge County Attorney, for appellee.

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

BOSLAUGH, J.

Fremont Plaza, Inc., and Mary Rodamar have appealed from the order of the district court which dismissed their appeal from the Dodge County Board of Equalization.

Mary Rodamar owns the land underlying the Fremont Mall which is leased to Fremont Plaza, Inc., under a long-term lease. Fremont Plaza owns all of the improvements on the land. As the interests of both parties in this matter are the same, they will be referred to as the taxpayer. This appeal involves six parcels of land, which will be referred to as the mall.

The Dodge County assessor fixed the actual value of the mall for tax purposes at $4,337,285 for the 1983 tax year. The taxpayer filed a timely protest with the Dodge County Board of Equalization (Board) based on unequal assessment. The protest was disallowed, and the taxpayer appealed to the district court. The county cross-appealed, contending the assessed valuation was too low.

The taxpayer's amended petition alleged that the actual value of the mall as determined by the assessor did represent the fair market value of the property on that date; that the use of the Nebraska Agricultural Land Valuation Manual (Land Manual) to value unimproved farmland resulted in that property's being assessed at not more than 45 percent of its actual value; and that the assessor used only the procedure described in the Land Manual to determine the value of such property. The taxpayer further alleged the assessor used the Marshall Valuation Service and comparable sales to determine the fair market value of its property and that the assessor did not attempt to correlate the results of the two different methods of appraisal to determine uniform valuation as required by Neb. Const. art. VIII, § 1, and Neb. Rev. Stat. § 77-201 (Reissue 1981). The taxpayer sought to have the assessed value of its property reduced to the same percentage of actual value as agricultural land was assessed.

The matter was heard March 26 and 27, 1985. The district court found that the assessor had correctly applied state-approved criteria in valuing the taxpayer's property for the 1983 tax year, that the resulting value represented the actual value of the property for that year, and that the taxpayer had failed to produce clear and convincing evidence to sustain its claim of disproportionate assessment. Both the taxpayer's appeal and the county's cross-appeal were dismissed. This appeal followed.

The trial court found that the value of the taxpayer's property as fixed by the Board in the amount of $4,337,285 was the actual value of the property. The taxpayer does not contest this finding, but contends that this value is disproportionate to the values placed on other property in the county. The taxpayer contends the trial court erred because it sustained its burden of proving disproportionate assessment, the assessed valuation of its property should have been reduced to the same percentage of actual value as agricultural land, and its appraiser's fees should have been taxed as costs.

The county has not appealed from the dismissal of its appeal, but seeks affirmance of the district court's order in all respects.

At the outset we note that an appeal from a judgment of the district court concerning action by a county board of equalization is heard as in equity and reviewed de novo. *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984). A taxpayer may question the assessed value (actual value) of the taxpayer's real estate, the lack of proportionate and uniform valuation of the property, or both issues, in a proceeding before a board of equalization. *Gordman Properties Co. v. Board of Equal., ante* p. 169, 403 N.W.2d 366 (1987).

In an appeal from action by a county board of equalization the taxpayer has the burden of proving "the contention that the value of the taxpayer's property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment." *Gordman Properties, supra* at 178, 403 N.W.2d at 372. In such a case

> "[t]here is a presumption that a board of equalization has faithfully performed its official duties in making an

> assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Such presumption disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon the evidence, with the burden of showing such valuation to be unreasonable resting upon the appellant on appeal from the action of the board."

(Emphasis omitted.) *Gordman Properties, supra* at 178, 403 N.W.2d at 372, citing *Hastings Building Co. v. Board of Equalization*, 212 Neb. 847, 326 N.W.2d 670 (1982).

As we explained in *Gordman Properties* at 179, 403 N.W.2d at 373, this presumption is more properly characterized as "a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation."

The taxpayer first contends the district court erred in finding the two dissimilar methods of appraisal used by the county to value urban and agricultural real estate did not result in the disproportionate assessment of the two classes of property. The taxpayer contends it presented sufficient evidence to sustain this claim and that its case is virtually identical to *Kearney Convention Center v. Board of Equal., supra*, in which this court ordered the assessed value of the taxpayer's property be reduced to the same percentage at which agricultural land was assessed.

The county argues the instant case is distinguishable because the evidence presented by this taxpayer is different and less reliable than that presented in *Kearney Convention Center*.

In *Kearney Convention Center* the taxpayer presented stipulated and uncontradicted testimony of an appraiser concerning his study of 550 detailed appraisals of urban and rural property to determine the fair market value of agricultural land as compared to its assessed value. The appraiser had concluded the fair market value-actual value for agricultural

land in the county was uniformly undervalued for the tax year in question, and, as a result, such land was uniformly assessed at 44 percent of its actual value. The expert based his opinion on a review of comparable sales in the county for 1980 and 1981. There was no evidence presented by the county of any attempt to correlate the different methods.

The record shows the taxpayer in this case presented the following evidence concerning disproportionate assessment.

Robin Hendricksen, the chief appraiser for the Dodge County assessor's office, testified for the taxpayer. He testified that three methods of appraisal were used by the assessor to determine the value of property in the county. Commercial property was valued by determining reproduction cost in conjunction with comparable sales. Residential real estate was valued by determining reproduction cost and the appropriate depreciation rate, with reproduction cost information obtained from the Residential Cost Handbook. In determining such reproduction cost various factors were considered, including the state of improvements on the property; the presence of built-in appliances and carpeting; the quality of construction; plumbing; the presence of a basement, garage, or fireplace; and the general condition of the property. The depreciation rate was determined by considering the age of the structure and any recent improvements added. Market studies were also used, and the method, in essence, was one using comparable sales.

Nonresidential, commercial, and industrial properties were valued in basically the same manner, except the Marshall Valuation Service, published by Marshall and Swift Publication Company, was used to determine reproduction costs. Market analysis, or comparable sales, was again used to determine the ultimate appraisal figure. When no comparable sales were available, the assessor made an independent appraisal based on the age of the structure and loss of value.

Land underlying residential homes was valued on the basis of market studies of vacant lots. The assessor endeavored to find the actual fair market value of the properties.

Residential improvements on agricultural land were valued in much the same manner as those on residential land. Comparable sales were used as guides where available.

Commercial improvements on agricultural land were valued by using an effective age life lapse system, using the Marshall and Swift valuation system to obtain appropriate reproduction costs. This differed from the valuation of commercial improvements on urban land in that market studies were not used as guides.

The assessor did not consider income to commercial or industrial property in his appraisals. The income approach was used, however, to verify the values obtained from the cost approach. The resulting values were then correlated and adjusted.

The value of unimproved agricultural land was determined solely on the basis of the Land Manual. The assessor first determined the usage of the land and then considered the soil type. Each soil type is classified according to a manual prepared by the Soil Conservation Service. Those classifications were then converted through the use of a chart which adjusts soil conservation designations to Department of Revenue designations. Finally, the value for each designation was multiplied by the number of acres per classification and the results were added together to obtain the total value. Hendricksen testified there was no attempt made to correlate the values computed under the Land Manual process with the fair market value of the property.

Hendricksen then testified that he had done a few informal studies to determine such a correlation and had concluded the ratio was in the "30 to 40 range, some 50. There was a wide variance." Hendricksen had compared the assessed valuation of agricultural lands to comparable sales of such land, using arm's-length sales of agricultural land in the studies. The information was obtained from form 521s, real estate transfer statements, filed from 1981 through early 1984, with the majority of sales having occurred in the " '83-'84" area.

Hendricksen also testified he had received copies of the results of a similar study undertaken by the state. The state reported the assessment-sale ratio for unimproved farmland in Dodge County was 40.22 percent for the 1983 tax year.

Hendricksen then testified that the value placed on unimproved farmland in the county for the 1983 tax year did

not represent the fair market value of such property but that the valuations established for other property in the county for that year did represent the fair market value of such property.

Hendricksen further testified that in appraising agricultural land the assessor did not consider the size of the farm, its proximity to a town or marketplace, location within an adverse weather area, presence of utility service, or any other factor. He conceded these would be relevant factors in determining the fair market value of the property and would be reflected in its sale price.

Hendricksen testified the manuals used to determine reproduction costs for residential and commercial property had been updated, as of January 1, 1984, to values current as of January 1, 1982. The values had not been updated further because, it was his opinion, based on a review of comparable sales, no significant changes in market value had occurred during that time. The agricultural manual had not been updated for the 1983 tax year, and the witness did not know to what year the values set forth in the manual were tied.

The taxpayer then presented testimony by William C. Fisher, a real estate appraiser. Fisher testified he had been an appraiser since 1965, had once held a position with the Department of Roads, then associated with a realty firm in Grand Island as an appraiser, and subsequently left that firm to start his own firm in 1972. He testified he had had extensive training in appraisal work, was a member of the Appraisal Institute, and had been active in various real estate groups. He had conducted appraisals in Nebraska as well as several surrounding states and had appraised all types of commercial, industrial, and farm property.

Fisher testified that he had attempted to determine the value of farmland in the county for use in comparing those values with the value of the taxpayer's property. Fisher testified he utilized the following methodology to determine the value of farmland as of January 1, 1984. He first hired an abstracter to obtain all of the sales of farmland in 1983 and 1984. The sales were then reviewed by the witness, and sales which were obviously not arm's-length transactions were discarded. The remaining sales were verified to ensure they were arm's-length

transactions by reviewing the transfer statements in the assessor's office and through private sources. After verification was completed, there were 30 usable sales.

Fisher then prepared a chart which illustrated the sales data of each transaction and the assessed valuation. Another chart was prepared which illustrated the soil and land classifications involved in each sale. Each sale involved tracts consisting of more than 20 acres.

Fisher defined an arm's-length transaction as one in which a willing buyer agreed to pay a certain amount to a willing seller for a specific parcel of property, each knowing all the uses for which it was suited and neither under any duress to buy or sell. He also testified that, in his opinion, arm's-length sale prices are the best determinant of fair market value.

The taxpayer then presented testimony by Dr. Gary M. Hoeltke, a research psychologist and senior vice president of Selection Research Incorporated (SRI). Hoeltke testified his responsibilities at SRI included designing and analyzing different research studies for clients of the company. Hoeltke had received a doctoral degree in educational psychology and measurement, with a specialty in statistics and research, in 1966.

Hoeltke was employed by the taxpayer to make a comparison between sales values and assessed values of farmland in the county using the 30 sales identified by Fisher. Hoeltke testified he employed the following methodology. He first determined the 30 sales were representative of land in the county. To do so he made a comparison of the percentages of the various classifications of land in the sales to the percentages of such classifications in the county, using the classifications from the Land Manual. He also compared the distribution of sale land with the distribution of land in the county.

Hoeltke then testified he compared the sales values to the assessed values of the properties, using the following methodology. To obtain the first sample group, he deleted the effect of improvements from two of the sales using the same ratio used by the county for assessment purposes. He then figured the average sale price and the average assessed value and compared them using two different methods. He next redid

the analysis deleting all 12 sales which included improvements, thereby forming a second sample group.

In making the comparison Hoeltke testified he used the chi-square technique, which permitted the comparison of several different classifications simultaneously. He testified that essentially the same results were obtained using either set of data. The resulting ratio of assessed value to sale value was 40 percent. Hoeltke testified these results indicated the difference between assessed value and sale value was a greater difference than could be ascribed to chance. He also testified it was his opinion that a purely random sample would be a practical impossibility in this case due to the size of such a sample and the difficulty of obtaining accurate data.

The county then presented testimony by Frank W. Frost, who testified that he operated an appraisal and consulting firm and had been an appraiser for 29 years. He also testified he was a member of the American Institute of Real Estate Appraisers and various similar organizations.

Like the taxpayer's expert witness, Frost made an independent review of farmland sales in the county for the 1983 tax year. He testified that, in his opinion, the sales sample was not representative of the value of farmland in the county because the largest sale involved 160 acres, while the typical size of a farm in the county was 320 acres.

The county then presented testimony by James P. Scott, an associate professor of decision science and chairman of the department of management and information systems of Creighton University. Scott's doctoral work was primarily in applied statistics. He reviewed the statistical analysis performed by Hoeltke and concluded the study was flawed because it was based on sales data which he believed were not representative of property in the county which had not been sold. It was his opinion the only way to achieve an accurate statistical study of the comparison of actual value to assessment value would be through a random sample taken from the entire county.

The county then presented testimony by Bruce B. Johnson, a professor of agricultural economics at the University of Nebraska. Johnson testified the average size of farms in the county was 318 acres, while the average sale of farmland

consisted of 109 acres during the period of 1977 through 1982. He also testified that, given the market for farmland in the state, it would be difficult to find enough specific sales to provide a statistically sound representation of the total land base. In addition, he testified that he had participated in the development of the Land Manual and believed it was based on the value of the dollar sometime in the early 1970s.

From our review of the record we find the taxpayer sustained its burden of proving the claim of disproportionate assessment. There is clear testimony by the chief appraiser of Dodge County that his independent studies showed the value of farmland as determined by the soil classification method varied as compared to the market value of the farm from 30 to 40 percent of market value. There was also clear testimony by this witness that a similar study by the state revealed the assessment-sale ratio for Dodge County farmland was 40.22 percent for 1983. The witness further testified that the assessed value of other property in the county did represent the fair market value of that property.

The county presented evidence to rebut the independent studies undertaken by the taxpayer's experts, but did not satisfactorily refute the appraiser's testimony. The county attacked the statistical reliability of the taxpayer's study; yet, the results of those studies were consistent with the results obtained in the appraiser's independent studies and the state's study.

The county also argues the use of the assessment-sale ratio is improper because it does not accurately reflect the actual value of all agricultural property in the county for 1983, because the sales of farmland are insufficient to show the actual value of the land. In support of this position the county relies on *Box Butte County v. State Board of Equalization & Assessment*, 206 Neb. 696, 295 N.W.2d 670 (1980), where we held that sales were a poor indicator of the actual value of farmland in the county at that time because the sales were made to adjoining owners anxious to utilize rare opportunities to add contiguous tracts to their farms. We find this argument unpersuasive.

In *County of Loup v. State Board of Equalization & Assessment*, 180 Neb. 478, 480, 143 N.W.2d 890, 892 (1966), we

stated:

> Ordinarily, the objection to using sale price as the standard or evidence of value is the fact that the sale may not have been in the ordinary course of trade. The character and circumstances of the sale are important in determining to what extent the sale price may be used to fix the value of the property. The same difficulty is involved in the use of sales-assessment ratios. It is important that the computation include only representative sales with the consideration of each sale accurately determined.

The evidence in this case is that the transactions used in the studies were arm's length. Similarly, there is no evidence that the sales were made to farmers anxious to add adjoining land.

We find the taxpayer established that the two dissimilar methods used by the county resulted in a disparity between the assessment of urban and agricultural property in the county.

This holding answers another issue raised by the taxpayer, namely, whether the district court erred in requiring a showing of "deliberate and intentional discrimination systematically applied throughout the county." While several cases have utilized such language, the correct standard is that articulated in several more recent cases. In *Gordman Properties Co. v. Board of Equal., ante* p. 169, 178, 403 N.W.2d 366, 372 (1987), we stated the taxpayer has the burden of proving the contention of disproportionate assessment by showing the property had not been "fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment." A similar standard was set forth in *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984). The key requirement is that the evidence establish an actual disparity in assessment which indicates the principle of uniformity has been violated, and not a mere difference of opinion as to valuation. *LaGord Assoc. v. County of Cass*, 209 Neb. 99, 306 N.W.2d 578 (1981); *Hastings Building Co. v. Board of Equalization*, 190 Neb. 63, 206 N.W.2d 338 (1973).

The taxpayer next contends the district court erred in failing to reduce the assessment of the taxpayer's property to the same

percentage of actual value as applied to agricultural land.

As we stated in *Kearney Convention Center*,

> "[T]he right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."

Id. at 304, 344 N.W.2d at 626, quoting *Konicek v. Board of Equalization*, 212 Neb. 648, 324 N.W.2d 815 (1982).

Applying that principle to this case, we find the assessment of the taxpayer's property should be reduced to 40 percent of its actual value for the 1983 tax year.

The taxpayer's final contention is that the district court erred in failing to tax the costs of the taxpayer's appraiser's fees to the county. The county argues against such action, contending an appraiser would have been required to prove the taxpayer's case even without the county's cross-appeal.

Neb. Rev. Stat. § 77-1513 (Reissue 1986) provides:

> Whenever any person shall appeal to the district court from the assessment of his property as fixed by the county board of equalization, and the appeal shall be sustained in whole or in part, the cost of such appeal, including costs of witnesses, if any, shall be paid by the county wherein such property is situated. . . .

The statute applies whenever a taxpayer successfully challenges the county and provides for compensation for any witness called to testify on behalf of the taxpayer. Accordingly, the taxpayer in this case is entitled to an order taxing the costs of its witnesses and the appeal to the district court to the county.

The judgment is reversed and the cause remanded with directions to enter a judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. PIERRE C. HVISTENDAHL, APPELLANT.

405 N.W.2d 273

Filed May 1, 1987. No. 86-598.

1. **Convictions: Appeal and Error.** 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 verdict 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.
2. **Blood, Breath, and Urine Tests: Appeal and Error.** A breath test result which is subject to a margin of error must be adjusted so as to give the defendant the benefit of that margin. However, when there is a conflict in the evidence as to what that margin of error actually is, we will affirm the decision of the trier of fact so long as there is sufficient evidence in the record, if believed, to sustain its finding of guilt.
3. **Expert Witnesses: Evidence.** The court is not bound to accept a conclusion of an expert witness that certain evidence could not be used that would establish guilt beyond a reasonable doubt. Such a legal determination must be made by the trier of fact, not an expert witness.
4. **Blood, Breath, and Urine Tests: Proof.** A test made in compliance with Neb. Rev. Stat. § 39-669.11 (Reissue 1984) is sufficient to make a prima facie case on the issue of blood alcohol concentration.

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

E. Dean Hascall of Hascall, Jungers & Garvey, for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates, for appellee.

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

HASTINGS, J.

The defendant was convicted, following a trial to the court in the county court for Sarpy County, of operating or being in actual physical control of a motor vehicle when he had ten-hundredths of 1 percent or more by weight of alcohol in his body fluid. Neb. Rev. Stat. § 39-669.07 (Reissue 1984). He was sentenced to 7 days in the Sarpy County jail with credit for 1 day served, ordered to pay a fine of $200 plus costs, and his driving privileges were suspended for 6 months. The conviction and

sentence were affirmed by the district court for Sarpy County, and the defendant has appealed.

The defendant contends there was insufficient evidence to sustain his conviction, in that (1) the 2,100-to-1 blood/breath partition ratio used by the Intoxilyzer Model 4011AS in its calculation of blood alcohol concentration is not constant from individual to individual; (2) the breath test was performed over an hour after the defendant was stopped; and (3) the court considered a blood alcohol concentration measured by weight per volume, instead of measured by weight as required by § 39-669.07. We affirm the decision of the district court.

The defendant was stopped by a Bellevue police officer during the early morning hours of August 31, 1985, while driving his automobile in Sarpy County. He was eventually arrested and taken into the police station, where a test of his breath on an Intoxilyzer Model 4011AS produced a reading of .133 percent.

There is a great deal of evidence in the record regarding field sobriety tests and opinion testimony of the officers as to defendant's intoxication. However, at the conclusion of the case the trial judge ordered the opinion testimony of the officers stricken, so no determination was made by the trial court beyond a finding of operating a motor vehicle with more than ten-hundredths of 1 percent of alcohol in defendant's body fluid. Therefore, we will not consider the officers' testimony other than as it relates to the breath test.

The defendant first contends that the breath test performed on him was not sufficiently accurate to sustain a finding of guilt beyond a reasonable doubt. 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 verdict 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. Goodon*, 219 Neb. 186, 361 N.W.2d 537 (1985). As the district court, which reviewed the county court's determination of guilt, stated:

> [This case] is a "swearing match" between two expert

> witnesses over the validity of a breathalizer test conducted on the defendant, and the conversion factors used by the testing equipment to translate alcoholic content of a person's breath to alcholic [sic] content of that person's blood. It is not within this Court's province to retry the ultimate issue, even though a different decision might have been reached had the trial been held before me . . . .

This "swearing match" consisted of testimony of the defendant's expert, Dr. Richard Jensen, and the State's rebuttal witness, William Ihm. Dr. Jensen, a toxicologist and analytical chemist, testified as to the accuracy of the Intoxilyzer Model 4011AS used in the defendant's breath test. He concluded that the Model 4011AS assumed a constant relationship between the amount of alcohol in a person's blood and the amount in the breath, that ratio being 2,100 to 1. He testified that this blood/breath partition ratio is different from individual to individual, mainly due to differing rates of alcohol absorption and elimination from person to person and the presence of impurities in the tested person's mouth, which would give a false high reading. He stated that the 2,100-to-1 ratio was arrived at by committee decision but that now the majority of toxicologists reject the idea that the blood/breath partition ratio is constant from individual to individual. He also stated that in experiments he had conducted in which simultaneous breath and blood alcohol readings were taken, 10 to 14 percent of persons showed a higher alcohol concentration in the blood when calculated from a breath test as opposed to an actual blood test. Finally, he concluded that he believed no ratio between breath and blood could be used to establish beyond a reasonable doubt the level of blood alcohol content from a breath test. He did state, however, that if one could sample and measure true alveolar air (air at the end of the bronchi), the ratio would be closer to 1,736 to 1, with an error rate of approximately plus or minus 4 percent.

Dr. Jensen did not testify as to the relationship of alveolar air to that obtained by deep breathing and prolonged vigorous blowing into the Intoxilyzer. However, Kenneth King, a lieutenant in the Bellevue Police Department who is qualified as an expert on the use and operation of this particular machine,

testified as to the procedure of observing a subject for 15 minutes before commencing the test. This is to make sure that no foreign elements, such as tobacco, mints, food, gas, or other items, are introduced into the mouth to taint the breath sample. King also explained that there is a green light on the machine which indicates that the subject is blowing hard enough and long enough to build up sufficient volume of pressure to get a sample of the deep lung air. He further explained that this is important in order to eliminate the variables that would affect the accuracy of the 2,100-to-1 ratio. We believe there was sufficient competent evidence for the trial court to conclude that air being tested is, for all practical purposes, alveolar air.

The rebuttal witness for the State, William Ihm, testified that in experiments he had conducted, using Sarpy County's Intoxilyzer Model 4011AS and simultaneous blood tests, the Intoxilyzer result is usually a little bit lower than the blood alcohol result. He then stated that 95 times out of 100 the breath result would be within 10 percent of the blood result, and that there is always a deviation between the breath test result and the blood test result.

The defendant contends that this testimony established that the breath test performed on him was not sufficiently accurate to sustain a finding of guilt beyond a reasonable doubt. It is true, as we first stated in *State v. Bjornsen*, 201 Neb. 709, 271 N.W.2d 839 (1978), and again in *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987), that a test result which is subject to a margin of error must be adjusted so as to give the defendant the benefit of that margin. However, when there is a conflict in the evidence as to what that margin of error actually is, we will affirm the decision of the trier of fact so long as there is sufficient evidence in the record, if believed, to sustain its finding of guilt. See *State v. Goodon*, 219 Neb. 186, 361 N.W.2d 537 (1985).

In this case there is sufficient evidence to sustain the county court's finding of guilt. The court was faced with two witnesses who disagreed as to the accuracy of the Intoxilyzer Model 4011AS in converting breath test results to blood alcohol concentration. Had the county court believed the State's rebuttal witness, it would have been justified in finding the

defendant not guilty, based on the evidence that 5 percent of the subjects involved in his experiments had a blood alcohol concentration outside of a 10-percent margin of error. The court, however, apparently chose to believe the defendant's witness, who stated that using a ratio of 1,736 to 1 instead of the 2,100-to-1 ratio used by the machine, a result could be produced with an error rate of plus or minus 4 percent. The court could then have properly adjusted the defendant's reading of .133 percent as is required by *Bjornsen* and *Burling, supra*, by changing the ratio to 1,736 to 1 and applying the 4-percent error rate to that result. This would have produced an adjusted reading of .1055 and was therefore sufficient to sustain the defendant's conviction. (That is, .133 times 1,736, divided by 2,100, times .96 equals .1055.)

Additionally, it must be noted that the court was not bound to accept the conclusion of the defendant's expert witness that no ratio could be used that would establish guilt beyond a reasonable doubt. Such legal determinations must be made by the trier of fact, not an expert witness. See *Cathcart v. Blacketer*, 217 Neb. 755, 351 N.W.2d 70 (1984).

The defendant next argues that there was insufficient evidence to sustain his conviction because the breath test was performed over an hour after he was stopped by the police. We have stated that a test made in compliance with Neb. Rev. Stat. § 39-669.11 (Reissue 1984) is sufficient to make a prima facie case on the issue of blood alcohol concentration. See *State v. Dush*, 214 Neb. 51, 332 N.W.2d 679 (1983). Thus, any testimony adduced by the defendant as to the accuracy of a breath test taken over an hour after the stop is admissible for the purpose of raising the specter of reasonable doubt in the mind of the trier of fact. In this case, however, despite the testimony of the defendant's expert witness, the trier of fact determined that the defendant was guilty beyond a reasonable doubt. Thus, the only way this court can reverse that determination is to find that the defendant's expert testimony cast reasonable doubt on the defendant's guilt as a matter of law. The testimony in this case does not rise to that level.

The defendant testified that he had consumed eight beers evenly throughout the course of the evening, until 1 a.m. when

he quickly consumed two more beers. He left the party at 1:15 a.m. and was then stopped by the police at approximately 1:30 a.m. He was not tested until 2:34 a.m. The defendant's expert testified that in 20 minutes the average person has absorbed only 50 percent of his or her last drink and that in 45 to 60 minutes the average person has absorbed 90 percent of his or her last drink. Apparently, then, because the expert believed that at 1:30 a.m. the defendant would *not* have and at 2:30 the defendant *would* have absorbed all of the alcohol contained in the defendant's last two drinks, the expert testified that at the time the defendant was stopped by the police he would have had a blood alcohol concentration that was "quite a bit lower" than at the time of the test. The expert could not, however, state what the defendant's blood alcohol concentration would have been at the time of the stop, or state how the trier of fact could determine how much less the blood alcohol concentration would have been at that time. The expert also did not provide any information on the rate of elimination of alcohol from the system. We have no way of knowing how much lower "quite a bit lower" might be. Whether, when applied to the adjusted readout of .1055, such testimony creates a reasonable doubt as to the guilt of the defendant is a question of fact which was resolved against the defendant.

Finally, the defendant believes there was insufficient evidence to sustain his conviction because the court received into evidence the reading of the breath test in percent by weight per volume instead of percent by weight as prescribed by § 39-669.07. To support this argument the defendant cites *State v. Carwile*, 441 S.W.2d 763 (Mo. App. 1969).

In that case the Missouri statute involved provided that " '[p]er cent by weight of alcohol in the blood shall be based upon milligrams of alcohol *per one hundred milligrams* of blood.' " (Emphasis supplied.) *Id.* at 765. The Division of Health's rules for determination of blood alcohol by breath analysis provided that the alcohol content of blood should be based upon milligrams of alcohol *per 100 milliliters of blood.* The defendant's test was .16 percent, but the operator of the test did not know whether that figure represented blood alcohol concentration per weight of blood or per volume of blood. The

Missouri court of appeals held that the statute prescribed measurement in weight per milligrams and the rule prescribed measurement in weight per milliliters, and therefore it was error to instruct the jury that the breath analysis indicated the amount of alcohol in defendant's blood to be .15 percent or more by weight.

The statute involved in this case, however, simply prescribes that the alcohol content in the blood should be measured by weight, but does not prescribe whether that alcohol content should be expressed in terms of weight of alcohol in a particular weight of blood, or weight of alcohol in a particular volume of blood. § 39-669.07. The Department of Health has determined that the weight of alcohol should be measured in a particular volume of body fluid—that being 100 milliliters of, in this case, blood. Neb. Admin. Code tit. 177, ch. 1, § 002.01 (1984). It is obvious that weight of alcohol can be measured in either a known weight or a known volume. The Legislature determined it wanted alcohol to be measured by weight and left open for the Department of Health whether that weight would be measured in a given weight of blood or a given volume. The Department of Health chose weight per 100 milliliters of blood, which is one of several acceptable definitions of blood alcohol concentration by weight. See *State v. Carwile, supra*. The breath test result was expressed in weight per volume of blood, which is what the Department of Health requires and which § 39-669.07 does not prohibit; therefore, it was sufficient evidence upon which to base the defendant's conviction.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LANNY HICKS, APPELLANT.

404 N.W.2d 923

Filed May 1, 1987. No. 86-601.

1. **Escape: Arrests: Words and Phrases.** A person commits the crime of escape if he unlawfully removes himself from official detention. Official detention shall mean arrest, detention in or transportation to any facility for custody of persons under charge or conviction of crime or contempt or for persons alleged or found to be delinquent, detention for extradition or deportation, or any other detention for law enforcement purposes. Neb. Rev. Stat. § 28-912(1) (Reissue 1985).
2. **Criminal Law: Statutes.** A penal statute is required to be strictly construed and should be given a sensible construction. A statute should be construed in the context of the object sought to be accomplished, the evils and mischiefs that are sought to be remedied, and the purpose for which it serves.
3. **Arrests: Words and Phrases.** Some degree of custody is essential before one can be considered to be in official detention.
4. _____: _____. Constructive, as distinguished from physical, restraint sufficient to constitute a constructive seizure or detention of an arrestee exists where an officer has the intention to effect an arrest, that intention has in some way been communicated to the arrestee, the arrestee understands that he is under legal restraint, and the officer has the apparent present power to control the person even though he has not yet asserted physical control.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded with directions to dismiss.

Thomas J. Garvey, Sarpy County Public Defender, 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.

The defendant, Lanny Hicks, appeals from his conviction and sentence for escape in violation of Neb. Rev. Stat. § 28-912(1) (Reissue 1985).

The defendant and his wife, Shirley, were divorced on September 27, 1985. On November 10, 1985, the defendant came to Shirley's home in LaVista, Nebraska, stating that he wanted something to eat. When she refused to tell him where

she had been the night before, he held a knife to her face. When he came to her home again that evening, she called the police. When the police arrived, he left by the front door.

Officer David Gran was the first policeman to arrive at the scene. As he drove up behind an older-model Chevrolet which was blocking Shirley Hicks' driveway, he observed the defendant leave the home. The defendant hurried across the yard to the Chevrolet. When the defendant got to the vehicle, Officer Gran, over his public address speaker, ordered the defendant to stop. According to Gran he stated something to the effect of "Halt. Police. I want to talk to you." The defendant entered the car and drove away.

Officer Gran pursued the defendant in his cruiser with the lights and siren activated for several miles and through several stop signs before Gran was instructed to terminate the chase because of bad driving conditions. The defendant was arrested, pursuant to a warrant, approximately 1 week later.

The defendant was charged with unlawfully removing himself from official detention. The jury returned a verdict of guilty, and the defendant was sentenced to imprisonment for 20 months to 5 years.

On appeal the defendant has assigned three errors: (1) The trial court erred in overruling his motion to quash the information as unconstitutionally vague and in overruling his motion to dismiss at the end of the State's case; (2) the court erred in not accepting his proposed instruction which more clearly expresses Nebraska law; and (3) the sentence was excessive.

The only issue we address is the assignment of error concerning the defendant's motion to dismiss.

The relevant portion of the escape statute provides:

> A person commits escape if he unlawfully removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited period. Official detention shall mean arrest, detention in or transportation to any facility for custody of persons under charge or conviction of crime or contempt or for persons alleged or found to be delinquent, detention for extradition or deportation, *or any other*

> *detention for law enforcement purposes*; but official detention does not include supervision of probation or parole or constraint incidental to release on bail.

(Emphasis supplied.) Neb. Rev. Stat. § 28-912(1) (Reissue 1985).

The parties' arguments focus on the meaning of the language emphasized above, "any other detention for law enforcement purposes," and whether there was evidence to show that the defendant was so detained.

In *State v. Parmer*, 210 Neb. 92, 94, 313 N.W.2d 237, 239 (1981), we set out rules of statutory construction which are relevant here.

> A penal statute is required to be strictly construed and should be given a sensible construction. [Citation omitted.] A statute should be construed in the context of the object sought to be accomplished, the evils and mischiefs that are sought to be remedied, and the purpose for which it serves. [Citation omitted.]

In *State v. Schlothauer*, 206 Neb. 670, 294 N.W.2d 382 (1980), *supp. op.* 207 Neb. 663, 300 N.W.2d 194 (1981), a case involving the application of § 28-912(1), we noted that legal custody had been an essential element of the crime of escape from legal custody under the predecessor escape statute, Neb. Rev. Stat. § 28-736 (Reissue 1975). Schlothauer had been charged with unlawful removal from official detention after arrest on a felony charge. At issue was whether the defendant had been lawfully arrested at the time of his escape. In deciding the issue, we stated, "If there was no legal arrest, defendant was not in 'official detention' within the meaning of the escape statute so that he could not be convicted of the crime of escape." 206 Neb. at 674, 294 N.W.2d at 384.

The language in § 28-912(1) is essentially the same as that found in the escape provision of the Model Penal Code. Model Penal Code and Commentaries § 242.6(1) (1980). The Comments to that section state:

> It seems plain that the offense of escape should be extended to delinquency, extradition, and deportation proceedings and that the process from arrest through conviction and service of an institutional sentence should be included. The phrase "any other detention for law

> enforcement purposes" is meant to take account of the diversity of institutional facilities employed in modern penology.

Model Penal Code and Commentaries, *supra* at 264.

Regarding the distinction between the offenses of resisting arrest and escape, the Comments also state:

> Occasionally, circumstances may blur the difference between flight from arrest and escape from official detention once arrest is effected, but the distinction is essential to recognition of the separate policy considerations governing escape and resisting arrest. *Generally, the escape provision becomes relevant only after the arresting officer has successfully taken the arrestee into custody.*

(Emphasis supplied.) *Id.*, § 242.2 at 215.

At another point, the Comments state that nonviolent refusal to submit to arrest and other minor forms of resistance, such as running from a police officer, are not criminal under any provision of the Model Penal Code.

This court's interpretation of the statute in *Schlothauer, supra*, is that some degree of custody is essential before one can be considered to be in official detention. The A.L.I. commentary provides that the "any other detention for law enforcement purposes" language does not refer to anything less than custody, but is intended to cover cases where one is incarcerated for law enforcement purposes in a facility not traditionally used to house criminal offenders or those charged with a crime.

At common law a person could escape only if he was in custody. "He comes into custody at the time he is arrested. If, as a result of successfully resisting arrest, he is never taken into custody, he cannot be guilty of escape." 4 C. Torcia, Wharton's Criminal Law § 664 at 431 (14th ed. 1981).

The State argues that the standard by which the jury was to determine whether an official detention or arrest occurred in this case was whether "in view of all the circumstances surrounding the encounter with the officers, a reasonable person believes he is not free to leave." Brief for Appellee at 6. That language appears in *State v. Longa*, 211 Neb. 356, 318 N.W.2d 733 (1982), in a quotation from *United States v.*

Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980), and refers to when a seizure occurs for fourth amendment purposes.

In *State v. White*, 209 Neb. 218, 306 N.W.2d 906 (1981), this court required a substantially different showing in order to prove that an arrest had occurred prior to the defendant's alleged escape in violation of § 28-912. In *White*, the defendant was charged with unlawfully removing himself from official detention while under arrest for a felony. The issue was whether the defendant was under arrest where the evidence showed that he had been told of his arrest and would have to go to police headquarters. The arresting officer was within an arm's length of the defendant when the officer turned his back to make a radio transmission. The defendant struck the officer and fled.

In determining that the defendant in *White* had been under arrest, the court noted that "one of the elements necessary to effectuate an arrest is 'actual or constructive seizure or detention of the person.' " *White, supra* at 224, 306 N.W.2d at 911. The court then went on to say:

> We hold that constructive, as distinguished from physical, restraint sufficient to constitute a constructive seizure or detention of an arrestee exists where an officer has the intention to effect an arrest, that intention has in some way been communicated to the arrestee, the arrestee understands that he is under legal restraint, and the officer has the apparent present power to control the person even though he has not yet asserted physical control.

Id.

The evidence in this case failed to establish that the defendant was in official detention. The evidence shows the defendant was not under arrest when he drove away from Officer Gran. There was no intent by the officer to effect an arrest at that point, no communication to the defendant of such an intent, and no apparent present power by the officer to control the defendant. The motion to dismiss should have been sustained.

The judgment is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

PERRY WOUNDED SHIELD, APPELLEE, V. FRANK O. GUNTER, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLANT.

405 N.W.2d 9

Filed May 1, 1987. No. 86-747.

1. **Criminal Law: Statutes.** Although a penal statute is required to be strictly construed, such statute should be given a sensible construction with its general terms limited in construction and application to prevent injustice, oppression, or an absurd consequence.
2. **Statutes: Legislature: Intent.** As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act, which are in pari materia, may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
3. **Criminal Law: Prisoners: Probation and Parole.** Pursuant to the Nebraska Treatment and Corrections Act, Neb. Rev. Stat. §§ 83-170 to 83-1,135 (Reissue 1971, Cum. Supp. 1972 & Cum. Supp. 1974), there may be a forfeiture of credit for meritorious behavior earned before release on mandatory parole.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded with direction.

Robert M. Spire, Attorney General, and Sharon M. Lindgren, for appellant.

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos, Special Deputy Lancaster County Public Defender, for appellee.

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

SHANAHAN, J.

Perry Wounded Shield, an inmate in the custody of the Nebraska Department of Correctional Services (DCS), filed a declaratory judgment action to determine whether DCS, in recomputing a mandatory parole date for Wounded Shield, had authority to withhold credit for Wounded Shield's meritorious good time earned before Wounded Shield violated his mandatory parole. The district court for Lancaster County decided that Wounded Shield was entitled to restoration of his meritorious good time, notwithstanding violation of

mandatory parole.

After conviction for attempted rape, Wounded Shield, on January 22, 1973, was sentenced to a term of imprisonment for not less than 5 years nor more than 15 years in the state penitentiary. Pursuant to Neb. Rev. Stat. § 83-1,111 (Cum. Supp. 1972), Wounded Shield was granted a discretionary parole on March 23, 1978, which he violated on May 13, 1978, resulting in revocation of his parole and reincarceration in the penitentiary. Wounded Shield's second discretionary parole was granted on February 20, 1980, and, on account of a subsequent parole violation on June 18, 1980, was revoked. At May 1, 1982, Wounded Shield had earned a credit for good behavior, namely, 4 years 5 months and 5 days, and had earned an additional credit of 1 year 4 months and 17 days for meritorious behavior during incarceration. See Neb. Rev. Stat. § 83-1,107(1) (Cum. Supp. 1974). As the result of a reduction of sentence due to credits, both good behavior and meritorious behavior, Wounded Shield was granted a mandatory parole on May 1, 1982. See § 83-1,111(5).

While on mandatory parole, Wounded Shield was convicted of attempted theft and, on February 13, 1984, was sentenced to 1 year in the penitentiary, which sentence was consecutive to Wounded Shield's initial sentence for attempted rape. On February 14, 1984, Wounded Shield was reincarcerated in the state penitentiary. Wounded Shield's mandatory parole was revoked, after a hearing before the Board of Parole on February 21, 1984. Pursuant to Neb. Rev. Stat. § 83-1,123 (Cum. Supp. 1974), Wounded Shield was reincarcerated in the penitentiary for the remainder of his initial prison term on the attempted rape charge. In recomputing Wounded Shield's maximum sentence and determining a new mandatory parole date in view of the consecutive sentence imposed for the theft conviction, DCS withheld any credit for meritorious good behavior earned by Wounded Shield before revocation of his mandatory parole. Wounded Shield has received credit for good and meritorious behavior following revocation of his mandatory parole.

In his petition for declaratory judgment, Wounded Shield sought restoration of good time credit withheld by DCS after

revocation of his mandatory parole and requested determination of a new mandatory parole date. Frank O. Gunter, the director of DCS, answered, alleging that Wounded Shield, as a result of his violation of mandatory parole, had lost or forfeited all credit for meritorious behavior concerning his initial sentence. The district court relied on § 83-1,107(2), which states in part: "No reduction of an offender's term for especially meritorious behavior or exceptional performance of his duties shall be forfeited or withheld after an offender is released on parole," and found that Wounded Shield was entitled to restoration of 1 year 4 months and 17 days as a credit for meritorious good time earned before revocation of mandatory parole. The director of DCS has appealed, claiming that "the District Court erred when it held that meritorious good time earned prior to parole cannot be withheld upon a parole revocation."

Both parties acknowledge, and we concur, that this case is governed by the good time statutes in existence at Wounded Shield's initial sentencing in 1973. See Neb. Rev. Stat. §§ 83-170 to 83-1,135 (Reissue 1971, Cum. Supp. 1972 & Cum. Supp. 1974) (1969 Neb. Laws, ch. 817, §§ 1 to 65 and § 85, pp. 3072 to 3104 and 3112 (L.B.1307), amended by 1972 Neb. Laws, L.B. 1499). In 1975 the good time statutes were amended by L.B. 567, which changed the provisions concerning credit for good time and the effect of such good time on parole and eventual discharge from custody, see Neb. Rev. Stat. §§ 83-1,107 and 83-1,107.01 (Reissue 1981), and which was discussed and analyzed in *Lytle v. Vitek*, 203 Neb. 825, 827, 280 N.W.2d 654, 655 (1979):

> Until 1969 good-time credits were applied to reduce the maximum term of a sentence and the statutes required discharge from custody rather than release on parole when time limits had been met. From 1969 until 1975 the statutes continued to provide for discretionary parole but provided for mandatory release on parole rather than the mandatory discharge from custody required by prior and subsequent statutes. In 1975 the statutes basically returned to the pre-1969 system and the statutes now have no provision for mandatory parole but instead require

> discharge from custody when the time served in custody and on parole equals the maximum term, less all good-time reductions granted.

Thus, L.B. 567, enacted in 1975 after imposition of the initial sentence on Wounded Shield, is inapplicable to the case before us. As we expressed in *Boston v. Black*, 215 Neb. 701, 712, 340 N.W.2d 401, 408 (1983): "Application of those L.B. 567 provisions to offenders first sentenced prior to its effective date is impermissible, under the Constitution of this state, without Board of Pardons approval." See, also, *Johnson & Cunningham v. Exon*, 199 Neb. 154, 256 N.W.2d 869 (1977). In *Lytle v. Vitek, supra*, we expressed that a prisoner, sentenced when L.B. 1307 was in effect, could not rely on statutes reflected in L.B. 1307, which were repealed by L.B. 567 in 1975. To the extent that we so held in *Lytle*, that case is overruled. For a review and discussion of the good time statutes contained in L.B. 1307 and the changes effected by enactment of L.B. 567, see *Boston v. Black, supra*.

The sole issue in this case is whether a prisoner's meritorious good time credit, earned pursuant to § 83-1,107(1) (Cum. Supp. 1974) and before release on mandatory parole, may be withheld after revocation of mandatory parole. In *Brown v. Sigler*, 186 Neb. 800, 802, 186 N.W.2d 735, 736 (1971), we stated that "the reductions provided for [in § 83-1,107] are used to determine eligibility for release on parole or supervision, and they are subject to forfeiture." See, also, *Von Bokelman v. Sigler*, 186 Neb. 378, 183 N.W.2d 267 (1971).

It is helpful to examine the statutes pertaining to credit for good behavior, release of a prisoner on parole, and revocation of such parole. The Nebraska Treatment and Corrections Act is contained in §§ 83-170 to 83-1,135 of the Nebraska Revised Statutes. Section 83-1,107 (Cum. Supp. 1974) states in part:

> (1) . . . In addition, for especially meritorious behavior or exceptional performance of his duties, an offender *may* receive a further reduction, *for parole purposes*, not to exceed five days, for any month of imprisonment. . . .
>
> . . . .
>
> (2) Reductions of such terms may be forfeited, withheld and restored by the chief executive officer of the facility

after the offender has been consulted regarding the charges of misconduct. No reduction of an offender's term for especially meritorious behavior or exceptional performance of his duties shall be forfeited or withheld after an offender is released on parole.

(Emphasis supplied.) Section 83-1,111 (Cum. Supp. 1972) states in part:

(5) If the board fixes no earlier release date, a committed offender's release on parole shall become mandatory at the expiration of his maximum term of imprisonment, less good time reductions allowed in accordance with the provisions of this act, or three months prior to discharge, whichever is earlier. Nothing herein shall require the mandatory parole of an offender who has violated a discretionary parole within twelve months of the date when his parole would otherwise be mandatory.

Section 83-1,114 (Reissue 1971) states in part:

(1) Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:

(a) *there is a substantial risk that he will not conform to the conditions of parole*;

. . . .

(2) In making its determination regarding a committed offender's release on parole, the Board of Parole shall take into account each of the following factors:

. . . .

(j) The offender's prior criminal record, including the nature and circumstances, recency and frequency of previous offenses;

. . . .

(l) . . . [W]hether any reductions of term have been forfeited, and whether such reductions have been restored at the time of hearing or reconsideration;

(m) *The offender's behavior and attitude during any previous experience of probation or parole and the recency of such experience* . . . .

(Emphasis supplied.) Section 83-1,115 (Reissue 1971) states in

part: "Before making a determination regarding a committed offender's release on parole, the Board of Parole shall consider the following: . . . (2) *All official reports of his prior criminal record, including reports and records of earlier probation and parole experiences* . . . ." (Emphasis supplied.) Section 83-1,121 (Reissue 1971) states: "A committed offender while on parole shall remain in the legal custody and control of the Board of Parole. The board may at any time revoke the parole of an offender or recommit him to the custody of the Division of Corrections, with or without cause." Section 83-1,123 (Cum. Supp. 1974) states in part:

> (1) A parolee whose parole is revoked shall: (a) Be recommitted for the remainder of his maximum prison term, deducting the period served on parole prior to the violation . . . .
>
> . . . .
>
> (3) A parolee whose parole has been revoked shall be considered by the Board of Parole for reparole at any time in the same manner as any other committed offender eligible for parole.

Wounded Shield argues that a literally strict construction of § 83-1,107(2) controls in this case so that meritorious good time can never be forfeited or withheld, once a prisoner has been released on parole. The director of DCS argues that strict application of § 83-1,107(2), as suggested by Wounded Shield, would render futile other statutes giving DCS control over parolees and that "mandatory parole for all practical purposes would become discharge" from control of DCS. Brief for Appellant at 13-14. In substance, the director of DCS contends that, under § 83-1,111(5), a person who has violated mandatory parole is not entitled to remain on parole, and, correspondingly, meritorious good time credit, which has been granted at the discretion of the chief executive officer of a DCS facility, may be forfeited or withheld.

Although a penal statute is required to be strictly construed, such statute should be given a sensible construction with its general terms limited in construction and application to prevent injustice, oppression, or an absurd consequence. See *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977).

> " 'It is the duty of the court, as far as practicable, to give effect to the language of a statute and to reconcile the different provisions of it so they are consistent, harmonious, and sensible.' " . . . Further, the fundamental rule in construing statutes is that they shall be construed in pari materia and from their language as a whole to determine the intent of the Legislature. All subordinate rules are mere aids in reaching this fundamental determination.

Malone v. Benson, 219 Neb. 28, 31, 361 N.W.2d 184, 187 (1985). See, also, *State v. Black*, 195 Neb. 366, 238 N.W.2d 231 (1976).

As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act, which are in pari materia, may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. See, *State v. Nichols*, 167 Neb. 144, 91 N.W.2d 308 (1958); *State v. Jennings*, 195 Neb. 434, 238 N.W.2d 477 (1976). See, also, *Anderson v. Peterson*, 221 Neb. 149, 375 N.W.2d 901 (1985); *Tom & Jerry, Inc. v. Nebraska Liquor Control Commission*, 183 Neb. 410, 160 N.W.2d 232 (1968). Thus, the various sections of the Nebraska Treatment and Corrections Act must be read in the light of one another. See *State v. Golgert*, 223 Neb. 950, 395 N.W.2d 520 (1986), wherein this court held that statutes contained in the Nebraska Rules of the Road must be read in conjunction with one another.

Applying the foregoing rules of statutory construction, we do not adopt Wounded Shield's unduly restrictive construction of § 83-1,107.

Under § 83-1,121, the Board of Parole retains control over parolees and, on proper revocation of parole, may recommit a parole violator to the custody of DCS. If meritorious good time credits could not be forfeited or withheld after revocation of a mandatory parole, the Board of Parole would be powerless to recommit a parole violator, since previously accumulated credit for meritorious behavior would automatically entitle the parole violator to immediate release through another mandatory parole, thereby effectively nullifying the Board of Parole's

power for reincarceration after violation and revocation of a mandatory parole. As a consequence of indefeasible or nonforfeitable credit for meritorious behavior, every DCS facility would have a correctional revolving door which affords a violator of mandatory parole immediate reentry into a societal environment without inducement to perform the provisions prescribed for parole. Such a prospect contravenes the purposes and objectives of a parole system. The Legislature could not have intended such an absurdly incongruous result. It would be equally incongruous to recognize DCS' authority to withhold mandatory parole of a person who has violated parole during the 12 months preceding prospective release on mandatory parole, see § 83-1,111(5), which may necessitate withholding meritorious good time, and simultaneously deny DCS' authority to withhold mandatory parole and meritorious good time, after a parolee had violated mandatory parole. " 'When the literal enforcement of a statue would result in absurdity, the courts will assume that such consequences were not intended.' " *State v. Black, supra* at 368, 238 N.W.2d at 233.

Wounded Shield's interpretation of § 83-1,107 would transform mandatory parole into a mandatory discharge from custody of the State. Such extreme and unreasonable interpretation of the Nebraska Treatment and Corrections Act is unwarranted. See *Von Bokelman v. Sigler*, 186 Neb. 378, 183 N.W.2d 267 (1971).

Under the scheme of § 83-1,107, meritorious good time is granted solely at the discretion of the chief executive officer of the DCS facility and is used solely to determine eligibility for parole and the date on which parole becomes mandatory. Under § 83-1,107, meritorious good time cannot be withheld or forfeited while a parolee is on release from custody of DCS. However, such good time may be withheld or forfeited while a prisoner is confined in a DCS facility, including confinement after revocation of parole, provided that the inmate has been consulted regarding the charge of misconduct which is the basis for withholding or forfeiting credit for good time. This construction of § 83-1,107 avoids an absurd consequence and is harmonious with the provisions and purposes of the Nebraska

Treatment and Corrections Act. A parole violator recommitted to custody of DCS, after revocation of mandatory parole, may be considered for subsequent parole under the provisions of §§ 83-1,114 and 83-1,115. See § 83-1,123(3).

After a hearing before the Board of Parole, Wounded Shield's mandatory parole was revoked, and he was recommitted to the custody of DCS to serve the balance of the maximum prison term consequent to the consecutive sentences. It was within DCS' statutory authority to withhold Wounded Shield's meritorious good time on recomputation of the maximum sentence imposed on Wounded Shield. We hold that, pursuant to the Nebraska Treatment and Corrections Act, as such existed at the time of Wounded Shield's initial sentence, credit for meritorious behavior which had been earned before Wounded Shield's release on mandatory parole may be forfeited or withheld, after reincarceration for violation of mandatory parole. The district court erred in finding that Wounded Shield was entitled to have his meritorious good time restored. For this reason, we reverse the judgment of the district court and remand these proceedings with direction to enter judgment consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. DAVID MEINTS, APPELLANT.

405 N.W.2d 15

Filed May 1, 1987. No. 86-817.

1. **Directed Verdict: Convictions.** A trial court will be justified in directing a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony is of so weak or doubtful a character that a conviction based thereon could not be sustained.

2. **Convictions: Verdicts: Appeal and Error.** In determining whether the evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts of evidence, pass on credibility of witnesses, or evaluate the evidence. Those determinations are within the province of the jury, and its verdict must be sustained if the evidence, when viewed in the light most favorable to the State, is sufficient to support the verdict.

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

Frank J. Daley, Jr., of Germer, Murray, Johnson, Daley & Germer, for appellant.

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

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

PER CURIAM.

Defendant, David Meints, appeals from an order of the district court for Gage County affirming his conviction and sentence in the county court for Gage County on two counts of criminal trespass in violation of Neb. Rev. Stat. § 28-521 (Reissue 1985). For the reasons hereafter stated, we affirm the judgment of the district court.

The record shows that in 1979 Laverne Meints, defendant's father, purchased a tract of land in Gage County. Subsequently, defendant and his father entered into a 5-year lease. Under the terms of the lease, the defendant would receive 60 percent of the crops and pay for 60 percent of the chemicals, fertilizer, and seed. His father would receive the remaining 40 percent of the crops and be responsible for 40 percent of the expenses.

In late 1984, because of default in payments, the original contract sellers instituted foreclosure proceedings against the defendant's father. Also named as a defendant in the action was the Farmers Home Administration (FHA), which held a second mortgage on the property to secure an indebtedness. The land was sold at a sheriff's sale on April 3, 1985, to the FHA. The defendant was present at the judicial sale. Subsequently, on May 3, 1985, the sale was confirmed by the district court for Gage County.

The new owners of the property, FHA, then sought to negotiate a lease with the defendant to farm the land in question. On June 10, 1985, the FHA offered defendant a cash lease for the property for $50 per acre. The defendant declined the offer, saying that he did not have the cash for the lease and that he already had a contract to farm the land under a lease from his father.

Upon the failure to reach an agreement with the defendant and with the purpose of gaining control of the property, the FHA filed an application for a writ of assistance on June 24, 1985. By order of the district court for Gage County dated August 20, 1985, the FHA was granted the writ of assistance. The writ was served on the defendant on September 2, 1985. At the time of the service the deputy sheriff of Gage County advised the defendant that he was not to go onto the property in question and that if he did so he could get into trouble for trespassing.

Subsequently, the sheriff of Gage County received a telephone call from the defendant's father telling the sheriff that the defendant and his father would be harvesting the milo and soybean crops at the property in question on November 19, 1985. On this date, the sheriff went to the property and observed a procession of combines, tractors, and trucks driving onto the property. The sheriff saw the defendant and others harvesting the milo growing on the property. No arrests were made at this time.

The sheriff returned to the property on November 21, 1985, and saw defendant and others harvesting the soybean crop. The sheriff advised the defendant that he was trespassing and was not to be on the property. The defendant replied, "I know. I'm just helping my dad. He's running the show." Again no arrests were made at the location. The sheriff testified that he wanted to avoid a possible dangerous confrontation.

The defendant was subsequently arrested and charged with criminal trespass in connection with the incident occurring on November 19, 1985. The complaint was later amended to include a second count of criminal trespass in connection with the November 21, 1985, incident. The defendant was tried before a jury in the county court for Gage County. Evidence

adduced at trial showed the defendant was present at the judicial sale on April 3, 1985, and had received notice of the May 3, 1985, confirmation of that sale. The evidence showed that the crops being harvested on the dates in question, the milo and soybeans, were planted after this notice of the confirmation of the sale was received by the defendant. The defendant was convicted on both counts and sentenced to 30 days in the county jail on each count, with the sentences to be served concurrently. On appeal to the district court the convictions and sentences were affirmed. From the order of the district court affirming the judgment of the county court, the defendant timely appealed to this court.

The defendant assigns as error the district court's action in affirming the judgment of the county court, in that the county court erred in failing to sustain the defendant's motions to dismiss at the close of the State's case and the close of all the evidence. The defendant further alleges the county court erred in failing to allow the clerk of the district court for Gage County to testify as to certain proceedings occurring in the district court.

Defendant contends that the evidence is insufficient to support findings of guilty, and therefore the county court erred in not sustaining defendant's motions to dismiss, motions which for the purposes of this case will be treated as motions for a directed verdict. We have held that a trial court will be justified in directing a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony is of so weak or doubtful a character that a conviction based thereon could not be sustained. *State v. Donnelson, ante* p. 41, 402 N.W.2d 302 (1987); *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987). In determining whether the evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts of evidence, pass on credibility of witnesses, or evaluate the evidence. Those determinations are within the province of the jury, and its verdict must be sustained if the evidence, when viewed in the light most favorable to the State, is sufficient to support the verdict. *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

The evidence in the instant case is undisputed. The defendant planted the crops on the land in question after the confirmation of the sheriff's sale. There is no dispute as to the fact that defendant was indeed on the property on the dates of November 19 and 21, 1985. The defendant contends that he cannot be liable for criminal trespass, since he believed in good faith that he could reenter the property. The defendant testified that he believed the lease with his father enabled him to farm the land. Defendant's argument is without merit. The record clearly indicates that the defendant was aware of the sheriff's sale, since he personally attended the sale. Defendant acknowledged that he received a letter from the U.S. attorney's office dated May 28, 1985, indicating that the FHA now owned the property and that the defendant did not have a lease with the FHA. Defendant also admitted to having been told not to go onto the property in a proceeding in the Gage County District Court on August 12, 1985, and again in a proceeding in the federal district court. The defendant was served with a writ of assistance issued by the Gage County District Court ousting him from the property. On September 2, 1985, the deputy sheriff told the defendant that he was not to go onto the property in question and to do so might result in the defendant's being in trouble for trespassing. In view of the fact that defendant had repeatedly been told he was not to go onto the property, his "good faith" argument is without merit. The district court did not err in affirming the convictions in view of the ample evidence to sustain the verdicts of the jury in the county court trial.

Defendant also contends the district court erred in affirming the convictions in that the county court erred in failing to allow the clerk of the district court to testify regarding certain proceedings which took place in the district court for Gage County during the original foreclosure of the mortgages on the property in question. The county court sustained the State's objections to the proposed testimony on the grounds that proceedings in another court were irrelevant in defendant's trial for trespassing and that the arguments of counsel in that other case constituted inadmissible hearsay evidence. There was no error in the rulings of the county court. The action of the

district court in affirming the convictions and sentences of the county court was correct and is affirmed.

AFFIRMED.

GRANT, J., not participating.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JOHN C. KINNEY, RESPONDENT.

405 N.W.2d 17

Filed May 1, 1987. No. 87-352.

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, John C. Kinney, 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, John C. Kinney, be, and hereby is, disbarred effective May 1, 1987.

JUDGMENT OF DISBARMENT.

WENDELL'S, INC., A NEBRASKA CORPORATION, APPELLEE, V. COLLIN MALMKAR ET AL., APPELLANTS.

405 N.W.2d 562

Filed May 8, 1987. No. 85-431.

1. **Attorney and Client: Conflict of Interest.** Representation of multiple parties is not prohibited per se, but this court disapproves the actions of an attorney in representing conflicting interests in litigation, even with the consent of the clients involved.
2. **Debtors and Creditors: Presumptions: Proof.** All payments are presumed to be voluntary until the contrary appears, and the burden rests on the party seeking to recover a payment to prove that it was involuntary.
3. **Debtors and Creditors: Words and Phrases.** An involuntary payment is one springing from accident or impulse rather than conscious exercise of the will, or unintentional.
4. **Debtors and Creditors: Unjust Enrichment.** When a unilateral mistake is made and a party receives the benefit of that mistake, before the mistaken payor can recover the mistaken payment, it must also show that the person receiving the payment has been unjustly enriched.

Appeal from the District Court for Perkins County: JACK H. HENDRIX, Judge. Reversed and remanded with directions to dismiss as to Duane Messner, Jean Messner, Kareln Bullock, and Marita DeVoe, and reversed and remanded for a new trial as to Collin Malmkar.

Richard A. Koehler, for appellants.

Patrick R. McDermott, for appellee.

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

GRANT, J.

Plaintiff's petition filed in the district court for Perkins County, Nebraska, alleged that plaintiff is a Nebraska corporation engaged in the operation of a grain elevator in Grant, Perkins County, Nebraska, and that defendants, Duane Messner, Jean (sometimes Jane) Messner, Collin Malmkar, Kareln Bullock, and Marita DeVoe (all of whom owned farmland in Perkins County in the years 1982 and 1983) had grain stored in the elevator. Defendants Bullock and DeVoe owned farmland together and their interest will hereinafter be referred to as Bullock-DeVoe. The petition further alleged that,

in addition to his ownership interests, defendant Malmkar was the agent for each of the other defendants, that in the course of its business plaintiff received grain for storage from Malmkar, and that in May and June 1983, plaintiff, "at the request of . . . Malmkar," issued five warehouse receipts in favor of the Commodity Credit Corporation (CCC). The petition further alleged that one warehouse receipt was issued on May 31, 1983, to satisfy the delivery obligation of defendant Duane Messner; one receipt was issued on June 10, 1983, for the obligation of Jean Messner; one receipt was prepared on June 15, 1983, and issued June 22, for the obligation of Bullock-DeVoe; and two receipts were prepared on June 15, 1983, and also issued June 22, for the obligations of Malmkar.

The petition alleged that deliveries of grain from Malmkar to plaintiff's elevator began on May 14, 1983, and (as shown by the evidence, but not alleged in the petition), after 112 deliveries on 20 days, concluded on June 23, 1983. Plaintiff then alleged that, due to a mistake in keeping its records, it issued the five warehouse receipts indicating deliveries totaling 90,069 bushels of corn, when actually only 72,728.62 bushels were delivered to it by defendants. The petition then alleged that as a result of the error in plaintiff's recordkeeping, defendants were unjustly enriched to the damage of plaintiff

> in the amount of $75,957.29 the fair market value of 22,340.38 bushels of corn [the difference between 90,069 plus 5,000 other bushels purchased by plaintiff and 72,728.62] and the value received by Collin Malmkar for himself and for and on behalf of his principals, being all the other named defendants.

Defendants Duane Messner, Jean Messner, and Collin Malmkar filed a joint answer admitting that plaintiff received grain from Malmkar, admitting the issuance of the warehouse receipts by plaintiff, admitting that 5,000 bushels of corn were purchased by plaintiff from Malmkar (apparently as distinguished from stored corn), admitting plaintiff's allegation that "said receipts were duly issued to Commodity Credit Corporation in satisfaction of delivery obligations of Defendants to the CCC under the PIK program," and generally denying the other allegations in the petition.

Defendants Bullock-DeVoe filed a separate answer, through a different attorney, generally denying the allegations of the petition and setting out various affirmative defenses.

In a separate pleading filed 10 months after his answer, through the same attorney who filed the Messners-Malmkar answer, defendant Malmkar counterclaimed against plaintiff, alleging that plaintiff had, in June of 1982, converted 15,317 (later amended to 10,317) bushels of Malmkar's corn. Plaintiff generally denied the allegations of the counterclaim. In the subsequent trial, the jury returned a verdict for plaintiff on Malmkar's counterclaim. Malmkar did not appeal on this issue, and no further mention need be made of it, except as it is concerned with the question of the representation of the various parties later discussed.

The case was tried to a six-person jury, which returned a verdict of $60,659.55 against all the defendants. Pursuant to the court's instructions, the jury in its verdict apportioned this amount against the various defendants as follows: 11 percent ($6,672.55) against Duane Messner; 15 percent ($9,098.93) against Jean Messner; 13 percent ($7,885.74) against Bullock-DeVoe; and 61 percent ($37,002.33) against Malmkar. Judgment was entered against defendants in the manner set out in the verdict.

A notice of appeal on behalf of all five defendants was timely filed, in a single document, by David T. Schroeder, the attorney representing the Messners and Malmkar at the trial, as "Attorney for Defendants." At the prehearing conference before this court's hearing officer in June of 1985, defendants-appellants were represented by the same attorneys who tried the case, Schroeder for defendants Messners and Malmkar and Richard A. Koehler for defendants Bullock-DeVoe. Schroeder informed the hearing officer of a possible conflict of interest among his clients, but informed the court that he had made full disclosure of the possible conflict to the Messners and Malmkar and that a different attorney would probably represent the Messners on appeal.

On August 20, 1985, Koehler entered his appearance in this court for appellants Messners and Malmkar, in addition to his representation of Bullock-DeVoe. On the same day, Schroeder

withdrew as attorney in the case. Koehler later filed a motion to extend the briefing date, stating he was filing a brief on behalf of all appellants and needed additional time to consider the issues raised by his new clients and "to properly advise all of the other Appellants of potential problems with having just one counsel submit a brief for all." Koehler has advised this court that such a full disclosure was made to all appellants, and the appellants, in effect, insisted that he represent all of them. This protracted statement of the problems of representation in this case is set out in view of the result in this case, and the possibility that it might appear that this court is sanctioning and approving single representation of litigants with conflicting interests.

We specifically disapprove the actions of attorneys in representing conflicting interests in litigation, even with the consent of the clients involved. We recognize that if such conflicting interests are represented by the same attorney after full disclosure of the facts and consultation with each client, the representation may be ethically proper. Representation of multiple parties in litigation is not prohibited per se. See, *Spindle v. Chubb/Pacific Indem. Group*, 89 Cal. App. 3d 706, 152 Cal. Rptr. 776 (1979); *Wait v. District Court*, 81 Nev. 612, 407 P.2d 912 (1965).

We note, however, our disciplinary rules, which provide in Canon 5, DR 5-105, of the Code of Professional Responsibility:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of his client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (C).
>
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (C).
>
> (C) In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that

> he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

Even though there was a disclosure to all defendants of the possible conflict, and apparently an insistence on their part that the attorney represent all, the result demonstrates the difficulties inherent in such an undertaking. Because of the representation of conflicting interests, both the trial court and this court were left to sort out confusing fact issues without the benefit of true advocacy. No attorney should permit himself or herself to be placed in a position which he or she knows will prevent the proper performance of the attorney's function.

Appellants set out, in substance, the following errors: (1) Appellee did not go to trial on a theory of recovery upon which relief could be granted; (2) the trial court erred in not dismissing defendants Messner from the lawsuit; (3) the trial court erred in directing a verdict on proration of the jury's verdict; (4) the court erred in giving its instruction on mistake and in failing to give submitted instructions on that issue; (5) the court erred in giving its instruction on damages; and (6) the verdict is not supported by the evidence. For the reasons hereinafter set out, the judgment against defendants Duane Messner, Jean Messner, Kareln Bullock, and Marita DeVoe is reversed and their cause remanded for dismissal, and the cause is reversed and remanded for a new trial as to defendant Collin Malmkar.

The facts adduced by plaintiff showed that defendant Malmkar did business with plaintiff in the summer of 1983 and that the nature of that business was "the delivery of Commodity Credit corn to that warehouse." Malmkar testified that the bushels "we had to deliver [to plaintiff] for — to cover the BID bushels was 90,069." The record shows that Malmkar was the agent of all defendants, but also shows that the principal-agent relationship between Malmkar and each of the other defendants was not the same in each instance. Malmkar was the farm manager for defendants Duane Messner and Jean Messner and received 10 percent of the production as his manager's fee for supervising the Messners' farm operations from planting to marketing. Malmkar acted as agent for

Bullock-DeVoe only for storage of their corn for a storage fee, and the Bullock-DeVoe participation in the events of this lawsuit was initiated when Malmkar told Bullock, as stated in Bullock's testimony, that plaintiff "would like to handle the grain and they would haul it for nothing, no charge to us." The record shows no common interest among the defendants, other than the fact that Malmkar was an agent for each of them and the fact that their corn production was commingled in Malmkar's storage facilities. The only way in which plaintiff could identify corn deliveries as those of a particular defendant was "because Collin [Malmkar] specified that this particular amount had been delivered to their account." Each defendant had a separate loan in varying specific amounts from CCC and had separate delivery obligations in connection with those loans.

In its brief at 13, plaintiff-appellee states that it "treated the whole delivery as one transaction" and that "[t]he Trial Court correctly interpreted the transaction as a single transaction . . . ." No facts are referred to by plaintiff to support that conclusion. The brief goes on to state at 13-14:

> The various receipts were issued by the designation of Defendant Malmkar. The Trial Court . . . treated all of the defendants equally, the Plaintiff established everything within its power to establish. If Messners are ill served by Malmkar their remedy lies against Malmkar or in a suit for contribution and not in the denial of a recovery to the Plaintiff or the imposition of a greater burden upon the Defendants Bullock and DeVoe.

That statement of position by appellee clearly points out the conflict in representation referred to above. It does not, however, dispose of the legal problem presented in the cause against the defendants Messner.

With regard to that problem, we postpone the discussion herein of the correctness of plaintiff's theory of "mistake" in affording a remedy for plaintiff's bookkeeping errors. We later set out that we believe the remedy is available to plaintiff, but for the purpose of disposing of plaintiff's cause against the two Messners, we assume the "mistake" remedy is available.

With regard to defendant Duane Messner, the record,

through the U.S. Department of Agriculture's "Commodity Delivery Notice," shows that the "outstanding loan quantity" of Duane Messner was 14,154 bushels with a "balance to be settled" of $40,621.98, and a "disbursement date" of December 12, 1982. The outstanding loan quantity figure on this document is crossed out and 9,704 written in. Other testimony showed that Duane Messner satisfied a part of his obligation to CCC by delivery of 4,450 bushels of corn at Dudden Elevator at Venango, Nebraska, leaving an obligation of 9,704 bushels handled in the transaction relevant to this lawsuit.

Malmkar delivered grain from his storage facilities to plaintiff's elevator beginning May 14, 1983. By May 25, 1,140,200 pounds of corn had been delivered. This number of pounds of corn, when divided by 56 (the number generally used for this purpose), converts to 20,360.7 bushels. On May 31, warehouse receipt No. 381007 was issued to CCC to satisfy the obligation of Duane Messner. The amount was apparently designated by agent Malmkar. There is nothing in the record to show that Malmkar did not have the authority, as an agent, to make this designation. Only defendants Malmkar and Bullock (in addition to other witnesses, of course) testified. No evidence on the particular point of Malmkar's authority was adduced. It can only be presumed, in the absence of evidence, that Malmkar's agency authority extended to include the right of designation employed with respect to delivery of corn. If that were not the fact, the delivery of corn in any such situation would come to a halt, and no business would be transacted.

Once that issue is decided, it is clear that more than enough bushels of corn of Duane Messner had been delivered on May 31, 1983, to support the issuance of a warehouse receipt that date to CCC in the amount of 9,704 bushels. Plaintiff's witnesses Roger Wendell, plaintiff's president, and Maxine Wendell, plaintiff's secretary-treasurer and bookkeeper, testified that at the time of the issuance of warehouse receipt No. 381007 for the benefit of Duane Messner "no mistake had been made."

The record also shows that at the time of the issuance of warehouse receipt No. 381011 on June 10, 1983, more than enough bushels of corn had been delivered to plaintiff, and

apparently designated by agent Malmkar to satisfy the delivery obligation of defendant Jean Messner, to support the issuance of that receipt in the amount of 13,364 bushels. Robert and Maxine Wendell testified explicitly that no mistake had been made at the time warehouse receipt No. 381011 was issued for the benefit of defendant Jean Messner.

The thrust of plaintiff's lawsuit against the five defendants is that plaintiff made mistakes which resulted in defendants' unjust enrichment. As stated in the court's instructions, plaintiff had to prove that warehouse receipts "overstating the amount of corn received by plaintiff were issued for the credit of defendants" and that "the overstatement, if any, was by mistake and was involuntary."

With regard to defendants Duane Messner and Jean Messner, there was no overstatement of the amount of grain and no mistake. No contention is made to us that agent Malmkar's designation that the first corn delivered was that of defendants Messner was beyond Malmkar's authority.

The trial court erred in not sustaining the Messners' motion to dismiss and in not dismissing defendants Duane Messner and Jean Messner. The cause, insofar as those two defendants are concerned, is reversed and remanded with directions to dismiss.

After the second warehouse receipt was issued to satisfy the obligation of defendant Jean Messner, additional deliveries of grain were made to plaintiff by Malmkar. After the June 14, 1983, deliveries, plaintiff's records (exhibit 6) showed plaintiff had received a total of 1,837,990 pounds of corn from the Malmkar deliveries. Maxine Wendell left on a vacation, and on June 15 a temporary employee took over the records. At the conclusion of the June 15 business day the deliveries totaled 2,184,364 pounds of corn. By June 23, the deliveries were concluded, and plaintiff's records showed that a total of 4,072,803 pounds of corn had been delivered to plaintiff through Malmkar.

On June 15, 1983, the new employee, at the direction of Roger Wendell, plaintiff's president, prepared two warehouse receipts to Collin Malmkar and one to Bullock-DeVoe, in a total of 3,752,056 pounds of corn. The two earlier warehouse receipts issued to cover the obligations of the Messners (in the

total of 1,272,400 pounds of corn) were not deducted from the running total, and, as can be seen, plaintiff, if its evidence is believed, issued warehouse receipts in excess of corn received into storage at its elevator. The reason the last three warehouse receipts were issued on June 22 and indicate the grain was received June 15, while substantial amounts of corn were received after that date, is not explained in the record.

In any event, it is clear that plaintiff proved, if its evidence is believed, that it issued the last three warehouse receipts because of its own mistake of fact. Defendants' allegation that plaintiff's evidence, if believed, does not support a finding of mistake is without merit. The trial judge properly submitted the issue of mistake to the jury.

With regard to the remaining three defendants (hereinafter defendants means only those three), the basic question presented is whether the trial court erred in submitting to the jury the issue that plaintiff could recover, from defendants, money damages resulting from plaintiff's unilateral mistake. Defendants' position is set out in appellants' brief at 13:

> Wendell's Inc. filed suit on a unilateral mistake, it pled a unilateral mistake in its Petition; it proved a unilateral mistake at the trial. It did not plead or prove any excuse for the unilateral mistake. The unilateral mistake was made by its own employees and officers. The unilateral mistake was made or came about through the inattention and/or negligence of Wendell's Inc.

Defendants go on to state, correctly, that "Wendell's, Inc. does not allege nor did it attempt to prove that any of the Appellants had anything at all to do with the alleged error." *Id.* Notwithstanding that factual situation, this court has recognized that one who transfers money to another under a mistake of fact may recover such overpayments if the payments were involuntary and resulted in unjust enrichment of the person receiving the payment.

In *Hersch Buildings, Inc. v. Steinbrecher*, 198 Neb. 486, 490, 253 N.W.2d 310, 312 (1977), a building contract case involving a mistaken overpayment to a builder, we stated that in such cases, "All payments are presumed to be voluntary until the contrary is made to appear, and the burden rests on the party seeking to

recover a payment to prove that it was involuntary." In clarification of the word "involuntary," we went on to state that the plaintiff in the *Hersch* case had to prove "that its overpayments were made by mistake, and were therefore involuntary." *Id.*

In *Globe Indemnity Co. v. Thayer County Bank*, 135 Neb. 484, 488, 282 N.W. 400, 402 (1938), we defined "involuntary" as " 'Not proceeding from choice.' " Webster's Third New International Dictionary, Unabridged 1191 (1981), defines it as "springing from accident or impulse rather than conscious exercise of the will : unintentional . . . ."

The same principle was applied to mistaken payments made under insurance policies. In *Chalupa v. Hartford Fire Ins. Co.*, 217 Neb. 662, 666, 350 N.W.2d 541, 544 (1984), we stated: "An insurer who has made a payment under a mistake of fact that the terms of an insurance contract require such payment is entitled to restitution, at least where the payee has not so changed his position that it would be inequitable to require him to make full payment." See, also, *Federated Mut. Ins. Co. v. Good Samaritan Hospital*, 191 Neb. 212, 214 N.W.2d 493 (1974), where the doctrine is further discussed in pointing out that a creditor who has innocently received payment from a third party is not under a duty to make restitution to the payor, which has made a mistake of fact in its dealings with the debtor. The *Federated* case left open the right of the payor, the insurance company, against its insured, the debtor. See, also, *Nebraska State Bank v. Sherlock*, 180 Neb. 772, 145 N.W.2d 573 (1966), concerning a mistaken payment of two checks by a bank.

In this case, a similar question of mistake was presented. Plaintiff's actions were involuntary in the sense they were the result of a mistake of fact, if the jury so found. Since the cause must be remanded for new trial, we point out that the jury should be instructed as to the meaning of the word "involuntary" used in the court's instructions.

The trial court was correct in submitting plaintiff's case, based on mistake, against Malmkar, but not as against Bullock-DeVoe. When a unilateral mistake is made and a party receives the benefit of that mistake, before the mistaken payor can

recover the mistaken payment, it must also show that the person receiving the payment has been unjustly enriched. In the case of Bullock-DeVoe, plaintiff alleged that Bullock-DeVoe were unjustly enriched, and Bullock-DeVoe specifically denied any unjust enrichment. The evidence is undisputed that Bullock-DeVoe had an outstanding loan quantity of 12,118 bushels of corn with CCC. The evidence is also undisputed that plaintiff issued its warehouse receipt No. 381015 to CCC for the satisfaction of Bullock-DeVoe's obligation, showing corn received in the amount of 12,118 bushels. Uncontested evidence from Kareln Bullock showed that Bullock-DeVoe had no corn left after 12,118 bushels of corn were delivered to plaintiff. Bullock-DeVoe have no corn left, but they have a warehouse receipt in lieu of that corn. Bullock-DeVoe have not been unjustly enriched in any sense, but have come out exactly even. Plaintiff is not entitled to recover back from them on account of plaintiff's own mistake. The trial court should have directed a verdict in favor of defendants Kareln Bullock and Marita DeVoe at the conclusion of all the evidence. The judgment against these two defendants is reversed and the cause remanded with directions to dismiss plaintiff's case against them.

An entirely different situation exists as to defendant Malmkar, particularly because of his dual role as principal and as agent. The record shows that during this general time, Malmkar was also making grain sales to Ed Duggan, Inc., of Colorado. The Duggan sales began on June 28, 1983, and ended July 7, and totaled 2,425,825 pounds of corn, or, on a 56-pound conversion basis, 43,318.30 bushels of corn. Some of this grain was sold on behalf of Duane Messner and others, including Carl Dean. Malmkar was unable to testify as to the amount of shares due others because his records no longer existed. Additionally, Malmkar received corn as rent from several parties, and a quantity of corn was received from Noel Bullock. Malmkar testified that all this corn was handled through his storage facilities.

Additionally, plaintiff developed a system which avoided a second handling of a substantial quantity of corn, but which inevitably led to further confusion between Malmkar and

plaintiff. Plaintiff had entered into a contract of its own with Valley Feed & Seed to sell 70,000 bushels of corn. Plaintiff would send Valley trucks to Malmkar's storage site, where the trucks would be loaded with corn. The trucks would then return to plaintiff's elevator and be weighed. The Malmkar corn would later be credited to the delivery obligations of Malmkar and the other defendants, but the corn itself would remain on the Valley trucks and be forwarded to satisfy plaintiff's contractual obligation to Valley.

It is apparent that large quantities of corn were handled by plaintiff and Malmkar, and errors in those transactions might have created an advantage to either plaintiff or Malmkar, but did not in any way unjustly enrich the other four defendants. The evidence does not show, in any degree, that the other four defendants received anything in excess of credit in the precise amount to which they were entitled.

The jury determined that the plaintiff had made a mistake. The only person disclosed in the evidence who could have been unjustly enriched on account of that mistake was defendant Malmkar. Due to the manner in which the case was presented, with four additional defendants, it cannot be said that Malmkar has received a fair trial. The cause must be remanded for a new trial, as between plaintiff and Malmkar, consistent with this opinion.

The issue of damages must be clarified on remand. The only instructions referring to damages are instruction No. 2 and instruction No. 10. Instruction No. 2 sets out, as a part of plaintiff's burden of proof, that plaintiff must prove "[t]he amount of money, if any, by which the defendants have been unjustly enriched as a result of said overstatement and which is allowed by way of damages."

Instruction No. 10 provides: "The measure of damages for a mistake and involuntary credit is the fair and reasonable value of the credit to the recipient at the time of its receipt."

The concept of "fair and reasonable value of the credit" is not discussed in the evidence. Instead, the documentary evidence indicates, with respect to defendant Malmkar, a total "outstanding loan quantity" of 34,435 bushels and a "balance to be settled" of $86,776.20, as shown on a commodity delivery

notice, in connection with warehouse receipt No. 381013, to discharge part of Malmkar's obligation to the CCC. Calculations from this document show a per bushel value of $2.52. Calculations made from a similar document executed in connection with warehouse receipt No. 381014, also issued to Malmkar, show a per bushel value of $2.87, which happens to be the same value as that which can be calculated from warehouse receipts issued to the other defendants. Whatever those values mean, they certainly have a bearing on the amount of damages, if any, due plaintiff.

A further discrepancy must be noted. In the two warehouse receipts issued to Malmkar (as well as in the receipt issued to Bullock-DeVoe), the figure set out in "Net Pounds" has been altered by the crossing out of the pounds initially entered (1,859,490 and 1,104,192) and the interlined entries of 1,928,360 pounds and 1,145,088 pounds respectively. It is of further interest that the "Warehousman's [sic] Copy Duplicate" in both instances have only the interlined numbers and are not duplicates in that respect. Plaintiff's president testified he has no knowledge as to how this happened, and plaintiff's temporary employee testified she knows nothing of the discrepancy.

Whoever made the change is not known, but the reason for the change is clear—another mistake. The "Test Wt. lbs." on each warehouse receipt in question is 54. When the original pounds on each receipt are divided by 54, the number of bushels is correctly set out in each warehouse receipt. When the original pounds, however, are divided by 56, the number of bushels on the receipt are not mathematically correct. A balance has obviously been forced, on the amended documents, by multiplying the number of bushels on each receipt by 56. The resulting documents are inconsistent within their four corners. No explanation is available in the record before us, and Malmkar does not complain. The net change in Malmkar's two receipts shows an increase of 109,766 pounds of grain—a substantial difference, particularly when plaintiff alleges with precision that its mistake has resulted in an overstatement of corn received "by 22,340.38 bushels." The cause must be reversed and remanded for a new trial on all issues against

defendant Malmkar. The cause is reversed and remanded with directions to dismiss as to defendants Duane Messner, Jean Messner, Kareln Bullock, and Marita DeVoe.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS AS TO DUANE MESSNER, JEAN MESSNER, KARELN BULLOCK, AND MARITA DEVOE, AND REVERSED AND REMANDED FOR A NEW TRIAL AS TO COLLIN MALMKAR.

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

JOHN GALLAGHER, PERSONALLY AND AS ASSIGNEE, BY AND THROUGH HIS FATHER AND NEXT FRIEND, MERLE GALLAGHER, APPELLEE, V. OMAHA PUBLIC POWER DISTRICT, APPELLANT.

405 N.W.2d 571

Filed May 8, 1987. No. 85-774.

1. **Recreation Liability Act: Negligence: Liability.** Subject to the provisions of Neb. Rev. Stat. § 37-1005 (Reissue 1984), an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby (1) extend any assurance that the premises are safe for any purpose, (2) confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.
2. **Negligence: Intent: Words and Phrases.** In order for an action to be willful or wanton, the evidence must show that one acted with actual knowledge that a danger existed and that he intentionally failed to act to prevent the harm which was reasonably likely to result. The term imparts knowledge and consciousness that injury is likely to result from the act done or omission to act, and a constructive intention as to the consequences.
3. _____: _____: _____. To constitute willful misconduct there must be actual knowledge, or its legal equivalent, of the peril to be apprehended, coupled with a conscious failure to avert injury. To constitute willful negligence the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith. Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury.
4. **Recreation Liability Act: Negligence: Liability.** Subject to the provisions of Neb. Rev. Stat. § 37-1005 (Reissue 1984), an owner of land owes no duty of care to

keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded with directions to dismiss.

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

Howard A. Kaiman, for appellee.

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

PER CURIAM.

This is an action brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), in which the appellee, John Gallagher (Gallagher), a 6-year-old boy, by and through his father and next friend, Merle Gallagher, seeks to recover damages from the appellant, Omaha Public Power District (the District), for personal injuries sustained by Gallagher in a sledding accident occurring on property owned by the District.

Gallagher's petition alleged two purported causes of action. The first sought to recover damages for injuries sustained on January 5, 1983, by Gallagher to his buttock when the sled he was riding struck a piece of metal protruding above the ground on the District's property. The second sought damages for past and future medical bills and loss of earnings.

Trial of the matter was had to the court, and thereafter the district court entered judgment for Gallagher and against the District in the amount of $22,862.70.

The District has assigned a number of errors. They can be separated into two basic groups. The first concerns issues as to whether the district court erred in ruling that the Nebraska Recreation Liability Act did not apply to the specific area where the accident occurred. The second group deals with the negligence questions which gave rise to the judgment.

A brief recitation of the facts is necessary. The property in question, belonging to the District, is a future substation site

located near 16th and Spring Streets in Omaha, Nebraska. It consists of several lots. Most of the property is more or less flat and level. The southwest corner of the property, however, is a steep ravine. On January 5, 1983, Gallagher went across to the District's property for the purpose of sliding down the steep ravine on his plastic sled. While sitting on the sled, sliding down the hill, he was severely cut on his buttock by a piece of metal which cut through the plastic sled. It was stipulated by the parties that the piece of metal that injured Gallagher was found on the District's property. The piece of metal was estimated to weigh 45 to 50 pounds and was embedded in the snow on the ravine. There was no evidence to indicate who had placed the metal object on the ravine or how long it had been there.

The district court found that while the flat area of the property in question was clearly within the protection of the Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1984), the ravine area where the accident occurred was not, because "[t]here is no evidence that that portion of the property was made available to the public for any recreational purpose." We are unable to agree with the district court's finding in that regard.

The evidence discloses that sometime prior to the date on which the accident occurred, the Deer Park Neighborhood Association (Association) sought permission from the District to use the lots for recreational purposes. Following a meeting of the District's board, permission was granted to the Association. Specifically, a letter was sent by the District to the Association on February 25, 1982, extending to the Association the use of all of the lots. Without restriction as to use or area, the letter from the District to the Association read in part:

> The Omaha Public Power District is happy to authorize the use of its *unoccupied substation site* at 16th and Spring Streets to the Deer Park Neighborhood Association. It is our understanding that your Association will be coordinating the *use of this land* for youth sports activities, primarily baseball and softball.

(Emphasis supplied.)

No restrictions were placed on the use of the lots, nor was any portion of the land excluded from use. The entire "unoccupied

substation site at 16th and Spring Streets" was made available for recreational use by the public. While it is true that the District anticipated that the principal use would be for baseball and softball, it is clear that the District did not forbid other uses. Moreover, it is clear that, while the District may have contemplated that the level area would be the principal area used, it is likewise clear that no restrictions were imposed upon the use of the property, and, in fact, the Association was free to use the property in its entirety under its own supervision and direction. This was obviously the intent of the District and the understanding of the Association when the District further indicated in its letter of February 25, 1982, that "pursuant to Nebraska law, OPPD has no liability for accidents that may occur on the property as a result of its use for recreational purposes." While we recognize that one may not avoid liability where the law otherwise imposes such liability, we do believe that a reading of the entire letter of February 25, 1982, which permitted the Association to use the substation site, makes it clear that there were no limitations, either as to area or as to activity. The entirety of the lots was covered for any recreational activity which might be conducted on the site.

As the evidence discloses, there were no fences or other types of barriers erected on or around the ravine to limit activity in that area. In our view, the evidence requires a finding that the entire area was made available, directly or indirectly, to the Association, and therefore to Gallagher. The district court, in concluding that only a portion of the area was made available, was in error.

Section 37-1003 provides:

> Subject to the provisions of section 37-1005, an owner of land who either *directly or indirectly invites or permits* without charge any person to use such property for recreational purposes does not thereby (1) extend any assurance that the premises are safe for any purpose, (2) confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.

(Emphasis supplied.)

While, during trial, questions were raised by Gallagher regarding the meaning of this act and its application to the District, we believe that we have already resolved all of those questions in favor of the District and against Gallagher. It is clear that the act is not limited to private persons and that governmental subdivisions are "owners" within the meaning of § 37-1003. See, *Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766 (1984); *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984); *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981).

Furthermore, there is no longer any question in this jurisdiction that the provisions of the Nebraska Recreation Liability Act apply to urban as well as to rural areas. See, *Bailey v. City of North Platte, supra; Garreans v. City of Omaha, supra; Watson v. City of Omaha, supra.*

Therefore, the only question, as noted by the district court, was whether the entirety of the lots was covered by the act or only the flat portion suitable for use as a baseball diamond. As we have indicated, we believe the evidence leads us to the conclusion that the entire area was covered by the act. No one would seriously argue that if, during a softball game, a ball was hit into the area of the ravine, the participants would not have permission from the District to retrieve it. Furthermore, as the record indicates, children in the neighborhood were permitted to enter the flat area by walking across the ravine area, and regularly did so. Nowhere in the letter issued by the District to the neighborhood Association can we find any restrictions imposed regarding the area to be used. The use of the lots in their entirety, including the ravine, was given to the Association for whatever recreational use it might be able to make of the area.

This view is supported by the evidence adduced. The father of the injured child testified that the entire neighborhood used the lots as if they were a public park. It does not require a great deal of imagination to conclude that young children with sleds will attempt to ride them down a hill in a park in the wintertime. We therefore believe that permission was given, if not directly, then certainly indirectly, to use all of the lots in question, including the ravine. For that reason we believe that the

Nebraska Recreation Liability Act did apply to the area upon which the accident occurred.

We have further examined the record in its entirety and find no evidence to support a claim that the District had actual knowledge that a danger existed, and, therefore, the District could not be found to have willfully or maliciously failed to guard or warn against such dangerous condition or structure as required by § 37-1005. As we observed in *Garreans v. City of Omaha, supra* at 493, 345 N.W.2d at 314:

> In order for an action to be willful or wanton, the evidence must show that one acted with actual knowledge that a danger existed and that he intentionally failed to act to prevent the harm which was reasonably likely to result. The term imparts knowledge and consciousness that injury is likely to result from the act done or omission to act, and a constructive intention as to the consequences. To constitute willful misconduct there must be actual knowledge, or its legal equivalent, of the peril to be apprehended, coupled with a conscious failure to avert injury. To constitute willful negligence the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith. Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury.

In view of the fact that the evidence fails to disclose that the defendant willfully or maliciously failed to guard or warn against the dangerous conditions or structure, the District was relieved of liability as a matter of law. Section 37-1002 provides:

> Subject to the provisions of section 37-1005, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

And, § 37-1003 provides:

> Subject to the provisions of section 37-1005, an owner of land who either directly or indirectly invites or permits

> without charge any person to use such property for recreational purposes does not thereby (1) extend any assurance that the premises are safe for any purpose, (2) confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons.

As we have already indicated, § 37-1005 has no application as a matter of law under the evidence in this case.

And, finally, § 37-1006 reads: "Nothing in sections 37-1001 to 37-1008 creates a duty of care or ground of liability for injury to person or property."

We can perceive of no way the Legislature could have been any clearer as to its intention in regard to matters such as those involved in this case.

In reaching our conclusion we do not, as we have not in the past, pass upon the wisdom of the Nebraska Recreation Liability Act. It appears from its history that the passage of the act was an attempt to balance various interests. On the one hand, it makes land available for use without charge, while, on the other hand, it relieves landowners, who would make the land available without charge, of liability. That is a value judgment which the Legislature has properly made and one which this court is not in a position to question.

For these reasons, therefore, the judgment of the district court must be reversed and remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

WHITE, J., dissenting.

I dissent. We have, in three prior cases, held that the Recreation Liability Act is applicable to public entities. *Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766 (1984); *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984); *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981). While the act provides that a landowner shall not be held liable for ordinary negligence, it may be held liable for malicious or willful actions which result in injury. Neb. Rev. Stat. § 37-1005 (Reissue 1984). Assuming the majority is

correct that the entire site was dedicated to public recreation purposes, the cause should be remanded for further action by the trial court.

The appellee alleged in his amended petition that OPPD's failure to warn of the dangerous condition of the lot donated for recreational purposes constituted a willful and malicious act on the part of the appellant. This issue was not addressed by the district court. The testimony of Mr. and Mrs. Gallagher reveals that OPPD was notified of the presence of debris and trash on the hill which the neighbor children used for sledding, and the evidence at trial revealed that the object on which the boy injured himself was only partially visible above the snow and weeds. Also, then employees of OPPD testified that each time they were on the property, debris was present.

Section 37-1005 provides:

> Nothing in sections 37-1001 to 37-1008 limits in any way any liability which otherwise exists (1) for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity, or (2) for injury suffered in any case where the owner of land charges the person or persons who enter or go on the land. Rental paid by a group, organization, corporation, the state or federal government shall not be deemed a charge made by the owner of the land.

To constitute willful misconduct there must be actual knowledge that a danger exists and a conscious failure to act to prevent harm which is likely to result. *Garreans, supra.*

Evidence was introduced tending to prove OPPD has had knowledge that a dangerous condition existed and that the injury was reasonably foreseeable, especially in view of the evidence in the record of a similar injury to another neighbor boy sledding on the hill. I would remand for rehearing on the issue of malicious or willful misconduct on the part of OPPD.

SHANAHAN, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. DONALD M. LAFLER, APPELLANT.

405 N.W.2d 576

Filed May 8, 1987. No. 86-682.

1. **Speedy Trial.** The purpose of Nebraska's speedy trial act, Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985), sometimes called the "6-month rule," is protection of an accused from a criminal charge pending for an undue length of time.
2. **Speedy Trial: Proof.** Under Nebraska's speedy trial act, it is unnecessary to show factually that delay actually prevented commencement of trial, that is, a demonstration of a cause-and-effect relationship between a condemned delay and failure to commence a defendant's trial within 6 months as prescribed by Neb. Rev. Stat. § 29-1207(2) (Reissue 1985).
3. _____: _____. To obtain absolute discharge under Neb. Rev. Stat. § 29-1208 (Reissue 1985) of the Nebraska speedy trial act, a defendant is not required to show prejudice sustained as the result of failure to bring the defendant to trial within 6 months in accordance with Neb. Rev. Stat. § 29-1207(2) (Reissue 1985).
4. _____: _____. The primary burden is on the State to see that an accused is brought to trial within the time prescribed by the Nebraska speedy trial act.
5. _____: _____. To avoid a defendant's absolute discharge from an offense charged, as dictated by Neb. Rev. Stat. § 29-1208 (Reissue 1985), the State, by a preponderance of evidence, must prove existence of a period of time which is authorized by Neb. Rev. Stat. § 29-1207(4) (Reissue 1985) to be excluded in computing the time for commencement of the defendant's trial in accordance with the Nebraska speedy trial act, or "6-month rule."
6. **Speedy Trial: Good Cause.** Any delay caused by the defendant's act or conduct, namely, those pretrial situations or matters described or characterized in Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1985), is automatically excluded in computing the time when the defendant's trial must commence pursuant to the Nebraska speedy trial act. Any period of delay resulting from a defendant's act or conduct specifically mentioned in reference to the pretrial matters or situations described or characterized in § 29-1207(4)(a) is computed without consideration whether such delay was reasonably necessary. However, a period of delay resulting from other than the defendant's act or conduct described or characterized in § 29-1207(4)(a) may be excluded in computing the time for commencement of a defendant's trial, if such delay occurred on account of "good cause," as provided in § 29-1207(4)(f).
7. **Conspiracy: Words and Phrases.** 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.

Appeal from the District Court for Cheyenne County: JOHN D. KNAPP, Judge. Affirmed.

David T. Schroeder, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

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

SHANAHAN, J.

A jury in the district court for Cheyenne County found Donald M. Lafler guilty of two crimes, namely, conspiracy, see Neb. Rev. Stat. § 28-202(1) (Reissue 1985), to commit a felony (theft by deception), see Neb. Rev. Stat. § 28-512(1) (Reissue 1985), and attempted theft by deception, see Neb. Rev. Stat. § 28-201(1) (Reissue 1985). We affirm.

After a preliminary hearing on September 10, 1985, in the county court, Lafler was bound over for trial in the district court, and the State filed the information against Lafler on September 16. Lafler, on September 24, filed a plea in abatement, see Neb. Rev. Stat. § 29-1809 (Reissue 1985), alleging that evidence adduced at the preliminary hearing did not show commission of a crime. On October 8, Lafler's attorney appeared before the district court regarding the pending plea in abatement and offered an exhibit consisting of the transcription of testimony and evidence in Lafler's preliminary hearing, which exhibit was received by the court, with the following colloquy between the court and Lafler's attorney:

> MR. SCHROEDER: And with respect to arguing this matter, Your Honor, I would request the Court to continue this matter to a later time for argument and for further arraignment at that time if necessary.
>
> THE COURT: I will read the transcript and then set a date for hearing.
>
> Thank you.
>
> MR. SCHROEDER: Thank you, Your Honor.

The exhibit received on October 8 consisted of 80 pages and 6 exhibits (1-page photostatic copies of documents, for example, a canceled check, a bank draft, and a money order).

On its own motion, the court made the following entry on its

"trial docket" for January 21, 1986: "Arguments to be heard Febr 4 '86 at 10:00." On February 4, a deputy county attorney and Lafler's lawyer appeared before the court, who remarked: "The defendant is present in court with his counsel, Mr. Schroeder; the State is present by the Deputy County Attorney, Mr. Luben. The matter comes on to be heard upon the Plea in Abatement filed on behalf of defendant." Lafler's lawyer then addressed the multicount information filed against Lafler, referred to the "transcript of the preliminary hearing," and requested that the court abate the proceedings on the separate counts in the information. At the conclusion of the hearing on Lafler's plea, the court remarked: "Thank you, gentlemen. I will let you know in a day or two." The court's trial docket for February 4 reflects: "Arguments had. Case submitted." The journal signed by the court concerning the February 4 hearing recited: "[T]he matter is argued by the parties and submitted to the Court. The Court, being duly advised in the premises, finds that the Court shall take this matter under advisement and will notify the parties hereto of the Court's decision." A copy of the February 4 journal was mailed to attorneys of record. As reflected in the court's "journal entry," on February 11 the court overruled Lafler's plea in abatement.

On April 21 Lafler filed a "Motion for Discharge," claiming that he had been denied his right to a speedy trial, guaranteed by the Nebraska Constitution and the U.S. Constitution, as well as prescribed by Nebraska statute. The court overruled Lafler's motion for discharge on April 22, and Lafler's jury trial commenced on May 22.

During the conference on jury instructions, Lafler objected to the court's proposed instruction regarding a conspiratorial "overt act." Concerning conspiracy, § 28-202 in part provides:

> (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.

Lafler tendered the following instruction regarding an overt act:

> Defendant['s] Proposed Instruction No. 2
>
> Definitions
>
> . . . An "overt act" is an act knowingly committed by one of the conspirators, in an effort to effect or accomplish some object or purpose of the conspiracy. The act must be one that tends toward accomplishment of the plan or scheme or must be done in furtherance of some object or purpose of the conspiracy alleged.

The court refused Lafler's tendered instruction on "overt act" and instructed the jury:

> Instruction No. 8A
>
> "Overt act" is defined as an act which tends to show the pre-existing conspiracy; an act done in pursuance of the conspiracy, manifesting an intent or design looking toward the accomplishment of the crime; it need not of itself have a tendency to accomplish the object of the conspiracy, and further, it need not be an act which is criminal in nature.

The jury found Lafler guilty of conspiracy and an attempted theft by deception. Lafler filed a motion for new trial and, among other items, asserted:

> Notwithstanding a question by the Court to the jury panel as to whether or not any of the panel members were related to law enforcement officers, the Defendant has reason to believe and does believe that [name of juror] failed, neglected and refused to inform the Court and the parties that he was an in-law of the Sheriff of Cheyenne County, Nebraska . . . .

At the hearing on the motion for new trial, the deputy county attorney and Lafler's lawyer stipulated that the juror in question was the son-in-law of the Cheyenne County sheriff. In his argument on this aspect of the motion for new trial, Lafler's counsel told the court: "[I]t was my recollection that one of the questions the Court asked the jury panel was whether or not they were related to any law enforcement officers and [juror in question], who ultimately was on the jury, did not respond to

that question in any way."

To that statement by Lafler's counsel, the county attorney countered:

> [M]y recollection of the voir dire by the Court is that there in fact was no question put to the panel as to whether or not they were related to any of the witnesses. . . . However, it is not my recollection that that question was ever asked by the Court and certainly not being asked, [juror in question] did not have any reason to inform the Court of that fact. Of course, the defendant did have time to voir dire, did voir dire extensively . . . .

Concerning voir dire examination of the jury in reference to any relationship to a law enforcement officer, the trial judge commented:

> The Court has no recollection of that precise question being asked. It is the Court's practice to ask any members of the jury panel whether or not they are related to any of the parties. . . . It is not my practice to specifically ask if they are related to law enforcement officers and it is my recollection that I did not ask that specific question.

Lafler's lawyer requested an opportunity to present a witness to substantiate that the court had asked whether any of the prospective jurors was related to a law enforcement officer, but the court refused to hear testimony on that matter. The court sentenced Lafler to probation and overruled Lafler's motion for new trial.

Lafler contends (1) he was entitled to be discharged from the offenses charged, because, contrary to Nebraska statute, he was not brought to trial within 6 months from the date on which the information was filed; (2) the court erred in refusing Lafler's tendered instruction concerning an overt act and, instead, giving instruction No. 8A; and (3) the court committed reversible error in denying Lafler a hearing on the question about the juror's relationship to the sheriff.

SPEEDY TRIAL

While Lafler's motion for discharge referred to constitutional safeguards and guarantees for a speedy trial, see, Neb. Const. art. I, § 11, and U.S. Const. amend. VI, the question presented on appeal relates only to Nebraska's

statutory prescription for a speedy trial. Therefore, we do not review any question concerning Lafler's constitutional right to a speedy trial. See, *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983); *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985); *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) (four-part balancing test to determine whether delay in trial infringes on a defendant's constitutional right to a speedy trial). See, also, *United States v. Loud Hawk*, 474 U.S. 302, 106 S. Ct. 648, 88 L. Ed. 2d 640 (1986).

Nebraska's speedy trial act, Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985), was enacted in view of the rule in some federal courts before adoption of the federal Speedy Trial Act of 1974, 18 U.S.C. §§ 3161 et seq. (1982), and was intended to require discharge of a defendant whose case had not been tried within 6 months after the criminal charge had been filed, unless delay in trial were requested by the defendant. See, Introducer's Statement of Purpose, L.B. 436, Committee on Judiciary, 82d Leg., 1st Sess. (Feb. 15, 1971); Committee Statement, L.B. 436, *supra* (Feb. 18, 1971). Thus, in the case before us, we construe legislation pertaining to a speedy trial, an act which is an implementary companion of the constitutional right to a speedy trial but not coextensive with the constitutional provision for a speedy trial, which is self-executing irrespective of any statutory implementation.

The purpose of Nebraska's speedy trial act, sometimes called the "6-month rule," is protection of an accused from a criminal charge pending for an undue length of time. See *People v. Wilson*, 60 Cal. 2d 139, 383 P.2d 452, 32 Cal. Rptr. 44 (1963).

Under Nebraska's speedy trial act, it is unnecessary to show factually that delay actually prevented commencement of trial, that is, a demonstration of a cause-and-effect relationship between a condemned delay and failure to commence a defendant's trial within 6 months as prescribed by § 29-1207(2). See, *United States v. Velasquez*, 802 F.2d 104 (4th Cir. 1986); *United States v. Novak*, 715 F.2d 810 (3d Cir. 1983); *United States v. Stafford*, 697 F.2d 1368 (11th Cir. 1983).

As a part of the Nebraska speedy trial act, or "6-month rule," § 29-1207 in pertinent part provides:

(1) Every person indicted or informed against for any

> offense shall be brought to trial within six months, and such time shall be computed as provided in this section.
>
> (2) Such six-month period shall commence to run from the date the indictment is returned or the information filed. . . .
>
> . . . .
>
> (4) The following periods shall be excluded in computing the time for trial:
>
> (a) . . . [T]he time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence, motions to quash the indictment or information, demurrers and pleas in abatement and motions for a change of venue; and the time consumed in the trial of other charges against the defendant;
>
> (b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel. . . .
>
> . . . .
>
> (f) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause.

Section 29-1208 states: "If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he shall be entitled to his absolute discharge from the offense charged and for any other offense required by law to be joined with that offense." To obtain absolute discharge under § 29-1208, a defendant is not required to show prejudice sustained as the result of failure to bring the defendant to trial within 6 months in accordance with § 29-1207(2). See, *People v. Wilson, supra; State v. Williams*, 85 Wash. 2d 29, 530 P.2d 225 (1975); *United States v. Mehrmanesh*, 652 F.2d 766 (9th Cir. 1981).

Since the information against Lafler was filed on September 16, 1985, the last day for commencement of Lafler's trial was March 17, 1986 (March 16 being a Sunday), unless any period between the filing of the information and March 16 must be excluded in computing the time for commencement of trial.

Lafler's plea in abatement was pending 15 days, from September 24, 1985, until October 8, inclusive, when the

transcription of the preliminary hearing was presented to the court with a request for argument on such plea. After the hearing on October 8 and until argument on the plea (February 4, 1986), 119 days elapsed, with an additional 7 days passing while the court had Lafler's plea under advisement and before the court overruled Lafler's plea on February 11. Therefore, from September 24, 1985 (filing of plea in abatement), to and including February 11, 1986 (court's ruling on plea), there are 141 days.

Lafler acknowledges he is responsible for the periods from September 24 to October 8 in 1985 and from February 4 to 11 in 1986, or a total of 22 days. Thus, Lafler contends that the last day for commencement of his trial was April 7 (March 16 plus 22 days). Any time outside those 22 days, Lafler argues, is charged to the State on account of judicial delay which Lafler characterizes as "inordinate or unreasonable."

The State contends that Lafler was charged with the entire elapsed time from the filing of his plea in abatement until disposition by the court, or all 141 days during which the plea in abatement was pending and under advisement by the court. According to the State, the date for commencement of Lafler's trial was extended 141 days beyond March 16, so that the last day to begin trial was August 4, 1986 (since August 3 was a Sunday). Because Lafler's trial commenced on May 22, the State argues, Lafler was brought to trial within the time prescribed by § 29-1207.

The primary burden is on the State to see that an accused is brought to trial within the time prescribed by the Nebraska speedy trial act. See, *State v. Bolton*, 210 Neb. 694, 316 N.W.2d 619 (1982); *State v. Beck*, 212 Neb. 701, 325 N.W.2d 148 (1982). To avoid a defendant's absolute discharge from an offense charged, as dictated by § 29-1208, the State, by a preponderance of evidence, must prove existence of a period of time which is authorized by § 29-1207(4) to be excluded in computing the time for commencement of the defendant's trial in accordance with the Nebraska speedy trial act, or "6-month rule." See, *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972); *State v. Beck, supra; State v. Bolton, supra*. Under § 29-1207(4), some illustrations of time excluded, in computing

the statutory deadline for trial, include a discovery motion for production of documents in the prosecutor's possession, see *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983), and defendant's motion for depositions and obtaining depositions of prospective witnesses, see, *State v. Fatica*, 214 Neb. 776, 336 N.W.2d 101 (1983), and *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985). As we expressed in *State v. Craig, supra* at 72, 361 N.W.2d at 210: "An accused cannot generally take advantage of a delay in being brought to trial, where he is responsible for the delay either by action or inaction."

Lafler argues that the time from filing a pretrial motion until its final disposition is not an absolute exclusion in computing the time for commencement of trial under § 29-1207, but, rather, only a reasonable postfiling period may be excluded, that is, exclusion of a reasonable time until final disposition of such pretrial motion. In support of his position, Lafler relies on *State v. Wilcox*, 224 Neb. 138, 395 N.W.2d 772 (1986), wherein this court ruled that a defendant was entitled to discharge in view of an unreasonable delay condemned by § 29-1207(4)(f), which excludes "Other periods of delay not specifically enumerated [in § 29-1207], but only if the court finds that they are for good cause." In *Wilcox*, the State filed the information on October 27, 1983, and Wilcox filed a motion to suppress evidence on January 12, 1984. After Wilcox had rested his case during the evidential hearing on his motion, which was held on January 25, the State asserted that Wilcox lacked standing to contest the search of an outbuilding on the premises occupied by Wilcox. The court requested briefs on the issue of Wilcox's standing and ordered an adjournment of the suppression hearing until February 22. However, on February 13 the trial judge indicated that he was going to recuse himself, and did recuse himself on April 10, when a second or successor judge contacted counsel but took no action regarding Wilcox's pending motion to suppress. No action occurred in Wilcox's case until August 20, 1985, when a third judge entered the proceedings and obtained a transcript of the suppression hearing held before the first judge on January 25, 1984. That third judge, having considered the question about Wilcox's standing, overruled the motion to suppress on September 5.

From filing of the information against Wilcox until disposition of the motion to suppress, 1 year 7 months 24 days elapsed, including the unexplained inactivity from April 10, 1984, until August 20, 1985, a period consisting of 1 year 4 months 10 days. Wilcox's trial commenced on September 20, 1985; 1 year 10 months 24 days after the information had been filed. In *Wilcox* we reasoned that delay in bringing Wilcox to trial did not totally result from his motion to suppress, but was caused in great part by some unexplained judicial inactivity after the first judge's recusal in Wilcox's case. Referring to § 29-1207(4)(f), we concluded: "Judicial delay, absent a showing of good cause, does not suspend a defendant's right to a speedy trial." 224 Neb. at 142, 395 N.W.2d at 775. Because the delay in progression toward trial in *Wilcox* was not justified by "good cause" pursuant to § 29-1207(4)(f), Wilcox was entitled to absolute discharge in accordance with § 29-1208.

In suggesting a reasonableness standard, Lafler misplaces reliance on *State v. Wilcox, supra*, which, as we have pointed out, involved delay considered under § 29-1207(4)(f), whereas Lafler's case involves a plea in abatement, one of the specifically enumerated or described periods of delay which "shall be excluded in computing the time for trial" pursuant to § 29-1207(4)(a). While § 29-1207(4)(f) does relate to exclusion of delays "for good cause," conspicuously absent from § 29-1207(4)(a) is any limitation, restriction, or qualification of time which may be utilized for disposition of specifically mentioned pretrial motions, including a plea in abatement. We observe that, pursuant to § 29-1207(4)(e), exclusion of a "reasonable period of delay" is warranted in certain cases involving joinder of codefendants for trial, where there is "good cause" for not granting a severance of trials.

We note that § 29-1207(4)(a) of Nebraska's speedy trial act is substantially similar to the federal Speedy Trial Act of 1974, 18 U.S.C. § 3161 (1982), which, in part, provides:

> (h) The following period of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other

> proceedings concerning the defendant, including but not limited to—
>
> . . . .
>
> (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion; . . . .

The federal Speedy Trial Act of 1974 also provides for exclusion of "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." 18 U.S.C. § 3161(h)(7). The foregoing provisions of the federal Speedy Trial Act were considered by the U.S. Supreme Court in *Henderson v. United States*, 476 U.S. 321, 106 S. Ct. 1871, 90 L. Ed. 2d 299 (1986), where the Court concluded that excludable time for delay resulting from any pretrial motion is not limited to reasonably necessary delays. In *Henderson*, the Court stated:

> On its face, subsection (F) excludes "[a]ny period of delay" caused by "any pretrial motion," "from the filing of the motion through the conclusion of the hearing." The plain terms of the statute appear to exclude all time between the filing of and the hearing on a motion whether that hearing was prompt or not. Moreover, subsection (F) does not require that a period of delay be "reasonable" to be excluded, although Congress clearly knew how to limit an exclusion: in § 3161(h)(7), Congress provided for exclusion of a "reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." Apart from this single instance, every other provision in § 3161(h) provides for exclusion of "any period of delay."

406 U.S. at 326-27.

As was the situation involving Congress and the federal Speedy Trial Act of 1974, the Nebraska Legislature, in § 29-1207(4)(a), has not indicated a limitation, restriction, or qualification of time to be excluded as the result of a defendant's specific pretrial act or conduct, that is, exclusion of a period of delay in computing the time for commencement of

trial pursuant to the Nebraska speedy trial act. If the Legislature had intended the phrase "reasonable time" to apply to the situations described in § 29-1207(4)(a), as was done by use of the phrases "reasonable period of delay" in § 29-1207(4)(e) and "good cause" in § 29-1207(4)(f), the Legislature would have inserted such phraseology into § 29-1207(4)(a). We decline to rewrite the provisions of § 29-1207(4)(a) to include and require a reasonable time or good cause for delay in disposition of the pretrial matters described or characterized in § 29-1207(4)(a) as a part of the Nebraska speedy trial act.

act or conduct, namely, those pretrial situations or matters described or characterized in § 29-1207(4)(a), is automatically excluded in computing the time when the defendant's trial must commence pursuant to the Nebraska speedy trial act. Any period of delay resulting from a defendant's act or conduct specifically mentioned in reference to the pretrial matters or situations described or characterized in § 29-1207(4)(a) is computed without consideration whether such delay was reasonably necessary. However, a period of delay resulting from other than the defendant's act or conduct described or characterized in § 29-1207(4)(a) may be excluded in computing the time for commencement of a defendant's trial, if such delay occurred on account of "good cause," as provided in § 29-1207(4)(f).

As a result of our holding in this case, the period of 141 days, that is, the entire period from the filing of Lafler's motion on September 24, 1985, until the court's disposition of such plea on February 11, 1986, is excluded in computing the time for commencement of Lafler's trial. By adding 141 days to the date of March 16, 1986, the last day on which Lafler's trial could have commenced under the Nebraska speedy trial act was August 4, 1986. Lafler's trial, which in fact started on May 22, 1986, was commenced within the time prescribed by § 29-1207. The court was correct in overruling Lafler's motion to discharge him from the offenses charged in the information.

INSTRUCTION ON CONSPIRATORIAL OVERT ACT

In *State v. Copple*, 224 Neb. 672, 692, 401 N.W.2d 141, 155 (1987), we stated:

> An overt act manifests that a conspiracy is "still at work." [Citation omitted.] 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. . . . 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, also, *State v. John*, 213 Neb. 76, 328 N.W.2d 181 (1982).

The instruction given by the court comports with the characterization of "an overt act" expressed in *State v. Copple, supra*, and *State v. John, supra*. Lafler's assignment of error regarding the court's action on instructions is without merit.

JUROR QUESTION

As noted, the bill of exceptions does not contain any of the voir dire during the impaneling of the jury in Lafler's case. We do not have a record reflecting what actually transpired during that voir dire and are confronted with a situation involving expressions of recollection on the part of court and counsel.

In *Sandomierski v. Fixemer*, 163 Neb. 716, 718, 81 N.W.2d 142, 145 (1957), we stated:

> Alleged misconduct of counsel in argument to a jury cannot be properly shown by affidavit or evidence taken in support of a motion for a new trial, and to preserve such error the statements must be taken by the official court reporter at trial, together with the objections made thereto and the court's ruling thereon.

See, also, *Garska v. Harris*, 172 Neb. 339, 109 N.W.2d 529 (1961).

Recently, in *Johannes v. McNeil Real Estate Fund VIII, ante* p. 283, 287, 404 N.W.2d 424, 428 (1987), we expressed:

> [E]rrors predicated on occurrences during the course of closing arguments cannot be shown by affidavit. In order that there may be an opportunity to make an accurate record, the proper procedure, when the full arguments are not being reported, is to call in the official reporter and make a record of what occurred part of the bill of exceptions. [Citing *Sandomierski v. Fixemer, supra.*] While it is in any event appropriate to make such a record

> at the close of the argument, see *Sandomierski v. Fixemer, supra*, the parties can avoid disputes about what occurred by exercising their right to have the entire arguments reported. See, Neb. Ct. R. of Official Ct. Rptrs. IV-B (rev. 1986)....

The rule set forth in *Johannes, supra*, concerning counsel's summation also applies to occurrences during the conduct of voir dire examination. This court will not undertake to resolve disputes about what is claimed to have happened, when a record of the voir dire examination could have been made. We find no abuse of discretion by the trial court in denying Lafler's request to present testimony regarding the voir dire examination of the jury.

AFFIRMED.

MARK DITLOFF AND NANCY DITLOFF, HUSBAND AND WIFE, APPELLANTS, V. STATE FARM FIRE AND CASUALTY COMPANY, A FOREIGN INSURANCE COMPANY, APPELLEE.

406 N.W.2d 101

Filed May 15, 1987. No. 85-496.

1. **Insurance.** In order to recover upon a policy of insurance of limited liability, the insureds must bring themselves within its express provisions.
2. **Directed Verdict.** In reviewing the evidence on a motion for a directed verdict, the party against whom the motion is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
3. **Circumstantial Evidence: Verdicts.** Circumstantial evidence is not sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom. The evidence must be such as to make the plaintiffs' theory of causation reasonably probable, not merely possible.
4. **Directed Verdict: Evidence: Proof: Trial.** In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

5. **Evidence: Proof.** Where several inferences are deducible from the facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiffs do not sustain their position by a reliance alone on the inferences which would entitle them to recover.
6. **Damages: Evidence: Circumstantial Evidence: Proof.** Conjecture, speculation, or choice of quantitative possibilities is not proof. There must be something more which would lead a reasoning mind to one conclusion rather than to the other. However, when there is direct evidence sufficient to refute all theories of the cause of damage except the one established solely by circumstantial evidence, there then remains but one inference deducible from the facts under the circumstances, and it is within the province of the trier of fact to make this determination.
7. **Intent: Presumptions: Words and Phrases.** Malice is an intention or desire to harm another through doing something unlawful or otherwise unjustified. However, malice can in certain situations be presumed from the mere doing of an act.
8. **Intent: Damages: Presumptions.** Malice may be presumed from an intentional act if damage of some kind to some property should or could have been reasonably expected to result from such act. This presents a question of fact for the jury.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Reversed and remanded for further proceedings.

John R. Brogan of Brogan & McCluskey, for appellants.

Daniel M. Placzek of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

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

HASTINGS, J.

Plaintiffs have appealed the order of the district court for York County, Nebraska, overruling their motion for a new trial, which followed the court's order sustaining the defendant's motion for a directed verdict at the close of the plaintiffs' case.

Plaintiffs brought this action against the defendant for payment under their insurance policy for direct loss to their property caused by "[v]andalism or malicious mischief, meaning only wilful and malicious damage to or destruction of property." Plaintiffs alleged in their petition that vandals willfully and maliciously opened the gate on one of their grain trailers, causing corn to flow from the trailer onto the ground.

Some of plaintiffs' cattle ate excessive quantities of that corn and died.

At the end of plaintiffs' case the court directed a verdict for the defendant and dismissed the plaintiffs' case, because it found the plaintiffs had failed to establish a prima facie case of willful and malicious destruction of property. The court then overruled the plaintiffs' motion for a new trial, and this appeal followed.

Although plaintiffs make two general assignments of error, they argue solely in their brief that the district court erred when it took from the jury the issue of whether the loss of their cattle had been caused by vandalism or malicious mischief. Accordingly, we also focus solely on that issue. Because we believe the plaintiffs did establish a prima facie case of willful and malicious destruction of plaintiffs' cattle, we reverse the judgment of the district court.

On Saturday, January 21, 1984, one of the plaintiffs, Mark Ditloff, moved a Big Boxer grain trailer loaded with approximately 175 bushels of shell corn from the home of his parents, George and June Ditloff, to a field on the east side of a north-south gravel road, where 55 head of Mark's cattle were located. The trailer was placed next to the fence which ran alongside the ditch on the east side of the road. Mark's brother, Dennis Ditloff, lived directly across the road to the west.

On Saturday evening the cattle were fed from that trailer by Mark and his father, George. On Sunday George alone fed the cattle. On Monday they both fed them. On Tuesday morning Mark discovered the spilled grain.

The procedure of feeding the cattle involved the use of four buckets which were carried from the Ditloffs' pickup truck. Mark and George parked the pickup on the gravel road adjacent to the grain trailer and then walked across the ditch and over the fence to the grain trailer. They had a washtub which was kept between the grain trailer and the fence. The washtub was placed below the gate on the grain trailer. The buckets were set in the washtub, and when the gate on the grain trailer was opened the corn fell into the buckets, and, if it missed the buckets, it fell into the washtub.

The gate was raised or lowered by turning a wheel on the side

of the trailer. The wheel was located about 3 feet above the ground and was about 1 1/2 to 2 feet tall. The gate took "quite a bit of force" to open, and Mark only opened it an inch or so to empty the corn from the trailer. A ratchet could be used to hold the gate open, but the plaintiff never used it because the trailer was rusty and the gate stayed open without the ratchet. Once the feeding was completed the washtub was moved back between the grain trailer and the fence.

Mark testified at trial that on Monday evening he closed the gate on the trailer—that it had to have been closed, otherwise he would have noticed the grain running out when the washtub was moved back. George testified that he closed the gate. It was about 5:45 p.m. when they finished the feeding.

Dennis Ditloff, who lived across the road from the trailer, testified that he was "kind of awakened" at midnight that night when he heard his dog start barking. Dennis sat up in bed, looked out his west bedroom window, and saw his dog. The dog barked for 5 to 10 seconds and then stopped. Dennis could not see the grain trailer from his west window, and he testified that he did not see or hear anyone drive away on the road, nor hear any vehicles moving at all.

At approximately 8 the next morning, Dennis saw a "big pile of corn on the ground under the trailer" and a "bunch" of cattle were up there eating. When Mark got there at 9 a.m. there was a "heavy mat of corn" on the ground, with some cattle still eating. Mark cleaned up the spilled corn, went home, and called the veterinarian. Following this, 13 head of cattle died despite the treatment given them by Mark and the veterinarian.

In order to recover upon a policy of insurance of limited liability, the insureds must bring themselves within its express provisions. *Swedberg v. Battle Creek Mut. Ins. Co.*, 218 Neb. 447, 356 N.W.2d 456 (1984). The peril insured against in the present case was loss by vandalism or malicious mischief, defined in the policy as "wilful and malicious damage to or destruction of property." Proof that the loss occurred by any other means would preclude recovery under this provision of the policy.

In reviewing the evidence on a motion for a directed verdict, the party against whom the motion is directed is entitled to have

every controverted fact resolved in his or her favor and to have the benefit of every inference that can reasonably be deduced from the evidence. The question in this case is whether, in view of this assumption, the jury could properly bring in a verdict in the plaintiffs' favor. *Wilgro, Inc. v. Vowers & Burback*, 190 Neb. 369, 208 N.W.2d 698 (1973). In order for the jury in this case to have properly brought in a verdict for the plaintiffs, the plaintiffs needed to present evidence upon which a jury could find that the cattle were destroyed both willfully and maliciously. *Swedberg, supra.*

The plaintiffs recognized that in order to prove whether the gate was opened willfully and maliciously they must prove who the actor was that opened it. They could offer no direct proof of who opened the gate, but they sought to prove that it was some unidentified third person by ruling out the other possible actors, those being the cattle themselves, Mark, or George. If the cattle had opened the gate, coverage would have been properly denied, because animals such as cattle cannot act with the necessary malicious intent. *Stack v. Hanover Insurance Company*, 57 Ala. App. 504, 329 So. 2d 561 (1976). If Mark or George had left the gate open the night before, that act would have been done accidentally, not willfully, and coverage would again have been properly denied.

As we stated in *Anderson v. Farm Bureau Ins. Co.*, 219 Neb. 1, 4-5, 360 N.W.2d 488, 490-91 (1985) (quoting *Popken v. Farmers Mutual Home Ins. Co.*, 180 Neb. 250, 142 N.W.2d 309 (1966)):

> "The plaintiffs may establish their case by circumstantial evidence as well as by direct evidence.
>
> "However, circumstantial evidence is not sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom. Mullikin v. Pedersen, 161 Neb. 22, 71 N.W.2d 485.
>
> "The evidence must be such as to make the plaintiffs' theory of causation reasonably probable, not merely possible.

> "In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Weston v. Gold & Co., 167 Neb. 692, 94 N.W.2d 380.
>
> "Where several inferences are deducible from the facts presented, which inferences are opposed to each other, but equally consistent with the facts proved, the plaintiffs do not sustain their position by a reliance alone on the inferences which would entitle them to recover. Shamblen v. Great Lakes Pipe Line Co., 158 Neb. 752, 64 N.W.2d 728.
>
> "Conjecture, speculation, or choice of quantitative possibilities are [sic] not proof. There must be something more which would lead a reasoning mind to one conclusion rather than to the other."

See, also, *Raff v. Farm Bureau Ins. Co.*, 181 Neb. 444, 149 N.W.2d 52 (1967).

While we recognize that these statements of the rules regarding circumstantial evidence in civil cases have been viewed as internally inconsistent and perhaps different than the standard applied in criminal cases, see *Anderson, supra* (Krivosha, C.J., concurring in the result), we need not, at this time, address those statements further. This is true because in our opinion the plaintiffs presented direct evidence sufficient for a jury reasonably to have found that the plaintiffs had refuted the two other possible theories of who or what opened the grain trailer. When there is direct evidence sufficient to refute all theories of the cause of damage except the one established solely by circumstantial evidence, there then remains but one inference deducible from the facts under the circumstances, and it is within the province of the trier of fact to make this determination.

To refute the theory that the cattle may have rubbed against the wheel, thereby opening the gate, the plaintiffs presented evidence that the gate itself, which was about 3 feet off the ground, was rusty. Mark testified that, as a result, it took "quite

a bit of force" to open and that it would take the strength of a "man to do it; it opened that hard." George Ditloff testified that it took all of his power to open it and that he often would have Mark help him get it open. He also testified that he had trailers in with cattle at the south farm and that they were never opened by cattle. Mark testified that they had had that particular grain trailer for about 9 years and had never experienced an incident where cattle could get the gate open. He also testified that cattle usually only rub their heads and bodies against things when they have lice and grubs. These particular cattle had all been wormed and poured in November. Finally, Mark testified that when he first saw the corn on the ground it was in a radius like a half moon out in front of the trailer. He stated that cattle usually moved in bunches; consequently, if one had opened the gate, they would have been able to keep up with the grain pouring out of the trailer and there would have been no such mound of corn. At the time he arrived there that morning, cattle were still eating the corn.

From this evidence we believe it would not have been mere speculation for a jury to believe that the cattle did not open the gate on the grain trailer.

To refute the theory that Mark or George accidentally left the gate open on the grain trailer when they were feeding the cattle the previous evening, the plaintiffs presented evidence that the gate was closed when they left that evening. Although there was some dispute about who actually shut the gate, with George testifying that he closed it and Mark looked at it too, and Mark testifying at trial that he closed it but testifying in a previous deposition that his father closed the gate, both were positive that the gate was shut. As Mark stated: "You got to bend down to pick up the tub right in front of the gate and if it had been running it would have been noticeable." Mark also testified about the amount of grain in the trailer and the rate at which the grain would fall out of the gate. He stated that they had filled the trailer up 3 days before the spillage, that the trailer held around 175 bushels (which equals 1,400 gallons) when full, and that they had fed the cattle approximately 135 gallons of feed so far from the trailer. The night before the spillage they opened the gate about 1 inch and fed the cattle 55 gallons of feed,

completing the feeding in approximately 15 minutes. The next morning the gate was open less than an inch and the level of corn had fallen only about 18 inches to 2 feet. If Mark and George could feed 55 gallons of feed in 15 minutes with the gate open approximately 1 inch, it is obvious that had the gate been left open, even only half of an inch, from 6 p.m. until 9 a.m., there would have been no grain left in the trailer at all.

From this evidence it would not have been mere speculation for a jury to believe that Mark and George did not leave the gate open on the grain trailer.

This leaves the plaintiffs with their theory that some third party opened the gate on the grain trailer. Although Dennis Ditloff's testimony about hearing his dog barking in the middle of the night lends some credence to the third-party theory, we believe that the plaintiffs' refutations of the other possible actors raised sufficiently the theory that some unidentified person opened the grain trailer. Because the grain trailer was parked in a fenced-in field, and because it was so rusty that opening it was quite difficult, a jury could also properly have found that some unidentified third party opened the gate willfully. However, whether a jury could properly find that this unknown person engaged in "malicious damage to or destruction of property" is a more troublesome question.

In *Swedberg v. Battle Creek Mut. Ins. Co.*, 218 Neb. 447, 451, 356 N.W.2d 456, 459 (1984), malice was defined as " 'intention or desire to harm another usu. seriously through doing something unlawful or otherwise unjustified' " (citing Webster's Third New International Dictionary, Unabridged 1367 (1968)). After defining malice, we then wrestled with the question of whether intent of doing harm could be presumed from the mere act of placing poison in an area which had previously been used to dump other debris. We determined it could not, but went on to state:

> Certainly, if a can of poisonous substance is placed on the front steps of a home or near the feeding troughs of livestock, both places where one would not expect to find such a substance, the intent of doing harm may be presumed and malice established by reason of the act of placing the poison.

218 Neb. at 451, 356 N.W.2d at 460. Thus, we recognized that malice can in certain situations be presumed from the mere doing of an act, not that it could never be presumed.

The question in this case is whether intent of doing harm can be presumed from the fact that some unauthorized person opened the gate on a grain trailer and let grain spill to the ground in a field in which cattle are grazing. Unlike the situation in *Swedberg*, where we determined that the placement of the poison in an area where other junk had been dumped evidenced possible negligence or carelessness on the actor's part, it would not appear that opening up a grain trailer under these circumstances could have been a merely negligent or careless act. What motivation, other than ill will toward the owner of the grain, could account for someone's going through the trouble of crossing the plaintiffs' fence and deliberately turning the rusty wheel on their grain trailer, causing grain to spill out on the ground?

An answer to this query may be found in *Burgess Farms v. New Hampshire Ins. Group*, 108 Idaho 831, 702 P.2d 869 (1985).

> A growing number of courts, on the other hand, do not limit the definition of malice to "an intent to damage or destroy." These courts have adopted a broader definition which includes acts done with such reckless and wanton disregard for the rights of the property owner as to be the equivalent of intent. [Citations omitted.] In *Frontier Lanes v. Canadian Indemnity Co.*, 26 Wash.App. 342, 613 P.2d 166, 169 (1980), *overruled in part, on other grounds, Graham v. Public Employees Mutual Ins. Co.*, 98 Wash.2d 533, 656 P.2d 1077 (1983), it was held that "[p]roperty has been damaged 'willfully and maliciously' [contract language] if the damage results from an intentional act from which damage was *reasonably expected to result*." (Emphasis added.) In *Hatley v. Truck Ins. Exchange*, 494 P.2d at 431, the Oregon court held that "property has been damaged 'willfully and maliciously' [again, contract language] if the damage results from an intentional act from which damage *manifestly would or could result*." (Emphasis added.) . . .

> A person, under this broader standard, need not intend a specific type of damage to specific property. It is enough that damage of some kind to some property should or could have been expected to result from the intentional act.

Id. at 833-34, 702 P.2d at 871-72.

We adopt the reasoning of the Idaho court and hold that malice may be presumed from an intentional act if damage of some kind to some property should or could have been reasonably expected to result from such act. This presents a question of fact in this case, and a finding of malice from the act of deliberately opening the grain trailer under these circumstances would not have amounted to mere speculation by the jury. See, also, *Hunter v. Nat. County Mut. Fire Ins. Co.*, 687 S.W.2d 110 (Tex. App. 1985) (sudden appearance of dirt directly in the lubricating oil of a truck implies both a human agency and, since no other reason can be perceived for the putting of dirt in an engine, that the human agency acted deliberately and with malicious intent).

We therefore reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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

BARBARA J. NICKEL, APPELLEE, V. GARY J. NICKEL, APPELLANT.
405 N.W.2d 585

Filed May 15, 1987. No. 85-585.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Paul E. Galter of Bauer & Galter, for appellant.

Cynthia S. Mahlin and, on brief, Jack G. Wolfe of Wolfe, Hurd, Rierden & Luers, for appellee.

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

PER CURIAM.

This is an appeal from the district court for Lancaster County, Nebraska. The appellant, Gary J. Nickel, filed a motion seeking to terminate his obligation to pay alimony to the appellee, Barbara J. Nickel, due to alleged substantial and material changes in his financial condition. The trial court, essentially, denied the motion, though it did permit appellant to delay making several of the payments.

We have now reviewed the record de novo, as we are required to do in cases of this nature, and find that the district court did not abuse its discretion. See, *Kelly v. Kelly*, 220 Neb. 441, 370 N.W.2d 161 (1985); *Creager v. Creager*, 219 Neb. 760, 366 N.W.2d 414 (1985); *Cooper v. Cooper*, 219 Neb. 64, 361 N.W.2d 202 (1985). For that reason the judgment of the district court is affirmed; each party to pay his or her own fees and costs.

AFFIRMED.

TIM C. MALLETTE AND DONNA JEAN MALLETTE, APPELLEES, V. TAYLOR & MARTIN, INC., REAL ESTATE, A NEBRASKA CORPORATION, APPELLANT.

406 N.W.2d 107

Filed May 15, 1987. No. 85-645.

Principal and Agent: Releases. In the absence of a specific statute, a valid release of either of the parties to the principal-agent relationship releases the other.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed and remanded with directions to dismiss.

James R. Place and Alan M. Thelen of Breeling, Welling, Place & Steier, for appellant.

Neil W. Schilke of Sidner, Svoboda, Schilke, Wiseman, Thomsen & Holtorf, for appellees.

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

PER CURIAM.

The appellant, Taylor & Martin, Inc., Real Estate, a Nebraska corporation, appeals from a jury verdict in the amount of $32,053.50. For reasons more particularly set out hereinafter, we believe that the verdict cannot be sustained, and the judgment entered on the verdict must be set aside and the action dismissed.

The appellees, Tim C. Mallette and Donna Jean Mallette (Mallettes), filed a petition in the district court for Douglas County, Nebraska, consisting of four causes of action. The first cause of action alleged that Taylor & Martin "was party to a real estate listing agreement with Clifford Dean Vanderlinde and Cathy Vanderlinde by the terms of which [Taylor & Martin] agreed to use its efforts to sell the Vanderlinde property located in Cherry County, Nebraska." The petition then alleged that Taylor & Martin solicited an offer from Mallettes to purchase the property. Mallettes alleged that in an effort to induce them to make the offer, Taylor & Martin made certain representations which were untrue and which were made with the intent to deceive Mallettes and induce them to make an offer to purchase the real estate. Among other matters, Mallettes further alleged that a downpayment in the sum of $80,000 was paid to Taylor & Martin as agents. Mallettes then alleged that they later learned of the fraudulent misrepresentations and proceeded to have a prior decree of specific performance obtained by Mallettes against Vanderlindes set aside.

The petition then alleged: "By agreement of Vanderlindes and Mallettes the contract was rescinded. A copy of said assignment and release is attached hereto and made a part hereof." Mallettes further alleged: "The defendant has failed to make payment to plaintiffs in the amount of $27,737.50 which constitutes a portion of the initial $80,000 payment made by the plaintiffs to Vanderlindes." As a result thereof, Mallettes prayed for judgment against Taylor & Martin in the amount of

$27,737.50.

The remaining three causes of action seek to recover further sums allegedly expended by Mallettes for legal fees, travel expenses, and overpayment of rental for pastureland rented by Mallettes from Vanderlindes. The expenditure of these sums was allegedly caused by the statements made by Taylor & Martin to Mallettes.

The agreement, which was attached to the petition and made a part of the petition, alleged that Taylor & Martin "was acting as an agent of Vanderlinde at the time [when the material misrepresentations of fact were made]." The agreement then further provides that:

> 4. In order to accomplish such restoration the parties agree as follows:
>
> a. The entire amount of $52,262.50 which has been held by the Clerk of the District Court together with accrued interest shall be paid to Mallette;
>
> b. Vanderlinde shall lease a portion of their real estate to Mallette on the terms set forth on a lease to be signed simultaneously with this agreement.
>
> c. Vanderlinde releases any claim to any portion of the payment made by Mallette through Taylor & Martin by reason of the land contract.
>
> . . . .
>
> 6. Vanderlinde releases Mallette and Mallette releases Vanderlinde severally and jointly of any and all claims known or unknown, liquidated or unliquidated, and whether arising in tort or contract other than obligations as set forth herein.
>
> 7. Each party shall pay their own costs and legal fees.

The $52,262.50 appears to be the difference between the $80,000 initially paid by Mallettes to Taylor & Martin as agent of Vanderlindes and the amount paid by Vanderlindes to Taylor & Martin.

Taylor & Martin has assigned a number of errors as to why the judgment should be set aside. Among those assignments of error is one which we believe to be the threshold question which, if answered in favor of Taylor & Martin, makes all of the other assignments of error moot. That question is whether the

trial court erred in failing to find that the release executed by Mallettes to Vanderlindes likewise released Taylor & Martin from any liability to Mallettes by reason of the sale of the real estate. The district court apparently found that it did not operate to release Taylor & Martin. We believe that the district court was in error and, for that reason, the judgment must be reversed.

There can be no question, nor do the parties contend otherwise, but that the agreement and release executed by and between Mallettes and Vanderlindes was intended to be a complete settlement and release of any dispute between the buyers and the sellers with regard to this property. Moreover, by reason of the agreement and release, the parties acknowledge that Taylor & Martin was acting as agent of the sellers, Vanderlindes, and that therefore there existed a principal-agent relationship between Vanderlindes and Taylor & Martin.

In *Ericksen v. Pearson*, 211 Neb. 466, 319 N.W.2d 76 (1982), we made a careful analysis concerning the question as to whether the release of either the principal *or* the agent thereby released the other, and concluded that it did. Specifically, we observed at 475, 319 N.W.2d at 81:

> The general rule is stated in 76 C.J.S. *Release* § 50 at 689 (1952) as follows: "In a situation where several persons are not actively joint tort-feasors, but one person commits the tort and is primarily liable while the liability of the other person is derivative or secondary, as where it arises under the doctrine of respondeat superior, the releasor's acceptance of satisfaction from one, discharges the other as well, as in the case of master and servant or principal and agent; and it has been held that this is true despite an attempted reservation of rights against the person secondarily liable, since if the rule were otherwise, such person would be liable without having recourse against the person primarily liable, the latter having been released . . . ."

After then referring to an extensive annotation titled " 'Release of (or covenant not to sue) master or principal as affecting liability of servant or agent for tort, or vice versa,' appearing in 92 A.L.R.2d 533 et seq. (1963)," 211 Neb. at 475,

319 N.W.2d at 81, we said:

> "What is the rule in Nebraska?" It appears that Nebraska has already passed upon the question of whether the release of an agent by a third party also releases the principal, and has decided that in the affirmative; but so far as we have been able to ascertain, this court has not directly passed upon the question of the reverse situation, that is to say, whether the release of the principal also releases the agent where the action is predicated upon negligence and the liability of the principal arises under the respondeat superior doctrine.

Ericksen v. Pearson, supra at 476, 319 N.W.2d at 81.

We then cited the case of *Dickey v. Meier*, 188 Neb. 420, 197 N.W.2d 385 (1972), in which the court referred to the cases of *Max v. Spaeth*, 349 S.W.2d 1 (Mo. 1961), and *Bacon v. United States*, 321 F.2d 880 (8th Cir. 1963), saying in 211 Neb. at 478, 319 N.W.2d at 82:

> "See, Max v. Spaeth, 349 S.W.2d 1 (Mo.); Bacon v. United States, 321 F.2d 880 (8th Cir.). Both courts held in those cases: 'The master's liability under the doctrine of respondeat superior is based not on his own misdeeds but those of his servant, and therefore, when the servant is not liable, the master for whom he was acting at the time should not be liable. It matters little how the servant was released from liability; as long as he is free from harm, it appears to us that his master should also be held blameless.' "

We then concluded by saying at 478, 319 N.W.2d at 82:

> We are of the opinion that the same rules should be applicable to a release given by a third party to the principal, that is to say, such release should release the agent from any liability, notwithstanding the fact that they are not technically joint tort-feasors. . . . Under the authorities above cited, the general rule is that in the absence of a specific statute, and Nebraska has no such statute, a valid release of either of the parties to the principal-agent relationship releases the other.

Mallettes acknowledge the rule announced in *Ericksen v. Pearson, supra*, but contend that there are significant

differences between the instant case and the facts in *Ericksen v. Pearson*. With that we do not agree. Mallettes argue that the *Ericksen* decision did not involve allegations of affirmative fraud by the defendant. While that may be true, the specific language is to the effect that "such release should release the agent from *any* liability, notwithstanding the fact that they are not technically joint tort-feasors." (Emphasis supplied.) *Ericksen v. Pearson*, 211 Neb. 466, 478, 319 N.W.2d 76, 82 (1982). We further pointed out in *Ericksen* that "the majority view [is] that a valid release of either master or servant from liability for *tort* operates to release the other where liability is based upon the doctrine of respondeat superior . . . ." (Emphasis supplied.) *Id.* at 479, 319 N.W.2d at 82. We did not there limit our holding to negligence actions, but included all tort actions.

Furthermore, the release executed by Vanderlindes and Mallettes was not limited to negligence but, rather, released each the other from "all claims known or unknown, liquidated or unliquidated, and whether arising in tort or contract."

As a second distinguishing factor, Mallettes argue: "In *Erickson* [sic], damages are requested from the defendant and there is no demand for return of money received and retained by the defendant as a result of the defendant's affirmative acts of fraud." Brief for Appellees at 8. There is no allegation that Taylor & Martin retained the $27,737.50 by reason of any alleged acts of fraud. It appears that Mallettes paid Taylor & Martin, as agents for Vanderlindes, $80,000, and settled with Vanderlindes for $52,262.50. While it is true that the difference happens to be $27,737.50, which Vanderlindes paid to Taylor & Martin as a commission, there is no indication that Vanderlindes agreed to pay to Mallettes anything more than $52,262.50. In light of the pleadings, we find no basis to conclude that Mallettes have the right to recover back more than the amount agreed to be paid by the settlement.

Mallettes then contend that the release in *Ericksen* was with the principal for settlement of damages, while in the case at bar the release is to effect a rescission of a contract and an effort " 'as nearly as possible, to place each in the position they would now be in if there had been no purported contract.' " Brief for

Appellees at 8. This appears to us to have made no significant difference. Obviously, the parties to the release agreed that the payment of $52,262.50 was "as nearly as possible" as the parties could get to placing each other in the position each would be in if there had been no purported contract.

Mallettes then argue that in *Ericksen* there was no evidence of duress involved in the release. The claim for duress apparently is based upon the fact that Mr. Mallette was suffering from ill health and was ordered by his physician to settle his claim against Vanderlindes. While, indeed, that may have been a motivating factor, it certainly was not duress as that term is commonly understood in the law. All of us are often compelled to make decisions because of factors we are required to take into account, over which we have no control. That does not constitute duress. See, *Brown v. Pierce*, 74 U.S. (7 Wall.) 205, 19 L. Ed. 134 (1868); *Williams v. Rutherfurd Realty Co.*, 159 A.D. 171, 144 N.Y.S. 357 (1913).

Next, Mallettes argue that in *Ericksen* the plaintiff received payment of damages for the release, while in the instant case no damages were received. We are again unable to see how that could affect the validity or application of the release. There was certainly adequate consideration for the release.

And, finally, Mallettes argue that in *Ericksen* the court found that the liability of the principal who was released arose only from the application of the doctrine of respondeat superior, while in the instant case the purpose of the release was to relieve the plaintiffs from the obligation to Vanderlindes arising by reason of the decree of specific performance. Whatever may have motivated Vanderlindes and Mallettes to ultimately enter into a release is immaterial in the instant case. What is significant is that the parties to the release are releasing each the other from any and all claims arising out of "a contract for the purchase of real estate from Vanderlinde," in which "Taylor & Martin, Inc. . . . was acting as an agent of Vanderlinde at the time." To somehow try to separate these matters into independent transactions is simply without any basis.

We believe that the record clearly establishes that as a matter of law Mallettes released Vanderlindes as principals and, therefore, as a matter of law, at the same time released Taylor &

Martin as agent. The release having been executed, there was nothing to submit to the jury, and, therefore, the motion for summary judgment made by Taylor & Martin should have been granted. For these reasons the verdict of the jury is set aside, and the action is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

BOSLAUGH, J., dissenting.

The majority relies on the rule announced in *Ericksen v. Pearson*, 211 Neb. 466, 319 N.W.2d 76 (1982). The rule in that case provides that where liability is based upon the doctrine of respondeat superior, "a valid release of either of the parties to the principal-agent relationship releases the other." *Id.* at 478, 319 N.W.2d at 82.

The rule is illogical in the context of a third party's release of the principal, and should not be applied in this case. As stated in *Hill v. McDonald*, 442 A.2d 133, 138 n.5 (D.C. 1982):

> Certainly, as a matter of logic, it is hard to see how a *principal* could still be held vicariously liable after the release of its *agent*, the only real wrongdoer. But the converse is not at all obvious. It is thus that a growing minority of courts hold that the release of a principal does not bar suit against the agent for the underlying tort unless the release is so intended. [Citations omitted.]

The original and primary justification behind the rule adopted in *Ericksen, supra,* was the desire to prevent unjust enrichment of the injured party, rather than consideration of the relationship between those with potential liability to the injured party. *Clark v. Brooks*, 377 A.2d 365 (Del. Super. 1977), *aff'd sub nom. Blackshear v. Clark*, 391 A.2d 747 (Del. 1978). The *Brooks* court indicated that the rule should not apply in situations such as that in the present case:

> Since the liability of the employer in such cases [where the sole basis of liability of an employer is the negligence of an employee] is dependent upon at least a showing of tort on the part of the employee, it is understandable that some courts have held that where no liability exists on the part of the employee there cannot be liability on the part of

> the employer and hence they have extended this reasoning to apply to a release of the employee's liability by the injured person. [As in *Dickey v. Meier*, 188 Neb. 420, 197 N.W.2d 385 (1972).] However, rationally the converse does not apply. The employee's liability for his own negligence is not dependent on negligence of the employer nor is the employee entitled to reimbursement by the employer. The ability to sue the employee who committed the tort is not contingent on the ability to sue the employer. Based upon the relationship of the parties no justification exists for extending nonliability of the employer to benefit the employee unless that benefit was created by contract intended to benefit the employee. Hence, the liability of the negligent employee should not be affected by a transaction between the injured party and the employer unless the parties intended the benefit to extend to the employee. The result should not, of course, permit dual recovery by the injured person.

Clark v. Brooks, supra at 371-72.

The *Ericksen* court cited the case of *Dickey v. Meier*, 188 Neb. 420, 197 N.W.2d 385 (1972), as support for the rule that release of either of the parties to the principal-agent relationship releases the other. In that case, the court held that a valid release of the employee-agent releases the employer-principal from liability, where the tort action is based exclusively on the alleged negligence of an employee or agent. In so holding, the court indicated that where a master's liability is based upon the doctrine of respondeat superior, the master should be held blameless, where the servant whose misdeeds gave rise to the suit has been released from liability. As previously noted, this view is consistent with those expressed in *Clark v. Brooks, supra*, and does not suggest that the release of the principal alleged to be liable exclusively on the theory of respondeat superior should serve to release the agent, regardless of the parties' intentions. See Busick, *Pleading and Procedural Considerations in Nebraska in Subrogation, Contribution, and Indemnity Actions*, 19 Creighton L. Rev. 278 (1986). Instead, the decision in *Dickey v. Meier, supra*, suggests that the release of the primarily liable agent should serve to release the

secondarily liable principal, because the latter's liability is merely vicarious. Such considerations are not involved where the person who is secondarily liable is released.

Further, the cases cited in support of the rule announced in *Ericksen v. Pearson*, 211 Neb. 466, 319 N.W.2d 76 (1982), do not provide strong support for the rule, because they either did not consider the effect of releasing the principal or did not support the proposition for which they were cited. See, e.g., *Spradley v. McCrackin*, 505 S.W.2d 955 (Tex. Civ. App. 1974), *disapproved, Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805 (Tex. 1980); *Smith v. Lincoln*, 52 Misc. 2d 66, 275 N.Y.S.2d 74 (1966). Thus, the rule expressed in *Ericksen v. Pearson* is illogical and should not provide the basis for the decision in this case.

Additionally, if the justification for the rule is to prevent a double recovery or unjust enrichment of the plaintiff, it can hardly be said that those considerations are present in the case at bar. The money sought from Taylor & Martin would do nothing more than place the Mallettes in the position they were in prior to the alleged misrepresentations and the subsequent signing of the contract.

In fact, the pleadings seem to be more in the nature of an action for money had and received than for an action in tort. The former cause is based upon the notion that where one person has money to which in equity and good conscience another is entitled, the law creates a promise by the former to pay it to the latter. *Village of Morrill v. Roosevelt P.P. Dist.*, 215 Neb. 41, 337 N.W.2d 125 (1983).

The fact that the money held by Taylor & Martin was retained as a commission on the sale should not negate such a claim by the Mallettes because, as is noted in the Restatement (Second) of Agency § 339 at 97-98 (1958):

> An agent who has received things from another for a disclosed . . . principal in a transaction conducted by him has a duty to return them or their proceeds if the other rescinds the transaction for a cause existing at the time of their receipt, to the extent that the agent has not, before notice of rescission and in good faith, changed his position.

Comment *f.* to this section indicates that a change in position, such as paying the money over to the principal, is no defense to an action for the return of the money where there has been a fraudulent inducement by either the principal or the agent for the third party to enter into the transaction.

Thus, even if the rule of *Ericksen v. Pearson, supra*, were considered to be sound, it should not apply in this case.

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

STATE OF NEBRASKA, APPELLEE, V. MOHAMED EL-TABECH, APPELLANT.
405 N.W.2d 585

Filed May 15, 1987. No. 86-065.

1. **Attorney and Client: Conflict of Interest.** Because the task of assessing the potential for conflict of interest well in advance of trial is such a difficult one, the standards applicable to making that assessment must be flexible.
2. **Constitutional Law: Right to Counsel.** Where counsel is court appointed, the defendant does not have a constitutional right to counsel of his choice.
3. **Criminal Law: Homicide: Indictments and Informations.** Prosecutions for felonies, including murder, may be had on informations filed by the county attorney.
4. **Verdicts: Appeal and Error.** The Supreme 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.
5. **Convictions: Circumstantial Evidence.** 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.
6. **Criminal Law: Evidence.** Alibi, in Nebraska, is not an affirmative defense.
7. **Criminal Law: Evidence: Words and Phrases.** In the context of a criminal prosecution, "alibi" denotes an attempt by the defendant to demonstrate he did not commit the crime because, at the time, he was in another place so far away or in a situation preventing his doing the thing charged against him. Alibi evidence is merely rebuttal evidence directed to that part of the State's evidence which tends to identify the defendant as the person who committed the alleged crime.
8. **Criminal Law: Evidence: Proof.** A defendant, to establish an alibi, must not only show he was present at some other place about the time of the alleged crime,

but also that he was at such other place such a length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the time he was at such other place.

9. **Juror Qualifications: Death Penalty.** While a prospective juror's attitudes about capital punishment are irrelevant to sentencing in Nebraska, they may be relevant to his ability to fairly determine the defendant's guilt or innocence.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch, for appellant.

Robert M. Spire, Attorney General, and William L. Howland, for appellee.

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

PER CURIAM.

The appellant, Mohamed El-Tabech, was found guilty of murder in the first degree, in violation of Neb. Rev. Stat. § 28-303(1) (Reissue 1985), and use of a deadly weapon to commit a felony, in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1985). He was sentenced to life imprisonment for the first degree murder conviction and 20 years' imprisonment for the use of a deadly weapon conviction, the sentence on the second conviction to run consecutively to the first conviction. He has now appealed to this court, specifically assigning as error the following:

I.

Whether a defendant is entitled to an untrammeled attorney/client relationship.

II.

Whether the defendant is entitled to some additional community input into the life-death decision beyond a petit jury verdict on the issues of guilt-innocence.

III.

Whether the evidence was sufficient to support a conviction for murder in the first degree?

IV.

Whether the defendant is entitled to have his jury

correctly instructed, pursuant to a Nebraska Jury Instruction, on his theory of the defense, if that defense is supported by evidence in the record?

V.

Whether the trial court violated the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution by death qualifying a jury in a capital case where the jury has absolutely nothing to do with punishment?

VI.

Whether the trial court violated Article I, Section 6 of the Constitution of the State of Nebraska by death qualifying the jury in a capital case when the jury has absolutely nothing to do with punishment?

VII.

Whether the trial court abused its discretion in death qualifying the jury?

We believe that none of the assignments of error entitle El-Tabech to a new trial, and, for that reason, we affirm the convictions and sentences.

On June 24, 1984, in response to a 911 emergency call, police and emergency personnel were dispatched to a home in Lincoln, Nebraska. Linda Woodruff, a paramedic employed by Eastern Ambulance Service, was the first to arrive at the scene. Upon entering the house, she observed El-Tabech seated on the floor, rocking back and forth and pointing to the back of the house.

El-Tabech's wife, Lynn El-Tabech, was found lying on a bed with a white terry cloth bathrobe belt tied tightly around her neck. Both the condition and temperature of her body indicated that she had not been dead for very long. Woodruff unsuccessfully attempted to untie the belt and then obtained scissors from the ambulance and cut the belt from around the decedent's neck. Shortly thereafter other emergency personnel and the police arrived.

There was testimony from various witnesses regarding alleged remarks made by El-Tabech at that time. Woodruff recalled that she heard El-Tabech say, "Don't take me to jail" as he was being taken to a police car. Lieutenant Soukup of the

Lincoln Police Department heard El-Tabech say, "Who will take care of me now?" while he was on the porch of the residence. Sharon Hebbard, a neighbor who was 150 feet away from the El-Tabech porch, testified she heard El-Tabech say, "I didn't mean to" or "I didn't mean to do it." Officer Sims of the Lincoln Police Department, who transported El-Tabech to the police station and observed him, heard him say, "Do you got whoever did that?" and "I swear I'll kill them."

In investigating the crime the State produced the following evidence. The neighbor, Sharon Hebbard, claimed to have overheard an argument at the El-Tabech residence around 11 a.m. or noon on the day that Ms. El-Tabech was murdered. Hebbard testified that, while seated on the porch with her husband, she heard a 30-minute argument going on at the El-Tabech residence. Hebbard remembered hearing a woman's voice say, "Leave me alone" and "Don't touch me." Hebbard's testimony was corroborated by her husband, who had also overheard the arguing.

David James, a member of the Mormon church that Mr. El-Tabech attended, testified that he spoke with El-Tabech at about 3 p.m. on the day of the murder. El-Tabech called the church, where James was in meetings. According to James, El-Tabech was quite upset and asked James if James would come right over and talk with him and the decedent. When James told him that he could not make it until later, El-Tabech advised James that he and the decedent were having troubles. Specifically, James said he heard the decedent in the background say something to the effect of "I'm leaving. I'm going for a walk." El-Tabech then said, "Well, when will you be back?" and the decedent said, "I don't know." Then, El-Tabech said to James, "Well, she's leaving me."

A waitress at a Village Inn Restaurant in Lincoln testified that she arrived at work at 4 p.m. on the day of the murder. She recalled that she waited on El-Tabech, who was dining with a woman, at about 5:30 p.m. She was able to ascertain this by reason of the computer at the restaurant, which prints the date and time an order is presented to the kitchen cooks. The waitress testified that the time printed on the ticket reflecting El-Tabech's order was 5:36 p.m. She testified she heard the

couple arguing when she took their food to their table. Specifically, she testified, "He said, 'You never tell me where you're going. I have a right to know where you are.' " She further testified that the statements were made in an angry, loud voice. When she returned to the table at approximately 6 p.m. to pick up their meal plates, El-Tabech apologized to the waitress for his loud voice, saying, "Excuse me for my voice. Married life is not easy." According to the waitress, when she clocked out on break at 6:07 p.m., El-Tabech and the woman were still in the restaurant. When she returned from break at 6:41 p.m., El-Tabech and his companion were no longer in the restaurant.

The State also called Gertrude Makovicka, a neighbor of El-Tabech's. She and her husband returned home from an afternoon of visiting at approximately 5:30 p.m. on the day of the murder. At 6 p.m. she and her husband started watching "60 Minutes." She testified that they watched the show until its completion at 7 p.m. During part of the time she was working in the kitchen, washing strawberries. She could both see the TV set and observe the El-Tabech residence from the kitchen. She testified that she saw the El-Tabechs arrive home at about 6:15 p.m. She further testified that shortly after 7 p.m. she went out on her porch. After she had been sitting outside for 5 to 10 minutes, she observed El-Tabech come out of his house. He got into his car, drove up to Vine Street, and then turned onto Vine, heading west. She remained on her porch and approximately 10 minutes later observed El-Tabech return with a small package. During the time that he was gone, Makovicka testified she did not see anybody go into or come out of the El-Tabech residence. About 5 minutes after El-Tabech arrived back at his residence, Makovicka saw the first emergency vehicle arrive.

Rhonda James, wife of David James, testified that she spoke to El-Tabech on the phone just before 6:30 p.m. She took the phone call at the church. She testified that El-Tabech "sounded upset, and he wanted to visit with [her husband]." El-Tabech asked that her husband come right by on his way home. She said she would relay the message to her husband but, in fact, did not tell him until after the family had gotten home from church.

James attempted to call El-Tabech around 7 p.m., but no one

answered the phone.

An employee at the Save-Mart grocery, located at 45th and Vine Streets, testified that on June 24, 1984, she was working on cash register No. 5. When a person makes a purchase, the cash register prints on the receipt what was purchased, the amount, the date, the time, and the check stand number. While she did not remember a particular purchase of ice cream bars at 7:23 p.m. on the evening of the murder, the receipt in evidence indicates that such a purchase did take place at that time.

The decedent's father, Elmer Prusia, testified that he started trying to call his daughter on the telephone shortly after 5:30 p.m. on June 24, 1984. He had received a call for her on his own phone at about 5:25 p.m. The caller had left a message which Prusia was attempting to relay to his daughter. When he did not get an initial answer, he intermittently redialed his daughter's number while watching television. Finally, at about 7:35 p.m., he got a busy signal. When he called again at 7:50 or 7:55 p.m., the phone was answered by emergency personnel.

The decedent's mother described El-Tabech as very attentive for the affection of her daughter. She further testified to an incident which had occurred on Memorial Day, when El-Tabech had been particularly upset that the decedent was not wearing her wedding ring. The decedent's mother also testified that on Father's Day preceding the day of the killing, her daughter and El-Tabech had advised them that they were expecting a child. The mother further corroborated the testimony of the decedent's father with regard to his attempts to reach his daughter by phone.

The decedent's sister was also called and testified. Specifically, she testified with regard to the announcement of her sister's pregnancy. El-Tabech insisted that no one was to know about the pregnancy and was quoted as saying, "Who knows what may happen in the next few months." The decedent's sister also testified with regard to her observations concerning El-Tabech's demeanor and her concerns over his view of women generally. The sister testified that El-Tabech was against his wife's wearing makeup and that he tended to have aggressive behavior toward her. She also testified that over the course of the 6 months of the marriage, the decedent had, on a

number of occasions, indicated that she did not favor the attention that was being bestowed upon her and, in fact, had specifically informed El-Tabech to "[l]eave me alone." The decedent's sister further testified that it was her observation that the decedent had become more and more concerned with the attention from her husband and that she had in some ways "withdrawn." This testimony was corroborated by the sister's husband.

El-Tabech called Khalil Chehab as a witness for the defense. Chehab testified that he had known El-Tabech since high school in Lebanon. At the time of the trial he had not seen El-Tabech in 8 or 9 years. However, during the summer of 1983, while on a visit to Lebanon, he had learned that El-Tabech was in the United States. He obtained El-Tabech's phone number and address. Upon his return from Lebanon to California, he made a phone call and spoke with the decedent. In March or April of 1984, he received a letter from El-Tabech in which he was informed of the new telephone number for the El-Tabechs.

He then testified that on June 24, 1984, he was working at a Taco Bell restaurant in California. He was scheduled to work from 11 a.m. until 5 p.m., but was told by the manager to take off work at 4 p.m. He testified that after he got off work at 4 p.m., he called his wife from a pay telephone inside the Taco Bell, but she was not at home. He stayed in the restaurant, had something to eat, and then decided to call his parents in Lebanon. The reasons he gave for calling Lebanon from a pay phone were that he did not want his wife to know about it and he wanted to be able to prevent his mother from talking too long.

He testified that he made this overseas call to his mother at about 5 p.m. California time, or 7 p.m. local time. During this phone call he received a message for El-Tabech. When he got off the phone, he again tried to call his wife but still received no answer. According to Chehab this was a little after 5 p.m. California time. He then decided to call El-Tabech and give him the message. He claims that he called the El-Tabech number and a woman who identified herself as the decedent answered. He asked for El-Tabech but was unable to speak with him. He then testified that he asked to and did leave a message for El-Tabech

with the woman who answered the phone. After this phone call, he again called his wife and she answered. Within a few minutes she picked him up, and the couple went shopping.

On cross-examination, Chehab stated that he remembered the events of that day because of his call to Lebanon and an argument he had with his wife. He did admit, however, that he was not wearing a wristwatch on the day in question and that he was estimating the times. With these facts in mind, we now review El-Tabech's assignments of error.

I.

Whether a defendant is entitled to an untrammeled attorney/client relationship.

While assignment of error No. 1 seems somewhat obscure, in essence, El-Tabech maintains that the district court committed error when it disqualified his court-appointed public defender and appointed private counsel to represent him.

The record reflects that the public defender was initially appointed to represent El-Tabech on the criminal charges. Specifically, Scott P. Helvie was assigned from the public defender's office to represent El-Tabech. He began this representation in June of 1984. At the same time Helvie represented an individual by the name of Robin Burchett, who had also been charged with murder in the first degree.

On April 29, 1985, Helvie received a call from Burchett. In that phone conversation, Burchett claimed that while both Burchett and El-Tabech were confined in the Lancaster County jail, El-Tabech confessed to Burchett that he, El-Tabech, had killed his wife. Apparently, Burchett had inquired of Helvie what he, Burchett, might get as a favor from the State in his case in return for giving testimony about the killing in the El-Tabech case. Helvie advised Burchett that it was not likely that he could get anything in return for the testimony.

Subsequently, in May of 1985, a detective from the Lincoln Police Department interviewed Burchett and another prisoner, who informed the detective that El-Tabech admitted to them that he had killed his wife. Burchett was then endorsed as a witness in the El-Tabech case.

The State, being concerned that Helvie might not be able to effectively cross-examine Burchett, thereby giving El-Tabech

grounds for an appeal because of ineffective assistance of counsel, moved, in effect, to disqualify Helvie as appointed counsel. One of the apparent concerns was that in the event that Burchett testified about his conversation with El-Tabech and maintained that he was coming forward simply as a concerned citizen, Helvie would not be able to question him as to whether he had not first inquired of Helvie whether he might not trade that information for a favor in his case, the information having come to Helvie from Burchett in the first instance, in a confidential communication between attorney and client.

The trial court, in an apparent abundance of caution, concerned that either a mistrial might subsequently be declared or the entire trial be subject to appeal on the grounds of conflict of interest, sustained the State's motion and appointed competent, experienced private counsel at State expense for El-Tabech. Nowhere in appellant's brief does El-Tabech tell us how he was adversely affected by this event or how newly appointed counsel failed to effectively represent El-Tabech. No claim is made that counsel appointed by the court was ineffective or that, by reason of the appointment, El-Tabech was denied an opportunity to present relative evidence. The argument which is made is simply that Helvie was El-Tabech's original lawyer who had spent a great deal of time in preparation for trial and who should have been permitted to continue.

Counsel for El-Tabech argues that there are only two reasons to hold a hearing regarding a conflict of interest. The first reason is to determine whether in fact a conflict of interest exists that is severe enough to endanger the defendant's sixth amendment right to effective assistance of counsel, and the second reason is to determine whether disqualification is the appropriate remedy for the conflict. There is, of course, a third reason. That is to ensure that potential errors, which might give rise to an appeal or deny El-Tabech an adequate trial, be eliminated if at all possible. And, in that regard, where the problem becomes apparent before the actual trial, the trial court must be given broad discretion in determining whether such a conflict might exist and whether disqualification is the appropriate remedy.

In the case of *United States v. Agosto*, 675 F.2d 965, 970 (8th

Cir. 1982), the court said:

> Here, we are concerned with the power of the district court to disqualify counsel *before* conflict results in ineffective assistance of counsel. At this stage in the proceedings, there is of necessity less certainty as to whether conflicts will actually arise and as to the nature of those conflicts. This is particularly so where the government files a motion for disqualification early in the proceedings.
>
> Because the task of assessing the potential for conflict well in advance of trial is such a difficult one, the standards applicable to making that assessment must be flexible.

(Emphasis in original.)

Certainly, there was the potential for a conflict of interest. See *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984). Moreover, as noted by appellant, while El-Tabech has a sixth amendment right to effective assistance of counsel, where counsel is court-appointed, the defendant does not have a constitutional right to counsel of his choice. See *State v. Blunt*, 197 Neb. 82, 246 N.W.2d 727 (1976). There is simply no evidence in this record to indicate that El-Tabech did not receive effective assistance of counsel or that the district court abused its discretion in disqualifying Helvie once the information concerning the potential conflict of interest was brought to the district court's attention. On the basis of the record presented to us in this case, there is no evidence that El-Tabech was in any way prejudiced by reason of the district court's order disqualifying Helvie and appointing other counsel well in advance of trial. Nor is there evidence that El-Tabech was denied any constitutionally guaranteed right. The first assignment of error must therefore be overruled.

II.

Whether the defendant is entitled to some additional community input into the life-death decision beyond a petit jury verdict on the issues of guilt-innocence.

Appellant's second assignment of error, though again couched in broad terms, is to the effect that proceeding against the appellant by information rather than by grand jury denied

El-Tabech his constitutionally guaranteed rights. We have recently reaffirmed our rejection of this charge. In *State v. Burchett*, 224 Neb. 444, 457, 399 N.W.2d 258, 267 (1986), we said:

> [W]e have determined that prosecutions for felonies, including murder, may be had on informations filed by the county attorney. *Jackson v. Olson*, 146 Neb. 885, 22 N.W.2d 124 (1946); *Hawkins v. State*, 60 Neb. 380, 83 N.W. 198 (1900); *Bolln v. State*, 51 Neb. 581, 71 N.W. 444 (1897), *aff'd* 176 U.S. 83, 20 S. Ct. 287, 44 L. Ed 382 (1900).

We are not disposed to depart from that position, and, therefore, the second assignment of error must likewise be overruled.

III.

Whether the evidence was sufficient to support a conviction for murder in the first degree?

El-Tabech argues that the case was entirely based on circumstantial evidence, and, therefore, the verdict cannot stand. We believe that such is not the case. To begin with, the Supreme 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. See, *State v. Ellis*, 223 Neb. 779, 393 N.W.2d 719 (1986); *State v. Rolling*, 209 Neb. 243, 307 N.W.2d 123 (1981); *State v. Joy*, 220 Neb. 535, 371 N.W.2d 113 (1985). Furthermore, the fact that the evidence convicting El-Tabech is circumstantial does not make it any less reliable. 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. See *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981).

Viewing the evidence most favorable to the State, as we are required to do in processing this appeal, we believe that the jury could find El-Tabech guilty of murder in the first degree beyond a reasonable doubt. To begin with, two facts are without

dispute. The first was that the decedent was murdered, and the second was that she died by strangulation on June 24, 1984, sometime between 6:15 and 7:30 p.m. Furthermore, there is no dispute that El-Tabech and the deceased were quarreling and that the deceased had advised El-Tabech that she was leaving. This information was both conveyed to the friend, David James, and observed by the waitress.

Moreover, the evidence is without dispute that just before 6:30 p.m., the decedent was still alive, having been seen by the neighbor. Additionally, El-Tabech was seen leaving the residence shortly after 7 p.m. Shortly thereafter, the decedent was found by the emergency personnel with the bathrobe belt tied around her neck. No one was observed entering the residence during El-Tabech's absence, nor does the evidence reveal that there were any visible signs of forced entry or robbery.

The jury could reasonably conclude that El-Tabech and the decedent had a domestic argument and that El-Tabech strangled his wife and thereafter left the residence, only to return shortly thereafter to report the homicide. The State argued, and the jury apparently chose to believe, that the process of strangulation was time consuming and supported a finding of intent, premeditation, and deliberation. We cannot say, as a matter of law, that the evidence was not sufficient for the jury to find El-Tabech guilty beyond a reasonable doubt. The assignment of error must be overruled.

IV.

Whether the defendant is entitled to have his jury correctly instructed, pursuant to a Nebraska Jury Instruction, on his theory of the defense, if that defense is supported by evidence in the record?

In essence what this assignment of error addresses is the question of whether prejudicial error was committed by the court when it refused to instruct the jury on the question of alibi. At the close of all of the evidence, El-Tabech submitted a proposed instruction providing as follows:

> The defendant contends that at or about the time the crimes with which the defendant stands charged were allegedly being committed the defendant was at such a

distant and different place that he could not have committed said crimes.

The defendant is not required to prove such defense. It is sufficient if the evidence raises a reasonable doubt in your minds as to his presence at the time and place the crimes are alleged to have been committed; and if from all the evidence in the case you are not satisfied beyond a reasonable doubt of defendant's presence at the commission of the crimes charged against him, then you should find him not guilty.

We believe that there are at least two reasons why the district court's refusal to give the requested instruction was not error. In the first instance, alibi in Nebraska is not an affirmative defense. In the case of *Hall v. State*, 135 Neb. 188, 191, 280 N.W. 847, 848 (1938), this court said:

> While the holdings in all of the courts cannot be reconciled, yet the majority of the courts hold that alibi evidence is not to be considered by itself, but in connection with all the other evidence, and that alibi is not an independent affirmative defense in the same sense that insanity is regarded as an affirmative defense. Annotation, 67 A.L.R. 138. Therefore, it was not error for the court to fail to give the jury an instruction on alibi.

Recent court decisions elsewhere have also determined that alibi is not an affirmative defense. The U.S. Court of Appeals for the Fourth Circuit, in *Adkins v. Bordenkircher*, 674 F.2d 279, 282 (4th Cir. 1982), observed:

> An alibi, however, negates *every* fact necessary to prove a breaking and entering; the defendant could not commit the offense if he was elsewhere at the time. When viewed under the *Patterson* standard, the West Virginia court's characterization of the alibi as an affirmative defense must be rejected.

(Emphasis in original.)

Likewise, the Supreme Court of Hawaii, in the case of *State v. Cordeira*, ____ Haw. ____, ____, 707 P.2d 373, 376 (1985), said:

> In the context of a criminal prosecution, "alibi" denotes an attempt by the defendant to demonstrate he

> "did not commit the crime because, at the time, he was in another place so far away, or in a situation preventing his doing the thing charged against him." [Citation omitted.] "Strictly speaking, *alibi evidence* is merely rebuttal evidence directed to that part of the state's evidence which tends to identify the defendant as the person who committed the alleged crime." *Witt v. State*, 205 Ind. 499, 503, 185 N.E. 645, 647 (1933). (Emphasis added.) Though Rule 12.1 of the Hawaii Rules of Penal Procedure requires the defendant to give notice of an intention to rely upon the defense of alibi, it is not an affirmative defense.

And, in *Wright v. State*, 169 Ga. App. 693, 697, 314 S.E.2d 709, 712 (1984), the court said:

> Although alibi has often been treated as an affirmative defense, it "is not truly an independent affirmative defense. It is simply evidence in support of a defendant's plea of not guilty, and should be treated merely as 'evidence tending to disprove one of the essential factors in the case of the prosecution, that is, presence of the defendant at the time and place of the alleged crime.' " *Parham v. State*, 120 Ga. App. 723, 727 (171 SE2d 911) (1969); accord, *Rivers v. State*, 250 Ga. 288 (298 SE2d 10) (1982).

In the instant case the jury was instructed that the State had the burden of proving each and every element of the crime, including the fact that the accused committed the act as charged. The failure to instruct the jury on the alibi did not relieve the State of its full burden of proof.

Secondly, the evidence in the instant case was not sufficient to justify the giving of an instruction on alibi. In the early case of *Mays v. State*, 72 Neb. 723, 725, 101 N.W. 979, 980 (1904), this court said:

> "A defendant, to establish an *alibi*, must not only show he was present at some other place about the time of the alleged crime, but also that he was at such other place such a length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the time he was at such other place." [Citation omitted.]

(Emphasis in original.) See *State v. Sutton*, 220 Neb. 128, 368 N.W.2d 492 (1985).

Other courts which have reviewed this issue have reached the same conclusion. See, *Greenhow v. United States*, 490 A.2d 1130 (D.C. 1985); *People v. Fritz*, 84 Ill. 2d 72, 417 N.E.2d 612 (1981); *State v. Gillespie*, 163 N.W.2d 922 (Iowa 1969).

El-Tabech's defense or alibi was that between 7 and 7:30 p.m. he was out of the house purchasing ice cream and therefore could not have committed the murder. The State, however, produced evidence that the murder occurred sometime between 6:15 and 7:30 p.m., and, therefore, it was possible for the jury to find that El-Tabech had committed the murder before he left the home to purchase the ice cream. It was therefore not error for the court to refuse to give the instruction on alibi.

V.

Whether the trial court violated the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution by death qualifying a jury in a capital case where the jury has absolutely nothing to do with punishment?

VI.

Whether the trial court violated Article I, Section 6 of the Constitution of the State of Nebraska by death qualifying the jury in a capital case when the jury has absolutely nothing to do with punishment?

VII.

Whether the trial court abused its discretion in death qualifying the jury?

The last three assignments of error can be discussed together. Each of the above assignments of error was recently considered by this court in *State v. Burchett*, 224 Neb. 444, 399 N.W.2d 258 (1986), and rejected. In *State v. Burchett, supra* at 452, 399 N.W.2d at 264, we held that any argument that a "death-qualified" jury is partial or biased must fail because " 'an impartial *jury* consists of nothing more than "*jurors* who will conscientiously apply the law and find the facts." ' " (Emphasis in original.) Citing *Lockhart v. McCree*, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

We further said in *Burchett, supra* at 450-51, 399 N.W.2d at

263:

> While a prospective juror's attitudes about capital punishment are irrelevant to sentencing in Nebraska, they may be relevant to his ability to fairly determine the defendant's guilt or innocence. Prospective jurors who are excused because they are unable either to fairly determine guilt or to fairly impose a sentence because of their opposition to capital punishment are both subsets of the group of death penalty opponents which the defendant maintains is a cognizable group. The U.S. Supreme Court rejected the cognizable group claim in *McCree, supra*, and we do the same.

Having thus examined and rejected each of appellant's assignments of error, the judgment and sentences of the district court are affirmed.

AFFIRMED.

NORMAN R. BRUNKEN, APPELLANT, V. CITY OF OMAHA EMPLOYEES' RETIREMENT SYSTEM BOARD OF TRUSTEES, APPELLEE.

405 N.W.2d 595

Filed May 15, 1987. No. 86-111.

1. **Courts: Ordinances: Appeal and Error.** Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will the Supreme Court on appeal.
2. **Evidence: Appeal and Error.** New evidence is not permitted in the appellate court to determine if errors of law occurred in the tribunal giving rise to the error proceeding.
3. **Evidence: Records: Appeal and Error.** Where errors assigned require review of evidence in error proceedings, they cannot be considered in the absence of a bill of exceptions.
4. **Administrative Law: Ordinances: Municipal Corporations: Employer and Employee.** Omaha Mun. Code § 22-35 (1980) does not permit one to receive disability payments if the employee is able to perform active duty services for the

employer, even though not the same as performed before the injury. It is only where the employee is unable to perform at all that he or she may receive benefits.

5. **Administrative Law: Appeal and Error.** In error proceedings taken from findings and orders of an administrative agency or body acting in a quasi-judicial capacity, as in the case at bar, only two questions are ordinarily presented for decision. The general rule is that if it appears in such cases that such agency or body has acted within its jurisdiction and that all of the jurisdictional facts essential to uphold its findings and orders are sustained by some competent evidence, such findings and orders will be upheld in error proceedings to the district court and on appeal to this court.

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

Daniel W. Ryberg, for appellant.

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

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

PER CURIAM.

This appeal deals with the single question as to whether the appellant, Norman R. Brunken, was entitled to receive a monthly disability pension from the City of Omaha by reason of his having become permanently unfit for active duty as a city employee. While the question itself is relatively simple and straightforward, the case is anything but simple and straightforward. The first thing we must do, then, is attempt to sort out the pieces so that the question involved in the appeal can be addressed.

In reality, two appeals were ultimately filed in the district court for Douglas County, Nebraska, from actions taken by the City of Omaha Employees' Retirement System Board of Trustees (Board). Those appeals were consolidated, for argument only, first in the district court and again in this court. While they have been consolidated for argument, they remain two separate cases and should be addressed as such.

The first case (docket 841, page 174) was filed in the district court for Douglas County, Nebraska, on December 19, 1984, and sought to review a decision entered by the Board following

a hearing held on November 21, 1984. The exact date the Board entered the decision denying Brunken's request for disability payments is not shown.

On January 9, 1985, while the matter was pending on appeal in the district court, the district court sustained a motion filed by the City of Omaha to strike paragraph 3 of Brunken's petition in error, which alleged, "Chapter 22 of the Ordinance of the City of Omaha, establish [sic] a Pension and Retirement Plan and Disability Retirement. Such chapter is attached hereto and incorporated herein as Exhibit 'A,' " on the basis that Brunken had failed to introduce the ordinance at the hearing before the Board. Brunken then sought to file a supplemental transcript in which he added the city ordinance, for the first time, before the district court. The district court denied the request, and Brunken then filed a second application before the Board, seeking a determination that he was eligible for disability benefits under the Omaha city ordinance.

At this subsequent hearing he reintroduced all of the evidence previously introduced at the first hearing and, in addition, presented the Board with a copy of the relevant Omaha city ordinance. This second hearing resulted in the Board's once again denying Brunken disability benefits, and that order was then appealed to the district court for Douglas County, Nebraska, and is docket 844, page 723.

While the matters were consolidated for argument in both the district court and again in this court, we believe that we can avoid some of the confusion if we review them separately. For that reason we will first examine the decision entered following the hearing held on November 21, 1984, at which the ordinance of the City of Omaha was not made a part of the record. We believe that the district court was correct in its decision regarding the striking of paragraph 3 of Brunken's petition in error and thereafter affirming the action of the Board. The specific question was earlier presented to this court in the case of *Andrews v. City of Fremont*, 213 Neb. 148, 328 N.W.2d 194 (1982), and is dispositive of the issue.

In *Andrews* a landowner appealed a decision by the city council of the City of Fremont, which refused to subdivide a tract of land owned by appellant. Copies of the relevant

ordinances were not presented to the city council and were not made a part of the transcript filed in the district court for Dodge County, Nebraska. In affirming the action of the district court, we said at 151-52, 328 N.W.2d at 196:

> As stated before, the transcript which was filed in the District Court, and which is brought to this court on appeal, does not contain the ordinances. Each of the nine assignments of error presented to the District Court and presented to this court refers to the ordinances of the City of Fremont, which simply were not before the District Court and are not before us as they did not appear in the transcript of the proceedings had before the city council of the City of Fremont, and we are powerless to review them. Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will the Supreme Court.

We went on further in *Andrews, supra* at 152, 328 N.W.2d at 196, to say:

> New evidence is not permitted in the appellate court to determine if errors of law occurred in the tribunal giving rise to the error proceeding. [Citations omitted.]
>
> Where errors assigned require review of evidence in error proceedings, they cannot be considered in the absence of a bill of exceptions.

We concluded in *Andrews, supra* at 152, 328 N.W.2d at 197, by saying: "Appellant remains free to refile her application for subdivision with the city council and to make a proper record with that tribunal."

Neither the district court for Douglas County, Nebraska, nor this court has any means to review the action of the Board regarding the first hearing, in view of the fact that in order to review the action we must have before us the relevant ordinance and it was not made a part of the transcript. Brunken's attempt to supplement the transcript on appeal was without authority. Because the issue of whether Brunken was entitled to disability was dependent upon the language of the Omaha city ordinance, neither the district court nor this court could properly pass upon the issue without having the ordinance before it. For that reason, if for no other reason, the action of the district court in

ultimately affirming the action of the Board denying to Brunken disability in docket 841, page 174, was correct and should be affirmed in this court.

That, then, leaves us with a review of the second case, docket 844, page 723. Brunken has assigned a number of errors, including that he had been denied his constitutional rights to due process and had been denied justice. Those arguments apparently are based upon some notion that Brunken was prevented from introducing evidence at the second hearing to establish his disability. While much is made of all of this by Brunken, a reading of the record quickly dispels any such contention.

The verbatim transcript discloses that on May 15, 1985, Brunken and his attorney appeared before the Board, where his attorney said:

> My name is Dan Ryberg, and I am the attorney representing Mr. Brunken. The reason that we brought this back to you is not because there has been any change, but because the District Court wanted a record, or wanted the ordinance of the pension on record, and that wasn't in the record and therefore I have to come back to you to make a record and put the ordinance in. That's really why we are here today, and that's really the only reason we're here today is simply to make the record that the District Court says should have been made in the first place. So to that end, I do have a copy of the Chapter 22 of the ordinance which I believe is what the court is guided by that I have marked at the bottom as Exhibit "W" and submit it for your consideration.

Ryberg then went on to say: "Well, with that regard, I do have a package that has been given to you which I think is pretty much of a historical development of Mr. Brunken's - this is his third application, and the package itself, I think . . . ." At that point a motion was made to go into executive session, and the motion was sustained. The record discloses that neither Brunken nor his attorney voiced any objection.

Following the executive session, the Board reconvened, and the following is reported to have taken place:

> JAMES DOYLE: Madam Chairman, after having time

> to review the packet that we have in front of us today, I make a motion to deny the application based on the fact that there is no demonstrated change in medical evidence presented to this board for its consideration of the application.

The motion was seconded and unanimously passed.

Brunken now maintains that he was denied his due process because he was not afforded an opportunity to introduce other or additional material to establish his disability. Neither the Board nor the court is advised what additional material was to be presented. Furthermore, it would seem that such a claim is contrary to what Brunken's attorney said to the Board at the outset. The only reason he gave for reapplying to the Board was to introduce the ordinance, which was accepted by the Board. He made no initial effort to present any other evidence to the Board, and there is no offer of any other evidence to the Board. Specifically, he earlier said:

> The reason that we brought this back to you is not because there has been any change, but because the District Court wanted a record, or wanted the ordinance of the pension on record, and that wasn't in the record and therefore I have to come back to you to make a record and put the ordinance in. That's really why we are here today, and that's really the only reason we're here today is simply to make the record that the District Court says should have been made in the first place.

Moreover, if he had additional material he could have included it in the packet he first gave to the Board. It is obvious from a reading of the proceedings that the Board considered the record, including the ordinance as presented by Brunken, and denied Brunken's request for disability.

It seems to us, therefore, that the only question before the district court initially on appeal and before this court subsequently on appeal is whether the action of the Board in denying Brunken's request for disability was based on some competent evidence. We conclude, as did the district court, that the decision was based upon competent evidence and must be affirmed.

Omaha Mun. Code § 22-35(a) (1980) provides in part:

> Any member of the system who has at least five (5) years of service credit and has sustained and/or shall sustain injuries or sickness, which immediately or after a lapse of time *permanently unfit such member for active duty*, shall receive a monthly disability pension as long as he or she remains unfit for active duty or until he reaches age sixty-five (65), whichever event occurs first.

(Emphasis supplied.)

The evidence presented to the Board, which, in part, consisted of medical statements, did not establish that Brunken was permanently disabled from active service. Rather, the various reports can reasonably be read to establish that Brunken suffers from a lung disease which restricts his activity but does not render him permanently disabled. At least one of the physicians concluded that Brunken's condition could be controlled with appropriate therapy. All of them urged the city to permit Brunken to work in an air-conditioned environment, free of noxious agents such as dust, but none of them suggested that he was not capable of engaging in some form of employment. Even Brunken's treating physician, after suggesting the Brunken not continue to work in an atmosphere containing pollutants, concluded by saying: "There are no other restrictions that need to be taken into consideration other than the concrete and dust free environment in attempting to place Mr. Brunken in some other position." This does not make Brunken "permanently unfit . . . for active duty" as we have previously interpreted that phrase.

Brunken acknowledges that under our previous decision in the case of *Garza v. City of Omaha*, 215 Neb. 714, 340 N.W.2d 409 (1983), the decision of the Board could be upheld. Nevertheless, he argues that we should disregard *Garza*, or at least limit it to the facts present therein. We see no basis to follow that suggestion. In *Garza v. City of Omaha, supra*, we were asked to pass upon this very ordinance. The Board had denied to Garza his request for monthly disability. On appeal, the district court affirmed, and, on further appeal to this court, we also affirmed.

Garza sustained injuries while employed by the City of Omaha, resulting in his being temporarily totally disabled but

not permanently totally disabled. As a result of the injuries, however, he did incur certain physical limitations requiring him to be assigned to other duties. Garza argued that by reason of the injuries he should receive disability under the Omaha city ordinance in question.

In sustaining the action of the Board we first said in *Garza, supra* at 717, 340 N.W.2d at 412:

> The ordinance does not permit one to receive disability payments if the employee is able to perform active duty services for the employer, even though not the same as performed before the injury. It is only where the employee is unable to perform at all that he or she may receive benefits.

We then went on to note:

> "In error proceedings taken from findings and orders of an administrative agency or body acting in a quasi-judicial capacity, as in the case at bar, only two questions are ordinarily presented for decision. The general rule is that if it appears in such cases that such agency or body has acted within its jurisdiction and that all of the jurisdictional facts essential to uphold its findings and orders are sustained by some competent evidence, such findings and orders will be upheld in error proceedings to the district court and on appeal to this court." [Citation omitted.]

Id.

The record would support a finding that Brunken could be gainfully employed if freed from the pollutants. Based on the two criteria from *Garza*, we have no difficulty in finding that the Board acted within its jurisdiction and that its action was sustained by some competent evidence. For those reasons, therefore, we conclude that the action of the district court affirming the action of the Board must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH WALTER BROWN, SR., APPELLANT.

405 N.W.2d 600

Filed May 15, 1987. No. 86-657.

1. **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 a trial court's findings of fact unless those findings are clearly incorrect.
2. **Constitutional Law: Miranda Rights: Search and Seizure.** The warning specified in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), is required only when there has been a restriction on a person's freedom as to render such person in custody. The mere fact that an investigation has focused on a suspect does not trigger the need for the *Miranda* warning in a noncustodial setting.
3. **Constitutional Law: Search and Seizure.** Whether a person is in custody, in a constitutional sense, is a question of fact to be determined by the trial court.
4. **Directed Verdict.** In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
5. **Convictions: Appeal and Error.** 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 a jury, which are 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.
6. **Sexual Assault: Words and Phrases.** Cunnilingus, that is, stimulation by the tongue or lips of any part of a female's genitalia, is an act which may subject the actor to prosecution for first degree sexual assault under the provisions of Neb. Rev. Stat. § 28-319(1) (Reissue 1985). Once the perpetrator's lips or tongue touches any part of a female's genitalia, the act of cunnilingus is complete, irrespective of any actual penetration of the genitalia.
7. **Jury Instructions: Lesser-Included Offenses.** Generally, it is not prejudicial error to not instruct upon a lesser offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information.

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

John F. Steinheider of Hoch & Steinheider, for appellant.

Robert M. Spire, Attorney General, and Bernard L. Packett, for appellee.

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

SHANAHAN, J.

Joseph Walter Brown, Sr., appeals the verdict and sentence in the district court for Otoe County regarding Brown's conviction for first degree sexual assault. We affirm.

The information charged that Brown, as one more than 19 years of age, had sexually penetrated a person less than 16 years of age, a violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1985). As a definitional section for the statutes pertaining to sexual assault, Neb. Rev. Stat. § 28-318(6) (Reissue 1985) provides in part: "Sexual penetration shall mean sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body . . . ."

BASIS OF CRIMINAL CHARGE

On February 2, 1985, the victim's mother, who is Brown's daughter, left the victim, 9 years of age, and the victim's 8-year-old sister with Brown, the children's apparently divorced 62-year-old grandfather, at his trailer house in Nebraska City. During that day, the two sisters played with friends outside Brown's trailer until suppertime, when the playmates returned to their homes. After supper, the victim, with her sister and grandfather, watched television in the living room of the trailer house. While watching "Creature Feature," the victim's sister fell asleep. As related in the victim's testimony, the following occurred:

> Q [deputy county attorney]- Okay. What happened after [your sister] fell asleep?
>
> A [victim]- Grandpa picked me up and took me into the bedroom.
>
> Q- And what happened after you got to the bedroom?
>
> A- He laid me down, took off my jeans and underpants.
>
> Q- What else did he do?
>
> . . . .
>
> A- And then he started kissing and licking me between the legs.
>
> . . . .
>
> Q- Okay. What was he kissing you with — or what was he licking you with?

A- His tongue.
Q- Did he lick you in any particular spot?
A- Between my legs.
Q- Did you feel any pains when he did this?
A- Well, he tried to enter me with his tongue.
Q- And what happened?
A- He couldn't do it.
Q- Why couldn't he do it?
A- I was too small.

With anatomically illustrative dolls utilized during her testimony, the victim pointed to an area of the doll corresponding with the vaginal area of a human and indicated that Brown had placed his tongue on such area of the victim's body. (Somewhere, somehow, the phrase "anatomically correct" has crept into the legal lexicon in sexual assault cases, referring to a doll as a trial aid used in conjunction with a victim's testimony. We believe the more accurate characterization of such doll may be "anatomically illustrative," inasmuch as the doll used may not be a readily acceptable standard of correctness in the portrayal of human anatomy or an actually accurate representation of the genders.) Later, pursuant to her grandfather's instruction, the victim went into the bathroom, dressed herself, and returned to the living room, where she fell asleep next to her sister, who was still asleep.

On the morning of February 3, Brown returned the victim and her sister to their home. That afternoon the victim complained to her mother about a burning sensation when the victim urinated, but did not implicate her grandfather, because, as the victim explained: "I was too scared. I — I thought Grandpa might get in trouble." Approximately 2 weeks later, when she could no longer contain herself, the victim disclosed the incident to her mother, who immediately contacted Investigator Dan Scott of the Nebraska State Patrol. Scott interviewed the victim and her mother at their residence on February 18, and the victim told Scott about the sexual incident at Brown's trailer. Immediately after interviewing the victim and her mother, Scott attempted to contact Brown, but was unsuccessful.

INTERVIEW OF BROWN

On February 19, Scott came to Brown's trailer to discuss the victim's allegations and knocked on the trailer's door. When Brown answered the door, Scott stated he "needed to talk to [Brown]" and asked to enter the trailer house, where Brown was alone. Scott was dressed in civilian attire rather than a trooper's uniform, and displayed his state trooper's badge to Brown, who, on account of a previous contact, knew that Scott was a police officer. Brown invited Scott into the living room of the trailer house, where Scott informed Brown that the victim-granddaughter had made "some accusations" against Brown which necessitated Scott's interviewing Brown, who was reminded that Scott was a police officer. Scott assured Brown that he was not under arrest and that he could cease talking with Scott at any time, admonishing Brown that "anything [Brown] told me could be used against [Brown] in court." Scott did not inform Brown of the latter's right to remain silent or the right to consultation with and presence of a lawyer during any discussion about the alleged sexual incident. Scott told Brown that the victim had indicated there was "some inappropriate sexual contact" between Brown and his granddaughter, and Brown responded: "I guess I went too far." When Scott sought an explanation concerning Brown's response, Brown admitted accompanying the victim into the bedroom of the trailer house, placing her on a bed, disrobing the victim, and placing his tongue between the victim's legs. Scott asked whether Brown knew the meaning of the word *vagina* and whether the vaginal area was the anatomical location where Brown had placed his tongue on the victim's body. Brown gave answers in the affirmative to each of Scott's inquiries. Throughout the interview, Scott made no promise or threat regarding any of Brown's unrecorded statements, and Brown neither requested that Scott leave the trailer nor attempted to terminate the conversation or request a lawyer. Nothing indicates that Brown was unable to leave his trailer house or otherwise depart from the presence of Investigator Scott.

MOTION TO SUPPRESS

Brown moved to suppress his oral statements made to Investigator Scott during the interview at Brown's trailer,

asserting that Brown's incriminating statements were "coerced by threats and promises of leniency" and were "given without [Brown's] having been informed of his constitutional rights." At the suppression hearing, the State's evidence consisted of the officer's account of the interview in Brown's trailer, as detailed above. Brown did not offer evidence regarding his motion to suppress. The court overruled Brown's motion to suppress and expressed "there was no requirement that the Miranda Rights be administered before questioning . . . [because] the Court . . . finds that the statements were made in a non-custodial setting . . . ."

TRIAL AND INSTRUCTIONS

At trial, Brown objected to admission of his incriminating statements as evidence offered by the State. At the conclusion of the State's case in chief, which consisted of evidence from the victim, the victim's mother, and Investigator Scott, as previously reflected in this opinion, Brown moved for dismissal of the charge against him or for a directed verdict of acquittal, alleging insufficiency of evidence to support the charge of first degree sexual assault. The court overruled Brown's motion.

Brown testified on his own behalf and denied making the incriminating statements to Investigator Scott. Further, while testifying, Brown denied all sexual contact with his granddaughter-victim and claimed that Investigator Scott "shaked his finger at me telling me that I did this." At the conclusion of his evidence, Brown renewed his motion for dismissal or directed acquittal, which the court overruled. At the conference regarding instruction of the jury, Brown requested an instruction on sexual assault of a child, conduct prohibited by Neb. Rev. Stat. § 28-320.01 (Reissue 1985): "A person commits sexual assault of a child if he or she subjects another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older." Section 28-318(5) provides:

> Sexual contact shall mean the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the

> actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party.

The court refused to instruct on sexual assault of a child, § 28-320.01, and instructed the jury on the first degree sexual assault charge, § 28-319(1)(c), the charge on which the jury eventually found Brown guilty. Also, the court properly instructed the jury to determine whether Brown's statements to Investigator Scott were voluntary. See *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985). The district court entered judgment on the verdict and sentenced Brown to imprisonment for 3 years.

Brown alleges the district court committed error in (1) failure to suppress Brown's incriminating statements made to Investigator Scott; (2) failure to dismiss the proceedings at the close of the State's case in chief and at the conclusion of all evidence; (3) failure to submit Brown's proposed instruction on sexual assault of a child as a lesser-included offense in first degree sexual assault; and (4) imposition of an excessive sentence.

BROWN'S INCRIMINATING STATEMENTS

We first address Brown's assignment of error concerning the district court's failure to suppress Brown's statements made to Investigator Scott. In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly incorrect. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987); *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986). Because Investigator Scott did not inform Brown concerning the right to remain silent and the right to a lawyer, Brown did not receive the admonition required by the *Miranda* warning. See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). As we expressed in *State v. Norfolk*, 221 Neb. 810, 814-15, 381 N.W.2d 120, 125 (1986):

> Before a defendant's custodial statement is admissible as evidence, the absolute and indispensable prerequisites

> of the *Miranda* warning must have been satisfied preceding the interrogation producing such statement, namely, law enforcement personnel must (1) inform the defendant of the right to remain silent, (2) explain that anything said can and will be used against the defendant in court, and (3) inform the defendant of the right to consult with a lawyer and to have a lawyer present during interrogation. *Miranda v. Arizona, supra.* If a defendant to be interrogated is indigent, the defendant must also be informed that a lawyer will be appointed to represent the defendant. *Miranda v. Arizona, supra.*

In *State v. Bodtke, supra* at 508-09, 363 N.W.2d at 921 (1986), we noted:

> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), formulated prerequisites for admissibility of a suspect's in-custody statement(s) obtained "in a police-dominated atmosphere, resulting in self-incriminating statements," *id.* at 445, and sought to minimize the psychological advantage frequently inherent in an exercise of governmental authority as a tool for coercion, that is, the "potentiality for compulsion." *Id.* at 457. "Custodial interrogation" has been characterized by the U.S. Supreme Court in *Miranda* as "questioning instigated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444.

See *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977) ("*Miranda* warnings are required only when there has been a restriction on a person's freedom as to render him 'in custody' "). See, also, *State v. Bowersmith*, 224 Neb. 6, 9, 395 N.W.2d 527, 529 (1986) ("[T]he ultimate inquiry regarding the custodial status of a suspect ' "is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." ' "). Whether a person is in custody, in a constitutional sense, is a question of fact to be determined by the trial court. *State v. Bowersmith, supra.*

For suppression of his incriminating statements, Brown suggests that the *Miranda* warning was required, since the

investigation into the victim's accusations was "no longer a general inquiry into an unsolved crime" but had begun to "focus" on Brown as a suspect.

In *Beckwith v. United States*, 425 U.S. 341, 96 S. Ct. 1612, 48 L. Ed. 2d 1 (1976), agents of the Internal Revenue Service called on Beckwith at his home to investigate a possible criminal violation of laws governing federal income taxation. After the callers had identified themselves as Internal Revenue agents, Beckwith invited the investigators into the dining room of his residence, where the agents presented their credentials and told Beckwith they were investigating the possibility of fraud regarding Beckwith's tax liability. The agents informed Beckwith of his right to a lawyer before answering questions and admonished Beckwith that "anything which you say and any information which you submit may be used against you in any criminal proceeding." 425 U.S. at 343. Although Beckwith sought suppression of his statements to agents, the U.S. Supreme Court found that the statements were made in a "noncustodial" setting and stated:

> Although the "focus" of an investigation may indeed have been on Beckwith at the time of the interview in the sense that it was his tax liability which was under scrutiny, he hardly found himself in the custodial situation described by the *Miranda* Court as the basis for its holding. *Miranda* implicitly defined "focus," for its purposes, as "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." [Citation omitted.]

(Emphasis omitted.) 425 U.S. at 347. See *Minnesota v. Murphy*, 465 U.S. 420, 431, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984) ("The mere fact that an investigation has focused on a suspect does not trigger the need for *Miranda* warnings in noncustodial settings").

Regarding suppression of Brown's incriminating statements, the crucial question is whether Brown was in custody at the time he made those statements to Investigator Scott.

Some factors used to distinguish "custodial" from "noncustodial" statements were examined in *United States v.*

Jones, 630 F.2d 613 (8th Cir. 1980). In *Jones*, two FBI agents interviewed Jones in her home concerning her possible role in an embezzlement. Before questioning Jones, the FBI agents identified themselves, informed Jones that she was not under arrest, and told Jones she was free to refuse to answer any questions. In finding that Jones was not in custody and that the *Miranda* warning was, therefore, not required, the court pointed to several features of a "noncustodial" setting:

> The place where an interrogation takes place does not conclusively establish the presence or absence of custody. A deprivation of freedom may take place at one's home as well as at the police station. *Orozco v. Texas*, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969). By the same token, an interrogation at the police station may be noncustodial. *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977); *Iverson v. North Dakota*, 480 F.2d 414, 423 n.10 (8th Cir. 1973). Determining if there has been a deprivation of freedom entails something more than simply identifying the place of interrogation.
>
> . . . .
>
> . . . [I]t becomes apparent that the interrogation of Jones was not custodial. We start with the fact that prior to any questioning Jones was informed that she was not under arrest and that she need not answer any questions. . . . The absence of a formal arrest and the advice of freedom to decline to answer, while not conclusive, are indicative of noncustodial interrogation. See *Oregon v. Mathiason*, 429 U.S. at 493, 97 S.Ct. at 713; *Beckwith v. United States*, 425 U.S. at 343, 96 S.Ct. at 1614; [citations omitted].
>
> It should not be understood, however, that the absence of a formal arrest and informing the suspect that she need not answer any questions automatically render an interrogation noncustodial. Other acts by those conducting the interrogation may establish custody. The record, however, is devoid of evidence exhibiting conduct on the part of the interrogating agents which would lead to the conclusion that Jones was in custody. No strong arm tactics were used. The defendant had not previously been

> subjected to a police escort nor given commands by the interrogating agents intended to dictate the course of conduct followed by the defendant. . . .
>
> . . . .
>
> . . . [Jones] was in her own home and under no physical restraint. She was free to depart, free to refuse to answer any questions, and free to request the interrogating officers to leave. Jones was not compelled to be subjected to the presence of the interrogating officers. In short, she suffered no such restriction on her personal freedom as to render her "in custody." *Oregon v. Mathiason*, 429 U.S. at 495, 97 S.Ct. at 714.

630 F.2d at 615-16. See, also, *United States v. Phillips*, 688 F.2d 52 (8th Cir. 1982).

At the hearing on Brown's motion to suppress, evidence does not show that Brown was in custody at the time he made the incriminating statements to Investigator Scott. Regarding the interview at Brown's trailer, nothing indicates that Brown was ever placed under arrest, " 'taken into custody or otherwise deprived of his freedom of action in any significant way.' " *Beckwith v. United States*, 425 U.S. 341, 347, 96 S. Ct. 1612, 48 L. Ed. 2d 1 (1976). At the time of the interview, Scott stated that Brown was not under arrest and neither uttered words nor demonstrated any conduct which dictated or restricted a course of action by Brown. During the interview, Brown was never physically restrained and was free to depart from the trailer house as well as from the presence of Investigator Scott, or otherwise free to request Scott to leave the premises. We can only characterize the entire setting at Brown's trailer as "noncustodial" and conclude that Investigator Scott was not required to give Brown the *Miranda* warning. Evidence at the suppression hearing raised no question about the voluntariness of Brown's statements made to Investigator Scott. Therefore, the district court was correct in overruling Brown's motion to suppress the incriminating statements.

MOTIONS FOR DISMISSAL OR DIRECTED ACQUITTAL

In his second assignment of error, Brown contends that his motions for dismissal or a directed verdict should have been

sustained, because evidence "[did] not establish the elements of the crime." Brief for Appellant at 14. The gist of Brown's argument is the evidence fails to provide any basis for finding that Brown sexually penetrated the victim.

> In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.

State v. Clancy, 224 Neb. 492, 501, 398 N.W.2d 710, 717 (1987).

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 a jury, which are 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, supra.* See, also, *State v. Schott*, 222 Neb. 456, 384 N.W.2d 620 (1986).

Cunnilingus is "stimulation of the vulva or clitoris with the lips or tongue." Webster's Third New International Dictionary, Unabridged 554 (1981). See, also, *State v. Kish*, 186 Conn. 757, 443 A.2d 1274 (1982); *State v. Ludlum*, 303 N.C. 666, 281 S.E.2d 159 (1981). The vulva is composed of "the external parts of the female genital organs . . . the opening between the projecting parts of the external organs." Webster's, *supra* at 2567. See, also, *State v. Ludlum, supra.* We need not indulge in an extensive anatomy lesson concerning the clitoris, an organ which realistically defies "sexual penetration" as envisioned in § 28-318(6). In view of § 28-318(6), characterizing or defining "sexual penetration," the criminal act of cunnilingus is punishable as a sexual assault similar, but not identical, to sexual assaults involving penetration of a victim's body, such as vaginal intercourse, or any other sexual activity constituting a prohibited intrusion of an assailant's or victim's body. The Legislature clearly intended that cunnilingus, that is, stimulation by the tongue or lips of any part of a female's genitalia, is an act which may subject the actor to prosecution

for first degree sexual assault under the provisions of § 28-319(1). It is difficult to imagine how attempted, but uncompleted, lingual penetration of a victim's vagina would not include cunnilingus. Moreover, we decline to require that a victim, especially a youthful victim, testify about an act of cunnilingus in vocabulary used by a gynecologist or provide a detailed description which might otherwise be found in some sordid novel. Therefore, once the perpetrator's lips or tongue touches any part of a female's genitalia, the act of cunnilingus is complete, irrespective of any actual penetration of the genitalia. See *State v. Ludlum, supra.* As aptly declared by the Supreme Court of North Carolina in *Ludlum*: "We do not choose to quibble either over the word 'stimulation' contained in the definitions of cunnilingus upon which we have relied." 303 N.C. at 674, 281 S.E.2d at 163. In this case, there was evidence from the victim that Brown placed his tongue in the victim's vaginal area and attempted, but failed, lingual penetration of the victim's vagina. According to Brown's statements made to Investigator Scott, Brown placed his tongue on the victim's vaginal area. In *State v. Piskorski,* 218 Neb. 543, 357 N.W.2d 206 (1984), this court reviewed the evidence presented in a prosecution for sexual assault by sexual penetration (cunnilingus) on a victim less than 16 years of age, a prosecution under § 28-319(1)(c), and we stated:

> Piskorski's second argument is that the evidence was insufficient to establish the elements of the crime. . . .
>
> . . . The mother testified that while her daughter's clothes were off, the defendant touched the child between the legs with his hands, rubbed her between the legs, and then kissed her between the legs. Piskorski argues that the testimony establishing that he placed his head between the child's legs and kissed her did not prove the elements of the crime. With that argument we cannot agree.

218 Neb. at 549, 357 N.W.2d at 211.

In *Piskorski*, we concluded that "the act of cunnilingus, constitutes sexual penetration within the meaning of § 28-319(1), even though there is not in fact intrusion into the body." 218 Neb. at 550, 357 N.W.2d at 212.

Courts of other jurisdictions have arrived at the same

conclusion we reached in *Piskorski*, namely, under the statutory scheme of first degree sexual assault, cunnilingus does not require penetration of a female's genitalia. See, *Partain v. State*, 63 Md. App. 260, 492 A.2d 669 (1985); *State v. Kish, supra; State v. McNeely*, 314 N.C. 451, 333 S.E.2d 738 (1985).

The State presented a prima facie case of first degree sexual assault, and the quantum of evidence in this case is such that the district court could not properly dismiss the proceedings or direct a verdict of acquittal. The court correctly overruled Brown's motions for dismissal and a directed verdict.

INSTRUCTION ON LESSER-INCLUDED OFFENSE

As his third assignment of error, Brown claims he was entitled to an instruction on sexual assault of a child (sexual contact), see § 28-320.01, as a lesser-included offense in first degree sexual assault, see § 28-319(1). However, much of what we have stated above in this opinion concerning cunnilingus is applicable in disposing of Brown's contention about instruction on a lesser-included offense. As we comprehend Brown's argument for the instruction on the lesser-included offense, when evidence failed to establish vaginal penetration of the victim, this left evidence that Brown placed his tongue on the victim's vaginal area without any penetration, which, according to Brown, is "sexual contact" described in § 28-318(5) and, therefore, sexual assault of a child, conduct condemned by § 28-320.01. Brown denied all sexual contact with the victim. However, because sexual penetration is not a necessary element for first degree sexual assault involving cunnilingus, evidence in Brown's case established the act of cunnilingus rather than intentional touching of a child-victim's body within the purview of § 28-320.01.

As we stated in *State v. Beasley*, 214 Neb. 918, 922-23, 336 N.W.2d 601, 604 (1983):

> Generally, it is not prejudicial error to not instruct upon a lesser offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information. *State v. Vicars*, 207 Neb. 325, 299 N.W.2d 421 (1980). In *State v. Tamburano*, 201 Neb. 703, 271 N.W.2d 472 (1978), a prosecution for sexual assault in the first degree, the only testimony regarding penetration was

> that of the victim. The defendant did not testify and argued that the jury should have been instructed on second degree sexual assault. We held that when the State offers uncontroverted testimony on an essential element of a crime, mere speculation that the jury may disbelieve the testimony does not entitle the defendant to an instruction on a lesser-included offense. . . .
>
> . . . In [*Tamburano*] we held that if, under a "different but reasonable" view, the evidence would be sufficient to establish guilt of the lesser offense and leave a reasonable doubt as to some element included in the greater offense but not the lesser, the jury should be instructed on the lesser offense.

The district court properly refused Brown's requested instruction regarding sexual assault of a child as a lesser-included offense in first degree sexual assault.

SENTENCE IMPOSED

Finally, Brown claims that his 3-year sentence is excessive. Brown was convicted of first degree sexual assault, a Class II felony, see § 28-319(2), which is punishable by imprisonment for not less than 1 year nor more than 50 years. See Neb. Rev. Stat. § 28-105 (Reissue 1985).

> "We have regularly and repeatedly held that a sentence imposed within the statutory limits will not be modified on appeal, absent an abuse of discretion on the part of the trial court. [Citations omitted.] Furthermore, we have repeatedly held that the granting of probation as opposed to imposing of a sentence is a matter which is left to the sound discretion of the trial court, and absent a showing of abuse, this court will not on appeal disturb the trial court's denial of probation."

State v. Clancy, 224 Neb. 492, 502-03, 398 N.W.2d 710, 717-18 (1987). See, also, *State v. Dillon*, 222 Neb. 131, 382 N.W.2d 353 (1986). The sentence imposed upon Brown is not excessive.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN L. PAUL, APPELLANT.
405 N.W.2d 608

Filed May 15, 1987. No. 86-744.

1. **Search Warrants: Affidavits.** In order to authorize the issuance of a search warrant for service during the nighttime under Neb. Rev. Stat. § 29-814.04 (Reissue 1985), the magistrate or judge must only be satisfied from a commonsense reading of the affidavit in support of such issuance that it reasonably supports the inference that the interests of justice are best served by the authorization of such nighttime service.
2. _____: _____. An affidavit in support of the issuance of a search warrant which alleges facts which would lead a reasonable person to believe that a delay in service of the warrant would permit the possible destruction of contraband may be sufficient to authorize immediate nighttime service.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Affirmed.

Leonard P. Vyhnalek, 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 has appealed his convictions in the district court for Dawson County, Nebraska, of possession of a controlled substance with intent to distribute, possession of a controlled substance, and possession of a firearm by a felon.

The defendant has assigned as error the district court's (1) overruling the defendant's motion to suppress evidence, (2) finding that the affidavit in support of the issuance of the search warrant was adequate, (3) finding that the search warrant was valid, and (4) overruling of defendant's motion for a new trial. The only argument made in the defendant's brief, however, is that the court erred in overruling the defendant's motion to suppress because the affidavit in support of the issuance of the search warrant did not present sufficient facts to justify a nighttime search. Accordingly, we will address only that issue. Because we find that the facts in the affidavit in support of the issuance of the search warrant were sufficient to

justify a nighttime search, we affirm the judgment of the district court.

The facts relevant to the issuance of the search warrant are as follows. Just after midnight on December 3, 1985, Investigator Mashek presented an affidavit to Judge Kaufman in order to obtain a search warrant. The affidavit provided in part as follows:

> That [your affiant] has just and reasonable grounds to believe, and does believe, upon information, that there is concealed or kept as hereinafter described, the following property, to-wit: Marijuana and or Drug Paraphenalia [sic], that said property is concealed or kept in, on, or about the following described place or person, to-wit: A two story bluish gray with white trim wood frame house at 312 East Sixth street in Lexington, Dawson County, Nebraska, that said property is under the control or custody of John Paul, that the following are the grounds for issuance of a search warrant for said property and the reasons for his belief, to-wit: your affiant was serving a warrant for Florentino Robles and was advised by Florentino Robles father that Florentino Robles would be at John Paul's residence. Approximately ten minutes later on December 2, 1985 at 2215 your affiant went to 312 East 6th Street in Lexington, Dawson County, Nebraska which was identified by Trooper Parish as the residence of John Paul. Your affiant observed that residence to be a two story bluish gray wood frame house with white trim.
>
> Your affiant went to the north door and knocked. A white male answered the front door and your affiant asked subject if a Florentino Robles was at this residence. The male subject advised that he was not at the house. While talking with the subject, your affiant detected a strong odor of burnt marijuana coming from inside the residence.
>
> WHEREFORE, he prays that a search warrant may issue according to law.

On the actual search warrant itself, after the words "This warrant shall be served:" the words "In the Daytime" were scratched out, and the words "At Any Time" were typed in.

Nothing in the record indicates who did this scratching out and inserting of the time the warrant could be served. The warrant was served at about 2:20 a.m. on December 3, 1985. The evidence seized during this search provided the basis for the defendant's convictions.

The defendant brought a motion to suppress the evidence seized during this search, a hearing was held, and the motion was overruled. The case proceeded to trial, and the court found the defendant guilty on the three charges previously listed.

The defendant's argument on appeal raises a question of first impression in Nebraska, namely, What is required by Neb. Rev. Stat. § 29-814.04 (Reissue 1985) before a search warrant can direct that the search incident thereto be conducted at night? That statute states in pertinent part: "The warrant shall direct that it be served in the daytime unless the magistrate or judge is satisfied that the public interest requires that it should not be so restricted, in which case the warrant may direct that it may be served at any time."

The defendant believes that this statute mandates that the affidavit in support of the search warrant must contain a separate statement of facts showing why the public interest requires that the warrant be served at night in order for the nighttime search to be valid. We do not agree.

The language of the statute is clear. The only requirement which must be satisfied before the magistrate or judge can issue a warrant which can be served any time, day or night, is that he or she be "satisfied that the public interest requires" that it not be restricted to daytime. Nothing in the statute indicates that a separate statement of facts is required. Thus, although a separate statement of facts as to why the warrant should not be restricted to daytime service would perhaps be helpful to the issuing judge or magistrate, it is not necessary to support a finding that its issuance was proper.

However, as stated in *Henry v. State*, 373 A.2d 575, 577 (Del. 1977):

> The elements of the requisite "satisfaction" and the documentation thereof are not announced in the statute but, clearly, something more is required than the Alice-in-Wonderland explanation offered by the State; namely,

> issuance of the warrant shows that the magistrate was satisfied because he would not have issued it if he were not.

Instead, in the affidavit there must be sufficient facts showing that the public interest requires nighttime service. As stated in *People v. Mardian*, 47 Cal. App. 3d 16, 35, 121 Cal. Rptr. 269, 281 (1975): "[I]f the affidavit, read in a common sense manner and as a whole reasonably supports the inference that the interests of justice are best served by the authorization of nighttime service, provision for such service in the warrant is proper."

The defendant next argues that the affidavit, even if read in a commonsense manner, does not contain facts which show how the public interest required that the warrant be served at night. The State, on the other hand, argues that the search warrant contained factual allegations from which the judge could infer that the marijuana would be destroyed if a nighttime search were not authorized. First, the State argues that the fact the investigator smelled the odor of burnt marijuana supported an inference that marijuana was being consumed and thus destroyed. The State also argues that the investigator's presence at the defendant's residence when marijuana was being burned would cause the defendant to remove or destroy the marijuana once the investigator left. Because of the possibility that the contraband could be destroyed, the State concludes that the public interest required the issuance of a nighttime search warrant.

We do not totally agree with either the defendant's or the State's position. The State's argument that the presence of the investigator might cause the defendant to destroy the evidence is simply not supported by the facts as stated in the affidavit. The affidavit did not contain any facts from which the judge could infer that the defendant even knew that the investigator was a law enforcement officer. The affidavit did not state whether the investigator was in uniform, whether he drove a marked police car, whether he identified himself to the defendant, or whether he told the defendant why he was looking for Robles.

Thus, we are left with the question of whether an affidavit

which states that an investigator smelled burnt marijuana emanating from a home at 10:15 p.m. states facts sufficient to justify a nighttime search. We believe that it does.

The odor of burnt marijuana supports the inference that marijuana is being consumed and thus destroyed. It is clearly in the public interest to prevent the destruction of contraband which evidences criminal activity. Had the investigator waited until morning to conduct the search, it was possible that all of the marijuana would have been burned up. Although it was also possible that the marijuana would have been consumed during the time it took the investigator to obtain the warrant, the investigator took the only course available to him—he obtained a warrant for a nighttime search.

We therefore affirm the judgment of the district court.

AFFIRMED.

IN RE INTEREST OF C.R.S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. T.S., APPELLANT.

405 N.W.2d 611

Filed May 15, 1987. No. 86-820.

1. **Constitutional Law: Statutes: Appeal and Error.** One cannot challenge the constitutionality of a statute for the first time on appeal to this court.
2. **Juvenile Courts: Appeal and Error.** On appeal from a juvenile court's determination to assume jurisdiction of a minor pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1986), we will review the findings of the lower court de novo.

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

Walter R. Metz, Jr., of Metz & Metz, for appellant.

Leo P. Dobrovolny, Jr., Deputy Box Butte County Attorney, for appellee.

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

WHITE, J.

This is an appeal from the district court for Box Butte County. T.S. appeals from the district court's affirmation of the county court's decision to assume jurisdiction of her minor son pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1986).

The appellant assigns as error that the district court incorrectly affirmed the county court's adjudication that the child was one defined by the provisions of § 43-247(3)(a), that the district court erred in failing to require the county court to support its findings by clear and convincing evidence, and that the district court erred in failing to find that a finding of dependency and neglect pursuant to § 43-247(3)(a) and Neb. Rev. Stat. § 43-279.01(3) (Cum. Supp. 1986) by a preponderance of the evidence was unconstitutional. Finally, the appellant assigns as error that the district court erred in failing to find that the county court's adjudication was unsupported by a preponderance of the evidence, by clear and convincing evidence, or by any competent evidence. We affirm.

Addressing the appellant's challenge to the constitutionality of §§ 43-247(3)(a) and 43-279.01(3), which permit a finding of dependency and neglect by a preponderance of the evidence as opposed to a higher standard of clear and convincing evidence, we only note that the appellant failed to challenge the constitutionality of these statutes in the lower court proceedings and, hence, cannot do so for the first time on appeal to this court. *State v. Thomas*, 223 Neb. 759, 393 N.W.2d 711 (1986). As each of the appellant's remaining assignments of error deals with the sufficiency of the evidence presented to the county court upon which its finding of dependency and neglect was based, we will address those remaining assignments of error together.

Section 43-247 provides:

> The juvenile court in each county as herein provided shall have jurisdiction of:
>
> . . . .
>
> (3) Any juvenile (a) who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian; who is abandoned by his or her parent, guardian, or custodian; who lacks proper

> parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; whose parent, guardian, or custodian neglects or refuses to provide special care made necessary by the mental condition of the juvenile; or who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile . . . .

The evidence presented to the county court is as follows. The testimony of the Nebraska social services nurse revealed that the child, 2 years of age at the time, was sleeping alone in the room the appellant shared with her son. The bed upon which the child was sleeping was located close to an open and unguarded window looking out over a second story elevation. Clothing was strewn about the room, and stale food was left on top of a dresser and a table in the room. There was also an open bottle of Bufferin on top of the table. On a chair near the bed was a running fan through which, the nurse testified, the boy could have easily inserted his fingers. As to the physical condition of the boy, the nurse testified that the child was weak, pale, and thin. She stated that his eyes were sunken and his ribs were prominent. The nurse testified that while they were removing the child from the room, the appellant returned and stated that she had instructed a neighbor to listen for the child to awaken. The evidence shows that the appellant had left the child alone for approximately 45 minutes to 1 hour.

The notes of the home health nurses kept since the child's birth illustrate a history of poor parenting skills on behalf of the appellant. The notes and records of the Nebraska Department of Social Services also reveal that the child has developed at a rate which has been consistently slow, both physically and mentally. The nurses' notes reveal that the appellant has consistently been unable to provide a safe and secure environment for her son. We do not agree with the contention of the appellant that this was an isolated incident.

Appellant argues that under any standard of proof, clear and convincing evidence, a preponderance of the evidence, or any

competent evidence, the State has not shown that the child comes under the jurisdiction of the court pursuant to § 43-247(3)(a). Under the statutes and case law of this State, § 43-247(3)(a) cases will be judged by a preponderance of evidence standard. § 43-279.01(3); *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986).

In reviewing the evidence de novo as we are required to do, see, *In re Interest of W.C.O.*, 220 Neb. 417, 370 N.W.2d 151 (1985), and *In re Interest of V.T. and L.T.*, 220 Neb. 256, 369 N.W.2d 94 (1985), we hold that the district court correctly affirmed the county court's finding that the minor, C.R.S., came under its jurisdiction, pursuant to § 43-247(3)(a). The evidence we have before us illustrates that the State met its burden of showing by a preponderance of the evidence that the child is one described by the above-noted statute, and the county court properly assumed jurisdiction.

AFFIRMED.

RICHARD L. ANDERSEN, APPELLEE AND CROSS-APPELLANT, V. FLORENCE F. ANDERSEN, APPELLANT AND CROSS-APPELLEE.

405 N.W.2d 613

Filed May 22, 1987. No. 85-533.

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

Thomas C. Emery, for appellant.

Marianne Clare Vainiunas and Gary B. Randall of Marks, Clare, Hopkins, Rauth, Cuddigan, Offner & Watson, for appellee.

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

PER CURIAM.

On January 17, 1985, the district court for Douglas County, Nebraska, entered a decree dissolving the marriage between Richard L. Andersen, appellee, and Florence F. Andersen, appellant. Paragraph 8 of the decree specifically directed that the award of attorney fees and costs was reserved by the court and would be considered at a separate hearing at a later date. On June 11, 1985, the district court for Douglas County, Nebraska, entered its order directing that each party was to pay his or her own attorney fees. The only issue presented to this court on appeal is whether the district court erred in directing each party to pay his or her own attorney fees and in failing to award the appellant an attorney fee for the services of her attorney in the district court. Appellant maintains that the trial court erred in that regard and should have awarded her a substantial attorney fee. We have reviewed the record de novo, as we are required to do in cases of this nature, and have concluded that the trial court was not in error. See *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984). For that reason, the judgment of the district court is affirmed. Each party is to pay his or her own attorney fees in this court.

AFFIRMED.

LINCOLN EAST BANCSHARES, INC., A CORPORATION, APPELLANT, V. J. MICHAEL RIERDEN, TRUSTEE, ET AL., APPELLEES, ROBERT A. WEIGEL ET AL., INTERVENORS-APPELLEES.

406 N.W.2d 337

Filed May 22, 1987. No. 85-629.

1. **Equity: Appeal and Error.** On appeal, the record of an equity action is reviewed de novo, and it is the duty of this court to reach independent conclusions as to the findings required by the pleadings and evidence.
2. _____: _____. In an appeal of an equity case, we give proper consideration to the fact that the trial court inspected the property.
3. **Restrictive Covenants.** A restrictive covenant is to be construed in connection with the surrounding circumstances which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of

land; the purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the property.

4. **Evidence: Appeal and Error.** Generally, the reception of evidence is within the broad discretion of the trial court, and to obtain reversal on the grounds of the exclusion of evidence, a clear abuse of discretion must be shown.
5. **Parol Evidence.** Once an agreement is found to be a complete agreement and is not challenged as ambiguous or as the result of mistake or fraud, the written agreement is the only competent evidence of the agreement between the parties, and any negotiations by the parties prior to the execution are excluded by the parol evidence rule.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

David C. Pierson of Pierson, Ackerman, Fitchett, Akin & Hunzeker, for appellant.

Rodney P. Cathcart of Erickson & Sederstrom, P.C., for appellees.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

The plaintiff commenced this action to enjoin the defendants from constructing a building which the plaintiff alleged would interfere with the flow of traffic between the properties owned by the parties, in violation of a prior agreement. The trial court found generally for the defendants, and the plaintiff has appealed.

The property involved lies along the south side of O Street in Lincoln, Nebraska, between 66th and 70th Streets. The plaintiff, Lincoln East Bancshares, Inc., owns Lot 73 and the east 30 feet of Lot 74, which lie east of 68th Street. The defendant J. Michael Rierden is the trustee of a trust which holds the title to Lot 74, except the east 30 feet thereof, and Lot 75, which lie between 66th Street and 68th Street and are west of and adjacent to the plaintiff's property. The defendant R-D Investment Company is the beneficiary of the trust and lessor of the property, and defendant ShopKo Stores, Inc., is lessee of the property. Both properties are part of a commercially zoned

area which is bounded by O Street on the north side, 70th Street on the east, 66th Street on the west, and a private street, referred to herein as N Street, which abuts the portion of the property owned by the defendants along the south side. The parties' properties are separated by 68th Street, which is a public street for 70 feet south of O and then a private street with a public easement from that point until it ends in a cul-de-sac.

At the time the action was commenced, a retail store building was being constructed on the defendants' property. When the plaintiff became aware of the construction and obtained a copy of the site plan, the petition was filed to enjoin the construction. The plaintiff alleged the building under construction would violate a restrictive covenant in an agreement which the predecessors in title of the parties had entered into in 1970. A hearing on that petition was held August 1, 1984, and the trial court viewed the property on that date. Based on the observation of the property and the language of the agreement, the trial court denied plaintiff's request for a temporary injunction.

Construction on the building continued, and plaintiff filed an amended petition, seeking a permanent injunction to enjoin the defendants from allegedly impeding the flow of traffic on their property, in violation of the 1970 agreement. A hearing on the amended petition was held January 10, 1985. Additional evidence, together with the testimony and evidence heard and received at the first hearing, was received into evidence. The trial court again denied the requested injunction, finding the 1970 agreement was designed to provide access to three specific streets and that the building did not inhibit such traffic.

The plaintiff has set forth six assignments of error. The plaintiff first contends the trial court erred in failing to find the 1970 agreement restricted the use of the defendants' property. That contention is not supported by the record.

A copy of the 1970 agreement was attached to the amended petition, and the agreement was received into evidence. In their answer to the amended petition the defendants recognized the existence of the agreement and alleged they had complied with its terms. At the second hearing the defendants objected to certain testimony by a plaintiff's witness on the grounds the

defendants had pleaded the agreement was valid and had complied with its terms. The court then asked, "The question here is whether there has been a violation of that exhibit?" The plaintiff's attorney replied, "Yes." The court then asked, "And everybody agrees that was in force or effect for whatever purpose?" The plaintiff's attorney again replied, "Yes." No evidence was presented to dispute the existence of the agreement or that it restricted the use of the defendants' property. Instead, the issue was the extent of the restriction. Moreover, the trial court specifically found the defendants' property was bound by the agreement. Therefore, the plaintiff's first assignment of error should be overruled.

The plaintiff next contends the trial court erred in finding the defendants had not breached the agreement. Plaintiff does not contend the agreement is ambiguous, but argues the plain meaning of the language clearly shows the extent of the restriction imposed upon the property. The plaintiff argues the agreement requires that all properties have access to 68th Street, 70th Street, O Street, and 66th Street, as well as easy access to all other property in the area without using the public streets. The defendants, also, do not contend the agreement is ambiguous, but argue that the agreement, when read as a whole, does not restrict the use of their property in the manner described by the plaintiff. The defendants contend the agreement requires only that access to the three named streets be provided.

The agreement contains several provisions which are relevant to this dispute. The purpose clause states:

> WHEREAS, the parties hereto desire to establish a uniform flow of traffic through and upon their commercially zoned respective properties so as to make use of the access to and from the streets abutting said properties, namely 68th Street, "O" Street and 70th Street, through and over the various entrances and exits provided through such streets and along the separate properties of the parties, and so as to establish a mutually advantageous flow of traffic to and from such exits.

Paragraph 1 of the agreement states:

> Each of the parties hereto shall have a right-of-way at all

> times, in common with the owners of the other properties hereinbefore described . . . over the said commercially zoned property so as to permit a free flow of such traffic to and from any and all street exits to and from said respective properties; and the parties will maintain the driveways upon their respective properties in such a manner as to permit such flow of traffic between the several properties. The document hereto attached . . . is intended to show the intention of the parties with reference to such traffic flow; but it is expressly understood and agreed that any buildings shown on said exhibit are by way of illustration only, and that none of the parties are in any manner obligated to construct or develop in accordance with said exhibit, but that rather said exhibit is designed to show the intention of the parties to develop the traffic upon their several properties in such a manner as to permit the traffic to flow between their separate developments without using a public street and without creating traffic hazards.

The second paragraph states:

> The right-of-way referred to in paragraph 1 above shall not be less than thirty (30) feet in width on straight portions thereof . . . . The location of such rights-of-way may be varied by the respective parties from time to time in such manner as each party shall deem most convenient. . . . Neither of the parties shall build or maintain or permit to be built or maintained any structure on a driveway which will interfere with the flow of traffic to and from the premises, except as hereinbefore provided; and in the event any of the parties hereto shall desire to change the traffic pattern . . . such party shall provide adequate substitute means of ingress and egress to and from the property of the other parties, so as to provide a flow of traffic as contemplated by the parties.

The agreement was entered into on August 3, 1970, by Earl R. Taylor and Hazel Petersen as first parties, Robert A. Weigel as second party, and Gateway Medical Village, Inc., as third party. Taylor and Petersen (hereafter Taylor) owned Lots 45 and 51 and part of Lot 46, Weigel owned the remainder of Lot

46, and Gateway owned Lot 50. In the intervening years the property has been subdivided, and the ShopKo store is now situated on a portion of the Taylor property, while the plaintiff's bank building is located on land also formerly owned by Taylor. Exhibit 2, referred to in the agreement as "the attached document," is a rough sketch of a possible plan for development of the area.

Royce Harper, an assistant attorney general for the State of Nebraska, testified that in 1970 the city widened O Street, and portions of properties owned by Taylor and Weigel were condemned. Harper was involved with these condemnation proceedings. At that time the property abutting 68th Street, on both sides, was owned by Taylor. Weigel's property line was located about 56 feet east of 68th Street, which line is now the east line of the Lincoln Bank East property. Harper testified that during the negotiations with Weigel in the condemnation proceedings, it was proposed that Taylor have access to Weigel's property, while the latter have access to 68th Street. Harper testified the state was ultimately a party to an agreement between Taylor and Weigel, wherein the state agreed to pave the easement from the Weigel property to 68th Street as part of its settlement with Weigel. Harper stated the whole agreement was designed to provide access from the Weigel property to 68th Street.

Douglas Brogden, the former director of planning for the city of Lincoln, testified he also had been involved with the acquisition of property due to the widening of O Street in 1970. He testified the problem created was access to the property from O and 70th Streets. Brogden testified the original tracing for exhibit 2 was prepared under his direction, and in designing the sketch he had considered the possible development of buildings on the property, offstreet parking, the relation and design of parking lots to curb cuts, and the relationship of potential future ownership patterns and allowing traffic to "move in a pattern of one ownership to another ownership easily." His purpose in designing the development was to show satisfactory access to O without numerous curb cuts and access across the property without the use of O Street.

Richard Haden, a traffic engineer for the city of Lincoln,

testified that a traffic signal has now been installed at the intersection of 68th and O Streets. He also testified the city has planned to extend the median on 68th Street and prevent left turns from the bank's curb cut north of the bank on 68th Street. Haden testified that 68th Street is a public street for a distance of 70 feet south of O and a public right-of-way or private property with a public access easement from there on (68th Street Place). He testified that N Street is also a private street with a public access easement. He further testified that N Street is about 26 feet wide at its east end and about 32 feet wide at 66th Street. He stated there is approximately 18 feet for public travel on N Street because parking is permitted on one side. On cross-examination he testified that two-way traffic is possible on N Street from 66th to 68th Street, and there is no impediment to traffic traveling from N Street to O Street on 68th Street. He further testified the city had denied a request to install a curb cut on the west side of 68th Street.

Joseph Berchenko, a plan examiner with the codes administration in Lincoln, testified he had reviewed ShopKo's application for a building permit. The department determined the appropriate setback requirements and issued the permit. Berchenko testified there was "a little jog" in the property line where the building abuts the dedicated right-of-way on 68th Street, so the setback was figured from the right-of-way line rather than from the centerline of the street. To determine the setback from 68th Street Place, the witness used the centerline of the street, which was the actual property line. ShopKo had requested the change in procedure, which, Berchenko testified, was a routine kind of request.

James Krieger, executive vice president of Selection Research, Inc. (SRI), testified SRI owns property located on the cul-de-sac of 68th Street Place and the adjoining lot to the east of that street. Krieger testified SRI built the private portion of 68th Street and N Street. The streets were constructed prior to ShopKo's construction and had been financed by SRI and the plaintiff. He further testified the construction of the ShopKo store affected the traffic flow on N Street.

George Hancock, a commercial sales manager and appraiser employed by Austin Realty Company, testified it was his

opinion that the construction of the ShopKo store had reduced the value of the plaintiff's property by $75,000. Hancock based this opinion on the loss of visibility and accessibility caused by the building. On cross-examination he testified the ShopKo building had not affected access from the bank to 68th Street or O Street and that an additional route, from 66th Street via N Street, to 68th Street is now available as well.

James F. Nissen, president of Lincoln East Bancshares, testified the majority of the bank's customers reach the bank by traveling along O Street to 68th Street. Nissen testified that 68th Street is located immediately west of the bank property, and there are two access points from the bank to 68th Street. Customers can approach from the east across the other shopping areas, and there is also access from 70th Street to the bank. Nissen testified the defendants' property is located immediately to the west of the bank between 66th and 68th Streets. Nissen first learned of the potential location of the ShopKo building in June of 1984 and then determined it was contrary to the 1970 agreement. Nissen testified the ShopKo building "makes the bank building invisible until you are very close to the intersection" of O and 68th Streets. It was his opinion this effect would diminish the bank's business and the value of the property. On cross-examination Nissen testified that the ShopKo building did not close off the curb cut north of the bank building used by the bank's customers on 68th Street and that the access from the bank onto 68th Street was not affected by the ShopKo building. Nissen testified that access across ShopKo's property from 66th Street to 68th Street would benefit the bank. He testified that ShopKo customers would have to cross 68th Street to reach the bank property regardless of where the building had been constructed because the bank's property is completely bounded on the west, and ShopKo on the east, by 68th Street. Nissen testified there were no curb cuts on the west side of 68th Street.

Plaintiff contends this evidence clearly shows the agreement requires the free flow of traffic from the defendants' property to all other property in the area. Plaintiff argues that since the location of the easement is not specified, a convenient, reasonable, and accessible way must be provided. Plaintiff

argues the defendants have failed to provide such access and that N Street is an unacceptable substitute because it is not 30 feet wide. The defendants respond that since the agreement specifically requires access to three named streets and the building does not interfere with such access, the agreement has not been violated.

On appeal, the record of an equity action is reviewed de novo, and it is the duty of this court to reach independent conclusions as to the findings required by the pleadings and evidence. Neb. Rev. Stat. § 25-1925 (Reissue 1985).

Further, in an appeal of an equity case, we give proper consideration to the fact that the trial court inspected the property and that its examination constituted evidence bearing upon the weight given to the testimony of the various witnesses. *Newson Constr. Co. v. Calvary Assembly of God Church*, 193 Neb. 556, 227 N.W.2d 886 (1975).

> A restrictive covenant is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the property.

Lund v. Orr, 181 Neb. 361, 363, 148 N.W.2d 309, 310-11 (1967). Restrictions as to the erection or use of buildings or other structures will be so construed, if possible, as to effectuate the intent of the parties. *Hogue v. Dreeszen*, 161 Neb. 268, 73 N.W.2d 159 (1955).

The record shows that the circumstances surrounding the adoption of the restrictive covenant were the widening of O Street and the signators' concern for access to that street and 68th Street. The location of the entire tract of land and its commercial character make access to O Street, 68th Street, and 70th Street vital to its economic survival. The stated purpose of the agreement was to "establish a uniform flow of traffic through and upon their commercially zoned respective properties . . . to make use of the access to and from . . . 68th

Street, "O" Street and 70th Street . . . and so as to establish a mutually advantageous flow of traffic to and from such exits." There is no mention of any street which might subsequently be developed and affect the property nor any mention of cross-access to the entire tract of land in the purpose clause. The covenant was designed to benefit the grantor, the grantee, and subsequent purchasers by providing access to those named streets. There is no evidence of a common building plan for the development of the property.

Exhibit 2, as discussed earlier, was merely a sketch of one possible development of the area. In that sketch the buildings were set back to the southern property lines of all property adjacent to O Street, with parking lanes on the northerly half. Similarly, the buildings were set back to the western boundary of property adjacent to 70th Street, with parking lanes on the easterly half. If the property had been developed according to this plan, it would have been possible to drive the length and width of the entire area without using a public street, by traveling through the parking areas and common driveways.

A plat map in the record shows the property was not developed according to exhibit 2. In particular, the plaintiff's building was not built at the southernmost edge of its property, and there are no parking lanes on the northern portion of its property. Similarly, the buildings on the property adjacent to 70th Street are not located as shown in exhibit 2. As a result, it is not possible to drive directly across the property in the manner originally envisioned. The development of the property has been consistent, however, with the purpose of the 1970 agreement, in that the properties do have access to the three named streets.

The language of the agreement shows that the parties' intention was to provide access to the three named streets from the various properties of the signators. The purpose clause clearly states the agreement was designed to provide such access. Paragraph 1 requires each property owner to provide a right-of-way to permit "a free flow of such traffic to and from any and all street exits." This language, read in the context of the purpose clause, requires the free flow of traffic across the properties to street exits on the three named streets. Paragraph

2 provides that all rights-of-way referred to in paragraph 1 must be 30 feet wide. The agreement as a whole requires only that each property owner provide access across his property to street exits for the three named streets.

The record shows the construction of the ShopKo building has had no effect on the plaintiff's access to the three named streets. The plaintiff's customers have the same access since the construction as they had before. In addition, the bank's customers can utilize N Street to travel from 66th Street to 68th Street. Upon considering the circumstances surrounding the agreement, the intent of the parties, and the language of the agreement, we find the defendants have not violated the 1970 agreement.

Plaintiff's next three assignments of error concern the exclusion of testimony concerning title matters in general, the defendants' attempts to procure title insurance before constructing the building, and the exclusion of testimony by an original signator of the agreement.

At the outset we note that, generally, the reception of evidence is within the broad discretion of the trial court, and to obtain reversal on the grounds of the exclusion of evidence, a clear abuse of discretion must be shown. *Childers v. LCW Apartments*, 214 Neb. 291, 333 N.W.2d 677 (1983).

This principle has been applied to rulings concerning the reception of evidence, the admissibility of which turns on its relevancy; evidence collateral to the main issue, or which bears remotely on issues involved; and to rulings relating to cumulative evidence, opinion evidence, evidence concerning matters of common knowledge, and evidence which is competent yet would tend to excite undue prejudice. *Nusz v. Wells*, 214 Neb. 1, 332 N.W.2d 204 (1983).

The excluded evidence first complained of was testimony concerning the legal effect of the 1970 agreement on the defendants' property. The trial court excluded the testimony on the grounds it invaded the province of the court, called for a legal conclusion, and was not a proper subject of expert testimony. The exclusion of this testimony was not a clear abuse of discretion. This testimony was in the form of opinion evidence, which, as stated above, the trial court has broad

discretion to receive or exclude. Further, the trial court viewed the site and made specific findings regarding the legal effect of the easement. As noted earlier, such examination constituted competent evidence which we will consider in reaching our findings. *Newson Constr. Co. v. Calvary Assembly of God Church*, 193 Neb. 556, 227 N.W.2d 886 (1975). This assignment of error is without merit.

Plaintiff next contends that evidence concerning the defendants' attempts to procure title insurance prior to the construction of the building should have been admitted. This testimony was excluded on the grounds that it was not relevant to the issues before the court. The exclusion of this testimony was within the broad discretion of the trial court. *Nusz v. Wells, supra*. The objection was based on the fact that any contract for title insurance affected only the defendants and the insurer and had no bearing on the plaintiff. In view of the facts of the case, we find the trial court did not abuse its discretion in excluding this testimony.

Plaintiff's final contention is that the trial court erred in excluding the testimony of an original signator of the agreement, Robert A. Weigel. This testimony was excluded on the basis of the parol evidence rule. Defendants contend this issue is not properly before this court because the plaintiff failed to make an offer of proof. Defendants' argument is unpersuasive because the substance of the evidence was apparent from the context.

Neb. Rev. Stat. § 27-103(1) (Reissue 1985) provides that

> [e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . (b) . . . the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

See, also, *Birkel v. Hassebrook Farm Serv.*, 219 Neb. 286, 363 N.W.2d 148 (1985).

Once an agreement is found to be a complete agreement and is not challenged as ambiguous or as the result of mistake or fraud, the written agreement is the only competent evidence of the agreement between the parties, and any negotiations by the parties prior to the execution are excluded by the parol evidence

rule. See, *Erickson v. Newell*, 183 Neb. 641, 163 N.W.2d 286 (1968); *Preferred Pictures Corp. v. Thompson*, 170 Neb. 694, 104 N.W.2d 57 (1960). Since the agreement appears to be a fully integrated agreement and there is no contention of ambiguity, fraud, or mistake, the trial court properly excluded the testimony.

The judgment of the district court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., not participating.

IN RE INTEREST OF S.H., L.H., AND A.H., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. D.L.H., APPELLANT.
406 N.W.2d 112

Filed May 22, 1987. No. 86-720.

1. **Parental Rights.** Parental rights may be terminated when such action is in the best interests of a child because the parent has substantially and continuously or repeatedly neglected the child and has refused to give the child necessary parental care and protection.
2. **Motions for New Trial.** Evidence of facts occurring after a trial ordinarily cannot be made the basis for a motion for new trial on the grounds of newly discovered evidence.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

Donald E. Earnshaw, for appellant.

Ronald L. Staskiewicz, Douglas County Attorney, and Elizabeth G. Crnkovich, for appellee.

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

CAPORALE, J.

The appellant mother challenges the judgment of the separate juvenile court terminating her parental rights in and to the subject three children, S.H., aged 12 years, L.H., aged 11

years, and A.H., aged 4 years. Her single assignment of error raises two issues: (1) whether the evidence is sufficient to support the juvenile court's judgment and (2) whether she should have been granted a new trial because of newly discovered evidence. We affirm.

The record establishes the mother is 27 years old and has a "[m]ixed personality disorder" with "antisocial passive/aggressive, inadequate traits." Although she began a number of dependency treatment programs during the 4 years this matter pended in the juvenile court before the termination hearing, she did not stay with any one program long enough to have overcome her alcohol and drug dependencies. Throughout this period of time, she has demonstrated an overall inability to manage funds provided her and to properly shelter, feed, clothe, or supervise her children. She has also demonstrated a lack of the discipline required to participate in a sustained program designed to teach her the required parenting skills.

Neb. Rev. Stat. § 43-292(2) (Reissue 1984) provides that parental rights may be terminated when such action is in the best interests of a child because the parent has substantially and continuously or repeatedly neglected the child and has refused to give the child necessary parental care and protection. The record clearly and convincingly demonstrates the existence of the foregoing ground for termination of the mother's parental rights in the subject children and that the best interests of the children require such action; the children cannot be allowed to remain in limbo forever. *In re Interest of Levey*, 211 Neb. 66, 317 N.W.2d 760 (1982).

The mother's contention that she should have been granted a new trial because there was newly discovered evidence is equally without merit. She bases her contention on the claims that at the time of the trial on the State's motion for termination, it was too early to determine whether the alcohol dependency treatment program in which she was then involved would be successful, and that she has been making progress since the termination trial. The short but dispositive answer to this contention is that evidence of facts occurring after a trial ordinarily cannot be made the basis for a motion for new trial on the grounds of newly discovered evidence. *State ex rel. Douglas v. Bible*

Baptist Church, 218 Neb. 307, 353 N.W.2d 20 (1984); *Martinez v. Peterson*, 212 Neb. 168, 322 N.W.2d 386 (1982).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY A. VRTISKA, APPELLANT.
406 N.W.2d 114

Filed May 22, 1987. No. 86-752.

1. **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.
2. **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. 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.
3. **Search and Seizure: Search Warrants.** Generally, seizure of property is permissible under a validly authorized search warrant, under exigent circumstances, or under some other recognized exception to the warrant requirement.
4. **Search and Seizure: Search Warrants: Presumptions.** A search pursuant to a warrant is presumed to be valid.
5. **Search and Seizure: Search Warrants: Motions to Suppress: Proof.** A defendant who seeks to suppress evidence obtained under a legally issued search warrant has the burden of establishing that the search was improper and that the evidence secured thereby should be suppressed.
6. _____: _____: _____: _____. If police have acted pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable; but, if police acted without a search warrant, the State has the burden of proof that the search was conducted under circumstances substantiating the reasonableness of such search or seizure.
7. **Constitutional Law: Search and Seizure: Motions to Suppress: Proof.** Regarding a motion to suppress, the initial burden of proof (burden of going forward) is on the movant to establish a prima facie case of an unconstitutional search and seizure, and when such prima facie case has been established, the burden of proof (burden of going forward) shifts to the State to establish that the search and seizure were constitutionally permissible.
8. **Constitutional Law: Search and Seizure.** Entry through a window of a dwelling

is an intrusion subject to the safeguard of the fourth amendment to the U.S. Constitution.

9. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure: Search Warrants.** A nonconsensual and unannounced entry by a police officer for execution of a search warrant within an unoccupied dwelling is not, by itself and necessarily, an unreasonable intrusion prohibited by the fourth amendment to the U.S. Constitution.
10. _____: _____: _____: _____. A search of premises must be directed in good faith toward the object specified in a search warrant or for other means and instrumentalities by which a crime charged has been committed. Such search must not be a general exploratory search through which officers merely hope to discover evidence of wrongdoing.
11. _____: _____: _____: _____. When officers, in the course of a bona fide effort to execute a valid search warrant, discover articles which, although not included in the warrant, are reasonably identifiable as contraband, the officers may seize such articles whether those items are initially in plain sight or come into plain sight subsequently as a result of the officers' efforts.
12. **Criminal Law: Joinder: Trial.** If the offenses charged are of the same or similar character, or are based on the same act or transaction, the offenses may be joined in one trial pursuant to Neb. Rev. Stat. § 29-2002(3) (Reissue 1985).
13. **Criminal Law: Joinder: Trial: Appeal and Error.** A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed in the absence of an abuse of discretion.
14. **Trial: Appeal and Error.** A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or rulings of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through a judicial system.

Appeal from the District Court for Pawnee County: ROBERT T. FINN, Judge. Affirmed.

James R. Mowbray of Mowbray, Chapin & Walker, P.C., for appellant.

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

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

SHANAHAN, J.

Gary A. Vrtiska appeals his conviction in a jury trial for possession of a short shotgun in violation of Neb. Rev. Stat. § 28-1203(1) (Reissue 1985). We affirm.

THE WARRANT AND SEARCH

The application and affidavit for the search warrant for Vrtiska's residence, as well as the search warrant itself, was introduced as evidence at the hearing on Vrtiska's motion to suppress evidence. According to those documents, law enforcement personnel had reliable information that Vrtiska was growing marijuana in the basement of his dwelling, where Vrtiska also had a stolen machine gun. The county court issued a warrant to search Vrtiska's residence and seize "Growing Marijuana Plants and a fully automatic machine gun described as a 'Thompson' machine gun," if found on the premises searched.

Pursuant to the search warrant, the sheriff, two deputy sheriffs, and two investigators from the Nebraska State Patrol went to Vrtiska's residence. The sheriff, who was the first to arrive, had the search warrant, found the front door locked, and entered the house through a dining room window. Nothing discloses whether the window was open or entry was gained by application of force to the window. The sheriff then unlocked the house's front door, through which the other officers entered the dwelling.

After entering, the officers first confirmed their belief that the premises were unoccupied and then commenced a search for marijuana plants in the basement, where officers found a marijuana plant "stem that looked like it had been chopped off." Although there were no plants growing in the basement, the officers found a fan, electric lights, loose dirt, a watering apparatus, aluminum foil, and a thermometer, which were items used in a "marijuana-cultivating operation." Officers photographed the area for marijuana production in the basement and returned upstairs to continue their search for the machine gun mentioned in the search warrant. In the course of the upstairs search, the officers came across some "explosive material," a plastic pipe with a fuse in it, and continued their search for the machine gun.

During their search, and at various times in different parts of the house, the officers found the machine gun, which consisted of three components—a barrel and receiver group, a loaded drum-magazine, and a butt stock.

On top of a buffet in the dining room, the officers found the loaded magazine for the machine gun. Believing that the other parts for the weapon were in the vicinity, the officers continued their search. Beneath a television set in the living room, one officer found the barrel and receiver group for the machine gun. The sheriff, still searching in the dining room, opened a door in the buffet and discovered a sawed-off shotgun, which had an 11 1/4-inch barrel. Later, officers found the butt stock near a footlocker in the living room.

The State filed three complaints against Vrtiska. The first complaint charged Vrtiska with possession of a short shotgun, which is defined in Neb. Rev. Stat. § 28-1201(6) (Reissue 1985) as "a shotgun having a barrel or barrels less than eighteen inches long or an overall length of less than twenty-six inches." The second complaint charged Vrtiska with possession of explosive materials in violation of Neb. Rev. Stat. § 28-1215 (Reissue 1985), while the third charged that Vrtiska had received stolen property in violation of Neb. Rev. Stat. § 28-517 (Reissue 1985). After a preliminary hearing, Vrtiska was bound over to district court on all three charges filed in separate informations, to which Vrtiska entered his not guilty plea.

MOTION TO SUPPRESS

In district court, Vrtiska, as authorized by Neb. Rev. Stat. § 29-822 (Reissue 1985), filed a motion to suppress all physical evidence obtained under the search warrant for his residence and alleged that such search violated his rights "under the applicable provisions of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution." At the hearing on Vrtiska's motion to suppress, evidence was adduced, as previously set forth in this opinion. The court overruled Vrtiska's motion.

CONSOLIDATION OF TRIALS

At the State's request and pursuant to Neb. Rev. Stat. § 29-2002(3) (Reissue 1985), the court ordered that the three informations against Vrtiska be tried together. After the State rested its case, Vrtiska asked for dismissal of each information, contending that the State had failed to prove a prima facie case for the three charges. The court dismissed the informations

which charged Vrtiska with receiving stolen property and possessing explosive materials, but overruled Vrtiska's motion concerning the charge of possessing a short shotgun. After the jury found Vrtiska guilty of possessing a short shotgun, the court sentenced Vrtiska to imprisonment for a term of 3 years.

ASSIGNMENTS OF ERROR

Vrtiska contends that the district court erred in failing to suppress evidence obtained at Vrtiska's residence and in consolidating the trials on the three informations.

SUPPRESSION OF EVIDENCE

Vrtiska argues that the search of his residence violated statutory and constitutional safeguards concerning search of a dwelling.

Vrtiska refers to the "notice" requirement contained in Neb. Rev. Stat. § 29-411 (Reissue 1985) pertaining to execution of a search warrant, which statute in part provides:

> In executing a warrant for the arrest of a person charged with an offense, or a search warrant, or when authorized to make an arrest for a felony without a warrant, the officer may break open any outer or inner door or window of a dwelling house or other building, if, after notice of his office and purpose, he is refused admittance; or without giving notice of his authority and purpose, if the judge or magistrate issuing a search warrant has inserted a direction therein that the officer executing it shall not be required to give such notice . . . .

In this case, the warrant did not contain a direction that notice was not required.

Section 29-822, the statute authorizing a motion to suppress evidence, in part provides: "Any person aggrieved by an unlawful search and seizure may move for return of the property so seized and to suppress its use as evidence."

There is no evidence that the officers knocked and announced their authority and purpose before entry into the house, and, Vrtiska argues, such noncompliance with § 29-411 negates valid execution of the search warrant, requiring suppression of evidence obtained at Vrtiska's residence.

As we recently noted in *State v. Lafler, ante* p. 362, 405 N.W.2d 576 (1987), the constitutional right to a speedy trial,

guaranteed by Neb. Const. art. I, § 11, and U.S. Const. amends. VI and XIV, is distinct from the provision for a speedy trial prescribed by the Nebraska speedy trial act, Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985). As pointed out in *Lafler*, protection in the form of a statutory right may not necessarily be coextensive with the protection afforded under a constitution, state or federal, notwithstanding that such statutory and constitutional provisions may, generally, relate to the same subject.

Vrtiska's motion to suppress did not claim any relief (suppression) based on § 29-411 and raised no question in the trial court concerning the statutory notice requirement in conjunction with execution of a search warrant. As we stated in *Holden v. Urban*, 224 Neb. 472, 474, 398 N.W.2d 699, 701 (1987):

> 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. *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985).

Consequently, because Vrtiska's motion to suppress did not refer to § 29-411, we do not consider any statutory aspect of § 29-411 applied to the present case. We do, however, consider Vrtiska's claim that the questioned evidence was the result of an unreasonable search of his dwelling, contrary to the safeguards of the fourth amendment to the U.S. Constitution and, therefore, inadmissible.

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

(Citations omitted.) *State v. Copple*, 224 Neb. 672, 689-90, 401 N.W.2d 141, 154 (1987). See, also, *State v. Dixon*, 222 Neb.

787, 387 N.W.2d 682 (1986).

Vrtiska does not challenge the validity of the search warrant. Rather, Vrtiska argues that the search and seizure of evidence under the warrant was unreasonable and, therefore, a violation of the fourth amendment to the U.S. Constitution. "[A]s a general rule, searches and seizures inside a home without a warrant are presumptively unreasonable and in violation of an individual's rights guaranteed under the fourth amendment to the U.S. Constitution." *State v. Hinchey*, 220 Neb. 825, 828, 374 N.W.2d 14, 17 (1985). See, also, *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Generally, seizure of property is permissible under a validly authorized search warrant, under exigent circumstances, or under some other recognized exception to the warrant requirement. *State v. Holman*, 221 Neb. 730, 380 N.W.2d 304 (1986). See, also, *State v. Skolnik*, 218 Neb. 667, 358 N.W.2d 497 (1984). We stated in *State v. Bartlett*, 199 Neb. 471, 474, 259 N.W.2d 917, 920 (1977), that "[a] search pursuant to a warrant is presumed to be valid." See, also, *State v. Ware*, 219 Neb. 594, 365 N.W.2d 418 (1985); *State v. Slaughter*, 252 Ga. 435, 315 S.E.2d 865 (1984).

BURDEN OF PROOF

In *State v. Hogan*, 194 Neb. 207, 211-12, 231 N.W.2d 135, 139 (1975), we stated: "[A] defendant who seeks to suppress evidence obtained under a legally issued search warrant has the burden of establishing that the search was improper, and that the evidence secured thereby should be suppressed." See, also, *State v. Sims*, 216 Neb. 569, 344 N.W.2d 645 (1984); *State v. Whitmore, White, and Henderson*, 215 Neb. 560, 340 N.W.2d 134 (1983).

> [I]t is first necessary to recall that the term "burden of proof" actually encompasses two separate burdens. One burden is that of producing evidence, sometimes called the "burden of evidence" or the "burden of going forward." If the party who has the burden of producing evidence does not meet that burden, the consequence is an adverse ruling on the matter at issue. The other burden is the burden of persuasion, which becomes crucial only if the parties have sustained their respective burdens of producing evidence and only when all the evidence has

been introduced.

4 W. LaFave, Search and Seizure § 11.2(b) at 217 (2d ed. 1987).

Regarding a motion to suppress, the initial burden of proof (burden of going forward) is on the movant to establish a prima facie case of an unconstitutional search and seizure, and when such prima facie case has been established, the burden of proof (burden of going forward) shifts to the State to establish that the search and seizure were constitutionally permissible. See, *United States v. Murrie*, 534 F.2d 695 (6th Cir. 1976); *United States v. Wright*, 468 F.2d 1184 (6th Cir. 1972); *Hogan v. State of Nebraska*, 402 F. Supp. 812 (D.C. Neb. 1975); *United States v. McDonnell*, 315 F. Supp. 152 (D.C. Neb. 1970); *People v. Hattery*, 109 Ill. 2d 449, 488 N.E.2d 513 (1985); *State v. Hamilton*, 335 N.W.2d 154 (Iowa 1983); *Malcolm v. United States*, 332 A.2d 917 (D.C. 1975).

Thus, the burden of proof depends on the basis for the search, that is, whether the search was conducted pursuant to a warrant or without a warrant. If police have acted pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable; but if police acted without a search warrant, the State has the burden of proof that the search was conducted under circumstances substantiating the reasonableness of such search or seizure. See, *United States v. Longmire*, 761 F.2d 411 (7th Cir. 1985); 4 W. LaFave, *supra*. Because validity or legality of the warrant in this case is undisputed, Vrtiska had the burden to establish that the search of his dwelling was invalid or illegal, namely, unreasonable and, therefore, contrary to the safeguard of the fourth amendment to the U.S. Constitution.

WHETHER THE SEARCH WAS UNREASONABLE

Whether the window of Vrtiska's dwelling was open or the sheriff applied force to gain entry through that window, there was an intrusion into Vrtiska's dwelling, an entry which is subject to the safeguard of the fourth amendment to the U.S. Constitution. Entry through a window is a rather uncommon or unusual entry into a dwelling. Cf. *Sabbath v. United States*, 391 U.S. 585, 88 S. Ct. 1755, 20 L. Ed. 2d 828 (1968), where the U.S. Supreme Court, construing 18 U.S.C. § 3109 (1964) (federal counterpart of § 29-411), held that a nonconsensual

intrusion includes entry by a passkey, forcing open a chain lock on a partially open door, opening a locked door, or opening a closed but unlocked door. Nevertheless, in Vrtiska's case the question to be resolved is whether entry by officers and consequent search of the dwelling are unreasonable under the fourth amendment to the U.S. Constitution.

A question involving a "no knock," or unannounced, entry into a dwelling was presented to the U.S. Supreme Court in *Ker v. California*, 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963). In *Ker*, California police officers, without a warrant, came to Ker's apartment. Believing Ker was inside his apartment and about to destroy contraband, officers obtained a passkey, and, without announcing themselves or their purpose, entered the apartment, arrested Ker, and later discovered marijuana on the premises. California had a statute permitting an entry by officers "after having demanded admittance and explained the purpose for which admittance is desired." 374 U.S. at 37 n.8. In *Ker*, the plurality of the Court noted that California law, which determined legality of Ker's arrest, allowed unannounced forcible intrusions in exigent circumstances, and then concluded:

> Here justification for the officers' failure to give notice is uniquely present. In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police. We therefore hold that in the particular circumstances of this case the officers' method of entry, sanctioned by the law of California, was not unreasonable under the standards of the Fourth Amendment as applied to the States through the Fourteenth Amendment.

374 U.S. at 40-41.

The dissent in *Ker* took the position that an unannounced intrusion into a dwelling may violate the fourth amendment to the U.S. Constitution, and, under the circumstances present in *Ker*: "The protections of individual freedom carried into the Fourth Amendment . . . undoubtedly included this firmly established requirement of an announcement by police officers

of purpose and authority before breaking into an individual's home." *Id.* at 49.

Later, in *Sabbath v. United States, supra*, the U.S. Supreme Court, referring to the dissent in *Ker, supra*, stated: "Exceptions to any possible constitutional rule relating to announcement and entry have been recognized [in] *Ker v. California* . . . ." 391 U.S. at 591 n.8.

As we view *Ker v. California, supra*, the U.S. Supreme Court did not rule that the fourth amendment requires that police officers knock, announce their purpose, and be refused admittance before making a nonconsensual entry into a dwelling to execute a warrant. That constitutional question is still undecided, at least as indicated by *Sabbath v. United States, supra*, where the Court acknowledged exceptions to "any possible constitutional rule." 391 U.S. at 591 n.8. See 2 W. LaFave, Search and Seizure § 4.8(a) (2d ed. 1987).

Some jurisdictions have interpreted *Ker v. California, supra*, to require that officers announce themselves to an occupant of the premises and state the purpose for entry in order that a nonconsensual entry into a dwelling may be reasonable under the fourth amendment. See, *United States v. Francis*, 646 F.2d 251 (6th Cir. 1981); *State v. Valentine/Darroch*, 264 Or. 54, 504 P.2d 84 (1972). Still other jurisdictions have determined that an officer's nonconsensual entry into unoccupied premises, including a dwelling, to execute a search warrant does not violate the fourth amendment to the U.S. Constitution. *United States v. Agrusa*, 541 F.2d 690 (8th Cir. 1976); *Payne v. United States*, 508 F.2d 1391 (5th Cir. 1975); *United States v. Gervato*, 474 F.2d 40 (3d Cir. 1973).

Perhaps the U.S. Supreme Court will consider whether the fourth amendment includes a "notice" requirement, that is, announcement of office and purpose before police enter a dwelling for execution of a warrant and determine whether notice is constitutionally worthwhile to decrease potential violence associated with such entry; protect privacy associated with the premises or its occupant(s); and prevent destruction of property. See 2 W. LaFave, *supra*. As observed by Justice Brennan, dissenting in *Ker v. California*, 374 U.S. 23, 57, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963), a constitutional requirement

of announcement is justified under the fourth amendment to the U.S. Constitution in order to avoid mistaken identity by police officers executing a warrant, inflicting trauma on anyone within a dwelling ("shock, fright or embarrassment attendant upon an unannounced police intrusion"), and minimization of hazards to police in their dangerous calling of executing a warrant.

Under the circumstances, we believe, and, therefore, hold, that a nonconsensual and unannounced entry by a police officer for execution of a search warrant within an unoccupied dwelling is not, by itself and necessarily, an unreasonable intrusion prohibited by the fourth amendment to the U.S. Constitution. Therefore, the entry and consequent search of Vrtiska's residence was not unreasonable.

CLAIM OF GENERAL EXPLORATORY SEARCH

As a part of his claim that the search was unreasonable, Vrtiska contends the officers conducted a general search of his dwelling.

In *State v. Traxler*, 210 Neb. 435, 438, 315 N.W.2d 440, 441 (1982), we stated: "A general search for evidence of any crime is prohibited by the fourth amendment to the U.S. Constitution and article I, § 7, of the Constitution of Nebraska, both of which provide that probable cause be shown before the search may occur." As stated in *State v. Waits*, 185 Neb. 780, 786-87, 178 N.W.2d 774, 779 (1970):

> "The search much [sic] be one directed in good faith toward the objects specified in the warrant or for other means and instrumentalities by which the crime charged had been committed. It must not be a general exploratory search through which the officers merely hope to discover evidence of wrongdoing."

See, also, *State v. Traxler, supra*. However, when officers, in the course of a bona fide effort to execute a valid search warrant, discover articles which, although not included in the warrant, are reasonably identifiable as contraband, the officers may seize such articles whether those items are initially in plain sight or come into plain sight subsequently as a result of the officers' efforts. See *State v. Traxler, supra*.

The sequence of events, according to evidence from the

officers, included discovery of the contraband shotgun during the course of a search authorized by a warrant. Such contraband was discovered while officers were acting within the scope of their authority under the search warrant and was not discovered after cessation of authority by completion of the search authorized.

Vrtiska has failed to meet the burden of proof to establish that the search and seizure on his premises were unreasonable and, therefore, unconstitutional, in violation of Vrtiska's rights under the fourth amendment to the U.S. Constitution. The district court had a factual basis to conclude that the entry and search of Vrtiska's dwelling were reasonable. The findings by the district court are not clearly erroneous and are affirmed.

CONSOLIDATION OF TRIALS

Section 29-2002(3) states in part: "The court may order two or more indictments, informations, or complaints, or any combination thereof, to be tried together if the offense . . . could have been joined in a single indictment, information or complaint." If the offenses charged are of the same or similar character, or are based on the same act or transaction, the offenses may be joined in one trial. See, *State v. McGuire*, 218 Neb. 511, 357 N.W.2d 192 (1984); *State v. Cole*, 218 Neb. 1, 352 N.W.2d 154 (1984); *State v. Rodgers*, 186 Neb. 633, 185 N.W.2d 448 (1971). A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed in the absence of an abuse of discretion. See *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980). See, also, *State v. McGuire, supra; State v. Shiller*, 191 Neb. 291, 214 N.W.2d 616 (1974).

> "A judicial abuse of discretion does not denote or imply improper motive, bad faith, or intentional wrong by a judge, but requires the reasons or rulings of a trial judge to be clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition through a judicial system."

(Citation omitted.) *Newton v. Brown*, 222 Neb. 605, 617-18, 386 N.W.2d 424, 432 (1986).

Vrtiska neither points out an abuse of discretion by the trial court nor shows any prejudice resulting from consolidation of

trials on the three informations against him. Also, on review of the record, we find no "miscarriage of justice" from any alleged error in consolidating the trials. See Neb. Rev. Stat. § 29-2308 (Reissue 1985). Vrtiska's allegation of error in consolidating his trials is without merit.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, v. THOMAS A. WILSON, APPELLANT.

406 N.W.2d 123

Filed May 22, 1987. No. 86-777.

1. **Rules of Evidence: Other Acts.** Neb. Rev. Stat. § 27-404(2) (Reissue 1985) is an inclusionary rule which permits the use of evidence of relevant 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.
2. _____: _____. Although 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 be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
3. **Rules of Evidence: Trial.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
4. **Evidence: Trial: Appeal and Error.** Generally, it is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion.
5. **Trial: Rules of Evidence: Hearsay: Words and Phrases.** Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. Neb. Rev. Stat. § 27-801(3) (Reissue 1985).

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

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

Robert M. Spire, Attorney General, and Marie C. Pawol, for appellee.

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

BOSLAUGH, J.

The defendant, Thomas A. Wilson, was charged with first degree murder in the shooting death of his son, Robert Paul Wilson, and with use of a firearm in the commission of a felony. He was found guilty of second degree murder and sentenced to imprisonment for 35 years on count I and 6 to 20 years on count II, the sentences to run consecutively. He has appealed and contends the trial court erred (1) in allowing the testimony of Christine Wilson and Joseph Lang, Sr., regarding their knowledge of a Florida robbery; (2) in receiving exhibits 1 through 4; and (3) in receiving exhibit 37 into evidence.

The victim, who was known as Bobby Wilson, died from a single gunshot wound to his chest inflicted while visiting the defendant's Omaha, Nebraska, home on August 31, 1983. The only surviving witnesses to the incident, the defendant and Christine Wilson, the defendant's wife at the time of the shooting, originally reported that Bobby had shot himself following an argument with the defendant. Similar stories were reported in taped statements by the Wilsons the day after the shooting. Following these statements, the police closed the case as a suicide.

In September of 1985, Christine Wilson came forward with a different version of the shooting. According to Christine's testimony at trial, she and the defendant were in bed on August 31, 1983, when Bobby Wilson knocked on the front door. The defendant answered the door and after 5 to 10 minutes, the two men began to argue. The defendant yelled at Bobby, "[H]ow could you do that" and "there were other people that had to be paid and it wasn't right." Bobby responded that "Tommy was too old, he couldn't handle it any more, he couldn't do the job any more."

When Christine walked through the dining room on the way to the bathroom, she saw the two men near the front door in the living room. They stopped arguing as she passed by. After she

had returned to the bedroom, Christine heard the two men begin to argue again. Bobby became very angry and stated that he was leaving. Christine heard the front door open and then the defendant, in a conciliatory tone of voice, asked Bobby to stay. Bobby said okay and the door was closed. Then Bobby screamed, "[D]ad, no," and there was a shot fired. Christine ran to the dining room and saw Bobby on his knees leaning against the wall by the front door. Bobby was pleading with his father, who was holding a gun 5 inches from Bobby's head, not to kill him.

Christine began screaming at the defendant not to shoot. The defendant backed away from Bobby, who then began to plead for an ambulance. Christine started toward the telephone, but was ordered to stop by the defendant. The defendant then offered to call an ambulance if Bobby promised to say he had shot himself. Bobby agreed, and an ambulance was summoned. Christine was instructed to say that Bobby had shot himself. By the time the rescue team arrived, Bobby's state of consciousness was confused. Upon his arrival at the hospital emergency room, Bobby stated that he did not wish to die. Rescue efforts were unsuccessful, and Bobby died at 8:54 that evening. Christine testified that on the following day the defendant demonstrated how he had shot Bobby.

Apparently, the argument leading to Bobby's death stemmed from the robbery of a drug dealer in Florida during the summer of 1983, in which the defendant, the victim, and Joseph Lang, Sr., were involved. Lang and the defendant flew to Miami, Florida, that summer, where they met Bobby. According to Christine, the defendant had been hired to rob a drug dealer there. About a week after arriving in Florida, the defendant returned to Omaha alone, stating to Christine that he had come home to rest, but was planning to return to commit the robbery.

Lang and Bobby remained in Florida another 2 or 3 weeks before Bobby individually obtained the sought-after money. After the two men returned to Omaha, Bobby gave Lang $6,000 for himself and an envelope for the defendant. Bobby then left town. Lang delivered the envelope to the defendant the next day. The defendant became angry when he received the envelope because it contained only $6,000. According to

Christine, the defendant could not understand how Bobby could "do that to him" when it was his (the defendant's) "deal." Less than a month prior to the shooting, the defendant went to New Hampshire to see Bobby and to "get something resolved or taken care of." While there, the two men physically fought over the share of money the defendant received.

Christine's testimony indicates that her marriage to the defendant began to deteriorate after Bobby's death. By June of 1985, she determined that she must leave the defendant because of the shooting.

After her separation from the defendant, he began to harass and threaten Christine and her family. On one occasion, the defendant came at Christine with a gun, but she was able to defend herself. Following an incident on July 4, 1985, Christine filed for divorce. Three to four weeks after the filing, Christine began seeing the defendant twice weekly for "sexual relations." Christine testified that she was forced to make those visits because of the defendant's death threats against her family and herself. Christine also testified that on several occasions after Bobby's death, the defendant threatened her with statements to the effect that she had better not push him (the defendant) because Bobby had done so and she saw what happened to him. Christine also said the defendant told her that "rats" or "snitches" always die and that she could not testify against him because she was his wife.

Finally, after a threat by the defendant against her father's life, Christine Wilson sought out FBI agent Tom Murphy, to whom she told her story. Eventually she talked with the Omaha police. After making her own taped statement, Christine was asked to have a recording device placed in her purse to record conversations between herself and the defendant.

Christine agreed to carry such a device on December 17, 1985, but the defendant was unusually quiet that day and, according to Christine, hardly talked at all. She agreed to return to the defendant's home on January 2, 1986, with another listening device in her purse. On this occasion the conversation was monitored and recorded by an Omaha police officer in a nearby unmarked car. Four cassette tapes were used to record the conversation. In this conversation the defendant alluded to

Bobby's death as Christine said that he frequently had. The defendant was arrested 1 week later on January 9, 1986, and subsequently charged with first degree murder and the use of a firearm to commit a felony.

Trial to a jury began July 8, 1986. At trial, defense counsel objected unsuccessfully to the testimony of Christine Wilson and Joseph Lang, Sr., regarding their knowledge of the Florida robbery, on grounds of relevance and that it related to other crimes, wrongs, or acts.

Defense counsel also objected unsuccessfully to the admission of two portions of exhibits 1 through 4, the tape-recorded conversations between Christine Wilson and the defendant on January 2, 1986. This objection was that the two portions in question related to other crimes, wrongs, or acts and were therefore inadmissible.

Additionally, exhibit 37, photocopies of nine records of complaints received by the Bellevue, Nebraska, police department are said to have been received over the objection of defense counsel. These records indicate complaints were received from Christine Wilson's parents' home between July 4 and 8, 1985. The record of each complaint includes a remarks section which reflects the statements which were made by the complaining party when the call was made.

As to the first assignment of error, the defendant concedes that the testimony regarding the Florida robbery was relevant under Neb. Rev. Stat. § 27-404(2) (Reissue 1985), to show the motive to commit the crimes alleged. Clearly, that was the State's purpose in offering the testimony.

Section 27-404(2) provides:

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

Nevertheless, the defendant contends that Neb. Rev. Stat. § 27-403 (Reissue 1985) required exclusion of the testimony because its probative value was outweighed by the danger of unfair prejudice. Specifically, the defendant claims that the

evidence was unfairly prejudicial because it showed the defendant was involved in drugs and a robbery.

Section 27-404(2) is subject to the overriding protections of § 27-403. *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987). The latter section provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the *danger of unfair prejudice*, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (Emphasis supplied.) § 27-403.

It is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion. *State v. Clancy, supra*.

As noted in *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984), most evidence offered by one party to an action is intended to be prejudicial to the opposing party; it is only unfair prejudice with which § 27-403 is concerned. According to *Lincoln Grain, supra* at 439, 345 N.W.2d at 306, "In the context of § 27-403 such prejudice means a tendency to suggest a decision on an improper basis."

Probative value, on the other hand, "is a relative concept and involves a measurement of the degree to which the evidence persuades the trier of fact that a particular fact exists and the distance of that particular fact from the ultimate issue in the case." *State v. Clancy, supra* at 498, 398 N.W.2d at 715.

The ultimate issue in this case was the defendant's guilt or innocence of the crimes charged. Proof of motive was critical to the State's case under the circumstances of the shooting. Christine Wilson and the defendant had both originally reported that Bobby's gunshot wound was self-inflicted. There was evidence presented by the defendant to the effect that Bobby and the defendant were close to each other and were thought to have a good relationship prior to the shooting. A neighbor testified that Bobby was the black sheep of the family, who the defendant was always trying to help. There was also testimony, by Bobby's widow on cross-examination, that the defendant was a "soft touch" with money for his grandchildren as well as for Bobby.

Motive is defined as that "which leads or tempts the mind to

indulge in a criminal act." *State v. Coca*, 216 Neb. 76, 82, 341 N.W.2d 606, 610 (1983). Absent evidence of the circumstances leading to the dispute between the victim and the defendant regarding the money obtained in the Florida robbery, there would have been no apparent motive for the defendant to have shot his son.

Further, the testimony relating to the Florida robbery tended to suggest that it was the victim who actually committed the robbery, and not the defendant. In fact, the defendant had departed from Florida at the time of the alleged robbery and mentioned no plans to Lang about returning. Thus, the evidence suggested limited involvement by the defendant and did not warrant a conclusion by the trial court that the jury would improperly base its decision on that involvement in reaching its verdict. The trial court did not abuse its discretion in receiving the testimony. The probative value of the testimony outweighed the danger of unfair prejudice.

Next, the defendant complains that two portions of exhibits 1 through 4, the tape recordings of the January 2, 1986, conversation between the defendant and Christine Wilson, should have been excluded under § 27-404(2).

The prosecution originally offered exhibit 5, a copy of portions of the original tape recording of the January 2 conversation, during the direct examination of Christine Wilson. The exhibit was received into evidence without objection.

On cross-examination, defense counsel questioned Christine Wilson about why she had failed to immediately report that the defendant was responsible for the shooting. The questions suggested that Christine had the opportunity to immediately report the crime without fear of harm from the defendant. Throughout this line of questioning, Christine maintained that she did not immediately come forward because she feared the defendant would kill her. She also indicated that she had thought incarceration of the defendant would provide no protection because she believed he had "big connections" all over the country.

During further cross-examination, defense counsel offered exhibits 34 and 35, which are copies of the entire January 2

conversation with the exception of two deleted portions, which portions were among those deleted in exhibit 5.

The first deleted portion involved the defendant mentioning that he had been contacted to come to Casper, Wyoming, to talk to "Kirkland." During the discussion, Christine asked the defendant, "What's he want you to do, bump those guys off or somethin'?" The defendant responded that he did not know.

In the second deleted portion, the defendant indicated that he had been contacted by someone named Charlie to "torch" the Capitol Bar. The defendant also indicated that he refused to do it because he had not been offered any money.

The State objected to the offer of exhibits 34 and 35 on grounds that the two portions should not be deleted because they were part of the entire conversation and were relevant to show Christine Wilson's basis for fearing the defendant.

The court ultimately determined that the tapes (exhibits 1 through 4) were admissible in their entirety. The State was granted leave to reopen direct examination of Christine Wilson, and upon doing so, offered exhibits 1 through 4 over defense counsel's objections that the two portions in question were inadmissible pursuant to § 27-404(2).

Section 27-404(2) is an inclusionary rule which permits "the use of relevant 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." (Emphasis supplied.) *State v. Kern*, 224 Neb. 177, 185, 397 N.W.2d 23, 29 (1986).

In *State v. Hitt*, 207 Neb. 746, 301 N.W.2d 96 (1981), this court concluded that evidence of other assaults on the victim and his brother were admissible under § 27-404(2) in a prosecution for first degree sexual assault. Specifically, the court concluded the evidence was admissible because it was offered to corroborate testimony that the boys feared the defendant and because it also explained their failure to make a prompt complaint.

The evidence in the present case was relevant for purposes similar to those in *Hitt, supra*. Clearly, a material issue in this case related to why Christine Wilson failed to promptly report that the defendant was responsible for the shooting. According

to her testimony, she did not come forward at an earlier time because she feared retaliation by the defendant or others with whom he had connections. Thus, exhibits 1 through 4 were relevant to corroborate Christine Wilson's testimony concerning her fear of coming forward with the truth about the shooting.

Further, the trial court did not abuse its discretion in admitting this evidence because of the danger of unfair prejudice. The evidence in question involved talk by the defendant of being asked to commit or become involved in certain unlawful activities. While the conversations suggested that he had connections with persons who might ask him to commit criminal acts, it did not show that the defendant agreed to participate in them. On the other hand, the evidence did suggest that the defendant had connections with persons involved in criminal activity, as claimed by Christine Wilson. As previously stated, this evidence supported the testimony of Christine Wilson regarding her hesitation to come forward.

Finally, the defendant maintains the trial court committed reversible error in receiving exhibit 37 into evidence. Exhibit 37 consists of three photocopied pages reflecting nine complaint reports recorded by the Bellevue Police Department between July 4 and 8, 1985. Information in these reports includes the address, date, and time of the complaint; the police unit dispatched; a code reflecting how the complaint was made; a code indicating the type of call; a number representing the person receiving the call; the district of the call; a disposition code; a case number; the name, address, and telephone number of the complaining party; and a remarks section reflecting statements made by the complaining party.

The record does not show that exhibit 37 was actually received in evidence, although it is included in a volume of exhibits in the bill of exceptions. Instead, some of the information appearing in the reports was elicited through the testimony of Gary Fliehmann, the chief of communications of the Bellevue Police Department and the person ultimately in control of the filing of the complaint reports. Fliehmann specifically testified to the dates and times of the complaints and that they all involved 1114 Grandview. Defense counsel

indicated that he had no objection to the receipt of this information. He did object on hearsay grounds to questions regarding who lived at 1114 Grandview and who made the complaints. These objections were overruled. On previous cross-examination, Christine Wilson testified that her parents lived at the address in question.

The defendant maintains that exhibit 37 amounts to hearsay within hearsay and should have been excluded because there was no showing that each level of hearsay was admissible under an exception to the rule. There is no merit to this argument, even assuming that exhibit 37 was received into evidence.

Neb. Rev. Stat. § 27-802 (Reissue 1985) provides that "[h]earsay is not admissible except as provided by these rules or by other rules adopted by the statutes of the State of Nebraska." Hearsay is defined as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Neb. Rev. Stat. § 27-801(3) (Reissue 1985). Included within the definition of a statement for hearsay purposes are oral or written assertions. § 27-801(1)(a).

Neb. Rev. Stat. § 27-805 (Reissue 1985) provides: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule proved in these rules."

The defendant contends that exhibit 37 includes both oral and written assertions which amount to hearsay. Specifically, he argues that the written assertions are the written records themselves and the oral statements are the statements contained on the records, i.e., information provided by the complaining parties.

Although the record fails to show that exhibit 37 was received, the State did offer it into evidence at one point. The defendant objected on hearsay grounds, to which the State responded that the exhibit was not being offered to prove the truth of any message received. Instead, the State maintained it was offered merely to show complaints were received. The State's position was supported by testimony from Gary Fliehmann on direct examination:

Q. The truthfulness or the untruthfulness of the

complaint of the party that is recorded on those cards, you have no way of knowing?

A. No. We just take the information that they give us.

Q. And their complaint?

A. That's right.

Christine Wilson's credibility was critical to the State's case. In her testimony previous to the offer of exhibit 37, she testified that she and her family were harassed by the defendant on the 4th of July, 1985, and that the harassment escalated after that date. These events ultimately led her to contact law enforcement officials about the defendant's involvement in the shooting because she feared he might kill someone else. She also testified that because of the harassment "we had the police, Bellevue Police Department, over 20 times a day." At the time of the complaints, Christine Wilson was living with her parents.

The oral assertions complained of in exhibit 37, i.e., the remarks noted in the remarks section and the parties' names, were not offered to prove the truth of any matter therein asserted. As such, they were not hearsay statements. Instead, they were offered to show that complaints were received from persons claiming disturbances at 1114 Grandview during time periods relevant to this case. The evidence tended to corroborate Christine Wilson's testimony that complaints were made regarding the defendant during the relevant time period.

Any argument as to the admissibility of Gary Fliehmann's testimony regarding the times, dates, or addresses of the complaints, or as to the names given by the complaining parties, is similarly resolved. That evidence was also offered to show that complaints were received and not to prove the truth of the information received.

The "written assertions" or written records themselves were admissible under the business records exception to the hearsay rule. Neb. Rev. Stat. § 27-803(5) (Reissue 1985). The foundational requirements for admitting a document under this section are: "First, the activity recorded must be a type which regularly occurs in the course of the business' day-to-day activity. Second, the record must have been made . . . at or near the time of the event recorded. Third, the record must be authenticated by a custodian or other qualified witness."

Crowder v. Aurora Co-op Elev. Co., 223 Neb. 704, 715, 393 N.W.2d 250, 258 (1986) (quoting *Chalupa v. Hartford Fire Ins. Co.*, 217 Neb. 662, 350 N.W.2d 541 (1984)).

Since these foundational requirements were satisfied by Gary Fliehmann's testimony, the trial court would not have committed an abuse of discretion in admitting exhibit 37.

There being no error, the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RUSSELL RUBEK, APPELLANT.

406 N.W.2d 130

Filed May 22, 1987. No. 86-892.

1. **Postconviction: Effectiveness of Counsel: Proof.** When the defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.
2. _____: _____: _____. Where one claims that the alleged ineffective assistance of counsel resulted in prejudice, the defendant must show that, but for the ineffective assistance of counsel, there is a reasonable probability that the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
3. **Postconviction: Appeal and Error.** In an appeal involving a proceeding for postconviction relief, the lower court's findings will be upheld unless clearly erroneous.
4. **Postconviction: Proof.** The person seeking postconviction relief bears the burden of establishing the basis for relief.
5. **Postconviction.** A motion for postconviction relief may not be used to obtain a further review of issues already litigated, and the mere fact that the issues are rephrased does not change that rule.
6. **Lesser-Included Offenses: Trial.** A trial court can on its own motion instruct the jury on a lesser-included offense if the giving of the instruction is proper, and the fact that neither the prosecution nor the defense requests the instruction is of no significance.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Gregory A. Pivovar, for appellant.

Robert M. Spire, Attorney General, and Charles E. Lowe, for appellee.

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

PER CURIAM.

Russell Rubek appeals from an order entered by the district court for Sarpy County, denying Rubek relief sought pursuant to the provisions of the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). Rubek was earlier convicted by a Sarpy County jury of attempted first degree sexual assault in violation of Neb. Rev. Stat. §§ 28-201 and 28-319(1)(a) (Reissue 1985) and assault in the third degree in violation of Neb. Rev. Stat. § 28-310 (Reissue 1985). He appealed that conviction to this court, and we affirmed. See *State v. Rubek*, 220 Neb. 537, 371 N.W.2d 115 (1985) (*Rubek I*).

In his present appeal to this court, Rubek maintains as his sole assignment of error that the district court erred in finding that he had failed to prove that his original trial counsel failed to perform as well as a lawyer with ordinary training and skill in criminal law or that he failed to conscientiously protect Rubek's interest. While his assignment of error fails to describe to us in meaningful detail how and in what way the district court erred, in his brief he maintains that his original trial counsel was ineffective for one or more of the following reasons: (1) He failed to introduce evidence of the fact that Rubek lived close to where he met the victim; (2) he refused to find an expert witness to prove that a man of Rubek's size and weight could not possibly have pulled the victim over the front seat of an automobile and assaulted her in the back seat, as it was alleged; and (3) he failed to offer surrebuttal evidence to counter the evidence offered by the State that the victim suffered substantial hair loss when she was allegedly pulled over the front seat by Rubek.

Rubek further maintains that his original trial counsel

ineffectively represented him because he failed to make appropriate motions and assign as errors to the Supreme Court in *Rubek I* the manner in which Rubek was charged and subsequently arraigned. Finally, Rubek maintains that his original trial counsel failed to effectively represent him because he did not object to the trial court's tendering to the jury an instruction on a lesser-included offense on its own motion. We shall address these matters in the order in which they have been raised.

Before considering the assignment of error in light of the evidence, we first note the rules of law applicable in cases of this nature. When the defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions. See *State v. Lytle*, 224 Neb. 486, 398 N.W.2d 705 (1987). See, also, *State v. Fries*, 224 Neb. 482, 398 N.W.2d 702 (1987). Moreover, where one claims that the alleged ineffective assistance of counsel resulted in prejudice, the defendant must show that, but for the ineffective assistance of counsel, there is a reasonable probability that the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. See *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986). See, also, *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986). In an appeal involving a proceeding for postconviction relief, the lower court's findings will be upheld unless clearly erroneous. See *State v. Williams, supra*. Furthermore, the person seeking postconviction relief bears the burden of establishing the basis for relief. *State v. Bradford*, 223 Neb. 908, 395 N.W.2d 495 (1986).

The facts of the case are set out in *Rubek I* and need not be here repeated in detail. Suffice it to say that the evidence supporting the claim that an attempted sexual assault was committed was overwhelming. The uncontradicted evidence

disclosed that following the attempted assault the victim ran down a hill in a cemetery where the automobile had been parked, bruising and scratching her legs and knees, climbed over a fence at the boundary of the cemetery, and ran to a nearby house. She rang the bell of the house, awoke the residents, and pleaded to be let into the dwelling. The residents of the house observed that the victim had bruises, injuries to her face, swelling of her eyes, and a cut on her lip, and was bleeding. They also saw that she was hysterical, screaming, frightened, and emotionally upset, and noted that she was wearing no pants or underwear and had only a jacket wrapped around her waist. Additionally, she was missing one boot. She reported that she had been assaulted. Her injuries were further observed by a Bellevue policeman who was called. The victim was then taken to the emergency room of Midlands Community Hospital, where she was given emergency care. The emergency room report put into evidence established that the victim had a large bruise on her chest area, incurred loss of feeling in her cheek, and had a cut requiring suturing in her pubic area, thought to be caused when she climbed over a fence while fleeing from Rubek. The evidence was inconsistent with Rubek's contention that the victim had voluntarily accompanied Rubek and removed her clothing in anticipation of consensual sexual intercourse.

Rubek's contention, therefore, that trial counsel was ineffective in failing to introduce testimony regarding how close his home was to the bar where he initially met the victim is of no merit. Such testimony would have been of little importance. Furthermore, his contention that his counsel failed to adequately represent him because he did not produce an expert witness who would testify that a man of Rubek's size could not possibly have pulled a person of the victim's size into the back seat of the car by the hair was of little significance. Such testimony, had it even been available, hardly can be said to have been sufficient to probably change the outcome of the case. The other evidence as to the victim's condition was simply overwhelming. Furthermore, Rubek produced no testimony at his postconviction evidentiary hearing that such an expert was available and could have been called to testify.

To the same extent, Rubek's contention that the original trial counsel was ineffective because he did not file a plea in abatement is without merit. The issue regarding the form of the information and the manner in which Rubek was arraigned was raised in the direct appeal and was rejected by this court. A motion for postconviction relief may not be used to obtain a further review of issues already litigated, and the mere fact that the issues are rephrased does not change that rule. See, *State v. Evans*, 224 Neb. 64, 395 N.W.2d 563 (1986); *State v. Lytle*, 224 Neb. 486, 398 N.W.2d 705 (1987).

This leaves Rubek's last contention, which is that trial counsel was ineffective because he failed to object to and assign as error the trial judge's tendering of an instruction on a lesser-included offense of third degree assault. The contention is without merit, because if the objection had been made it should have been overruled. In *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986), we held that a trial court can on its own motion instruct the jury on a lesser-included offense if the giving of the instruction is proper, and the fact that neither the prosecution nor the defense requests the instruction is of no significance.

Our review of the record leads us to the conclusion that none of Rubek's claims for postconviction relief had merit. Rubek has not sustained his burden imposed in postconviction cases. For that reason we find that the district court was correct in denying the relief. The decision is affirmed.

AFFIRMED.

CHILTON ACCOUNTS RECEIVABLE MANAGEMENT, INC., APPELLEE, V. PROJECT LIFE MINISTRIES, INC., A NEBRASKA CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, TELAMARKETING COMMUNICATIONS OF OMAHA, THIRD-PARTY DEFENDANT, APPELLANT.

406 N.W.2d 133

Filed May 22, 1987. No. 86-913.

1. **Judgments: Appeal and Error.** On appeal from the county court, the district court is to review the case for error appearing on the record. In a law action the disposition of the trial court has the effect of a jury verdict and is not to be disturbed on appeal unless it is clearly wrong. However, when such judgment is not supported by the evidence, it is clearly wrong and must be set aside.
2. **Contracts: Time.** Generally, when a contract does not provide a time for performance, a reasonable time will be implied by law.
3. _____: _____. What constitutes a reasonable time for the performance of a contract must be determined from the general nature and circumstances of each case.
4. **Courts: Judgments: Appeal and Error.** On appeal from the county court, if the district court reverses the judgment appealed from, it may enter judgment in accordance with its findings.

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

John C. Lindsay of Lindsay & Lindsay, for appellant.

David S. Houghton of Fitzgerald & Brown, for appellee Project Life Ministries.

No appearance for appellee Chilton Accounts Receivable Management.

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

PER CURIAM.

This action originally commenced as a collection action in the county court for Douglas County by Chilton Accounts Receivable Management, Inc., against Project Life Ministries, Inc. Project Life answered and filed a third-party action against TelaMarketing Communications of Omaha (TMC) based on a guarantee or letter of indemnity provided to Project Life by TMC. The posture of that third-party action was consented to

for the sake of convenience by the parties and the court. The county court at trial and district court on appeal ruled in favor of the plaintiff on the original action, and Project Life does not contest those rulings. The county court also held against Project Life on its third-party petition, which latter judgment was reversed by the district court on appeal, and the district court entered judgment in favor of Project Life in the amount of $4,000. TMC has appealed that judgment of the district court.

TMC believes the district court erred by applying the wrong standard of review and in reversing the findings of fact of the county court. Because we hold that the district court applied the correct standard of review and correctly reversed the decision of the county court, we affirm the decision of the district court.

Project Life is a nonprofit organization founded to offer counseling to young women with problem pregnancies. The organization's main communication tool to reach those young women around the nation is through 1-800 telephone numbers. In August of 1984, TMC entered into an agreement with Project Life to provide this 1-800 service by September 7, 1984. The specific 1-800 numbers were assigned to Project Life by TMC on August 21, 1984, although those numbers were not yet operable.

The numbers were not working by September 7, 1984, so the director of Project Life, David Harvey, telephoned TMC's territorial manager, Duane King, to inquire about the delay. King assured Harvey that the lines would be available in a couple of days and that TMC was just having a little problem with AT&T. Harvey explained to King that he was about to order $4,000 worth of advertisements with the 1-800 numbers printed on them. He explained that he was hesitant to do the printing without the numbers being operable and so requested a guarantee from King for the printing costs. King agreed to guarantee the printing costs. In a followup letter King wrote: "In response to your request for a guarantee . . . TMC herby [sic] agrees to assume liability up to the amount of $4,000.00 printing expense, in the event that TMC is unable to supply Project Life with the number assigned to you." Harvey then went ahead and ordered the advertisements with the numbers

TMC had assigned to Project Life printed on them. This printing included advertising stickers and various contribution solicitation materials, which were sent out nationally.

Thereafter, Harvey spoke with King approximately every other day, wondering when the numbers would be connected. He was given some excuse that TMC would be out next week, or tomorrow, or that TMC had a holdup with AT&T, or its truck was down. This went on for a couple of months. Harvey called King on November 26, 1984, and canceled his order for the 1-800 numbers. Project Life later ordered 1-800 services from another carrier and received a different number than those which TMC had assigned Project Life and which Project Life had printed on its earlier-ordered advertisements.

In December of 1984, AT&T provided TMC with the block of 1-800 numbers TMC had ordered. Included in that block of numbers were the 1-800 numbers TMC had originally assigned to Project Life. Had Project Life not canceled its order, TMC would have been able to provide those numbers to Project Life.

Based on these facts, the county court found for TMC on the third-party petition, but made no specific findings of fact. On appeal from the county court, the district court reversed the county court's judgment and entered judgment for Project Life.

On appeal from the county court, the district court is to review the case for error appearing on the record. Neb. Rev. Stat. § 24-541.06 (Reissue 1985). In a law action the disposition of the trial court has the effect of a jury verdict and is not to be disturbed on appeal unless it is clearly wrong. *South Sioux City Star v. Edwards*, 218 Neb. 487, 357 N.W.2d 178 (1984). However, when, as here, such judgment is not supported by the evidence, it is clearly wrong and must be set aside. See *Siebler Heating & Air Conditioning v. Jenson*, 212 Neb. 830, 326 N.W.2d 182 (1982).

TMC claims there was sufficient evidence in the record for the county court to find that TMC should not be held liable on the letter of guarantee. TMC suggests that the county court reached its conclusion using the following steps. (1) The guarantee states that TMC will be liable for printing costs only if it cannot provide the assigned numbers. (2) The guarantee

does not provide a time for performance. (3) TMC therefore should be allowed a reasonable time for performance. (4) A reasonable time for performance extended into December of 1984. (5) Project Life canceled its order before TMC's time for performance had expired. (6) Therefore, Project Life is not entitled to recover on the guarantee.

We agree with TMC that because the guarantee does not provide a time for performance, a reasonable time for performance will be implied by law. *Gustav Thieszen Irr. Co., Inc. v. Meinberg*, 202 Neb. 666, 276 N.W.2d 664 (1979). However, "[w]hat constitutes a reasonable time must be determined from the general nature and circumstances of each case." *Clemens Mobile Homes, Inc. v. Guerdon Industries, Inc.*, 199 Neb. 555, 559, 260 N.W.2d 310, 313 (1977). Considering the circumstances of this case, there was no evidence upon which the county court could find that a reasonable time for performance extended into December, as TMC asserts.

The circumstances surrounding the guarantee clearly establish that Project Life wanted the 1-800 numbers quickly and that TMC knew this before it executed the guarantee. Project Life specifically contacted TMC because TMC asserted it could provide service "at just a fraction of the time commitment" required by AT&T. This first contact was made on August 16. On August 17, TMC agreed to supply the service by September 7, a mere 3 weeks away. When TMC missed this due date, Harvey phoned King to inquire about the delay. Harvey explained to King that he needed the numbers right away due to the printing situation. King assured Harvey that the numbers would be operational in a couple of days. Harvey was still hesitant to go ahead with the printing, and only then asked for and received the guarantee. Moreover, after the guarantee had been executed, Harvey continually hounded TMC with questions about when the numbers would be operational, and King always indicated that the numbers would be operational shortly.

The testimony produced by TMC, which indicated that the normal period of delay in the industry was 90 to 120 days, does not change the result in this case. The relevant inquiry is not

whether or how much Project Life knew about the delay in the industry; it is what Project Life was told by TMC that determines what constitutes a reasonable time for performance under the circumstances. Project Life was promised 1-800 number service within a matter of days, and when that service was not forthcoming, it was told repeatedly that service would be operational shortly. Under those circumstances, a reasonable time for performance was a matter of days, not the 3 months TMC believes is appropriate. Thus, there was no credible evidence to support the judgment of the county court, and judgment should have been rendered in favor of Project Life. This is what the district court did.

The various printing materials which Project Life ordered at a cost to it in excess of $4,000 were rendered worthless as a proximate result of the failure of TMC to furnish the agreed 1-800 numbers within a reasonable time. This was the evidence which supported the district court's order of reversal and judgment in favor of Project Life. "If the district court reverses [a judgment of the county court], it may enter judgment in accordance with its findings . . . ." § 24-541.06.

The judgment of the district court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAUL J. KRIEGLER, ALSO KNOWN AS GARY DIGGS, APPELLANT.

406 N.W.2d 137

Filed May 22, 1987. No. 86-989.

Speedy Trial. A defendant whose trial is set at the end of the 6-month period required pursuant to the Nebraska speedy trial act, Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985), but who fails to appear for that trial, is not necessarily entitled to an immediate trial when he subsequently appears in court.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

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

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

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

KRIVOSHA, C.J.

Paul J. Kriegler appeals from a jury verdict finding him guilty of theft by unlawful taking in violation of Neb. Rev. Stat. §§ 28-511(1) and 28-518(2) (Reissue 1985). This is a Class IV felony, punishable by up to 5 years' imprisonment, or a fine of $10,000, or both. Kriegler's single assignment of error is that the district court erred in not sustaining his motion to dismiss the action on the basis that the State had failed to bring him to trial within 6 months after the information was filed, as required by Neb. Rev. Stat. § 29-1207 (Reissue 1985). For reasons more particularly set out hereinafter, we believe that the assignment of error must be overruled and the judgment and sentence affirmed.

The record discloses that an information was filed against Kriegler on January 28, 1986, charging Kriegler with theft by unlawful taking. Under the provisions of the Nebraska speedy trial act, Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1985), the State was obligated to bring Kriegler to trial within 6 months of that date, or on or before July 28, 1986, unless otherwise extended, as provided by the act. Specifically, § 29-1207 provides in part as follows:

> (1) Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section.
>
> (2) Such six-month period shall commence to run from the date the indictment is returned or the information filed....
>
> ....
>
> (4) The following periods shall be excluded in computing the time for trial:
>
> ....

> (d) The period of delay resulting from the absence or unavailability of the defendant;
>
> . . . .
>
> (f) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause.

In fact, Kriegler was tried on September 8, 1986, or 42 days after July 28, 1986. We believe, however, that the 42 days are excluded under the provisions of § 29-1207(4)(d) and (f) and that therefore Kriegler was tried within the 6-month period required by our speedy trial act.

On February 6, 1986, an order was entered by the district court for Douglas County, Nebraska, setting the case for trial "to the next jury panel or as soon thereafter as it may be reached." Kriegler's name appears on the June criminal trial list for Douglas County District Judge Carlson, and the evidence discloses that Kriegler was ordered to appear on June 6, 1986, while the jury panel was in session. He failed to do so, and an order was entered directing him to appear on June 10, 1986. He again failed to appear, and the court ordered the clerk to issue a capias for Kriegler's arrest. He appeared on June 18, 1986, at which time he was released on his own recognizance. It appears clear beyond question, and Kriegler agrees, that these 12 days must be excluded in computing the time for trial under the provisions of § 29-1207(4)(d). This therefore would have theoretically advanced the last day of trial from July 28 to August 9, 1986.

The record further discloses that the next possible time for trial following Kriegler's reappearance on June 18, 1986, was July 14, 1986. We believe that these 26 days should be excluded under the provisions of § 29-1207(4)(f), which provides that there shall further be excluded in computing the time for trial "[o]ther periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause." As we stated in *State v. Johnson*, 201 Neb. 322, 329, 268 N.W.2d 85, 89 (1978):

> [A] defendant whose trial is set at the end of the 6-month period, but who fails to appear for that trial, is not necessarily entitled to an immediate trial when he

> subsequently appears in court. It would appear in many cases that a delay after the defendant's reappearance might be justified for good cause, such as a congested docket in the trial court, or scheduling difficulties on the part of the trial judge or the prosecutor.

We do not believe it unreasonable or not within the contemplation of the act to presume that the State may wait for the next regular jury term, in a case where juries are summoned at least once each month, because the defendant failed to appear when ordered for trial within the 6-month period. That extended the last day for trial to September 4, 1986.

The record further discloses, however, that there are 4 additional days which must be excluded pursuant to § 29-1207(4)(f). The record discloses that the judge to whom this case had been assigned, the prosecutor, and Kriegler's own defense attorney from the public defender's office were scheduled to begin a jury trial on July 14. That trial lasted for 4 days. Therefore, the earliest reasonable time that Kriegler could have been tried as a result of his having failed to appear when ordered in June was July 18, 1986, or 4 days after the July 1986 jury term began. We therefore must exclude 4 additional days. That moved the time within which Kriegler must be tried to September 8, 1986, the very day upon which he was in fact tried.

The burden is upon the State to prove by a preponderance of the evidence that one or more of the excluded periods provided by § 29-1207(4)(a) to (f) are applicable. See, *State v. Lafler, ante* p. 362, 405 N.W.2d 576 (1987); *State v. Bennett*, 219 Neb. 601, 365 N.W.2d 423 (1985). We believe that the State has proven by a preponderance of the evidence that 42 days must be excluded from the computation of the 6-month period following the filing of the information against Kriegler on January 28, 1986. The judgment is therefore affirmed.

AFFIRMED.